



# THE ARMY LAWYER

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**Command Authority: What Are the Limits on Regulating the Private Conduct  
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## New Developments

### U.S. Army Legal Services Agency

#### Court Grants Partial Summary Judgment in KBR Convoy Cases

On 25 March 2010, in *Fisher v. Halliburton*,<sup>1</sup> the District Court for the Southern District of Texas granted partial summary judgment in favor of KBR. Pursuant to the LOGCAP III contract, KBR operated convoys in Kuwait and Iraq supplying materiel for the Army. On 8 and 9 April 2004, three KBR convoys were attacked by insurgents near Camp Anaconda, Iraq, resulting in numerous deaths and injuries to KBR employees. Plaintiffs filed suit against KBR in 2005 alleging numerous causes of action, including fraud regarding the safety and nature of the work in Iraq, tort claims, and the intentional deployment of convoys knowing the convoys would be attacked. KBR alleged in a motion for summary judgment that the Defense Base Act (DBA)<sup>2</sup> provided the exclusive remedy for all of plaintiffs' claims.

The DBA, which incorporates the Longshore and Harbor Workers' Compensation Act (LHWCA),<sup>3</sup> applies to employees engaged in public works contracts with the United States or its agencies to be performed outside the continental United States.<sup>4</sup> "Public works" includes "projects or operations under service contracts and projects in connection with the national defense or with war activities."<sup>5</sup> The DBA is similar to state workers' compensation statutes in that it, along with the LHWCA, determines the benefits for the injury or death of a covered employee. The LHWCA defines "injury" as an accidental injury or death arising out of and in the course of employment.<sup>6</sup> The liability of an employer under the DBA is the exclusive remedy for covered employees.<sup>7</sup>

The court determined that the Smith-Idol claim (the 8 April 2004 convoy) is covered by the DBA because the attacks that day met the statutory definition of an "accident" under the DBA (an unexpected event). Accordingly, the court dismissed the Smith-Idol claim and determined the DBA was the exclusive remedy. However, the court determined that the Fisher and Lane convoys dispatched the

following day were not covered by the exclusivity provisions of the DBA because KBR had information demonstrating that, on 9 April 2004, attacks on the convoys were "expected" and no longer considered an "accident" under the statute. Accordingly, the court denied the KBR motion for summary judgment regarding the Fisher and Lane convoy claims. The court stayed the *Fisher* and *Lane* cases pending interlocutory appeal to the Fifth Circuit Court of Appeals. The trial, set for 24 May 2010 in Houston, Texas, is postponed pending the outcome of the interlocutory appeals. —Litigation Division.

### Criminal Law

#### Criminal Law Advocacy Course (CLAC)

Because of the high demand, the CLAC has been transformed into a one-week course that will be offered four times a year (instead of a two-week course offered twice a year). Two courses will be offered in the Fall and two in the Spring, during consecutive weeks. The dates for the Fall course are as follows:

34th CLAC: 13–17 Sep 10\*

35th CLAC: 20–24 Sep 10\*

The new CLAC will continue to utilize small-group advocacy exercises and mock trials, so the course will remain "invitation only" on ATRRS to allow management of slots. To secure seats at the September courses, please have your Chief of Justice contact Major Chuck Neill, CLAC Course Manager, (434) 971-3343, (DSN 521) or [steven.neill@us.army.mil](mailto:steven.neill@us.army.mil).

### Administrative and Civil Law

#### Investigations of Suspected Suicides and Suicide Incident Family Briefs

Recently published Army Directive 2010-01, *Conduct of AR 15-6 Investigations Into Suspected Suicides and Requirements for Suicide Incident Family Briefs*,<sup>8</sup> supplements the guidance regarding suicide investigations contained in Army Regulation (AR) 600-63, *Army Health Promotion*,<sup>9</sup> and creates a requirement to offer Suicide Incident Family Briefs to next of kin for confirmed

<sup>1</sup> *Fisher v. Halliburton*, 2010 U.S. Dist. LEXIS 28565 (S.D. Tex. Mar. 25, 2010) (consolidating *Fisher v. Halliburton*, *Lane v. Halliburton*, and *Smith-Idol v. Halliburton*).

<sup>2</sup> 42 U.S.C. § 1651–1654 (2006).

<sup>3</sup> 33 U.S.C. § 901–950 (2006).

<sup>4</sup> See 42 U.S.C. § 1651(a).

<sup>5</sup> *Id.* § 1651(b)(1).

<sup>6</sup> 33 U.S.C. § 902(2).

<sup>7</sup> 42 U.S.C. § 1651(c).

<sup>8</sup> U.S. DEP'T OF ARMY, DIR. 2010-01, CONDUCT OF AR 15-6 INVESTIGATIONS INTO SUSPECTED SUICIDES AND REQUIREMENTS FOR SUICIDE INCIDENT FAMILY BRIEFS (26 Mar. 2010).

<sup>9</sup> U.S. DEP'T OF ARMY, REG. 600-63, ARMY HEALTH PROMOTION (7 May 2007) (RAR, 20 Sept. 2009).

suicides.<sup>10</sup> A Rapid Action Revision (RAR) to AR 600-63, published on 20 September 2009, requires commanders to conduct an AR 15-6 investigation into “every suicide and equivocal death which is being investigated as a possible suicide.”<sup>11</sup> Army Directive 2010-01 directs AR 15-6 investigating officers to consult with the Office of the Staff Judge Advocate, the Army Criminal Investigation Command (CID) office investigating the death, behavioral and health care providers, the Office of the Armed Forces Medical Examiner (if applicable), and the line of duty investigating officer (if applicable), prior to finalizing their findings and recommendations.<sup>12</sup> The directive also provides a list of detailed questions for the investigating officer to consider that are intended to be “guidelines” for the investigation.<sup>13</sup> These questions pertain to “lines of inquiry” categorized as “Communication of Suicidal Intent,” “Personality and Lifestyle,” “Military History” of the decedent, and “Other” considerations that might be relevant to a given case.<sup>14</sup>

In addition to adding these requirements for the investigation, Army Directive 2010-01 also imposes a requirement that “for deaths that occur on or after 15 April 2010 that are later confirmed to be suicides, colonel-level commanders or other colonel-level designees appointed by the investigation approval authority will offer a death investigation briefing to the deceased Soldier’s primary next of kin and, when practical, to parents who are secondary next of kin . . . .”<sup>15</sup> These death investigation briefings, also called Suicide Incident Family Briefs, are to be conducted in accordance with the procedures already established for Fatal Training and Operational Accident Briefings for next of kin<sup>16</sup> conducted under the provisions of AR 600-34.<sup>17</sup>  
—Major Scott Dunn.

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<sup>10</sup> *Supra* note 1.

<sup>11</sup> *Supra* note 2, para. 1-24o.

<sup>12</sup> *Supra* note 1, enclosure 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

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<sup>15</sup> *Id.* at 1. *See also* New Developments, Administrative and Civil Law, *Mandatory Investigations into Suicide*, ARMY LAW., Jan. 2010, at 1 (noting that these Suicide Incident Family Briefs were not required by the RAR to AR 600-63, dated 20 September 2009).

<sup>16</sup> *Id.* enclosure 2.

<sup>17</sup> U.S. DEP’T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).

## Lore of the Corps

### Shot by Firing Squad: The Trial and Execution of Pvt. Eddie Slovik

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

“Squad, ready. Aim. FIRE.” With that last command, a party of twelve American Soldiers fired their rifles at an Army private tied to a wooden post. It was 31 January 1945 and Private (PVT) Eddie D. Slovik, his head covered by a black hood as required by military regulations, was killed instantly. His death by firing squad in France was the only execution of an American for a purely military offense since the Civil War.<sup>1</sup>

Born in Detroit in February 1920, Slovik grew up in a poor home environment. He quit school at the age of fifteen and was repeatedly in trouble with the law. In the late 1930s, Slovik was convicted of embezzlement in state court and sentenced to six months to ten years in prison.

Slovik was still incarcerated when the United States entered World War II and, when released in April 1942, was classified “4-F” as an ex-convict. This meant he had initially escaped the draft, as the Army had sufficient manpower and did not need to draft convicted felons. In late 1943, however, facing an increased need for able-bodied young men, the War Department reclassified Slovik as “I-A” (available and fit for general military service) and inducted him.

After completing basic training at Camp Wolters, Texas, PVT Slovik shipped out to Europe in August 1944. Assigned to the 109th Infantry Regiment, a part of the Pennsylvania National Guard 28th Infantry Division, Slovik and other replacements were on their way to their unit in Elbeuf, France, when they were attacked by German forces. Slovik intentionally avoided combat and walked away. He then joined up with a Canadian unit and did odd jobs, including cooking, for the next forty-five days. Slovik was returned to U.S. authorities on 4 October 1944 and reported back to the 109th Infantry three days later.

When questioned by his company commander, Captain (CPT) Ralph O. Grotte, about this absence, Slovik told Grotte that he was “too scared, too nervous” to serve with a rifle company and would desert again if ordered to fight.<sup>2</sup> Slovik was then ordered to remain in the company area. Shortly thereafter, he returned to CPT Grotte and asked: “If

I leave now, will it be desertion?”<sup>3</sup> When Grotte said yes, Slovik left without his weapon.

The next day, PVT Slovik surrendered to a nearby unit and handed a cook a signed, hand-printed note that said, in part:

I Pvt. Eddie D. Slovik confess to the Desertion of the United States Army. . . . I told my commanding officer my story. I said that if I had to go out their again Id run away. He said there was nothing he could do for me so I ran away again AND ILL RUN AWAY AGAIN IF I HAVE TO GO OUT THEIR.<sup>4</sup>

After being returned to the 109th Infantry on 9 October, Slovik’s commander told him that the written note was damaging to his case and that he should take it back and destroy it. Slovik refused and was confined to the division stockade.

On 19 October, Slovik was charged with two specifications of desertion, in violation of the 58th Article of War. Both specifications alleged that he deserted “with intent to shirk hazardous duty and shirk important action, to wit: action against the enemy” on two different occasions: his forty-five day desertion from 25 August to 4 October 1944 and his one-day desertion from 8 to 9 October 1944.

On 26 October, Lieutenant Colonel Henry P. Sommer, the division judge advocate, offered Slovik a deal: if he would go into the line—that is, accept a combat assignment—he could escape court-martial. Slovik refused this offer and on 29 October his case was referred to trial by general court-martial.

On 11 November 1944, Slovik was tried for desertion. He pleaded not guilty and elected to remain silent. At the end of a two-hour trial, a nine-member panel found Slovik guilty and sentenced him to death.<sup>5</sup>

After Slovik was confined to the Army stockade in Paris, France, Sommer reviewed the record of trial. He recommended to Major General (MG) Norman “Dutch”

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<sup>1</sup> WILLIAM B. HUIE, *THE EXECUTION OF PRIVATE SLOVIK* 210–14 (1970); see also, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775–1975*, at 192–94 (1975).

<sup>2</sup> HUIE, *supra* note 1, at 127.

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<sup>3</sup> *Id.* at 128.

<sup>4</sup> *Id.* at 120.

<sup>5</sup> *Id.* at 110.

Cota, the division commander, that the findings and sentence be approved. Cota approved the findings and sentence on 27 November.

From 1 December 1944 to 6 January 1945, Brigadier General E. C. McNeil, the senior Army lawyer in the European Theater, and lawyers on McNeil's staff, reviewed Slovik's case. McNeil wrote:

This is the first death sentence for desertion which has reached me for examination. It is probably the first of its kind in the American Army for over eighty years—there were none in World War I. In this case, the extreme penalty of death appears warranted. This soldier had performed no front line duty. He deserted from his group of about fifteen when about to join the infantry company to which he had been assigned. His subsequent conduct shows a deliberate plan to secure trial and incarceration in a safe place. The sentence adjudged was more severe than he anticipated, but the imposition of a less severe sentence would only have accomplished the accused's purpose in securing his incarceration and consequent freedom from the dangers which so many of our armed forces are required to face daily. His unfavorable civilian record indicates that he is not a worthy subject of clemency.<sup>6</sup>

On 23 January 1945, Eisenhower ordered Slovik's execution by firing squad and directed that the shooting occur in the 109th's "regimental area." Note that General Eisenhower did not simply decline to intervene in the Slovik case. On the contrary, he *ordered* that Slovik be shot. As for MG Cota, he understood that Slovik's execution required his personal involvement—if for no other reason than to underscore the gravity of the situation. That explains why "Dutch" Cota personally informed Slovik that he was to be executed by firing squad, and why Cota then stood in the snow in the courtyard, faced Slovik, saw him shot, and reported to Eisenhower that the order had been carried out.<sup>7</sup> While 142 American Soldiers were executed—for murder, rape, and murder-rape—during World War II, Slovik's was the only execution for desertion in the face of the enemy.

In the years after Slovik's death, his widow campaigned relentlessly for his records to be changed so that she could receive the proceeds of his \$10,000 life insurance policy. While many were sympathetic, she and her supporters were unsuccessful.

Today, most historians believe that Slovik might have escaped a firing squad had his timing been better. However, the 28th Infantry Division was engaged in bloody fighting in Huertgen Forest at the time of his trial, and the court-martial panel was in no mood for leniency. Additionally, when Eisenhower acted on Slovik's case, the Battle of the Bulge was raging and American forces were in serious trouble in the face of a German surprise offensive. The possibility of leniency was outweighed by the view that maintaining discipline in the face of the enemy required that Slovik be executed.

*More historical information can be found at*

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Regimental History Website

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

<sup>6</sup> OTJAG, Criminal Law Division, Information Paper, subject: Private Eddie Slovik, USA (deceased) (10 Dec. 1981) (on file with author).

<sup>7</sup> HUIE, *supra* note 1, at 103.

# The Expanded Legal Assistance Program

Major Joshua Berger<sup>1</sup>

## I. Introduction

Military legal assistance offices provide servicemembers and their families an important resource to handle the unique and often complex set of legal problems they encounter as a result of military service. Unfortunately, many legal assistance attorneys are hamstrung in their ability to effectively represent military personnel and family members because state bar licensure rules prohibit out-of-state judge advocates from enforcing the client's rights by bringing suit or providing representation in local courts. Concomitantly, many servicemembers do not earn enough money to pay for civilian legal representation, yet their income level precludes them from formal legal aid programs.<sup>2</sup> Further compounding this problem is the fact that civilian attorneys are often unfamiliar with the federal statutes that give rise to many of servicemembers' most important rights.<sup>3</sup>

For these reasons and others, the Department of Defense, working in close coordination with local and national bar associations, instituted policies to allow judge advocates to represent servicemembers in state court, regardless of the attorneys' state of licensure.<sup>4</sup> This program, known generally as the Expanded Legal Assistance Program (ELAP), has enjoyed success in several jurisdictions. Unfortunately, however, most states still do not allow the military legal assistance practitioner access to their courts absent state licensure. Additionally, the military services have only adopted ELAP programs on a limited basis.

This article outlines the applicable statutes, rules, and policies governing ELAP practice, while emphasizing the benefits of a robust expanded legal assistance program. First, the article traces the development of the military's ELAP policies and programs, beginning with the genesis of modern day legal services. Further, it surveys the rules in a number of different states that allow, in one form or another, military judge advocates to represent legal assistance clients in state court. Additionally, this article analyzes and compares current regulatory ELAP guidance across the

different military services. Finally, the article discusses ELAP in practice on select military installations.

## II. Expanded Legal Assistance Program Defined

Although the term ELAP has come into common usage within the military legal assistance community and, to a lesser extent, various state and national bar associations, the meaning of the term may vary depending on context. The meaning of ELAP in military regulations and the way in which it is used in the context of national and state bars differs slightly. Generally, the defining characteristic of ELAP in military regulations is in-court representation of a legal assistance client.<sup>5</sup> In this regard, ELAP applies to judge advocates as well as civilian legal assistance attorneys employed by the Armed Forces.<sup>6</sup> Further, it encompasses situations where the attorney appears in court as a member of the state bar association in which the court is located, as well as situations when the lawyer appears pursuant to a special rule granting military attorneys limited access to state courts.<sup>7</sup>

Contrarily, the use of the term ELAP by the American Bar Association (ABA) does not include representation by civilian attorneys and is limited to in-court representation by judge advocates.<sup>8</sup> Additionally, ABA and state ELAP rules are written to allow judge advocates to practice in state courts from which they would otherwise be precluded because of state licensure rules.<sup>9</sup> Thus, unlike military regulations, the term ELAP as used by state and national bar associations would not encompass a judge advocate who appears in a state court as an active member of that particular state's bar association.<sup>10</sup> This article contemplates the more expansive definition of ELAP found in the military regulations.

<sup>1</sup> Judge Advocate, U.S. Army. Presently assigned as Brigade Judge Advocate, 12th Combat Aviation Brigade, Contingency Operating Base Adder, Iraq. This article was submitted in partial completion of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.

<sup>2</sup> *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, 129 No. 1 ANN. REP. AM. BAR ASS'N 104 (2004).

<sup>3</sup> Kevin Patrick Flood, *Expanded Legal Assistance Revisited*, DIALOGUE, Spring 2007, at 23.

<sup>4</sup> See generally Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1, 8 (1972).

<sup>5</sup> U.S. DEP'T OF NAVY, JAG INSTR. 5800.7E, MANUAL OF THE JUDGE ADVOCATE GENERAL para. 0711 (20 June 2007) [hereinafter JAGMAN] describes ELAP as "designated legal assistance attorneys" providing "in-court representation to certain categories of clients." Similarly, U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-7g(1) (21 Feb. 1996) [hereinafter AR 27-3] provides for in-court representation by an "attorney providing legal assistance," and para. 2-2a generally authorizes both Army judge advocates and "[Department of the Army] civilian attorneys" to provide legal assistance.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The MODEL EXPANDED LEGAL ASSISTANCE PROGRAM RULE FOR MILITARY PERS. § (1) (2003) [hereinafter MODEL ELAP RULE] permits in-court-representation by a "lawyer . . . who is a full-time active duty military officer serving in the office of a Staff Judge Advocate."

<sup>9</sup> See *infra* Part VI discussion.

<sup>10</sup> *Id.*

### III. History of Expanded Legal Assistance Programs

Modern day legal services in the military have come a long way since their relatively recent historical beginnings. Military legal services trace their history to the World War II era, when, in 1940, the Armed Forces, working in cooperation with the American Bar Association, began to provide basic legal assistance to servicemembers.<sup>11</sup> These services began, in part, in response to the increased demand created by the wartime induction of millions of citizens into the military.<sup>12</sup> Further adding to the demand for legal services during this era was the Soldiers' and Sailors' Civil Relief Act, which Congress passed in 1940 to provide legal remedies and relief to military members.<sup>13</sup> Initially, the legal services provided were somewhat limited to assistance during induction, as servicemembers were referred to the civilian bar for legal problems arising later.<sup>14</sup> However, in recognition of the need for a more comprehensive approach, in 1943, the Army and the Navy adopted a uniform plan to provide legal services to servicemembers and their dependents.<sup>15</sup> This plan marks the official beginning of military legal services, and, following WWII, the military and the ABA decided that legal assistance should continue as a permanent activity.<sup>16</sup>

Following the formal establishment of a military legal assistance program in 1943, the Army began providing varied and often limited legal services to its Soldiers and dependent family members.<sup>17</sup> In 1969, expanded legal services got a jump-start when Congress passed the Carey Amendment to the Economic Opportunity Act.<sup>18</sup> This Amendment made certain military members and their families eligible to receive legal services from civilian attorneys working in the Office of Economic Opportunity (OEO), subject to the Defense Department assuming the cost of these services.<sup>19</sup> Though the Carey Amendment implied that the military "could not or should not 'take care of its

own,"<sup>20</sup> the Department of Defense's initial reaction was to take no steps to implement the law.<sup>21</sup> Instead, it formed a committee to study the applicability of the amendment, as well as other alternatives to funding legal services through the OEO.<sup>22</sup>

Following four months of study, the committee, known as the McCartin Committee, made three recommendations: (1) that the existing legal assistance program be expanded; (2) that the expanded services only be provided to those servicemembers and dependents who could not afford to pay; and (3) that a pilot or test program be instituted to develop those proposals.<sup>23</sup> The proposed expansion of existing legal services clearly contemplated in-court representation in civilian court by judge advocates, which prompted the Secretary of Defense to seek—and ultimately obtain—ABA approval for the pilot program.<sup>24</sup> The Army implemented the pilot program at several installations, and by 1973, nineteen states had granted some form of permission for out-of-state judge advocates to represent their clients in civil court.<sup>25</sup> Also in 1973, the Secretary of Defense adopted the pilot project (termed the Expanded Legal Assistance Program) permanently into the military legal services program.<sup>26</sup>

Amidst insufficient personnel and funding as well as continued pockets of resistance by local bar associations, support for the ELAP programs steadily declined following its peak in the early 70s.<sup>27</sup> In response, the ABA's Standing Committee on Legal Assistance for Servicemen sought legislation to provide a statutory entitlement for military legal assistance programs as a way to ensure the continuation of ELAP.<sup>28</sup> Ultimately, in 1984, Congress passed 10 U.S.C. § 1044, which provided specific authorization for military legal assistance programs.<sup>29</sup>

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<sup>11</sup> Colonel Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW., May 1993, at 4.

<sup>12</sup> MILTON J. BLAKE, LEGAL ASSISTANCE FOR SERVICEMEN: A REPORT OF THE SURVEY OF THE LEGAL PROFESSION 9 (1951).

<sup>13</sup> *Id.*

<sup>14</sup> Arquilla, *supra* note 11, at 4.

<sup>15</sup> BLAKE, *supra* note 12, at 21. The Army adopted its plan pursuant to War Dep't Circular No. 74, *Legal Advice and Assistance for Military Personnel* (16 Mar. 1943). The Navy's implementation is located in U.S. DEP'T OF NAVY, NAVY BULL. R-1164, LEGAL ASSISTANCE FOR NAVAL PERSONNEL (26 June 1943).

<sup>16</sup> Arquilla, *supra* note 11, at 5.

<sup>17</sup> *Id.*

<sup>18</sup> S. 3016, 91st Cong., 1st Sess. (1969) (Carey Amendment) amending § 222(a)(3) of the Economic Opportunity Act of 1964.

<sup>19</sup> Mack Borgen, *The Proper Role of the Military Legal Assistance Officer in the Rendition of Estate Planning Services*, 73 MIL. L. REV. 65, 78 (1976).

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<sup>20</sup> Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1, 8 (1972).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.* The study was known as the Department of Defense Military Working Group on Expansion of Legal Assistance Programs. *Id.*

<sup>23</sup> Borgen, *supra* note 19, at 79 (citing REPORT OF DEPARTMENT OF DEFENSE MILITARY WORKING GROUP ON EXPANSION OF LEGAL ASSISTANCE PROGRAMS § III (1970)).

<sup>24</sup> *Id.* (citing Letter from Melvin Laird, Sec'y of Def., to Bernard Segal, President of the Am. Bar Ass'n (May 1970)).

<sup>25</sup> *Annual Report of the Standing Committee on Legal Assistance for Servicemen*, 100 ANN. REP. AM. BAR ASS'N 801 (1975).

<sup>26</sup> *Id.* at 801.

<sup>27</sup> *Id.* at 804.

<sup>28</sup> *Id.* at 802.

<sup>29</sup> Prior to this statute, the legal basis for military legal assistance rested on the Secretary of the Army's authority under 10 U.S.C. § 3013(g) to prescribe the duties of Army personnel and promulgate regulations to carry out his statutory duties. Arquilla, *supra* note 11, at 6.

However, the law fell short of the ABA's efforts to create a statutory entitlement to legal services because it only authorized such programs "[s]ubject to the availability of legal staff resources."<sup>30</sup>

The next significant ABA action with respect to ELAP occurred in 2003, when the House of Delegates adopted the Black Letter Model Expanded Legal Assistance Program Rule for Military Personnel (Model Rule or Model ELAP Rule).<sup>31</sup> Unfortunately, this ABA initiative did not have its desired effect, as very few states adopted the Model ELAP Rule or some form of an ELAP rule in response.<sup>32</sup>

Since the ELAP's inception under the Army Pilot Program in 1971, two major issues have limited the program's implementation. The first issue, typically raised by civilian bar associations, reflects a concern that the ELAP will take away revenue-generating clients from the local bar.<sup>33</sup> In part to address this concern, military regulations restrict eligibility for ELAP to servicemembers and dependents that are unable to pay legal fees to civilian counsel.<sup>34</sup> Most state ELAP rules also contain eligibility restrictions that require, in one form or another, a showing of financial hardship.<sup>35</sup> The second issue that has limited more widespread implementation of ELAP in the military is the lack of personnel and funds.<sup>36</sup>

#### IV. Current Regulatory Guidelines

After the Secretary of Defense formally adopted the pilot program in 1973, service regulations implemented regulatory guidance governing ELAP. The following section examines ELAP regulations in the Army, Navy, Marine Corps, and Air Force.

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<sup>30</sup> 10 U.S.C. § 1044(a) (2006). Making legal services a statutory entitlement for servicemembers is a frequently recurring issue that the ABA has continued to support. The Legal Assistance for Military Personnel Committee's most recent efforts to make legal assistance a statutory entitlement is contained in its proposed revision to 10 U.S.C. § 1044, which can be found on its website at <http://www.abanet.org/legalservices/lamp/>.

<sup>31</sup> *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, 129 No. 1 ANN. REP. AM. BAR ASS'N 104 (2004).

<sup>32</sup> Letter from William H. Neukom, President, Am. Bar Ass'n, & Earl E. Anderson, Chair, Standing Comm. of Legal Assistance for Military Pers., to Colleagues (May 20, 2008) (on file with author).

<sup>33</sup> See generally *Annual Report of the Standing Committee on Legal Assistance for Servicemen*, *supra* note 25; Borgen, *supra* note 19, at 82; Marks, *supra* note 20.

<sup>34</sup> AR 27-10, *supra* note 5, para. 3-7g(3); JAGMAN 0711a, *supra* note 5.

<sup>35</sup> See *infra* Part VI discussion.

<sup>36</sup> See generally Borgen, *supra* note 19, at 81-82; *Report of the Standing Committee on Legal Assistance for Servicemen*, 99 ANN. REP. AM. BAR ASS'N 723 (1974).

#### A. Army Policy

Army regulations authorize, but do not require, legal assistance attorneys to represent clients in civil courts, subject to a number of limitations.<sup>37</sup> In particular, paragraph 3-7g of Army Regulation (AR) 27-3, *The Army Legal Assistance Program*, allows an "attorney providing legal assistance," which is defined as a judge advocate or civilian attorney employed by the Army, to provide in-court representation to certain clients.<sup>38</sup> The regulation further requires a supervising attorney to approve the in-court representation on a case-by-case basis, while considering such factors as potential conflicts of interest and the in-court representation's impact on the quality or availability of other services.<sup>39</sup> Further, in-court representation is restricted to clients who would experience substantial financial hardship in hiring a civilian lawyer, though the regulation states that servicemembers in the pay grade of E-4 and below ordinarily qualify for such representation.<sup>40</sup> Finally, the regulation contains subject matter restrictions by prohibiting in-court representation for all military justice proceedings and all civilian criminal proceedings, with the exception of cases before a U.S. Magistrate on a military installation.<sup>41</sup>

#### B. Navy and Marine Corps Policy

The Navy JAG Instruction 5800.7E, *Manual of the Judge Advocate General (JAGMAN)*, and JAG Instruction 5801.2A, *Legal Assistance Manual*, contain the regulations governing ELAP for the Navy and the Marine Corps.<sup>42</sup> Similar to Army policy, these instructions permit, but do not require, legal assistance attorneys to represent qualified clients in civil court.<sup>43</sup> Also mirroring the Army regulation, the Navy instructions only allow for military representation for clients who cannot afford a private attorney; the JAGMAN describes these potential clients as servicemembers in the rank of E-3 and below, or E-4 and below with family members.<sup>44</sup> Those who do not meet this rank requirement may still be eligible for ELAP representation upon a showing of financial hardship and with the approval of The Judge Advocate General or his designee.<sup>45</sup>

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<sup>37</sup> AR 27-3, *supra* note 5, para. 3-7.

<sup>38</sup> *Id.* para. 3-7g; *id.* para. 2-2a.

<sup>39</sup> *Id.* para. 3-7g(1).

<sup>40</sup> *Id.* para. 3-7g(3).

<sup>41</sup> *Id.*

<sup>42</sup> JAGMAN, *supra* note 5, para. 0711.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* para. 0711b(4).

This policy is more expansive than the Army's in that it adds a provision allowing for in-court representation, absent a showing of financial hardship, for "cases that involve a significant issue that affects other servicemembers."<sup>46</sup> In a similar vein, the only subject matter restriction on ELAP representation in the Navy and Marine Corps rules is a prohibition against in-court representation for marital dissolutions.<sup>47</sup> Finally, Navy regulations make clear that ELAP is secondary to normal legal assistance services, and JAGINST 5801.2A further requires Judge Advocate General approval for legal assistance offices seeking to establish an expanded program.<sup>48</sup>

### C. Air Force Policy

Air Force Instruction 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, is the governing regulation for legal assistance in the Air Force. Although ELAPs are not specifically addressed in the regulation, Air Force legal assistance attorneys are prohibited from representing clients in a "court or administrative proceeding."<sup>49</sup> This would clearly preclude implementation of an ELAP.

### V. The ABA's Model ELAP Rule

Although some states already had ELAP rules on their books, the ABA promulgated and passed a Black Letter Model ELAP Rule for Military Personnel (Model Rule or Model ELAP Rule) in 2003.<sup>50</sup> This rule is by no means the most expansive rule in the ELAP context, and three key provisions limit its utility. First, the only clients authorized to receive military in-court representation under the Model Rule are enlisted personnel experiencing substantial financial hardship in the pay grades of E-1 to E-4, and their dependents.<sup>51</sup> Any other client seeking representation pursuant to the Model Rule must be approved by their respective Judge Advocate General.<sup>52</sup>

The second important limitation imposed under the Model ELAP Rule is a restriction on the subject matter of

the representation. Specifically, the rule limits representation to civil matters.<sup>53</sup>

The final, and perhaps most significant, limiting provision of the Model Rule is a requirement for judge advocates to obtain and complete fifteen hours of state-specific approved continuing legal education (CLE) before they may be permitted to practice under the rule.<sup>54</sup> Overall, the ABA Model ELAP Rule offers reasonable utility to judge advocates seeking to represent legal assistance clients in state courts, though a number of states have much more expansive ELAP rules.<sup>55</sup>

### VI. Survey of State ELAP Rules

A number of different jurisdictions allow military legal assistance attorneys to represent servicemembers in their courts. These rules vary greatly in many respects, and while some states offer very useful guidelines for military attorneys, others impose restrictions that render the rule virtually unworkable. In this context, the three main limitations to military representation in state courts are restrictions on client eligibility, which is usually based on military rank; training and fee requirements for the attorney; and subject matter limitations. The following section examines existing state ELAP rules, comparing their relative utility for judge advocates, in order of most to least permissive.

#### A. Alaska

The Alaska ELAP rule is an example of the most permissive rule allowing military judge advocates to represent clients in state court. Under the rule, active duty military judge advocates may apply to the Alaska Bar Association for a waiver to practice law in the state.<sup>56</sup> Once the waiver is approved, a judge advocate may represent military clients and dependents on any matter and may accept any case under the Alaska Pro Bono Program for a period of two years.<sup>57</sup> There are no further limitations on the scope or subject matter of representation; there are no fees or CLE requirements; and there is no requirement to show financial hardship on the part of the client.<sup>58</sup> To qualify for the waiver, an applicant need only provide proof of graduation from an accredited law school, a certificate of good standing from another state bar, proof of active duty

<sup>46</sup> *Id.* para. 0711b(5).

<sup>47</sup> U.S. DEP'T OF NAVY, JAG INSTR. 5801.2A, LEGAL ASSISTANCE MANUAL sec. 8-1c (26 Oct 2005) [hereinafter NAVY LEGAL ASSISTANCE MANUAL].

<sup>48</sup> *Id.* sec. 8-1a.

<sup>49</sup> U.S. DEP'T OF AIR FORCE, INSTR. 51-104, LEGAL ASSISTANCE, NOTARY, AND PREVENTIVE LAW PROGRAMS sec. 1.2.9 (27 Oct. 2003) [hereinafter AFI 51-104].

<sup>50</sup> See *infra* Part VI discussion; *Informational Report of the Standing Committee on Legal Assistance for Military Personnel*, *supra* note 31.

<sup>51</sup> MODEL ELAP RULE, *supra* note 8.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *infra* Part VI discussion.

<sup>56</sup> ALASKA BAR R. 43.1 (1999) (Waivers to Practice Law under a U.S. Armed Forces Expanded Legal Assistance Program).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

status and assignment to the Judge Advocate General's Corps of one of the Armed Forces, and an affidavit that the applicant has never failed the Alaska bar examination.<sup>59</sup> The most recent Alaska Supreme Court order amending the rule became effective on 15 January 1999, well prior to the ABA's adoption of the Model ELAP Rule. The text of the Alaska rule also bears no relation to the Model ELAP Rule.

## B. Mississippi

Mississippi's ELAP rule is also streamlined and receptive to military representation. Pursuant to the rule, any military lawyer stationed or employed in Mississippi serving as a judge advocate or employed by the Armed Forces may apply to the state Supreme Court for a certificate to practice as a "Registered Military Legal Assistance Attorney" in the state.<sup>60</sup> Lawyers practicing under the rule are limited by 10 U.S.C. § 1044 and applicable service regulations, and the scope of representation is restricted to certain enumerated subject matter areas, although a final catchall provision allows other matters or cases to be heard at the discretion of the court or tribunal.<sup>61</sup>

Lawyers practicing in Mississippi state courts as a Registered Military Legal Assistance Attorneys are considered active members of the Mississippi Bar for the purposes of disciplinary procedures, although the rule expressly exempts military attorneys from paying bar dues and CLE requirements.<sup>62</sup> The Supreme Court of Mississippi adopted Rule 46(e) in January 2005, subsequent to the ABA Model ELAP Rule.<sup>63</sup> There is little resemblance between the two rules however, and Mississippi's ELAP rule is far more permissive and useful for the military practitioner.

## C. Colorado

In a scheme similar to the Alaska rule, active duty military attorneys stationed in Colorado may apply for temporary admission to the Colorado bar and may represent

clients in their capacity as judge advocates.<sup>64</sup> The Colorado rule does not limit the scope or subject matter of the representation, nor does it require the lawyer to take any CLE courses.<sup>65</sup> Furthermore, military clients do not have to show financial hardship in obtaining civilian counsel, but attorney-applicants must pay a substantial annual fee of \$225 for the first calendar year and \$180 every year thereafter that the attorney seeks to practice in state courts.<sup>66</sup> These rules were amended to allow judge advocates to practice in court even before the ELAP movement gained momentum and before the writing of the ABA Model Rule.<sup>67</sup>

## D. Rhode Island

The distinguishing characteristic of Rhode Island's ELAP rule is its simplicity. Pursuant to the Rhode Island Rules of the Supreme Court, active duty judge advocates may appear in any Rhode Island court to represent junior noncommissioned officers and enlisted personnel "who might not otherwise be able to afford proper legal assistance."<sup>68</sup> The only other requirement is that the rule requires the senior active duty legal officer in the State of Rhode Island of the judge advocate's particular service to provide written authorization for the attorney seeking to practice under this rule.<sup>69</sup> Unlike most other states with ELAP rules, Rhode Island allows judge advocates to represent military clients—but not dependent family members—on criminal matters.<sup>70</sup> There also do not appear to be any CLE or fee requirements, although the rule is not entirely clear on these matters.<sup>71</sup>

## E. Utah

The Utah Supreme Court Rules of Professional Practice mirror the Model ELAP Rule and allow active duty judge advocates stationed in Utah to represent certain clients on civil matters in state courts.<sup>72</sup> In-court representation is limited to enlisted personnel under substantial financial hardship in grades E-1 to E-4 and their dependents.<sup>73</sup> Other

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<sup>59</sup> *Id.*

<sup>60</sup> MISSISSIPPI RULES OF APPELLATE PROCEDURE R. 46(e) (2005) (Military Legal Assistance Program).

<sup>61</sup> *Id.* Specifically, the subject matter limitations are the following: adoptions, guardianships, name changes, divorces, paternity matters, child custody, visitation, child and spousal support, landlord-tenant disputes on behalf of tenants, certain consumer advocacy cases, garnishment defenses, probate, matters arising under the Servicemember's Civil Relief Act (SCRA), and enforcement of rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The SCRA can be found at 50 U.S.C. § 501, the USERRA at 38 U.S.C. § 4301.

<sup>62</sup> MISSISSIPPI RULES OF APPELLATE PROCEDURE R, *supra* note 60, 46(e)(8).

<sup>63</sup> Supreme Court of Mississippi Order No. 86-R-99027 SCT.

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<sup>64</sup> COLORADO RULES OF CIVIL PROCEDURE R. 201.3 (2007) (Classification of Applicants).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* R. 227A(1)(a) (Registration Fee).

<sup>67</sup> *Id.*

<sup>68</sup> RHODE ISLAND R. 2(f) (1989).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> UTAH SUPREME COURT RULES OF PROFESSIONAL PRACTICE R. 14-804(a) (2004) (Special Admission Exception for Military Lawyers).

<sup>73</sup> *Id.* R. 14-804(e).

active duty military personnel may also qualify for representation with express, written approval from a service Judge Advocate General.<sup>74</sup> In a departure from the Model ELAP Rule, Utah does not impose any training requirements, although a \$10 fee must be submitted with every application to practice under the rule.<sup>75</sup>

#### F. Washington

Similar to Utah, Washington uses the language from the ABA Model ELAP Rule to implement its ELAP guidelines, which results in a somewhat permissive rule.<sup>76</sup> However, unlike Utah, which does not impose CLE requirements, Washington fully adopted the Model ELAP Rule's recommendation to require fifteen credit hours of state-specific CLE prior to admission to appear in court in the state.<sup>77</sup> Washington also limits legal assistance clients to active duty enlisted personnel in grades E-1 to E-4 and their dependents, and other servicemembers upon approval by the service Judge Advocate General. The subject matter of representation is restricted to noncriminal matters and may be further limited to the extent that representation is permitted by the supervisory service staff judge advocate.<sup>78</sup>

#### G. Hawaii

The Rules of the Supreme Court of Hawaii allow active duty judge advocates stationed in Hawaii to apply for a license to engage in "limited military practice" in state courts for a period of four years.<sup>79</sup> Though there is no subject matter limitation placed on the representation, only enlisted personnel in the grades of E-1 to E-4 and their dependents may be represented.<sup>80</sup> The Hawaii rules also prohibit military attorneys from demanding or receiving compensation from clients for their services.<sup>81</sup> In addition to the client eligibility requirements, Rule 1.7 of the Supreme Court of Hawaii drastically diminishes the rule's utility by requiring judge advocates to pay annual state bar membership dues, currently ranging from \$341 to \$501, depending on the year the attorney was admitted to

practice.<sup>82</sup> The Hawaii rule does not impose any CLE or other training requirements.<sup>83</sup>

#### H. Pennsylvania

Similar to Mississippi, Pennsylvania's ELAP rule was adopted after the ABA approved the Model ELAP Rule.<sup>84</sup> The Pennsylvania rule, which was adopted by the state supreme court on 2 June 2004, gives active and Reserve component judge advocates the limited ability to practice law in Pennsylvania while operating under the aegis of an established expanded legal assistance program.<sup>85</sup> Lawyers practicing under this limited license may represent certain active duty enlisted personnel and their dependents in civil matters and administrative proceedings, to the extent such representation is permitted by the attorney's supervising staff judge advocate or commanding officer.<sup>86</sup> Generally, clients must be enlisted members in the grade of E-1 to E-4, or their dependents, although any active duty servicemember, or his dependents, may receive representation under the rule upon a showing of substantial financial hardship.<sup>87</sup> Lawyers practicing under the limited license are bound by the Pennsylvania Rules of Professional Conduct but are not required to pay the annual attorney bar fee.<sup>88</sup> Unfortunately, Pennsylvania does not relax the normal continuing legal education requirement and mandates fifteen credit hours of Pennsylvania-specific, approved CLE prior to admission to practice.<sup>89</sup>

#### I. Virginia

Virginia's ELAP rules offer a mixed bag for military legal assistance attorneys. On one hand, they contain fairly expansive eligibility rules for attorneys and clients. In particular, Virginia is one of the few states to allow both judge advocates and civilian legal assistance attorneys to

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* R. 14-804 (b)(4).

<sup>76</sup> WASHINGTON STATE COURTS ADMISSION TO PRACTICE RULES R. 8(g) (2002) (Exception for Military Lawyers).

<sup>77</sup> *Id.* R. 8(g)(1).

<sup>78</sup> *Id.* R. 8(g)(4).

<sup>79</sup> RULES OF THE SUPREME COURT OF THE STATE OF HAWAII R. 1.7 (1984) (Limited Admission of Military Attorneys).

<sup>80</sup> *Id.* R. 1.7(c).

<sup>81</sup> *Id.*

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<sup>82</sup> *Id.* R. 1.7(d). Government attorneys, to include judge advocates, are exempt from paying the "Lawyers' Fund for Client Protection" fee, but must pay all other bar membership fees. The 2009 fees are published on the Hawaii State Bar Association website at [www.hsba.org/resources/1/2009\\_Renewal/2009-DUES.pdf](http://www.hsba.org/resources/1/2009_Renewal/2009-DUES.pdf), although the 2010 fee schedule has not yet been published.

<sup>83</sup> RULES OF THE SUPREME COURT OF THE STATE OF HAWAII R. 1.7 (1984) (Limited Admission of Military Attorneys).

<sup>84</sup> Supreme Court of Pennsylvania Docket No. 1, Order No. 336, 34 PA. BULL. 3102, June 2004.

<sup>85</sup> PENNSYLVANIA BAR ADMISSION R. 303A (2004) (Limited Admission of Military Attorneys).

<sup>86</sup> *Id.* R. 303D.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* R. 303F.

<sup>89</sup> *Id.* R. 303B3.

practice under the ELAP rules.<sup>90</sup> Similarly, the only requirement for clients is that they be eligible legal assistance clients that would experience substantial financial hardship by hiring private counsel.<sup>91</sup> However, Virginia requires that military legal assistance attorneys pay the same bar dues as regularly admitted active members,<sup>92</sup> as well as complete the required professionalism course and mandatory CLE requirements.<sup>93</sup> Finally, in the same manner and language as the Mississippi rule, Virginia limits the subject matter of the representation to twelve enumerated areas, although a catchall provision gives the court discretion to allow for other cases.<sup>94</sup>

## J. Florida

The Florida rules governing the practice of law by military legal assistance attorneys are the most extensive in the ELAP context. These rules expressly define “authorized legal assistance attorney,” “legal assistance supervisory attorney,” and “legal assistance client.” Furthermore, the rules specifically list attorneys’ permitted activities and the civil matters for which they may provide representation.<sup>95</sup>

The Florida rules contain the usual requirements for military judge advocates seeking admission to practice in court, with some key exceptions. First, the rules require a member of the Florida Bar to act as a “supervising attorney” and assume professional responsibility for all of the legal assistance attorney’s activities.<sup>96</sup> The impact of this requirement is tempered by a provision that allows a reserve judge advocate volunteering at a legal assistance office to serve as a supervising attorney.<sup>97</sup> Rule 18-1.2(a)(4) further requires judge advocate practitioners to attend a course entitled “Practicing with Professionalism” through the Florida Bar Young Lawyers Division.<sup>98</sup>

The rules also limit the eligibility of legal assistance clients and the subject matter of representation in other ways. In accordance with Rule 18-1.2(d), active duty servicemembers, retirees, and military dependents seeking

legal assistance representation must meet the income eligibility guidelines of the Legal Services Corporation to be considered “[a]uthorized” legal assistance clients within the meaning of the statute.<sup>99</sup> Additionally, in-court representation is restricted to the following seven “issues”: landlord/tenant disputes, small claims court actions, domestic relations matters, routine or statutory probate matters, actions arising the Florida Consumer Collection Practices Act, actions arising under the Florida Motor Vehicle Repair Act, and proceedings permitted by applicable law regarding appearances by foreign attorneys.<sup>100</sup> As a practical matter, these subject matter limitations would not preclude legal assistance attorneys from representing clients in the vast majority of cases they would likely encounter.<sup>101</sup>

In contrast to other states’ rules, the Florida guidelines explicitly list the permissible activities allowable under its expanded military rule.<sup>102</sup> These activities include appearing in court or before any administrative tribunal, and preparing pleadings and other court documents; a catch-all provision covers any other necessary preparatory activities.<sup>103</sup> Similarly, the rules contain express provisions requiring military attorneys to submit to the jurisdiction of the Supreme Court of Florida for disciplinary purposes, and further allow the state supreme court to withdraw, with or without cause, an attorney’s certification under the rule.<sup>104</sup>

## K. California

California has perhaps the most restrictive rule, and military judge advocates seeking to practice in California will find themselves severely limited. Specifically, the California Rules of Court permit military counsel to represent a “person in the military service” in state court, but only for a cause arising under the Servicemember’s Civil Relief Act.<sup>105</sup> Further, judge advocates must be appointed by the court, which can only approve the appointment upon a finding that retaining civilian counsel would likely cause substantial hardship for the servicemember or his family.<sup>106</sup> Finally, the California rule prohibits any court from determining the availability of a judge advocate and requires that the judge advocate be made available by the appropriate Judge Advocate General or duly designated

<sup>90</sup> VIRGINIA SUPREME COURT R. 1A:6(a) (2003) (Foreign Attorneys—Registered Military Legal Assistance Attorneys). The lawyer seeking admission under the rule must also be employed, stationed, or assigned in the Commonwealth of Virginia.

<sup>91</sup> *Id.* R. 1A:6(f).

<sup>92</sup> *Id.* R. 1A:6(d). This requirement may be waived for two years following the initial issue of a certificate to practice under the rule.

<sup>93</sup> *Id.* R. 1A:6(i).

<sup>94</sup> *Id.* R. 1A:6(e).

<sup>95</sup> RULES REGULATING THE FLORIDA BAR ch. 18 (1996) (Military Legal Assistance Counsel Rule).

<sup>96</sup> *Id.* R. 18-1.4(a), R. 18-1.2(c).

<sup>97</sup> *Id.* R. 1.2(c)(1).

<sup>98</sup> *Id.* R. 18-2.1(a)(4).

<sup>99</sup> *Id.* R. 18-1.2(d).

<sup>100</sup> *Id.* R. 18-1.4(c).

<sup>101</sup> See *infra* Part IV.

<sup>102</sup> RULES REGULATING THE FLORIDA BAR R. 18-1.3 (1996).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* R. 18-1.5, R. 18-1.7(a)(2).

<sup>105</sup> CALIFORNIA RULES OF COURT R. 9.41(a) (2007) (Appearances by military counsel).

<sup>106</sup> *Id.* R. 9.41(a)(2) – 9.41(a)(3).

representative.<sup>107</sup> There is no formal application process, and the rule does not impose CLE or fee requirements. The California Supreme Court most recently amended the rules effective 1 January 2007.

## VII. ELAP in Practice

Despite the fact that Army Regulations permit in-court representation in certain cases and that a handful of states have some form of an ELAP rule, the majority of legal assistance offices at Army installations do not have an ELAP.<sup>108</sup> Army-wide, legal assistance offices reported 622 cases of ELAP representation in state court during FY 2009, though the legal assistance office at Fort Lee, Virginia, accounts for 510 of those.<sup>109</sup> Two of the Army's largest installations, Fort Bragg, North Carolina, and Fort Hood, Texas, each reported no ELAP cases.<sup>110</sup> The only other installations with a significant number of reported ELAP cases were Fort Drum, New York (43), and Fort Bliss, Texas (44).<sup>111</sup>

Though not many Army legal assistance offices have implemented an ELAP, a number of success stories illustrate the benefits of a robust program. For example, until recently, the XVIII Airborne Corps legal assistance office at Fort Bragg had one of the most active ELAP programs in the Army.<sup>112</sup> As a part of its program, the office regularly represented both plaintiffs and defendants in consumer law

matters.<sup>113</sup> Additionally, the Fort Bragg office defended Soldiers and their families in landlord-tenant cases, as well as home foreclosures.<sup>114</sup> The program achieved many successful outcomes for clients, including the award of monetary damages, stays on home foreclosures, the halting of evictions, and the erasure of debts.<sup>115</sup>

The Navy has also achieved success with an ELAP. In one particular legal assistance office, the ELAP was able to reopen twelve separate default adjudications of paternity that were held in violation of the Soldiers' and Sailors' Civil Relief Act.<sup>116</sup> Judge advocates appeared in court to vacate these default judgments, and through court-ordered DNA testing, nine of the cases resulted in the exclusion of the client and putative father.<sup>117</sup>

## VIII. Conclusion

Expanded Legal Assistance Programs represent a great tool for enforcing the rights of military servicemembers and their dependents who would otherwise not be able to afford private representation. A growing number of states now have rules that allow military attorneys to represent their clients in state court, even absent local licensure. However, state ELAP rules vary significantly in their utility, from virtually unworkable to extremely useful. Presently, few Army legal assistance offices have implemented an ELAP, though Army policy has allowed for in-court representation of legal assistance clients since 1973. Despite the challenges of ELAP, installations that have a robust program have enjoyed considerable success in obtaining favorable results for their clients.

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<sup>107</sup> *Id.* R. 9.41(a).

<sup>108</sup> Telephone Interview with Mr. John Meixell, Chief, Legal Assistance Policy Div., Office of The Judge Advocate Gen., U.S. Army, in Rosslyn, Va. (Apr. 8, 2010) [hereinafter Meixell Telephone Interview].

<sup>109</sup> *Id.* The vast majority of the Fort Lee in-court representations involve filing pleadings, motions, and other documents with the local courts. Actual in-court appearances requiring litigation before a Judge occur much less frequently. Telephone interview with Ms. Rhonda Mitchell, Chief, Legal Assistance Div., Office of the Staff Judge Advocate, Fort Lee, Va. at Fort Lee, Va. (Apr. 13, 2010). The Fort Lee legal assistance office represents Soldiers and their families primarily in domestic, landlord/tenant, and consumer law matters. *Id.* This office is staffed with three civilian attorneys who are licensed in Virginia and one Army judge advocate. *Id.*

<sup>110</sup> Meixell Telephone Interview, *supra* note 108.

<sup>111</sup> *Id.* The Navy also performs a small number of ELAP representations each year. As with the Army, some Navy legal assistance offices are staffed with locally-licensed civilian attorneys who are able to appear in court notwithstanding the existence of a state ELAP rule. Telephone Interview with Commander Steven Haycock, Deputy Assistant Judge Advocate Gen. (Legal Assistance), U.S. Navy, in Wash., D.C. (Mar. 10, 2009). As discussed *infra* Part IV, Air Force regulations prohibit legal assistance attorneys from representing clients in court or an administrative proceeding, and ELAP has not been implemented in the Air Force. Telephone Interview with Lieutenant Colonel Lance Matthews, Deputy Commandant, Air Force Judge Advocate Gen.'s Sch. at Maxwell Air Force Base, Ala. (Mar. 12, 2009).

<sup>112</sup> Telephone Interview with Ms. Angela Martin, former Deputy Chief, Legal Assistance Div., Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, N.C., in Cumberland County, N.C. (Mar. 13, 2009).

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Flood, *supra* note 3.

<sup>117</sup> *Id.*

## Command Authority: What Are the Limits on Regulating the Private Conduct of America's Warriors?

Major Troy C. Wallace\*

*In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life."<sup>2</sup>*

### I. Introduction

You are the new staff judge advocate (SJA) assigned to a division. Before leaving for his next assignment, the outgoing SJA tells you the commanding general (CG) wants to institute two new command policies. The first policy would require personally-owned firearms to be stored in each Soldier's respective unit arms room, and the policy would apply to those living on the installation and those residing off-post.<sup>3</sup> The second policy would require all Soldiers who operate motorcycles to wear specific articles of personal protective equipment, including a helmet, while operating a motorcycle. Again, this policy would apply to all Soldiers within the division and would apply when operating a motorcycle both on and off the installation, in a state that imposes no requirement to wear a helmet.<sup>4</sup> One policy appears to conflict with constitutional rights while the other merely interferes with a personal activity.

You attend your first "actions" meeting with the CG in which the policies are discussed, and it is clear he feels strongly about implementing these policies. You return to your office, somewhat unsure about the lawfulness of the policies. What are the possible legal problems? If they are challenged, what are the Government's relative chances for success?

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<sup>2</sup> Chappell v. Wallace, 462 U.S. 296, 300 (1983) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

<sup>3</sup> This is a hypothetical policy based on the recent decision in *D.C. v. Heller*, 128 S. Ct. 2783 (2008) (upholding the individual right to bear arms in the home for traditional purposes such as self-defense, completely unrelated to membership in a militia).

<sup>4</sup> Hawaii state law does not require the use of any protective headgear, such as a helmet. Such a policy exists at the 25th Infantry Division, Schofield Barracks, Hawaii. Command Policy Memorandum from Commanding General, 25th Infantry Division (Light) & U.S. Army, Hawaii, to Military Personnel and Department of Defense Civilian Employees, subject: Green Tab Memorandum Safety-3, Motorcycle/Moped Operating Requirements (15 Aug. 2005) [hereinafter *Motorcycle Policy*]. The motorcycle policy is derived from AR 385-10. U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 11-9d (23 Aug. 2007) [hereinafter *AR 385-10*]. It is likely that the Hawaii policy was promulgated in order to make certain provisions of AR 385-10 punitive. There are no specific punitive provisions in AR 385-10.

The continued escalation in the Army's operational tempo has fueled an emerging trend in the regulation of servicemembers' private conduct.<sup>5</sup> Increasingly, SJAs are advising commanders who believe they need to regulate broader areas of private conduct. Many of these activities are not necessarily newly regulated areas, but the scope and breadth of some of these policies are now reaching well beyond what commanders have traditionally regulated.

Rather than solely regulating activities that occur on the installation, some policies restrict or even prohibit entirely lawful private conduct off the installation.<sup>6</sup> Some policies even apply when servicemembers are off-duty and outside the limits of an installation.<sup>7</sup> These expansive policies naturally raise questions about their lawfulness and appropriateness.

Some policies are legally supportable, but others may improperly interfere with the private affairs of servicemembers. The law arms commanders with enormous and often unchecked power to promulgate policies that impose limitations on personal conduct,<sup>8</sup> but there are limits to this power. Meanwhile, servicemembers may be more willing to challenge real or perceived intrusions into their personal affairs when they have families and live off an installation. Therefore, legal advisors should be cautious when reviewing and advising on command policies that are broadly conceived and clearly interfere with personal rights. As with many areas of the law, there is some gray area at the intersection of public regulation and personal rights. Stepping into the gray area may subject the command to challenges. Maintaining a reasonable and defensible position by crafting policies that support a legitimate military need while imposing the minimum amount of restriction necessary is the best course of action.

This primer provides a framework for determining whether a proposed command policy is legally supportable.<sup>9</sup>

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<sup>5</sup> This includes an increase in the number of issues addressed in the typical General Order Number 1, which regulates and prohibits various activities when deployed to a combat zone, including sexual relationships, the viewing and possession of pornography, the use of alcohol, and the taking of photographs. See, e.g., Multi-National Corps-Iraq, Gen. Order No. 1 (14 Feb. 2008).

<sup>6</sup> See *Motorcycle Policy*, *supra* note 4. The motorcycle policy requires the wear of certain protective equipment regardless of the location in which the motorcycle is operated.

<sup>7</sup> *Id.*

<sup>8</sup> See examples of challenged orders and policies which have been upheld in Part III *infra*.

<sup>9</sup> This primer was written with a view towards applicability in the continental United States (CONUS) only. There are, of course, different issues and factors involved in overseas or deployed environments that could substantially alter the analysis provided in this primer. This is particularly

Despite the current state of the law, which allows for vast command discretion, this primer recommends command self-restraint. Substantively, in Part II, this primer discusses the background and development of command authority. This overview considers constitutional, statutory, and regulatory authority, as well as the judicial evolution of personal jurisdiction over servicemember misconduct. Part III explains how command policies are challenged in the military justice system as collateral attacks on courts-martial convictions and in the federal district courts under the Administrative Procedure Act.<sup>10</sup> This primer concludes with practical recommendations and provides a basic approach to conducting legal reviews of command policy which may intrude upon the personal affairs of servicemembers.

## II. Background on Command Authority

At its highest level, command authority is drawn from the general power of the Executive Branch of Government granted to the President in the U.S. Constitution.<sup>11</sup> Article II confers on the President direct and supreme command authority by virtue of his power as Commander-in-Chief of the armed forces.<sup>12</sup> Some of the President's command authority is delegated to the heads of individual executive departments, including the Department of Defense (DoD).<sup>13</sup>

Through its constitutional power "[t]o make Rules for the Government and Regulation of the land and naval Forces," Congress enacted title 10 of the U.S. Code.<sup>14</sup> In doing so, Congress granted certain rights and responsibilities to the SECDEF<sup>15</sup> and the Secretaries of the Army,<sup>16</sup> Navy,<sup>17</sup> and Air Force.<sup>18</sup> Under federal law, the individual service secretaries have specific statutory responsibilities, such as recruiting, organizing, supplying, equipping, training, and

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true with respect to the regulation of motor vehicles and firearms, both mentioned hypothetically and actually herein. In addition, this primer is focused more on orders or policies that have the potential to reach into the off-post residence or private life of a servicemember within the United States. *See, e.g.,* United States v. McDaniels, 50 M.J. 407 (C.A.A.F. 1999) (employing a brief analysis of the lawfulness of an order, but quickly concluding by distinguishing between the authority to regulate activities on a military installation and those occurring off the installation).

<sup>10</sup> 5 U.S.C. §§ 500–596 (2006).

<sup>11</sup> U.S. CONST. art. II, § 1.

<sup>12</sup> *Id.* art. II, § 2.

<sup>13</sup> 10 U.S.C. § 113 (2006). The general powers of the Secretary of Defense (SECDEF) under this statute are delegated by Congress, not directly by the President. In his discretion, the President may, of course, delegate the authority to make certain decisions to the SECDEF.

<sup>14</sup> *Id.* §§ 101–18506.

<sup>15</sup> *Id.* § 113.

<sup>16</sup> *Id.* § 3013.

<sup>17</sup> *Id.* § 5013.

<sup>18</sup> *Id.* § 8013.

administering their respective departments.<sup>19</sup> To carry out these responsibilities and implement federal law and DoD policy, the secretaries promulgate administrative regulations which further delegate responsibilities and authority to subordinate commanders.<sup>20</sup>

Army Regulation (AR) 600-20, *Army Command Policy*,<sup>21</sup> is the primary source of regulatory guidance for Army commanders. It states that "the key elements for command are authority and responsibility."<sup>22</sup> *Army Command Policy* provides for nearly all of the most basic command responsibilities, all of which require the commander to exercise his inherent command authority.<sup>23</sup> These responsibilities include exercising basic military authority,<sup>24</sup> maintaining good order and discipline in the unit,<sup>25</sup> providing for the well-being<sup>26</sup> and medical fitness of Soldiers,<sup>27</sup> ensuring equal opportunity both on- and off-duty,<sup>28</sup> and preventing Soldiers from being victimized by sexual harassment<sup>29</sup> and sexual assault.<sup>30</sup> Similarly, other military regulations provide commanders with the authority to accomplish various administrative functions, including the administration of military justice,<sup>31</sup> the issuance and filing of reprimands,<sup>32</sup> and separation from service.<sup>33</sup>

In addition to administrative authority and responsibilities, chapter 47 of title 10 also includes the Uniform Code of Military Justice (UCMJ).<sup>34</sup> Commanders exercise quasi-judicial disciplinary authority in maintaining

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<sup>19</sup> *Id.* §§ 3013, 5013, 8013.

<sup>20</sup> *Id.* § 3013(g).

<sup>21</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008) [hereinafter AR 600-20].

<sup>22</sup> *Id.* para. 1-5b.

<sup>23</sup> One of the earliest cases to judicially recognize inherent command authority was *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886 (1961). Recent recognition of the doctrine by the highest military court can be found in *United States v. Miller*, 66 M.J. 306, 308 (C.A.A.F. 2008).

<sup>24</sup> AR 600-20, *supra* note 21, para. 4-6.

<sup>25</sup> *Id.* para. 4-1.

<sup>26</sup> *Id.* para. 3-1.

<sup>27</sup> *Id.* para. 5-4. For example, Chapter 5 provides a source of authority for ordering Soldiers to receive certain immunizations.

<sup>28</sup> *Id.* ch. 6.

<sup>29</sup> *Id.* ch. 7.

<sup>30</sup> *Id.* ch. 8.

<sup>31</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (16 Nov. 2005) [hereinafter AR 27-10].

<sup>32</sup> U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986) [hereinafter AR 600-37].

<sup>33</sup> U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006).

<sup>34</sup> Codified by the President in the *Manual for Courts-Martial*.

good order and discipline within their units, which can be accomplished through the power to impose non-judicial punishment<sup>35</sup> and to prefer and refer charges to a court-martial.<sup>36</sup> Commanders exercise similar quasi-judicial authority when they authorize searches of servicemembers or property under their command or control.<sup>37</sup> The power to issue search authorizations is virtually identical to the power of federal judges to issue search warrants to civilian law enforcement.<sup>38</sup>

One of the most important authorities a commander has within the military justice system stems from the punitive articles of the UCMJ.<sup>39</sup> Because of its central role in maintaining military discipline, a commander's power to issue lawfully binding and enforceable orders is significant. Violations of lawful orders can be punished in a variety of ways, including discharge and incarceration.<sup>40</sup> The power to issue orders is derived from and enforced through Article 90,<sup>41</sup> Article 91,<sup>42</sup> and Article 92<sup>43</sup> of the UCMJ. Article 90 provides the basic legal framework of an order and explains the requirements and prohibitions of orders.<sup>44</sup> Whether issued orally or in the form of written command policies or general orders, orders that are not patently illegal<sup>45</sup> on their face are presumed to be lawful.<sup>46</sup> According to the statute,<sup>47</sup>

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<sup>35</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V (2008) [hereinafter MCM].

<sup>36</sup> *Id.* R.C.M. 601.

<sup>37</sup> *Id.* MIL. R. EVID. 315.

<sup>38</sup> *See* FED. R. CRIM. P. 41. This rule provides basic authority for federal district and magistrate judges to issue search warrants. Although the probable cause standards applicable to Military Rule of Evidence 315 and Federal Rule of Criminal Procedure 41 are identical, the procedures are different. Unlike the federal civilian system where warrants must be in writing, the military system allows for oral search authorizations which are documented after the authorization has been granted.

<sup>39</sup> The power to impose discipline is one of the most important authorities within the context of the military justice system, although not necessarily the most important objective. Commanders and judge advocates often comment that ninety percent of a commander's time is spent on ten percent of the Soldiers.

<sup>40</sup> *See* UCMJ art. 90 (2008) (providing for a dishonorable discharge, total forfeiture of all pay and allowances and five years confinement for the willful disobedience to an order of a superior commissioned officer).

<sup>41</sup> *Id.* Article 90 proscribes assaults or insubordination towards a superior commissioned officer. It also provides the basic rules which apply to other articles dealing with violations of orders, such as Articles 91 and 92.

<sup>42</sup> *Id.* art. 91. Article 91 is the companion statute to Article 92, making punishable disrespect or disobedience to warrant officers and noncommissioned officers.

<sup>43</sup> *Id.* art. 92. Article 92 deals specifically with failing to obey a punitive general order or punitive regulation. Local installation command policies promulgated by general officers will fall under Article 92, whereas routine personal orders from officers to subordinates will fall under Article 90.

<sup>44</sup> *Id.* art. 90c(2).

<sup>45</sup> *Id.* art. 90c(2)(a)(i).

<sup>46</sup> *Id.* art. 90c(2)(a) (explaining all of the requirements of a lawful order issued either under Article 90 or Article 92).

orders must also not conflict with the statutory or constitutional rights of servicemembers.<sup>48</sup> Finally, the scope of an order must serve an official purpose; that is

[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs.<sup>49</sup>

Although Article 90 appears to be simple on its face, closer consideration reveals a certain vagueness in the use of some terms. For example, the phrase "all activities reasonably necessary to . . . safeguard or promote the morale, discipline, and usefulness of members" could constitute just about anything a commander believes he needs to regulate. The restriction on interfering with private rights is similarly vague. Ultimately, does the statute's vagueness mean commanders can issue command policies that conflict with servicemembers' private rights? What about statutory or constitutional rights?<sup>50</sup> Like the answer to many legal questions, it depends. Reviewing military case law offers some insight into how the service courts treat the issue. Before examining the case law, however, we should consider what options servicemembers have when deciding whether to obey or disobey an overly intrusive order.

### III. Challenging an Order or Command Policy

#### A. The Servicemember's Options

A servicemember faced with an order, directive, or policy he disagrees with or considers disobeying has four options: (1) obey the order; (2) obey the order, but challenge it in federal court; (3) disobey the order and challenge any punitive disciplinary action; and (4) disobey the order and challenge it in federal court. An SJA confronted with a new command policy must be prepared to deal with three of these four possibilities. The first option presents no problem at all because the servicemember merely complies with the order despite whatever

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<sup>47</sup> *Id.* art. 90c(2)(a)(v).

<sup>48</sup> *Id.* *See* discussion of the Supreme Court's treatment of constitutional issues in Part III *infra*.

<sup>49</sup> *Id.* art. 90c(2)(a)(iv).

<sup>50</sup> Although paragraph 14c(2)(a)(v), UCMJ, states that an order cannot violate a servicemember's statutory or constitutional rights, Supreme Court case law discussed *infra* (cited at footnotes 107 and 108) casts at least some doubts on the validity of this provision.

disagreement or distaste he has for the policy. The second option is to obey the order while also seeking invalidation of the order through a request for injunctive relief in federal court. In the third case, the servicemember disobeys the order and then challenges the order during the court-martial process. The servicemember's last option is to disobey the order and request injunctive relief in federal court.<sup>51</sup> Since these options give rise to challenges in both the military and federal judicial systems, judge advocates should be prepared to analyze new command policies in this context.

When a servicemember disobeys an order, the command must consider its options and determine whether the order will be upheld if challenged. Typical options include taking no action, taking administrative action, imposing nonjudicial punishment, or preferring court-martial charges. Should charges be referred to court-martial, either directly or after refusal of nonjudicial punishment, the servicemember could then challenge the order at the court-martial itself,<sup>52</sup> on grounds that the order was unlawful or illegal.<sup>53</sup> The order could potentially be challenged again during the military appellate process and again after the formal appellate process is complete, through a collateral attack in federal district court. If the Soldier chooses not to disobey, the final possibility, assuming the servicemember has standing, is to affirmatively challenge the order in federal court, most likely through a request for injunctive relief. Since courts-martial are the more commonly applied option, they will be examined first.

## B. The Judicial Evolution of Jurisdiction

Only forty years ago, the Supreme Court ruled in *O'Callahan v. Parker* that court-martial jurisdiction exists over a servicemember only for misconduct that is service-connected.<sup>54</sup> In reversing the lower courts, the majority in *O'Callahan* expressed grave doubts about a court-martial's ability to protect individual constitutional rights, stating that while civilian courts naturally protect these rights, courts-martial are "marked by the age-old manifest destiny of

retributive justice."<sup>55</sup> Despite some deference to the military at the time,<sup>56</sup> the service-connection test had been the prevailing test of court-martial jurisdiction until just over twenty years ago.

In 1987, the Supreme Court decided *Solorio v. United States*<sup>57</sup> and abandoned the service-connection test for the more universal, status-based rule that applies today.<sup>58</sup> Besides finally settling the issue of jurisdiction, the Court in *Solorio* also reaffirmed its view that the military establishment, including the military justice system, was entitled to great deference from judicial review.<sup>59</sup> While federal courts continued to expand their deference to the military into the 1980s,<sup>60</sup> the military appellate courts struggled with how to analyze and decide cases involving the lawfulness of orders.

## C. Orders and Policies in the Military Courts

In 1958, *United States v. Wysong* was one of the first cases to discuss the lawfulness of orders in the context of the relatively new UCMJ.<sup>61</sup> In *Wysong*, the accused had been ordered by his company commander "not to talk to or speak with any of the men in the company concerned with th[e] investigation except in line of duty."<sup>62</sup> After violating his

<sup>51</sup> In this example, the servicemember may also face the possibility of challenging the order in the court-martial process as well.

<sup>52</sup> The accused could submit a motion to dismiss. See MCM, *supra* note 35, R.C.M. 907. The accused could also attack the lawfulness of the order during trial on the merits.

<sup>53</sup> See UCMJ art. 90c(2)(a).

<sup>54</sup> 395 U.S. 258 (1969) (reversing convictions for attempted rape, housebreaking, and assault with intent to rape because offenses were committed off-post and while on an evening pass, thereby negating court-martial jurisdiction and affording petitioner a trial by a civilian court). Under *O'Callahan*, only crimes that were connected to the accused's military duties, or crimes committed on a military installation if the accused was "off-duty," were sufficient to establish personal jurisdiction under the UCMJ. *Id.* at 273.

<sup>55</sup> *Id.* at 266. This opinion from 1969 was indicative of a Supreme Court that perceived serious limitations in how the Bill of Rights were to be applied to servicemembers under the scheme provided for in the UCMJ.

<sup>56</sup> See, e.g., *Welchel v. McDonald*, 340 U.S. 122 (1950) (deciding that a military accused was not denied due process when he was offered the opportunity to present an insanity defense, while deferring to the military justice system by refusing to question the method by which evidence was reviewed at trial).

<sup>57</sup> 483 U.S. 435 (1987).

<sup>58</sup> *Id.* at 451. As had existed prior to *O'Callahan*, the military status of the accused at the time of the commission of an offense was reinstated as the proper standard for determining court-martial jurisdiction. See *Kinsella v. Singleton*, 361 U.S. 234 (1960), cited in *O'Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>59</sup> *Solorio*, 483 U.S. at 447-48. By the time the Supreme Court decided *Solorio* in 1987, the Military Deference Doctrine had become firmly entrenched in its jurisprudence and would have a far-reaching impact on military as well as political decision-making well into the future. See John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

<sup>60</sup> See *Goldman v. Weinberger*, 475 U.S. 503 (1986) (involving Air Force member who unsuccessfully sought injunctive relief from a regulation that prevented him from wearing religious headdress (yarmulke)); *Rostker v. Goldberg*, 453 U.S. 57 (1980) (involving male plaintiffs who unsuccessfully sought injunctive relief to prevent enforcement of the Military Selective Service Act); *Brown v. Glines*, 444 U.S. 348 (1980) (involving Air Force captain who unsuccessfully challenged an installation regulation requiring him to obtain prior approval before circulating petitions on base).

<sup>61</sup> 26 C.M.R. 29 (C.M.A. 1958). The UCMJ was first enacted in 1950 and was only eight years old by the time *Wysong* was decided.

<sup>62</sup> *Id.* at 30. The investigation concerned the alleged sexual promiscuity of his wife and minor stepdaughter, not the accused himself. *Id.*

commander's order by confronting potential witnesses, the accused was tried and convicted at a general court-martial and sentenced to a dishonorable discharge, total forfeitures, and confinement at hard labor for five years.<sup>63</sup>

The Court of Military Appeals set aside the specifications related to the violation of the order because the court found that the order "severely restricted" the accused's speech and was overly broad and vague.<sup>64</sup> The court's main concern was that orders should be tailored to be "specific, definite, and certain."<sup>65</sup> Other than stating that orders cannot be overly vague, the case offered little additional guidance for practitioners. Nearly twenty years would pass before a case with more comprehensive guidance was published.

In 1986, in *United States v. Green*, the Army Court of Military Review set aside the accused's conviction for violating a Fort Stewart regulation governing alcohol use and intoxication.<sup>66</sup> The specific provision of the regulation Private Green had been convicted of violating prohibited military personnel from "having any alcohol in their system or on their breath during duty hours."<sup>67</sup> Despite clear evidence that the accused had been drunk and had assaulted another Soldier as a result of intoxication, the court held that the policy was "standardless, arbitrary, and unreasonable, and that it serve[d] no corresponding military need not better satisfied by statutes and regulations of greater dignity."<sup>68</sup>

In *Green*, the court emphasized two points that later became crystallized in successive case law. The first is that superiors or commanders may regulate "activities which are reasonably necessary to safeguard and protect the morale, discipline and usefulness of the members of a command and are directly connected with the maintenance of good order in the [service]."<sup>69</sup> The second point qualifies the first, stating that the "regulatory authority of a commander is not unlimited . . . . Orders and directives which only tangentially

further a military objective, are excessively broad in scope, are arbitrary and capricious, or needlessly abridge a personal right are subject to close judicial scrutiny and may be invalid and unenforceable."<sup>70</sup> Unfortunately, the decision in *Green* failed to explain what level of scrutiny applies when balancing a personal right and a legitimate military need. This standard would become clearer only after several more years of litigating orders and policies at courts-martial.

Two kinds of "lawfulness of an order" cases became prevalent during the 1980s and early 1990s: cases challenging safe sex orders and the regulation of alcohol. With respect to the former, accused servicemembers with human immunodeficiency virus (HIV) challenged command orders requiring servicemembers to engage in safe-sex practices including (1) informing potential partners of their disease; and (2) wearing condoms during sexual activity.<sup>71</sup> While the courts recognized the personal right of servicemembers to engage in sexual relations, they nevertheless found that commanders have a "compelling interest" in maintaining the health and well-being of both servicemembers and civilians.<sup>72</sup> In addition, the courts required that orders be "specific, definite, and certain" and not impose an undue burden on private rights.<sup>73</sup>

In addition to "safe-sex" orders, the military courts reviewed many cases involving the regulation of alcohol.<sup>74</sup> The courts have approached challenges to alcohol consumption orders similarly to the issue of safe-sex orders. Courts have agreed that commanders may issue orders that

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 31.

<sup>65</sup> *Id.* *But see* *United States v. Mann*, 50 M.J. 689 (A.F. Ct. Crim. App. 1999) (holding that the use of "no contact" orders in situations involving suspected fraternization do not violate an accused's Sixth Amendment confrontation rights and are thus lawful because they rationally relate to a legitimate military need, namely the preservation of good order and discipline).

<sup>66</sup> 22 M.J. 711 (A.C.M.R. 1986).

<sup>67</sup> *Id.* at 714.

<sup>68</sup> *Id.* at 719. The specific authority the court was referring to was a recent re-publication of AR 600-85, which had occurred six months before promulgation of the Fort Stewart regulation. The two regulations had material provisions in direct conflict with the other. The Army regulation imposed no criminal liability upon the accused, whereas the Fort Stewart regulation criminalized the mere presence of alcohol on the breath. For the current version of AR 600-85, see U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (2 Feb. 2009).

<sup>69</sup> *Green*, 22 M.J. at 716.

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<sup>70</sup> *Id.* *See also* *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958) (order requiring Sailor who had significant financial problems to report personal financial transactions held invalid because it was overly broad and did not satisfy a legitimate military need).

<sup>71</sup> *See* *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990) (holding that orders issued for the purpose of protecting civilians from the harmful acts of servicemembers are clearly valid); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989); *United States v. Ebanks*, 29 M.J. 926 (A.F.C.M.R. 1989) (affirming conviction for disobeying "safe-sex" order and finding that the order had a valid military purpose); *see also* *United States v. Pritchard*, 45 M.J. 126 (C.A.A.F. 1996). The accused in *Pritchard* was convicted of violating a "safe-sex" order with his own spouse. Because the accused agreed that the order was lawful during the providency inquiry, the court did not otherwise analyze the lawfulness of order. The court did, however, admit that there might have been a potential issue requiring constitutional analysis absent the stipulation.

<sup>72</sup> *See* *Dumford*, 30 M.J. 137; *Womack*, 29 M.J. 88.

<sup>73</sup> *Womack*, 29 M.J. at 90.

<sup>74</sup> *See, e.g.,* *United States v. Kochan*, 27 M.J. 574 (N.M.C.M.R. 1988). *Kochan* involved a nineteen-year-old Sailor stationed in Hawaii who had been ordered not to consume alcohol until he reached twenty-one years of age. *Id.* at 574. The Sailor violated the order by drinking alcohol at a party in a private residence. *Id.* Although the minimum drinking age in Hawaii was twenty-one, it was not unlawful for persons under twenty-one to consume alcohol in private. The court in *Kochan* held that the "no drinking" order was illegal because it improperly restricted the accused's private rights without satisfying any legitimate military need. *Id.* at 575.

infringe on the personal rights<sup>75</sup> of servicemembers if (1) there is a legitimate military need;<sup>76</sup> (2) the order does not conflict with service regulations;<sup>77</sup> (3) and the order is narrowly tailored to satisfy the military need.<sup>78</sup> The order may not be overly vague, and it must rationally relate to the military need to be served.<sup>79</sup> In addition, a commander need not first find that unlawful, prejudicial, or service-discrediting misconduct will occur if the order is not issued before issuing the order.<sup>80</sup> Rather, an order may be preventive in nature, fulfilling the purpose of “safeguard[ing] or promot[ing] the morale, discipline, and usefulness of members of the command.”<sup>81</sup>

Both the safe-sex cases and the alcohol consumption cases demonstrate that for an order or policy to be valid and enforceable, it must serve a valid military purpose. Stated differently, an order must be rationally related to a legitimate military need. Orders may infringe on the personal or private rights of a servicemember, but, in addition to having a valid military purpose, they must be specific, clear, and reasonable in light of that purpose. Orders or policies that comply with these provisions will likely pass judicial scrutiny in the military justice system.

So, in the introductory example, what is the likelihood that the two new command policies will be upheld? The motorcycle policy will likely survive scrutiny in a court-martial proceeding. Even though the policy arguably

infringes on the private right to choose whether to wear safety equipment, maintaining the safety of servicemembers represents a valid military purpose, and the policy is specific and narrowly tailored to meet identifiable and genuine safety concerns. In contrast, the policy requiring servicemembers to secure their firearms on-post would almost certainly fail. Although firearms raise safety concerns, this policy is very broad in scope and unnecessarily infringes not only on private rights, but judicially recognized constitutional rights as well.<sup>82</sup> Therefore, a military court would likely find this policy invalid and dismiss charges related to the policy.<sup>83</sup> The clear discriminator between these two relatively easy examples is the degree of protection afforded the rights; one is constitutionally protected while the other is not.

Now assume a servicemember has refused to comply with the policies. As stated earlier, the command has the option of taking administrative action against the servicemember or prosecuting the servicemember at a court-martial. The next section briefly discusses the challenges servicemembers may initiate in federal court against court-martial convictions or administrative decisions.

#### D. Federal Judicial Remedies

Servicemembers can challenge the military’s judicial or administrative response to the violation of a policy in federal district court. In the case of courts-martial, federal courts will collaterally review a conviction after a servicemember’s military criminal appeals have been exhausted.<sup>84</sup> In the case of adverse administrative measures,<sup>85</sup> the servicemember can

<sup>75</sup> That is, the basic freedoms associated with daily living. Contrast this with rights implicating a servicemember’s fundamental constitutional rights, such as the right to marry or to procreate.

<sup>76</sup> See *United States v. Wilson*, 30 C.M.R. 165 (C.M.A. 1961) (holding blanket prohibition on consuming alcohol at any time, under any circumstances, unlawful for failing to satisfy a military need). *But see United States v. Blye*, 39 M.J. 92 (C.M.A. 1993) (holding order not to consume alcohol can be legally issued so long as it relates to a military need, such as the protection of the unit, victims, potential witnesses, or to ensure a defendant’s appearance at trial).

<sup>77</sup> See *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989). The accused was a known alcoholic who had been receiving treatment and who was pending discharge from the Coast Guard when he was granted a liberty pass for one evening, with the caveat order by his commander that he could not consume alcohol. After violating the order not to imbibe, he was tried and convicted. The court agreed that an order not to consume alcohol could be lawful, but the order in *Roach* was not because it conflicted with a Coast Guard personnel regulation.

<sup>78</sup> Orders may be preventative in nature. See UCMJ art. 90c(2)(a)(iv) (2008); *United States v. Padgett*, 48 M.J. 273, 278 (C.A.A.F. 1998); *United States v. Blye*, 39 M.J. 92, 94–95 (C.M.A. 1993).

<sup>79</sup> See *Padgett*, 48 M.J. 273. The accused had been romantically involved with a fourteen-year-old female and was ordered to cease all contact with the underage girl. The order was very broad, stated no time limitations or other stipulations, and was intended to permanently end the relationship. The court upheld the order as lawful because it served the military purpose of “protecting a 14-year-old girl and the reputation of the military.” *Id.* at 278. *Padgett* is heavily cited in recent military case law dealing with the lawfulness of an order.

<sup>80</sup> *Id.* at 278.

<sup>81</sup> *Id.* See also UCMJ art. 90c(2)(a).

<sup>82</sup> See *D.C. v. Heller*, 128 S. Ct. 2783 (2008). As stated earlier, this analysis applies in the context of living off military installations within CONUS. Firearms can be intensely regulated in overseas jurisdictions where status of forces agreements (SOFA) or other international agreements apply.

<sup>83</sup> The broad scope and application of an installation-wide policy should be contrasted with a narrowly tailored personal order given to an individual Soldier for his protection or those around him. In the case of domestic violence, or similar situations, personal orders issued for reasons of safety will almost always be lawful as satisfying a legitimate military purpose. Thus, an order requiring a Soldier to temporarily surrender weapons for the purpose of protecting a spouse or children would probably be lawful. Obviously, there are issues with the scope and duration of such an order, requiring considerably more thought than that given to routine orders.

<sup>84</sup> See, e.g., *Schlesinger v. Councilman*, 420 U.S. 738, 749–50 (1975) (reversing district court injunction imposed against Army captain’s court-martial); *United States v. Augenblick*, 393 U.S. 348, 349–50 (1969) (reversing Court of Claims assertion of jurisdiction and order of backpay for alleged constitutional violations resulting in court-martial conviction); *Bowling v. United States*, 713 F.2d 1558 (Fed. Cir. 1983) (affirming Court of Claims dismissal of servicemember petition for reversal of his court-martial conviction, reinstatement and backpay).

<sup>85</sup> Administrative action could be in the form of a written reprimand, reduction in grade, or separation from the service. Similar challenges could also arise from specific provisions in service regulations that either restrict or prohibit otherwise lawful activities. See, e.g., AR 385-10, *supra* note 4, para. 11-9d (purporting to “require” Soldiers to wear certain protective clothing and equipment while operating a motorcycle, even though the regulation contains no punitive language creating a legal obligation to comply).

request injunctive relief<sup>86</sup> or collaterally attack the underlying decision itself in federal court.<sup>87</sup> The differences in the standards of review for each, however, are significant. Nevertheless, in all cases, federal courts give great deference to military officials and are loath to interfere in purely military matters.<sup>88</sup>

### 1. Collateral Attacks on Courts-Martial Convictions

Servicemembers may challenge court-martial convictions based on violations of orders or policies in federal court. However, collateral attacks in federal court are not opportunities to re-litigate the underlying court-martial.<sup>89</sup> Collateral attacks on court-martial convictions are limited to challenges based on constitutional grounds.<sup>90</sup> In addition, collateral attacks must allege a violation of a significant constitutional due process right in the trial process itself.<sup>91</sup> This narrow window of collateral attack is open only to those issues addressing fundamental fairness in military proceedings and the constitutional guarantees of due process.<sup>92</sup> Mere allegations of constitutional violations alone are insufficient.<sup>93</sup> If the military courts have previously litigated the constitutional issues raised “fully and fairly,” federal courts will refrain from asserting jurisdiction and substituting its judgment for that of the military courts.<sup>94</sup> On the other hand, if a federal court determines that a

constitutionally unfair trial has taken place, the court may exercise its discretion and grant review of the case.<sup>95</sup>

If a servicemember is successful in challenging his court-martial, the federal district court can overturn the military criminal conviction.<sup>96</sup> The court could order the servicemember reinstated as if he had never left the military, order years of backpay, and require any remedial promotion boards and other favorable consideration for the time the servicemember spent absent from the military. In light of federal courts’ power of review, judge advocates should advise commanders that their decisions are subject to review and potential reversal.

Based on the discussion above, what is the proper analysis and advice on our two command policies? The policy requiring safety equipment raises no constitutional issues, so it has almost no chance of collateral review. By contrast, the policy governing firearms raises concerns about an individual’s right to bear arms under the Second Amendment.<sup>97</sup> Therefore, if a servicemember were convicted of violating this policy at a court-martial, and the military courts failed to adequately address the constitutional questions involved, federal review and reversal could occur.<sup>98</sup> The prudent recommendation would be to advise against the firearms policy but support the motorcycle policy.

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<sup>86</sup> See 28 U.S.C. § 1651 (2006) (outlining general power of federal courts to issue all writs incident to the performance of their judicial function). This statute grants federal courts the power to grant injunctive relief.

<sup>87</sup> See, e.g., *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). In *Mindes*, an Air Force officer sought review of an adverse officer evaluation report (OER) after exhausting all possible avenues of redress. The court fashioned a detailed analysis, discussed *infra* in Part D.2, for when military decisions should be reviewed and remanded the case for such a review. *Id.* at 201–02.

<sup>88</sup> See *Brown v. Glines*, 444 U.S. 348 (1980); *Parker v. Levy*, 417 U.S. 733, 758–59 (1974); *Burns v. Wilson*, 346 U.S. 137, *reh’g denied*, 346 U.S. 844 (1953).

<sup>89</sup> *Schlesinger*, 420 U.S. at 746.

<sup>90</sup> *Bowling v. United States*, 713 F.2d 1558, 1560–61 (Fed. Cir. 1983).

<sup>91</sup> *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (“[A] constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, that the proceeding is more a spectacle or trial by ordeal than a disciplined contest.”). The Court cited the 1923 case of *Moore v. Dempsey*, 261 U.S. 86 (1923), as an example. Charged with first-degree murder, the African-American defendants in *Moore v. Dempsey* had no possibility of a fair trial. The entire trial lasted only forty-five minutes; racial discrimination pervaded the all-white jury; the court-appointed defense attorney called no witnesses; and the jury took less than five minutes to render guilty verdicts. *Augenblick* makes it clear that trial errors at courts-martial, even those of an evidentiary nature and those that may affect the outcome of the trial, do not necessarily rise to a constitutional level justifying collateral review.

<sup>92</sup> *Matias v. United States*, 19 Cl. Ct. 635 (1990), *aff’d*, 923 F.2d 821 (Fed. Cir. 1990).

<sup>93</sup> *Augenblick*, 393 U.S. at 351–52, 356.

<sup>94</sup> *Burns v. United States*, 346 U.S. 137, 142, 144, *reh’g denied*, 346 U.S. 844 (1953).

### 2. Servicemember Attacks on Administrative Actions

Servicemembers can also seek review in federal court of command policies or adverse administrative actions taken against them. These attacks can be brought in one of two ways. The first type of challenge involves direct attacks on substantive military decisions.<sup>99</sup> The second challenge is in the form of injunctive relief.<sup>100</sup>

Although not required, a review of command actions or policies often involves the initiation of adverse

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<sup>95</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975).

<sup>96</sup> See 28 U.S.C. § 1331 (2006); *Burns*, 346 U.S. at 144, *reh’g denied*, 346 U.S. 844 (1953); *New v. Cohen*, 129 F.3d 639, 648 (D.C. Cir. 1997). The power of federal courts to review the constitutionality of courts-martial convictions comes generally from federal question jurisdiction under 28 U.S.C. § 1331. As stated in *Burns*, a federal court’s power to overturn a court-martial conviction would be based on constitutional due process grounds and would be reviewed only in the unlikely event that the military court of appeals failed to adequately address alleged violations. *Burns*, 346 U.S. at 144.

<sup>97</sup> U.S. CONST. amend. II.

<sup>98</sup> See *D.C. v. Heller*, 128 S. Ct. 2783 (2008). The author recognizes the unlikely scenario that a military trial or appellate court would fail to adequately address the constitutional issues.

<sup>99</sup> Servicemembers could also choose to obey an order, but also collaterally attack it.

<sup>100</sup> 28 U.S.C. § 1651 (2006); FED. R. CIV. P. 65.

administrative action. Because the amount of due process afforded to a servicemember in an administrative action is far less than that of a court-martial, federal court review of administrative actions is more expansive than the limited “constitutional review” involved in the collateral attack of courts-martial. When reviewing adverse administrative actions, federal courts can consider possible constitutional violations, regulatory violations, or policy violations and whether due process has been denied as a result of these violations.<sup>101</sup> However, review of administrative actions is still limited and the doctrine of deference briefly discussed earlier in Part III.B still applies.<sup>102</sup>

Alternatively, servicemembers may file for a preliminary injunction (PI) or a temporary restraining order (TRO) in an effort to compel the military to act or to refrain from acting.<sup>103</sup> The PI and TRO are designed to keep the status of the parties static until a court can consider the merits of the challenged action.

In most federal circuits, servicemembers who attack substantive administrative decisions<sup>104</sup> or seek injunctive relief must survive the test enumerated in *Mindes v. Seaman*,<sup>105</sup> which governs the review of military administrative actions and policies.<sup>106</sup> Because most Army

installations are located in circuits applying *Mindes*, judge advocates must understand the *Mindes* analysis in order to provide commanders with intelligent and reasoned advice.<sup>107</sup>

Under the *Mindes* test, courts will not review internal military decisions unless a plaintiff alleges: (1) a violation of the Constitution, a federal statute, or a military regulation and (2) has exhausted all available administrative remedies.<sup>108</sup> If the servicemember meets both of these requirements, the court must then weigh four factors to determine whether review should be granted. These factors are (1) the nature and strength of the servicemember’s claims; (2) the potential injury to the servicemember if review is denied; (3) the extent to which review would potentially interfere with military functions; and (4) the extent to which military discretion or expertise is involved.<sup>109</sup> The last two elements of the balancing test recognize that military expertise in the decision-making process is difficult to second-guess.

In addition to the limited review of administrative actions and policies, extreme deference is given to the judgment of policymakers.<sup>110</sup> Federal courts recognize that the military is a specialized society, separate from civilian society with laws and traditions of its own.<sup>111</sup> Even if a servicemember successfully overcomes the four-prong test in *Mindes*, the court will proceed with great deference to policymakers and commanders in reviewing the administrative decision.<sup>112</sup> Nowhere is the doctrine of

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<sup>101</sup> See *Hanna v. Sec’y of the Army*, 513 F.3d 4 (1st Cir. 2008) (finding the Army’s wrongful denial of a request for conscientious objector status and discharge resulted in permanent injunction preventing applicant physician from being ordered to active duty); *Witt v. Sec’y of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (remanding case challenging “Don’t Ask, Don’t Tell” to the district court for findings on procedural due process after deciding that the policy was subject to the heightened scrutiny test in light of the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003)); see also Administrative Procedures Act (APA), 5 U.S.C. §§ 500–596 (2006) [hereinafter APA].

<sup>102</sup> See *supra* note 59 and accompanying text.

<sup>103</sup> 28 U.S.C. § 1651 (2006); FED. R. CIV. P. 65.

<sup>104</sup> This is accomplished by alleging a violation of the APA.

<sup>105</sup> *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971) (enumerating a test for reviewability and expressing reluctance to substitute the judgment of courts for those who possess military expertise). Most circuits have expressly adopted the *Mindes* test. See *Penagaricano v. Llenza*, 747 F.2d 55 (1st Cir. 1984) (applying *Mindes v. Seaman*); *Williams v. Wilson*, 762 F.2d 357 (4th Cir. 1985) (adopting the test in *Mindes v. Seaman*); *Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983) (applying the *Mindes* analysis); *Wenger v. Monroe*, 282 F.3d 1068 (9th Cir. 2002) (applying *Mindes v. Seaman*); *Lindenau v. Alexander*, 663 F.2d 68 (10th Cir. 1981) (adopting the *Mindes* test); *Winck v. England*, 327 F.3d 1296 (11th Cir. 2003) (limiting application of *Mindes* to cases involving facial challenges to regulations or cases that are not incident to military service).

<sup>106</sup> If a servicemember challenges an order in a circuit that has not adopted *Mindes*, most of those circuits will first apply a test for justiciability. If the allegations are found to be reviewable, the courts will then employ traditional deference standards which are difficult to overcome. See *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981) (rejecting the rule in *Mindes v. Seaman* and holding instead that once a constitutional claim has been ruled to be justiciable under *Gilligan v. Morgan*, 413 U.S. 1 (1973) and *Orloff v. Willoughby*, 345 U.S. 83 (1953), it should be heard and decided on the merits); *Knutson v. Wisconsin Air Nat’l Guard*, 995 F.2d 765 (7th Cir. 1993) (rejecting the rule in *Mindes* and employing broad deference to the military); *Watson v. Arkansas Nat’l Guard*, 886 F.2d 1004 (8th Cir. 1989)

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(rejecting *Mindes* and applying the holding of another Fifth Circuit case, *Crawford v. Texas Army Nat’l Guard*, 794 F.2d 1034 (5th Cir. 1986), which essentially applies the broader deference rule of *Chappell v. Wallace*, 462 U.S. 296 (1983)); *Kries v. Sec’y of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989) (rejecting *Mindes* and applying an analysis similar to the Third Circuit’s decision in *Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981)).

<sup>107</sup> All of the military installations in the following states are located in *Mindes* jurisdictions: Arizona, Alabama, California, Colorado, Florida, Georgia, Louisiana, Maryland, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, and Virginia. This includes the vast majority of Army installations within CONUS.

<sup>108</sup> *Mindes*, 453 F.2d at 201.

<sup>109</sup> *Id.*

<sup>110</sup> *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975).

<sup>111</sup> *Id.* at 746. See *Middendorf v. Henry*, 425 U.S. 25 (1976) (holding that servicemembers are not entitled to counsel at summary courts-martial, under either Fifth or Sixth Amendment grounds); *Parker v. Levy*, 417 U.S. 733, 758–59 (1974) (refusing to overturn conviction of officer/physician for making disloyal statements about the propriety of the Vietnam War and refusing to conduct training for Special Forces medics preparing to deploy); *United States v. New*, 350 F. Supp. 2d 80 (D.D.C. 2004) (refusing to overturn servicemember’s conviction for refusing to wear United Nations uniform accessories in connection with peacekeeping deployment to Macedonia); *Staton v. Froehlke*, 390 F. Supp. 503 (D.D.C. 1975) (refusing to overturn former Army warrant officer’s court-martial conviction for fraternization).

<sup>112</sup> See, e.g., *Weiss v. United States*, 510 U.S. 163 (1994) (addressing unsuccessful challenge to The Judge Advocate General appointment of military judges); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (involving Air Force member who unsuccessfully sought injunctive relief from a regulation that prevented him from wearing religious headdress

military deference more alive than in the review of administrative decisions. This is consistent with the traditional reluctance to review or intervene in matters concerning the military, especially those involving personnel decisions.<sup>113</sup> It is also consistent with the recognition that the military is a specialized society, which requires duty and discipline unlike anything in civilian life.<sup>114</sup> With this in mind, how do our two command policies fare under this analysis?

A servicemember who challenges the motorcycle policy administratively would likely not meet the *Mindes* test for reviewability because showing a *prima facie* violation of the Constitution, a federal statute, or a regulation would be difficult.<sup>115</sup> Assuming the challenge did manage to pass the initial test for reviewability, the servicemember would still have difficulty satisfying the remaining four-prong balancing test under *Mindes*. Ultimately, most courts would probably find no harm to the servicemember and hesitate to interfere with the commander's decision to improve the safety of his Soldiers and members of the community.

In contrast, a servicemember attacking the firearms policy would likely have no difficulty passing the initial test for reviewability. The four-prong test would also weigh

strongly in favor of the servicemember based on the weight of the factors and the harm the servicemember would suffer if review were denied. In this case, the court would likely grant review and might enjoin the commander from enforcing the policy.

#### IV. Conclusion

Successfully challenging courts-martial convictions and military decisions in federal court is quite difficult. The military deference doctrine has become firmly entrenched in federal jurisprudence in the last thirty years, giving considerable discretion to policymakers and commanders. In addition, the *Mindes* test for reviewability has also become well-established.

Modern courts-martial are no less protective of an accused servicemember's rights than any other court. As such, federal court review of a conviction is only barely within the realm of possible. The command will almost always prevail in this situation. By contrast, the chances of challenging the lawfulness of an order or regulation at a court-martial are less clear, and the likelihood that an order or regulation will survive the scrutiny of a court will depend on the quality of the analysis given to the order or policy before its implementation.

In analyzing the lawfulness of an order, judge advocates should focus on whether the military need or objective is fairly balanced with the regulated activity and the degree to which the order interferes with the servicemember's private rights. Since most orders will interfere with a personal right, the intent and effect of the policy must be clear and narrowly tailored to meet the military need. If the order potentially infringes upon a constitutional right, it must be subjected to intense legal scrutiny prior to implementation as it would be during trial or on appeal. If the order is deemed lawful in light of this analysis, a servicemember's chances of being granted federal review will be slight at best.

Since the earliest deployments to Afghanistan and Iraq, commanders have increasingly regulated the private conduct of their Soldiers. Judge advocates reviewing new command policies should subject these potential policies to the analyses discussed in this primer before recommending approval. Although the military is afforded more deference now than ever, the courts do review and reverse bad decisions. Moreover, today's new servicemembers may be more inclined to litigate infringements on their liberty, whether real or perceived. Therefore, conducting a thorough legal analysis and imposing the minimum burdens necessary should be commanders' approach when considering whether to impose additional restrictions on America's warriors.

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(yarmulke)); *Rostker v. Goldberg*, 453 U.S. 57 (1980) (involving male plaintiffs who unsuccessfully sought injunctive relief to prevent enforcement of the Military Selective Service Act); *Brown v. Glines*, 444 U.S. 348 (1980) (involving Air Force captain who unsuccessfully challenged an installation regulation requiring him to obtain prior approval before circulating petitions on base); *Witmer v. United States*, 348 U.S. 375 (1955) (refusing to grant relief to conscientious objector applicant, based in part on the doctrine of deference); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (dismissing challenge to DoD's "Don't Ask, Don't Tell" policy on homosexual conduct). *But see* *Hanna v. Sec'y of the Army*, 513 F.3d 4 (1st Cir. 2008) (overturning Army's denial of conscientious objector status and discharge based finding of "no basis in fact" for the denial); *Witt v. Sec'y of the Air Force*, 527 F.3d 806 (9th Cir. 2008) (remanding "Don't Ask, Don't Tell" case brought by dismissed Air Force officer for findings on substantive due process claims as applied to appellant-officer, in light of the Supreme Court's decision regarding the criminality of homosexual conduct in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

<sup>113</sup> See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) ("The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion."); see also *Goldberg*, 453 U.S. at 64-65 (cases involving national defense and military affairs deserve the greatest possible deference); *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991) (discharge decisions within the discretion of the military); *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986) (finding that an officer seeking injunctive relief against the National Guard failed to satisfy the four-prong test of *Mindes* and holding that a decision on whether to transfer a servicemember is a matter within the discretion of the military, and, consistent with doctrine of deference, will not be disturbed).

<sup>114</sup> *Schlesinger*, 420 U.S. at 757 (explaining that the nature of the military requires certain demands that are "without counterpart in civilian life").

<sup>115</sup> This example, and the one following it, assumes that the servicemember has exhausted any review or complaint process the command may have established.

**Making a Molehill out of a Mountain:  
The U.S. Army's Counterinsurgency Doctrine Applied to Operational Law in Iraq\***

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I. Introduction

On 11 September 2001, the American homeland was attacked by a new and complex enemy; one that did not comply with the traditional rules of combat or ascribe to a doctrine conventional U.S. Armed Forces were trained to confront. When America deployed its military to confront this enemy, first in Afghanistan and then in Iraq, U.S. forces found, instead of orderly combat maneuvers through open tracts of land, an enemy that had congealed into small adaptable insurgent groups. Unrestrained by respect for international laws or convention, these insurgent groups employed insidious fighting tactics, such as hiding among civilians on U.S. domestic airlines and in the warrens of Baghdad's neighborhoods. Not long after the wars in Afghanistan and Iraq began, military leaders resurrected the doctrine of counterinsurgency (COIN) in order to forge victory against this new threat.<sup>1</sup>

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\* This article is the fourth in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps's functional legal areas during the deployment. Articles in the series cover issues that arose in Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims. The authors would like to thank the extraordinary contribution of Lieutenant Colonel (LTC) Robert Bowers, former Chief, Operational Law Division, XVIII Airborne Corps and Multi-National Corps–Iraq, whose contributions and tireless work made this paper possible. Additionally, the authors would like to thank LTC Jack Ohlweiler, Deputy Staff Judge Advocate, XVIII Airborne Corps and Multi-National Corps–Iraq, whose editing acumen proved invaluable. Finally, the authors would like to thank the entire Operational Law Division at Multi-National Corp–Iraq that served from February 2008 through April 2009.

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<sup>1</sup> The U.S. military has addressed counterinsurgency (COIN) in some form or another throughout the nation's history. Take for example this quote from the Vietnam era:

Pacification, as it applies in the Republic of Vietnam is the military, political, economic and social process of establishing or re-establishing local government responsive to and involving the participation of the people. It includes the provision of sustained, credible territorial security, the destruction of the enemy's underground government, the assertion or reassertion of political control and involvement of the people in the government, and the initiation of economic and social activity capable of self-sustenance and expansion . . . .

U.S. MILITARY ASSISTANCE COMMAND VIETNAM, U.S. ARMY, HANDBOOK FOR MILITARY SUPPORT OF PACIFICATION I (Feb. 1968).

Out of the crucible of combat, the military produced Field Manual 3-24,<sup>2</sup> which encapsulates the Army's COIN doctrine. The field manual states, "Current tactics, techniques, and procedures sometimes do not always achieve desired results. When that happens, successful leaders engage in a directed search for better ways to defeat the enemy."<sup>3</sup> From February 2008 until April 2009, the XVIII Airborne Corps (XVIII ABN Corps) was deployed to Iraq as Multi-National Corps–Iraq (MNC–I).<sup>4</sup> During XVIII ABN Corps's tenure in Iraq, the Army faced the need to rapidly adapt tactics to the ever-changing operational environment<sup>5</sup> of a COIN offensive combined with the urban insurgent approach.<sup>6</sup> As a result of this change in tactics, each MNC–I staff section needed to examine and then adapt their specific operations to the application of COIN strategy in the Iraq theater of operations.

The XVIII ABN Corps Office of the Staff Judge Advocate (OSJA) was not spared in this reexamination of processes and procedures. During the course of the deployment to Iraq, the judge advocates (JAs) of the OSJA

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<sup>2</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-28 (15 Dec. 2006) [hereinafter FM 3-24]. During our deployment, we found that the FM 3-24 helped staff officers think of enemy operations in certain categories outlined in the manual. This allowed them to more effectively focus their efforts instead of operating from a blank slate.

<sup>3</sup> *Id.* at x.

<sup>4</sup> Multi-National Corps–Iraq (MNC–I) was the corps operational echelon of command. A corps commands and controls two or more divisions in a theater. See U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-15, CORPS OPERATIONS (29 Oct. 1996). A corps converts strategic echelon guidance into goals and objectives for the tactical echelon. When XVIII Airborne Corps (XVIII ABN Corps) deployed to Iraq and took over as MNC–I, the XVIII ABN Corps Commander became the MNC–I Commander. As the MNC–I Commander, he oversaw operations by all members of the multinational coalition throughout the Iraq area of operations. In February 2008, MNC–I was comprised of: Multi-National Division–North (U.S. Command overseeing provinces of Ninevah, Tamim, Salahuddin, and Diyala), Multi-National Division–North-East (Republic of Korea Command overseeing provinces of Dahuk, Irbil, and Sulaimaniyah), Multi-National Division–South-East (U.K. Command overseeing provinces of Maysan, Dhi Qar, Basra, and the majority of Muthanna), Multi-National Force–West (U.S. Command overseeing provinces of Anbar and parts of Karbala), Multi-National Division–Baghdad (U.S. Command overseeing the City of Baghdad), Multi-National Division–Center (U.S. Command overseeing the provinces of Wasit, Babil, and Najaf in their entirety, and parts of Baghdad, Karbala, and Muthanna), and Multi-National Division–Central-South (Polish Command overseeing the province of Qadisiyah).

<sup>5</sup> An operational environment is a composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE MILITARY ASSOCIATED TERMS (12 Apr. 2001) [hereinafter JOINT PUB. 1-02].

<sup>6</sup> FM 3-24, *supra* note 2, at 1-23. Field Manual 3-24 describes how urban insurgencies are dynamic and can replace losses quickly, requiring flexibility and adaptive responses from the counterinsurgent force.

learned, firsthand, the intricacies of utilizing operational law (Op Law) in a COIN environment.<sup>7</sup> In particular, the Army's change in tactics required Op Law JAs to play a vital role in the planning and conduct of the Army's COIN operations.<sup>8</sup>

In an effort to share lessons learned from this experience, the purpose of this article is to (1) highlight the overarching principles of conducting a successful COIN operation; (2) apply those principles in an Op Law context; and to (3) discuss how the XVIII ABN Corps OSJA leveraged Op Law to support the MNC-I Commander's development of a successful COIN strategy during its 2008–2009 deployment. This article will first examine the basic planning principles necessary to conduct a successful COIN campaign. The article will then focus specifically on the different stages of a COIN campaign as XVIII ABN Corps proceeded from one stage to the next because of its success over the course of its deployment in Iraq.

## II. Conducting Counterinsurgency Planning and Assessing Counterinsurgency Tactics and Techniques—The Never Ending Battle

*“The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish . . . the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature. This is the first of all strategic questions and the most comprehensive.”<sup>9</sup>*

As with all military operations, the preparation for and assessment during a COIN operation is critical to the overall success of the mission.<sup>10</sup> One of the difficulties in a COIN operation is the additional training necessary to prepare a conventional military force for a type of mission that is not necessarily congruent with the normal instincts and general approach that is required to achieve victory in a conventional

conflict.<sup>11</sup> The process the American military has gone through since 11 September 2001 to shed those heavily ingrained conventional perceptions and instincts is a testament to the additional burdens of a COIN operation.<sup>12</sup> In order to stay one-step ahead of an insurgent force in COIN, commanders and their staffs must continually assess their original plans and adjust accordingly.<sup>13</sup> Changing the perspective of staff sections and their standard operational planning procedures to handle the unique challenges of a COIN operation can be a battle in and of itself.

It would be impossible to examine the COIN conflict in Iraq from an Op Law perspective without also understanding the general COIN principles involved, the battlefield situation, and the specific needs of commanders as they adapt to the dynamic battlefield. In order to discuss how Op Law is uniquely suited to help commanders at all junctures during COIN operations, this part will examine: (1) campaign design, planning, and preparations using COIN doctrine before deployment to Iraq;<sup>14</sup> (2) the XVIII Airborne Corps Op Law Division's role in the facilitation of the planning, assessing, and when necessary, reshaping of operations during the COIN campaign in Iraq; and (3) the Op Law Division's efforts to focus other MNC-I staff sections on the long-term implications, both legal and of a general nature, of their decisions on COIN in Iraq.

<sup>11</sup>

The measurement of conventional military 'victory' is straightforward enough: loss of ground, loss of force, loss of will, building to a sum which determines the loss of the war . . . . The form and sequence of military operations aim to maximize the application of force to overpower the enemy.

CHARLES TOWNSHEND, *BRITAIN'S CIVIL WARS—COUNTERINSURGENCY IN THE TWENTIETH CENTURY* (1986).

<sup>12</sup> See FM 3-24, *supra* note 2, at ix.

<sup>13</sup> See *generally id.* at 4-1 to 4-9. This point is further illustrated by the following quote discussing the issues militaries face when confronted with an insurgent campaign:

The first necessity is obviously for armies in such cases to adapt as quickly as possible, and develop a new repertoire of techniques suited to the complexity of the problem. It is, however, not always easy to see at the outset what skills will be useful; and vision can be further restricted by military conservatism. Soldiers may not want to develop new skills. Precisely because normal military logic is negated in counterinsurgency, Soldiers have an intense dislike of internal security duties. When called to aid the civil power, they naturally try to preserve as large a sphere of autonomy, within which they can maintain their traditional priorities, as they possibly can. Thus at the beginning, and often throughout the course of each campaign, there has been a direct clash between civil and military logic.

See TOWNSHEND, *supra* note 11.

<sup>14</sup> FM 3-24, *supra* note 2, at 4-1 to 4-9.

<sup>7</sup> The Operational Law (Op Law) Division embedded judge advocates (JA) in each of the three corps staff planning horizons. The C3 Current Operations on the Joint Operations Center floor was manned 24/7 and focused on command and control of the present battle to a few hours out; the C35 Future Operations conducted planning a few hours to a few weeks out; and C5 Future Plans, conducted planning a few weeks to months out. Operational law also embedded one JA in Information Operations in support of the robust psychological operations program. These embedded resources were in addition to the JAs working in the Op Law Division's main office.

<sup>8</sup> *Id.* See also FM 3-24, *supra* note 2, at 1-6. Field Manual 3-24 explains how the urban approach uses terrorist tactics to sow disorder and intimidate the population among other actions.

<sup>9</sup> CARL VON CLAUSEWITZ, *ON WAR* 88–89 (Michael Howard & Peter Paret ed., Princeton Univ. Press 1984) (1976).

<sup>10</sup> See *generally* FM 3-24, *supra* note 2, at 4-1 to 4-9. This entire chapter describes the importance of planning and campaign design during a COIN operation.

## A. Pre-Deployment Preparation

*“Before commanders deploy their units they make every effort to prepare their Soldiers and Marines for the anticipated challenges with a particular focus on situational awareness of the anticipated AO [Area of Operations]”*<sup>15</sup>

For commanders, the preparation for combat operations requires a vastly different focus than the normal, routine garrison tasks; however, the preparation for COIN operations entails additional demands.<sup>16</sup> A COIN operation requires intense study of the civil and political issues, as well as the cultural and civil considerations that may affect military operations in the anticipated area of operations.<sup>17</sup> Commanders use METT-TC (Mission, Enemy, Terrain, Troops, Time, and Civil)<sup>18</sup> to describe the underlying considerations for military planning. In COIN operations, the civil component weighs more heavily than in other forms of warfare because the objective is to gain the support of the civilian populace.<sup>19</sup>

The broad spectrum of operations in a forward-deployed COIN environment creates a unique challenge when compared with the fairly static garrison requirements for an OSJA Op Law Division. In garrison, Op Law JAs often review long-term contingency planning for operations that may never happen, participate in garrison force protection and homeland defense exercises, and provide legal training.<sup>20</sup> As the train-up and planning for COIN operations begins, however, Op Law JAs can provide significant support to a commander’s planning initiatives by integrating closely with the staff and injecting legal considerations into standard pre-deployment training. To be effective, Op Law

JAs must research and train to better understand the cultural and legal aspects in the area of operations.<sup>21</sup>

When preparing to enter an ongoing COIN, the battle is already being waged by units in the field. XVIII Airborne Corps’s predecessors at MNC–I was III Corps who were in the process of implementing and realizing the surge strategy.<sup>22</sup> This strategy significantly raised troop levels in Iraq with the hope of creating enough of a military footprint to temporarily quell the violence in Iraq while the political actors could work out the underlying disputes between the different ethnic and social groups.<sup>23</sup> During the pre-deployment phase, units must prepare for the operating environment they will face and for XVIII ABN Corps this meant looking at the current situation in Iraq under III Corps and reaching out to them to confer about the environment.<sup>24</sup> Staff sections were busy learning about Iraq and then ultimately planning how XVIII ABN Corps would implement the MNC–I Commander, Lieutenant General (LTG) Lloyd Austin III’s vision of what he hoped to accomplish during the deployment.

During pre-deployment train-up, the XVIII ABN Corps Op Law team followed a simple plan to meet the complex demands of planning for a COIN operation: research, integrate, and educate. In addition to completing the U.S. Army Forces Command (FORSCOM) task list requirements,

<sup>15</sup> *Id.* at 4-6.

<sup>16</sup> See generally *id.* at 4-1 to 4-9. Though preparing a Soldier to go to war in any conflict is difficult, time consuming, and demanding, the preparation for COIN operations requires leaders to train Soldiers to look beyond the classic find, fix, and defeat model and to adopt a more thoughtful approach examining the potential strategic impact of every decision made on the ground.

<sup>17</sup> *Id.* at 1-15.

<sup>18</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS 1-4 (20 Jan. 2005) [hereinafter FM 5-0].

<sup>19</sup> See FM 3-24, *supra* note 2, at 1-1 (“Long-term success in COIN depends on the people taking charge of their own affairs and consenting to the governments rule.”).

<sup>20</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY 5-4 (15 Apr. 2009) [hereinafter FM 1-04]. Legal training includes training described in Army Regulation (AR) 350-1, *Army Training and Leader Development*, AR 350-30, *Code of Conduct, Survival, Evasion, Resistance, and Escape (SERE) Training*, and any other subject tailored to the needs of corps command and staff and corps separate brigade commanders. U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 4-18 (3 Aug. 2007) [hereinafter AR 350-1] (law of war), U.S. DEP’T OF ARMY, REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING (10 Dec. 1985).

<sup>21</sup> See FM 3-24, *supra* note 2, at 5-4

Prior to operations, Op Law JAs, paralegal NCOs, and Soldiers conduct contingency planning, deployment preparation, and training. Op Law JAs develop staff skills and working relationships at all times, not merely before deployment. Deployment preparation is a cooperative effort between the Op Law JA, the command or chief paralegal NCO, the legal administrator, and other key personnel. It includes developing standing operating procedures, identifying deploying personnel, marshaling resources, and establishing liaisons. This pre-deployment training develops the soldiering and legal skills of legal personnel, provides mission-related legal information to unit personnel, integrates legal personnel into the unit, and establishes working relationships with reserve components legal personnel who will support the deployment.

*Id.*

<sup>22</sup> President George Walker Bush, State of the Union Address (Jan. 23, 2007) [hereinafter Bush, State of Union Address], available at <http://georgewebush-whithouse.archives.gov/news/releases/2007/01/20070123-2.html>.

<sup>23</sup> Michael Duffy, *The Surge at Year One*, TIME MAG., Jan. 31 2008, available at <http://www.time.com/time/magazine/article/0,9171,1708843-1,00.html>.

<sup>24</sup> Staff officers at XVIII ABN Corps discussed the situation in Iraq with III Corps through a variety of methods including video-teleconference and pre-deployment visits to Iraq. Op Law JAs at XVIII ABN Corps reached out to III Corps’s Op Law Division to learn about the current legal issues in theater. The authors would like to especially thank U.S. Army Captain Josh Berry and the other members of III Corps OSJA whom many of the XVIII ABN Corps Op Law JAs considered friends even before arriving in Iraq and meeting them in person.

mandated internal staff training, and the mission rehearsal exercise (MRX) required for all deploying personnel, Op Law also explored a number of areas in greater depth. For example, Op Law JAs facilitated internal leadership professional development sessions using the books on the reading list of General David H. Petraeus,<sup>25</sup> the Commander of Multi-National-Force (MNF-I), to improve the OSJA's understanding of Arabic culture, Islam, Iraqi history, and the geography of Iraq.<sup>26</sup> Operational Law JAs sought to gain at least a rudimentary understanding of Arabic by participating in an Arabic language-training program. In addition, Op Law JAs traveled to Islamic relations and counterinsurgency conferences in South Carolina<sup>27</sup> and the U.S. Military Academy,<sup>28</sup> and the Op Law Division sponsored a three-day Op Law conference for the entire OSJA featuring professors, who were experts in the fields of Iraqi history, culture, and COIN doctrine, from the U.S. Military Academy and several North Carolina universities.

In order to build trust and facilitate a good working relationship while deployed, Op Law JAs should integrate with their supported staff during the pre-deployment preparation to a COIN. For example, the XVIII ABN Corps OSJA received training from various staff sections including the XVIII ABN Corps's intelligence section, explosive ordnance disposal (EOD) team, and the corps civil affairs cell.<sup>29</sup> In preparation for reviewing kinetic strike target packets, air liaison officers and artillery Soldiers provided training on the Joint Integrated Prioritized Target List<sup>30</sup> and air tasking order<sup>31</sup> procedures; training and certification on

the collateral damage estimate methodology;<sup>32</sup> and members of the Op Law team went to the firing range to participate in fire direction center procedures.<sup>33</sup> All of the Op Law Divisions' pre-deployment cross training and networking helped build relationships that proved crucial when operating within Iraq.<sup>34</sup>

The XVIII ABN Corps OSJA maximized the benefit of their research and training by educating units throughout the Corps during legal pre-deployment training briefings. While Soldiers are required to receive both annual and pre-deployment Law of War (LoW) training,<sup>35</sup> the XVIII ABN Corps's Op Law Division tailored the training to include the most up-to-date information from both Operation Iraqi Freedom and Operation Enduring Freedom to prepare servicemembers to handle the COIN battlefield. From best practices, tactics, techniques, and procedures to regional peculiarities, the Op Law Division infused sect- and insurgent group-specific realism into training vignettes to better sensitize servicemembers to the consequences of transgressions.<sup>36</sup> The Op Law team believed that by arming servicemembers with a more exacting baseline of knowledge it would enable them to significantly refine their mission analysis.

Operational Law JAs must be proactive during the planning phase of COIN operations by preparing themselves both individually and as an office for the unique cultural considerations of a COIN conflict. By taking the time to research the projected theater of operations, assisting in the facilitation of internal office training and leadership development, integrating with other staff sections, and developing relationships with JAs currently on the battlefield, Op Law JAs can establish a solid pre-deployment foundation while setting the conditions for mission success.

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<sup>25</sup> General Petraeus published a reading list consulted by the Op Law Division at XVIII ABN Corps. See generally VALI NASR, *THE SHIA REVIVAL* (2006); T.E. LAWRENCE, *SEVEN PILLARS OF WISDOM: A TRIUMPH* (1926); and GILLES KEPEL, *THE WAR FOR MUSLIM MINDS: ISLAM AND THE WEST* (2004).

<sup>26</sup> Multi-National Force-Iraq (MNF-I) was the strategic level headquarters for all military and diplomatic coalition operations in Iraq. The MNF-I worked closely with the U.S. Department of State and the Government of Iraq to ensure U.S. operations in Iraq met the needs of the Iraqi people.

<sup>27</sup> The Rudolph C. Barnes Symposium, *Legitimacy, Legal Development & Change*, University of South Carolina School of Law (Feb. 2-3, 2007).

<sup>28</sup> Law of Armed Conflict Seminar, Law and Terrorism, Department of Law, U.S. Military Acad. (Sept. 26-28, 2007).

<sup>29</sup> Often Op Law JAs, when giving yearly and pre-deployment legal briefing, would ask the staff section if they would be willing to come to brief the Office of the Staff Judge Advocate (OSJA) on their field of expertise. The other staff sections enthusiastically supported these briefings often using them as an assessment of their own readiness.

<sup>30</sup> See JOINT PUB. 1-02, *supra* note 5. A prioritized list of targets approved and maintained by the joint force commander. Targets and priorities are derived from the recommendations of components and other appropriate agencies, in conjunction with their proposed operations supporting the joint force commander's objectives and guidance.

<sup>31</sup> *Id.* A method used to task and disseminate to components, subordinate units, and command and control agencies projected sorties, capabilities, and/or forces to targets and specific missions. Normally provides specific instructions to include call signs, targets, controlling agencies, etc., as well as general instructions.

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<sup>32</sup> JOINT CHIEFS OF STAFF, JOINT MANUAL 3160.01B, JOINT METHODOLOGY FOR ESTIMATING COLLATERAL DAMAGE AND CASUALTIES FOR CONVENTIONAL WEAPONS: PRECISION, UNGUIDED, AND CLUSTER (31 Aug. 2007).

<sup>33</sup> This included a special opportunity for the XVIII ABN Corps Op Law team during which JAs were able to pull the lanyard on the new M777 155mm howitzer.

<sup>34</sup> See FM 5-0, *supra* note 18, at 3-40. During a COIN operation, the most entrepreneurial staff sections work on areas which fall well outside their traditional staff roles. By virtue of the OSJA pre-deployment preparation, other staff sections within the XVIII ABN Corps staff relied on the OSJA to develop solutions to a variety of non-legal issues.

<sup>35</sup> See AR 350-1, *supra* note 20, para. 4-18. While the authors would prefer to use the term Law of Armed Conflict (LOAC) to describe modern jus ad bellum and jus in bello authority, current U.S. Army doctrine continues to use the term Law of War.

<sup>36</sup> For example, in the current version of the XVIII ABN Corps 350-1 training, JAs instruct servicemembers on how the incidents at Abu Ghraib and Haditha, while instigated by junior servicemembers, had a major strategic impact on the entire Iraqi campaign.

## B. Assessment—The Art of Fine Tuning the Battle Plan

*“The Operational Environment is likely to display a complex, shifting mosaic of conditions. To be effective, commanders—and indeed all personnel—continually develop and enhance their understanding of the mosaic peculiar to their AO.”*<sup>37</sup>

The Army’s COIN manual states, “Assessment is the continuous monitoring and evaluation of the current situation and progress of an operation. Effective assessment is necessary for commanders to recognize the changing conditions on the battlefield and determine their meaning.”<sup>38</sup> Effective assessment begins at the pre-deployment stage, but it must happen continuously throughout the deployment during a COIN campaign. In all commands, staff sections must continuously evaluate operations and refine their assessments and recommendations in order to help the commander focus efforts across the battlefield.<sup>39</sup>

Operational Law JAs ensure that staff sections comply with international and domestic law<sup>40</sup> when responding to the ever-changing realities of COIN operations.<sup>41</sup> Operational Law JAs should be involved in designing the campaign plan pre-deployment and in assessing and revising the campaign plan during the deployment as each shift on the battlefield brings new challenges.<sup>42</sup> Campaign design must be a living process that reflects ongoing learning and adaptation, including the growing appreciation counterinsurgents share for the environment and all actors within it.<sup>43</sup> During assessments of a COIN battle plan, JAs may advise on treaties with neighboring states that impact border operations, employment of existing or new weapons and ordnances, the ability to target individuals, such as

financiers or sniper trainers, within gray areas of the rules of engagement<sup>44</sup> (ROE), and the conformance of kinetic and non-kinetic operations with existing regulations and guidance. The input of Op Law JAs is critically important when staff sections reassess their pre-deployment COIN plan after first contact with the enemy. Operational Law JAs can provide not only international law guidance, but can also help inform the military decision making process by highlighting potential legal considerations.

The difference between examining a COIN while viewing PowerPoint briefings and receiving telephone calls during garrison pre-deployment preparations and sitting on the Joint Operations Center (JOC) floor addressing issues once in theater is substantial. Planning sections frequently begin altering campaign plans originally designed in the rear to account for the changing environment on the ground. When XVIII ABN Corps arrived in Iraq, violence was plummeting in some areas while it was increasing in others. In areas of decreasing violence, escalation of force (EOF) measures were adapted to prevent the alienation of local citizens by operational heavy handedness that undermined the objective of obtaining their support. Additionally, when local Iraqi security forces<sup>45</sup> were determined to be capable of handling local threats, Coalition battlespace owners would enter Provincial Iraqi Control<sup>46</sup> Memorandums of Understanding memorializing the transfer of responsibility for security and placing Iraqis primarily in charge. Where violence was increasing, more precise applications of both kinetic and non-kinetic force were required. Multi-National Corps–Iraq directly addressed increasing violence by becoming involved in named offensives when they crossed

<sup>37</sup> FM 3-24, *supra* note 2, at 4-6.

<sup>38</sup> *See id.* at 4-6.

<sup>39</sup> Brigadier General Daniel B. Allyn, Chief of Staff, XVIII ABN Corps, Address to Senior Planners at Multi-National Corps–Iraq (Mar. 2009) (providing After Action Review comments). A corps differs from a brigade or battalion because at those levels, the commander can make adjustments to his operational plan by directly controlling troops in daily contact with the enemy.

<sup>40</sup> U.S. DEP’T OF DEF., DIR. 2311.01E, DEPARTMENT OF DEFENSE LAW OF WAR PROGRAM (9 May 2006). The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law. Commanders must ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.

<sup>41</sup> FM 3-24, *supra* note 2, at 4-1 to 4-9.

<sup>42</sup> This continuous assessment and monitoring was reflected in the XVIII ABN Corps’s focus on the flow of money, weapons, and fighters crossing into Iraq from Iran. Subsequently, Op Law JAs worked closely with planners on cross-border considerations.

<sup>43</sup> FM 3-24, *supra* note 2, at 4-4. Counterinsurgents must understand who the important actors are and the cultural sensitivities of the environment because that dictates the operational plan.

<sup>44</sup> JOINT CHIEFS OF STAFF, INSTR. 3121.01, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005). Rules of engagement are directives issued by a competent military authority. They delineate the circumstances and limitations under which U.S. forces can initiate combat or can continue to engage in combat with other forces.

<sup>45</sup> The term “Iraqi security forces” includes forces under the control of the Iraqi Ministry of Defense, including the Army, Air Force, and Navy. The term also encompasses forces under the Iraqi Ministry of the Interior, including the National Police, Provincial Police forces, and the security forces of the Department of Border Enforcement.

<sup>46</sup> Multi-National Corps–Iraq used the Provincial Iraqi Control model to drive the assessment process of Iraq’s movement towards security and sustainability. Iraq’s eighteen provinces would be individually evaluated and transitioned from coalition to self-control and security. Provinces transitioned to Iraqi control when circumstances, such as a reduced threat level relative to government and security force (police and military) capabilities, warranted. Provincial Iraqi Control Memorandums of Understanding concluded between the various provincial governments and the U.S. formalized Iraqi control. This process of transitioning to Iraqi control was still ongoing when the Security Agreement (SA) was implemented on 1 January 2009; the SA effectively assigned responsibility for Iraqi security to the Government of Iraq. *See* Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Security Agreement].

major subordinate command (MSC) battlespace boundaries and by tasking Corps assets<sup>47</sup> to weigh in on MSC efforts.

The XVIII ABN Corps conducted a number of longer-term assessments with substantial legal import. Operational Law JAs worked with the various Corps staff sections and JAs in our MSCs to help increase governmental capacity while diminishing insurgent viability.<sup>48</sup> Another long-term assessment was the provincial elections held in the fall of 2008 when Op Law JAs worked hard to ensure that planners accounted for the monetary and legal implications associated with providing security for polling stations throughout Iraq. The advice of Op Law JAs was also pivotal to planning for the expiration of the United Nations Security Council Resolution (UNSCR)<sup>49</sup> that had provided the authority under which Coalition forces<sup>50</sup> had been operating since the war's inception. The expiration of the UNSCR on 31 December 2008 would be the most enduring concern during XVIII ABN Corps's time in Iraq.

The dynamic nature of COIN requires aggressive and continuous assessments by commanders and their staffs. Operational Law JAs should assist in this process by integrating themselves into other staff sections. Operational Law JAs can act as neutral observers able to identify flaws, both legal and of a general nature, that may not be apparent to planners in the heat of the frenetic planning cycle. This fresh perspective can be crucial to pursuing a logical and measured response to changes on the battlefield during COIN operations.

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<sup>47</sup> Multi-National Corps–Iraq directly controlled several organic brigades, which were separate and apart from the maneuver units controlled by Division commanders; these brigades were called “Corps separates” for short. The Corps separates each provided specialized skill sets, which could be used to enhance the Corps commander's command and control of the battlespace. For example, MNC–I sent the 525th Battlefield Surveillance Brigade (525th BfSB) to northeastern Iraq to close a gap in both intelligence and battlespace coverage.

<sup>48</sup> One mechanism for accomplishing this was through the Op Law JA in the MNC–I Psychological Operations section who reviewed various products that sought to encourage Iraqis to put faith in their government. Another mechanism for this was by telling JAs in our Major Subordinate Commands (MSC) to increase their efforts to work directly with Iraqis to determine how Coalition Forces could help foster the rule of law within Iraq.

<sup>49</sup> U.N. Security Council Resolution (UNSCR) 1546 granted MNF–I its authority, and subsequent resolutions renewed the authorization. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). XVIII ABN Corps assumed command of MNC–I under the authority of the last extension, S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

<sup>50</sup> The term “Coalition Forces” refers to all foreign forces that were in Iraq under the command of MNF–I. As of February 2008 when XVIII ABN Corps took over as MNC–I, the Coalition included forces from Albania, Armenia, Australia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Dominican Republic, El Salvador, Estonia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Netherlands, New Zealand, Nicaragua, Norway, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, South Korea, Spain, Thailand, Tonga, Ukraine, and the U.K.

C. Plan Discipline—Keeping the Staff Focused on Long-Term Implications of COIN Planning

*“Counterinsurgents should prepare for a long-term commitment.”*<sup>51</sup>

Counterinsurgency, by its nature, is a long-term commitment whose cost must be borne by the American people.<sup>52</sup> To preserve the national will and prevent disenchantment with U.S. efforts during COIN operations, U.S. forces must operate both within the legitimate bounds of international law and without the civilian casualties seen in earlier U.S. COIN conflicts.<sup>53</sup> This commitment to minimizing civilian casualties and staying within the bounds of international law also has a tremendous impact on the host population, which may otherwise feel threatened by the presence of foreign forces.

One of the most important functions for Op Law JAs during a COIN conflict is to make sure that the staff sections account for international law in all planning and operational effects.<sup>54</sup> Operational Law JAs are particularly well-suited for this role and must be proactive in voicing concerns about possible violations of both international and U.S. laws.<sup>55</sup> This is particularly important, because a commander may incorrectly interpret international law, resulting in abuses, even though the commander may have had no malicious intentions.

The ability of American forces to minimize LoW violations and to take appropriate action regarding those breaches that did occur gave legitimacy to U.S. and coalition force operations in the eyes of both the U.S. and Iraqi populations. By minimizing transgressions and quickly addressing violations when they happened, XVIII ABN Corps set the conditions for a change in popular opinion within the United States towards military operations in Iraq.<sup>56</sup>

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<sup>51</sup> FM 3-24, *supra* note 2, at 1-24.

<sup>52</sup> *Id.*

<sup>53</sup> For example, most estimates place the cost to civilian lives in the Vietnam War at approximately 2 million; see Philip Shenon, *20 Years After Victory, Vietnamese Communists Ponder How to Celebrate*, N.Y. TIMES, Apr. 23, 1995, at A12. This is in comparison to the estimates from the Associated Press which place the number of Iraqi civilian deaths from the 2003 invasion until April 23, 2009 at 110,600; see Kim Gamel, *AP Impact: Secret Tally Shows Violence Has Killed 87,215 Iraqis Since 2005*, ASSOC. PRESS, Apr. 23, 2009, available at <http://abcnews.go.com/International/WireStory?id=7411522>.

<sup>54</sup> U.S. DEP'T OF DEF., DIR. 2311.01E, DoD LAW OF WAR PROGRAM para. 5-11 (9 May 2006) (“The Commanders of the Combatant Commands shall . . . [e]nsure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war.”).

<sup>55</sup> See FM 1-04, *supra* note 20, at 5-3.

<sup>56</sup> See, e.g., GALLUP, *Public Opinion on Iraq* (July 2009), available at <http://www.gallup.com/poll/1633/Iraq.aspx>. This poll and the

In order to allow U.S. forces to accomplish their mission and address the worst issues of the Iraqi insurgency, XVIII ABN Corps Op Law JAs had to foster, across both the corps staff and the subordinate commands, the absolute need for all operations to comply with international law.<sup>57</sup> Following the adverse publicity of high profile events such as Abu Ghraib and Haditha, Op Law JAs began incorporating specific lessons learned from these incidents into briefings and discussions with corps staff. The cumulative effect of the previous abuses and subsequent fall out during earlier phases of the Iraq conflict, as well as the efforts of JAs, was to engender an operational climate where proactive compliance was the norm.<sup>58</sup> These efforts culminated in an operational climate where the most substantial high profile transgression over fifteen months was the Koran shooting incident in May 2008.<sup>59</sup>

During protracted COIN operations, all members of the military must conduct planning and mission execution with an eye toward the long-term implications of their actions. The U.S. military's conduct, good or bad, significantly affects public opinion during any given conflict. United States forces, therefore, must conduct their operations in accordance with the tenets and principles of international law. As the commander's primary advisors on international law and the primary trainers on the LoW, Op Law JAs are critical to ensuring this compliance. As part of their mission, Op Law JAs must also incorporate lessons learned from transgressions into future training and planning to

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corresponding graphs show U.S. public opinion held steady with a small rise during XVIII ABN Corps's deployment in Iraq. This is opposed to the sharp jump in negative views of the Iraq war following the revelations in early May 2004 of the abuses at the Abu Ghraib prison and the subsequent details and pictures of the story continuing to come out during June and July of 2004.

<sup>57</sup> In particular, XVIII ABN Corps Op Law JAs had two legal frameworks at separate times during their deployment: (1) the UNSCR 1790, which contained a broad operating authority; and (2) the SA.

<sup>58</sup> These earlier high-profile incidents had already been absorbed by both commanders and Soldiers across the military. As a result, individuals across the military understood that Law of War (LoW) violations could have profound impacts across the war effort.

<sup>59</sup> *Bush Apologizes to Iraqi PM over Koran Shooting*, REUTERS, May 20, 2008, available at <http://www.reuters.com/article/topNews/idUSL2011677820080520>. The incident involved a U.S. Army staff sergeant who found a discarded Koran and then used it for marksmanship practice. The Soldier drew a 1 x 1 inch square on the Koran before using the Koran as a target. When the Soldier was finished, he placed the Koran in a pile of other garbage. When local Iraqis discovered the Koran, they were understandably upset. The Brigade commander responsible for the area moved quickly to address the situation by personally and formally apologizing to the town's religious and secular leadership and presenting the town with a new Koran. The town's leadership publically accepted the apology and acknowledged that the actions of the Soldier did not represent the U.S. Army's attitudes or opinions. Although the major strategic incident that occurred during the XVIII ABC tour in Iraq was the Koran shooting incident described above, the Iraq war provided several examples of how a COIN operation requires focus on the long term strategic implications of actions by servicemembers. See Michael Getler, *The Images Are Getting Darker*, WASH. POST, May 9, 2004, available at <http://www.washingtonpost.com/ac2/wp-dyn/A11271-2004May8>.

prevent recurrences that might jeopardize U.S. efforts in a COIN campaign.

### III. In the Heat of Battle—Operational Law Within the Stages of Counterinsurgency

*“The focus of COIN operations generally progresses through three indistinct stages that can be envisioned with a medical analogy: stop the bleeding, inpatient care—recovery, outpatient care—movement to self-sufficiency.”*<sup>60</sup>

Long-term success in COIN depends largely on winning the support of the people within a nation-state.<sup>61</sup> Self-sustaining security is achieved by shifting public sentiment from support for the insurgent force and apathy toward the government, to a view of contempt toward the insurgent force and recognition of the benefits of a self-reliant, stable government.<sup>62</sup> The means of achieving this long-term success in COIN conflicts throughout history have followed a fairly consistent pattern, as described in the medical analogy quoted above.<sup>63</sup>

Operational Law JAs make important contributions in all three stages of COIN operations examined in further detail below—“stop the bleeding,” “inpatient care—recovery,” and “outpatient care—movement to self-sufficiency”<sup>64</sup>—that contribute to a secure, stable, and self-sufficient society. In the last stage, the article will focus in particular on the bilateral security agreement (SA) between the Government of Iraq and the United States after the expiration of the UNSCR. A historical perspective of XVIII ABN Corps handling of operations in Iraq can serve as a starting point for all Op Law JAs in future COIN missions.

#### A. Stop the Bleeding

*“In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering.”*<sup>65</sup>

The goal during the initial stages in a COIN struggle is to stop the insurgent force from attacking the civilian population and the national government.<sup>66</sup> Though this

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<sup>60</sup> FM 3-24, *supra* note 2, at 5-2.

<sup>61</sup> *Id.* at 5-1; *see also id.* at 1-24.

<sup>62</sup> *Id.* at 5-1.

<sup>63</sup> *Id.* at 5-2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1-25.

<sup>66</sup> In Iraq, the insurgents focused on defining power between the major ethnic groups of Sunni, Shia, and Kurdish people. This led to attacks against both ordinary civilians and instruments of the national government's

objective appears relatively straightforward, it is a critical and difficult task for commanders to undertake. The difficulty lies in the requirement for the COIN force to distinguish between non-combatants and enemy forces who invariably seek to hide among the civilian population.<sup>67</sup> Commanders must significantly decrease violence while setting the stage for future engagement by not alienating the civilian population through the use of overly harsh tactics.<sup>68</sup> This leaves commanders in the near-impossible position of trying to protect their Soldiers and engage the enemy while at the same time avoiding unnecessary civilian casualties with either decision possible having deadly consequences.<sup>69</sup> While civilian casualties are a concern in all conflicts, in a COIN environment they are exacerbated by the fact that these casualties undercut the COIN forces ultimate goals.

A COIN fight during the stop-the-bleeding phase can have so many moving parts that, at the macro scale, an observer might conclude the fight is too chaotic to be contained or to have the insurgency reversed. However, at the micro scale, tactical battlespace owners typically have a good handle on the threat in their areas and may just need sufficient intelligence to find, fix, and finish the enemy. Solutions are local, and like eating an elephant, COIN must be won bite by bite. The removal by destruction or capture of one smuggling network or insurgent group, or the defeat of an enemy tactic, technique, or procedure, can have profound ripple effects,<sup>70</sup> although offensive pressure must be maintained. Military forces must apply finite resources to tactical challenges in order to reduce threats while increasing popular support.

Operational Law JAs play a central role in shaping how commanders conduct this violent stage of a COIN operation. The LoW principle of proportionality is the watchword for operations as commanders struggle to engage an enemy deeply rooted within the civilian populace they are trying to

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power. In other insurgencies, the focus of insurgent operations may be on degrading the instruments of government power rather than focusing on ordinary civilians.

<sup>67</sup> FM 3-24, *supra* note 2; *see also id.* at E-1 (discussing the negative impacts resulting from using air strikes that produce civilian casualties). In Iraq, one such example was individuals who were paid to plant a roadside improvised explosive device (IED) at night, but in the day time were ordinary farmers.

<sup>68</sup> *Id.* at 7-5.

<sup>69</sup> The commanders dilemma was succinctly summed up in 1837 by the British General Charles James Napier, who stated after being “confronted by a mob his thoughts ‘dwell upon the . . . most interesting question, shall I be shot for my forbearance by a court-martial, or hanged for over zeal by a jury?’” *See* TOWNSHEND, *supra* note 11, at 20.

<sup>70</sup> In Iraq the insurgency was supported by smuggling networks which both funded and armed the insurgents. These networks were often interconnected with loose ties connecting wide ranging actors across Iraq. When one element of a network was shut down it affected operations throughout the network as either weapons or money to pay insurgents to continue fighting would be unavailable.

win over.<sup>71</sup> Judge advocates help U.S. forces use the proportionate level of force by continuously monitoring, assessing, and guiding the application of existing and new ROE, EOF procedures, and rules for the use of force (RUF).<sup>72</sup> More specifically, JAs advise commanders to use ROE, EOF, and RUF as tools to accept more risk in order to prevent unnecessary harm to the civilian population in order to further the overall strategic goal of gaining support from the host nation. It should be noted that commanders at various levels may be unwilling to approve of such restraints on the use of force because of the corresponding risk it places on servicemembers; however, JAs should advise commanders that in a COIN operation, the endgame may necessitate the acceptance of additional risk during the initial phases of the operation.<sup>73</sup> By refining the ROE, EOF, and RUF and pushing them to the lowest levels, Op Law JAs help U.S. forces demonstrate their commitment to the measured use of lethal force. This commitment is critical to winning the support of the local population and to COIN strategy during this phase of operations.<sup>74</sup>

The push to move past the bleeding stage often means adjusting priorities. Coming into Iraq at the tail end of the

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<sup>71</sup> U.S. DEP’T ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 19 (July 1956) (defining proportionality as the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the military advantage gained). *See also* Geneva Conventions Relative to the Treatment of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>72</sup> During the many rules of engagement (ROE), escalation of force (EOF), and rules of the use of force (RUF) briefings and training sessions given by the XVIII ABN Corps Op Law Division, Op Law JAs noticed a misconception by servicemembers that ROE, EOF, and RUF are intended to restrict their actions on the battlefield. The XVIII ABN Corps Op Law JAs attempted to change the perception by reminding servicemembers that ROE and RUF did not, in any way, restrict an ability to take action in self-defense. In addition, XVIII ABN Corps Op Law JAs 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 (i.e., if a servicemember knows something is a threat they may engage and not fire warning shots first; however, if the circumstances are not clear, a servicemember may use EOF measures like non-lethal munitions to help clarify the existence of a threat).

<sup>73</sup> Commanders on the street may not want to risk harm to their Soldiers for what they may see as objectives that are echelons above them. However, it is important for two reasons; the first is that for every civilian killed unnecessarily COIN forces give reasons for other civilians to take up arms ultimately increasing the threat to that commander’s Soldiers. The second reason is that commanders must be made aware that the decisions made echelons above them seek overarching goals that may unfortunately increase risk at lower levels. As Op Law JAs, it is incumbent upon us to make this argument and convince those putting their lives at risk that the reasons are legitimate and necessary because when commanders don’t accept the rationale for restrictive ROE then neither will their Soldiers. This argument was easier to make during XVIII ABN Corps’s deployment as operating areas where COIN principles were effectively practiced before the “Surge” between 2003 to 2006 had significantly less violence.

<sup>74</sup> FM 3-24, *supra* note 2, at 1-25.

surge strategy,<sup>75</sup> XVIII ABN Corps witnessed the ending of the bleeding stage as violence in Iraq remained at over 350 attacks per week and spiked during the Corps's initial few months in theater to over 700 per week in March 2008 until falling to fewer than 150 attacks per week by April 2009 as the Corps redeployed.<sup>76</sup> The change in the operating environment during this stage as attacks spiked and then began dropping meant that planners had to refocus operations to adjust to the changing battlefield. Multi-National Corps–Iraq accomplished this in a number of ways, including a focus on winnowing out the remaining bad actors who had enmeshed themselves in the population and were still committed to violence.<sup>77</sup> Coalition forces focused during this stage on sustaining the security gains achieved through the surge strategy by proactively preventing insurgent groups from committing violent acts instead of reacting to the daily violence that preceded the surge.<sup>78</sup> In addition, planners also sought to prevent insurgent forces from regaining strength by addressing the underlying causes of violence in Iraq.<sup>79</sup>

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<sup>75</sup> See Bush, State of the Union Address, *supra* note 22; see also Duffy, *supra* note 23.

<sup>76</sup> U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (June 2009) [hereinafter U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ], available at [http://www.defenselink.mil/pubs/pdfs/9010\\_Report\\_to\\_CongressJul09.pdf](http://www.defenselink.mil/pubs/pdfs/9010_Report_to_CongressJul09.pdf).

<sup>77</sup> Interview with Major Mark M. Turner, U.S. Army, MNC–I C3 Future Operations Planner, at Camp Victory, Iraq (Mar. 2008). In order to explain this new challenge and the apparent aberration of continued violence despite the previous successes of coalition forces, Major Turner commented that, “We’ve removed most of the less capable bad guys as a threat. Those that remain are generally smart, deadly, and know how to survive or they’re just plain lucky.”

<sup>78</sup> Interview with Major Jeremy Willingham, U.S. Army, MNC–I C3 Future Operations Planner, at Camp Victory, Iraq (Mar. 2008). Major Willingham referred to this as the “whack-a-mole” strategy. As soon as an insurgent group popped up in a new location, coalition forces could now focus their efforts specifically on that group. As violence decreased across Iraq because of the successful surge strategy, insurgent groups attempted to shift operations into an area where there was less of a coalition force presence. However when these groups shifted to a new area they were often the only group operating in that particular battlespace making it easier for coalition forces to focus efforts on that particular group.

<sup>79</sup> These underlying problems, which XVIII ABN Corps sought to address during our time in Iraq, were neatly summed up by General Raymond T. Odierno, who replaced General Petraeus as the Commander of MNF–I on 16 September 2008. General Odierno stated during his testimony before the House Armed Services Committee on 30 September 2009,

In Iraq, much of the struggles are about power, land and resources which is reflective in the Arab-Kurd and GoI-KRG [Government of Iraq – Kurdistan Regional Government] tensions. The key issues include the pending hydrocarbon law, revenue sharing, and the disputed internal boundaries (DIBs) including areas in Ninawa and Diyala provinces and Kirkuk.

See House Armed Services Committee, *The Status of Ongoing U.S. Efforts in Iraq* (statement of General Raymond T. Odierno, U.S. Army, Commander, MNF–I) (Sept. 30 2009), available at [http://armedservices.house.gov/pdfs/FC093009/Odierno\\_Testimony093009F.pdf](http://armedservices.house.gov/pdfs/FC093009/Odierno_Testimony093009F.pdf).

During this phase, MNC–I Op Law JAs began reviewing the ROE with the intent of making all necessary changes during the publication of MNC–I Operations Order (OPORD) 08-02.<sup>80</sup> The intent was to convey to commanders as much authority for mission accomplishment as possible while at the same time avoiding excessive loss of civilian life. To help the continuing surge strategy, the MNC–I Op Law JAs attempted to find a way to precisely kill the enemy while minimizing collateral damage to civilians. Part of the analysis included changing approval and notifications requirements to better synchronize the overall strategic objective throughout the different levels of command.<sup>81</sup> This allowed commanders to leverage the increased troop strength during the surge strategy in order to focus on enemy insurgents as they surfaced throughout the country.

### *1. Multi-National Coalitions in COIN—A Necessary Complexity for U.S. Forces*

*“They (the Americans) are, I think, a bit unwarrantably cock-a-hoop as a result of their limited experience to date. But they are setting about it in a realistic and business-like way. . . . I have a feeling that they will do it . . . .”*<sup>82</sup>

In modern warfare, for both political and economic reasons, it helps to share the burden of conflict across a multi-national coalition of partnered nations. However, while multi-national partners may share the same mission, they often operate under different ROE and home-country policies; even political sensitivities may differ among partners.<sup>83</sup> While a multi-national coalition may increase the overall effectiveness of a given operation, the challenge for coalition partners is to overcome their differences to forge an effective fighting force.

Operational Law JAs are indispensable when working with military and civilian forces from friendly nations. Operational Law JAs synchronize efforts across different legal systems, different types of command relationships, and different regulations to ensure a cohesive fighting force. Op Law JAs must be proactive in identifying possible fracture points with foreign partners to ensure that once on the battlefield the commander can trust that there will be mission accomplishment whether he is utilizing U.S. or a foreign partner’s resources.

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<sup>80</sup> See generally FM 5-0, *supra* note 18, at G-5.

<sup>81</sup> See *id.* at G-6.

<sup>82</sup> Air Vice-Marshal Sir John Slessor, Royal Air Force. Though Vice-Marshal Slessor was referring to allied air operations against Germany during World War II, the sentiment of the quote encapsulating British servicemembers feelings towards their American counterparts rang true in Iraq during Operation Iraqi Freedom. See AIR POWER THEORY AND PRACTICE 119 (John Gooch ed., 1995).

<sup>83</sup> FM 3-24, *supra* note 2, at 2-24.

During this phase, XVIII ABN Corps created and deployed two separate Tactical Command Posts (TACs) in Basra. The MNC-I Commander created these TACs to reinforce Prime Minister Nouri al-Maliki's faltering "Charge of the Knights" offensive against various Shiite insurgent and criminal groups who, at the time, controlled the city of two million.<sup>84</sup> Multi-National Corps-Iraq rushed U.S. Marines from the 24th Marine Expeditionary Unit and Army paratroopers from the 82d Airborne Division to embed with Iraqi combat units to provide additional firepower, intelligence, and logistics assets to support the offensive.<sup>85</sup> The Basra operation also served as the template for future MNC-I operations led by Iraqis with U.S. forces in support.<sup>86</sup> The template proved successful during operations in Sadr City and Maysan province, which resulted in a sharp decline in Shiite insurgent group attacks.<sup>87</sup>

Multi-National Corps-Iraq assigned one JA to each of the two TACs in Basra. These JAs played a leading role in interpreting ROE for embedded U.S. Soldiers and Marines and helped U.S. forces tread the fine line between British expectations as battlespace owners in Multi-National Division-South East (MND-SE)<sup>88</sup> and Iraqi expectations as the greatest combat force during the operations. Ultimately, the firepower of U.S. forces following U.S. ROE, helped to tactically overwhelm the enemy and decimate the enemy's senior leadership in Basra within a matter weeks.<sup>89</sup>

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<sup>84</sup> See Karen DeYoung et al., *U.S. Appears to Take Lead in Fighting in Baghdad: U.S. Forces Battle Mahdi Army in Sadr City, Aircraft Target Basra*, WASH. POST, Apr. 1, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/01/AR2008040100833.html>. Because of the kinetic nature of the fight in Basra, the XVIII ABN Corps desired to have a JA present on the ground to advise the on-scene commander of the legality of kinetic strikes and offensive operations. Once present, the XVIII ABN Corps JA became much more than a legal advisor to the tactical assault commander. A de facto executive officer, the XVIII ABN Corps JA advised the tactical commander of the diplomatic sensitivities of operating among the British and Iraqi forces, provided solutions for the problems with incompatibility between the U.S. and British communication network and filled gaps that existed between the U.S. and British ROE when U.S. forces operated among U.K. servicemembers.

<sup>85</sup> See *id.*; see also *Iraq Forces Battle Basra's Militia's*, BBC, Mar. 26, 2008; available at [http://news.bbc.co.uk/2/hi/middle\\_east/7312078.stm](http://news.bbc.co.uk/2/hi/middle_east/7312078.stm).

<sup>86</sup> During the XVIII ABN Corps tenure in Iraq, the MNC-I Commander directed that operations shift from coalition force centric toward operations conducted by, with, and through the Iraqi security forces; see *infra* note 119.

<sup>87</sup> U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (June 2008), available at [http://www.defenselink.mil/pubs/pdfs/Master\\_16\\_June\\_08\\_%20FINAL\\_SIGNED%20.pdf](http://www.defenselink.mil/pubs/pdfs/Master_16_June_08_%20FINAL_SIGNED%20.pdf).

<sup>88</sup> As one of the members of the coalition, British forces were given military responsibility for the entirety of MND-SE in the aftermath of the 2003 invasion of Iraq. All coalition forces in the area reported to the British divisional commander. When U.S. forces went down to Basra as a separate element in March of 2008, U.S. forces had to achieve mission objectives without stepping in the lane of British operations. See also *supra* note 50 (listing coalition forces).

<sup>89</sup> See James Glanz & Michael Kamber, *Shiite Muslims Cling to Swaths of Basra and Stage Raids*, N.Y. TIMES, Mar. 30, 2008, available at <http://www.nytimes.com/2008/03/30/world/middleeast/30iraq.html>.

As a result of the successful employment of Op Law JAs at the two TACs, one Op Law JA remained in Basra to assist in the international effort.<sup>90</sup> The Op Law JAs in Basra helped U.S. forces work through the United Kingdom's (U.K.) forces separate communications systems, political realities, and methods of accomplishing the mission.<sup>91</sup> For example, MNC-I JAs worked with their British counterparts to develop techniques to transfer data and information between incompatible U.S. and British systems.<sup>92</sup> These Op Law JAs also created a process, approved at the U.S. and U.K. national levels, to facilitate the processing of detainees obtained within the British battlespace, which was necessary because of legal and political barriers for British forces in the area of detention operations.<sup>93</sup>

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<sup>90</sup> An Op Law JA remained continuously in Basra for a period of thirteen months from the beginning of the Battle of Basra until just a few weeks before XVIII ABN Corps left theater. The JAs in Basra were rotated after various length stays between two months and five months.

<sup>91</sup> These issues were presaged by military thinkers such as Carl Von Clausewitz, "

It is traditional . . . for states to make offensive and defensive pacts for mutual support—though not to the point of fully espousing one another's interests and quarrels. Regardless of the purpose of the war or the scale of the enemy's exertions, they pledge each other in advance to contribute a fixed and usually modest force. . . . It would all be tidier . . . if the contingent promised . . . were placed entirely at the ally's disposal and he were free to use it as he wished. It would then in effect be a hired force. But that is far from what really happens. The auxiliary force usually operates under its own commander; he is dependent only on his own government, and the objective the latter sets him will be as ambiguous as its aims. . . . The affair is more often like a business deal. In the light of the risks he expects and dividend he hopes for, each will invest about 30,000 to 40,000 men and behave as if that were all he stood to lose. . . . Even when both share a major interest, action is clogged with diplomatic reservations, and as a rule the negotiators only pledge a small and limited contingent.

See CARL VON CLAUSEWITZ, ON WAR, *supra* note 9, at 603.

<sup>92</sup> By working through both C6 at MNC-I and the communications help desks in Basra, Op Law JAs assisted in the transfer of electronic documents from staff sections in MND-SE to their counterparts at MNC-I and in the other multi-national divisions. Op Law JAs were utilized in this manner because of their overall understanding of operations in Iraq and their wide ranging contacts with the staff at MNC-I.

<sup>93</sup> British detention operations in Iraq have been the subject of extensive scrutiny and litigation. Two leading cases were litigated to the U.K. House of Lords (the U.K.'s Supreme Court) in 2007 on the issue of detention in Iraq. See *Al-Skeini et al. v. Sec'y of State for Defence* UKHL 26 (2007) available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070613/skeini-1.pdf>; *Al-Jedda R. on the application of Al-Jedda v. Sec'y of State for Defence* UKHL 58 (2007), available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda-1.htm>. The issue in *Al-Skeini* was the extent of U.K. human rights law protections enjoyed by Iraqi citizens as a result of British military operations in Iraq. The court found that U.K. human rights law did not apply to the vast majority of Iraqis. However, the court held that detainees held by the British military were in a special position; determining that U.K. human rights law protected them. The reason for the distinction can be found in article 1 of the European Convention of Human Rights (ECHR)

It bears mentioning that the integration between the U.S. and international forces is largely personality driven. Those responsible for selecting the JAs who will act as liaisons to other coalition or multi-national forces should carefully pick individuals who are open-minded, flexible, and patient. In order to gain the maximum amount of productivity, the attorneys should be creative and adaptive in determining how to achieve overall mission objectives within the cultural and political parameters of the international force. For example, the MNC-I Op Law JAs who were assigned to Basra were only intended to act as liaisons to the British legal section; however, because they built a relationship of trust based on their willingness to comport with British military customs and culture, these liaisons took on a much larger role and became valued assets to the British military commanders in MND-SE.

## 2. *Sowing the Seeds of Goodwill with the Host Nation Population—The Foundation of A Successful COIN*

*“The conduct of a general in a conquered country is encompassed with difficulties. If he is severe, he exasperates and increases the number of his enemies.”<sup>94</sup>*

Part of the challenge in COIN operations during the initial phase is the need to understand and determine what is important to the host nation’s citizens so as to engender good will.<sup>95</sup> To build rapport and incur support from the local populace while promoting legitimacy within the host nation’s government, COIN forces must recognize and respect the cultural sensitivities of the host population. Counterinsurgency forces that make this effort help weaken the insurgency by contradicting the insurgents’ message that the government is illegitimate and the only way for the

population to secure their rights is by supporting the violence of the insurgency either actively or tacitly.<sup>96</sup>

Operational Law JAs can be invaluable to understanding cultural sensitivities and creating legal solutions to achieve a commander’s desired effect. By understanding the legal realities within a host nation, Op Law JAs can help tailor the actions of U.S. forces to have less of an impact on the civilian populace. This role can vary from understanding host nation laws<sup>97</sup> to helping change U.S. doctrine so that servicemembers’ actions conform better with a host nation’s cultural sensitivities.

For XVIII ABN Corps the effort to minimize U.S. effects in Iraq became paramount during this stage. The Government of Iraq, due to political considerations, was under pressure to end the U.S. presence after six years of U.S. forces in Iraq.<sup>98</sup> The activities of U.S. forces also created difficulties because of the outcome of certain operations during the summer of 2008 that added to the calls to end the U.S. presence in Iraq.<sup>99</sup>

Multi-National Corps-Iraq worked to engender good will with Iraqi civilians during the stop-the-bleeding stage; Op Law JAs assisted in the development of layered restraints on operations. These restraints were put in place for religiously or culturally sensitive areas. Operational Law JAs also created layered restraints by adjusting approval levels for ordinary operations and placing guidance regarding these restraints directly into the ROE and MNC-I’s standard operating procedures (SOP).<sup>100</sup> These restraints, when instituted at lower levels of command, were further refined to adjust for local differences within Iraq’s population. By attempting to minimize the disturbances

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which is given effect statutorily in the United Kingdom through the mechanism of the Human Rights Act 1998 (a statute of the U.K. Parliament). Article 1 of the ECHR says that it applies to those persons who fall within the jurisdiction of a high contracting party. In contrast, article 2 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by the United States in 1992) restricts the ICCPR’s application to the territory of the party state. This is a significant distinction. The ICCPR only has legal effect on U.S. soil while the United Kingdom is legally bound to protect the human rights of any person who falls within U.K. jurisdiction wherever they might be in the world. The court in *Al-Skeini* accepted that a person held in a British detention facility must be under U.K. jurisdiction. The *Al-Jedda* case accepted that military detention might be lawful where it was carried out under the authority of an UNSCR (as was the case in Iraq). This was due to the effect of article 103 of the U.N. Charter, which overrides other international agreements (i.e. the ECHR in this instance). However, the *Al-Jedda* Court cautioned that ECHR rights were merely ‘qualified’ and not ‘displaced.’ Interviews with Lieutenant Colonel Nigel Heppenstall, U.K. Army, LEGAD, British Exchange Officer Legal, Ctr. for Law and Military Operations, The Judge Advocate Gen.’s Legal Ctr. & Sch. (Oct.–Nov. 2009).

<sup>94</sup> NAPOLEON BONAPARTE, *MAXIMS OF WAR* (1820). See COLONEL MICHAEL B. CARGROVE, *DISTANT VOICES: LEARNING FROM LEADERS PAST* 17 (iUniverse Books 2005).

<sup>95</sup> FM 3-24, *supra* note 2, at 1-21.

<sup>96</sup> Where a government has come into power through some form of popular vote, fraudulent or not, and maintains at least an appearance of constitutional legality, the guerrilla outbreak cannot be promoted, since the possibilities of peaceful struggle have not yet been exhausted. See BRYAN LOVEMAN & THOMAS M. DAVIES JR., *GUERRILLA WARFARE* 48 (Univ. of Neb. Press 1997) (1985) (quoting Che Guevara).

<sup>97</sup> For example, Op Law JAs throughout Iraq were required to train servicemembers that an Iraqi citizen carrying an AK-47 was not necessarily an enemy insurgent. Iraqi law permits Iraqi citizens to own and possess an AK-47. Therefore, not all individuals with that weapon type posed an immediate threat to U.S. forces and targeting them would not be justified under the existing ROE. See Coalitional Provisional Authority, No. 3 (2003) (Iraq); Law of Arms, No. 13 (1992) (Iraq); Law of Arms No. 15 (2000) (Iraq).

<sup>98</sup> See Campbell Robertson, *Iraqi Officials Still Insisting on Withdrawal Timetable*, N.Y. TIMES, July 9, 2008, available at <http://www.nytimes.com/2008/07/09/world/middleeast/09iraq.html>.

<sup>99</sup> See Richard A. Opiel Jr. & Ali Hameed, *U.S. Forces Kill Relatives of Iraqi Governor*, N.Y. TIMES, July 21, 2008, available at <http://www.nytimes.com/2008/07/21/world/middleeast/21iraq.html>. See also *supra* note 59 (discussing the Koran shooting incident and Abu Ghraib and additional examples of events that provided opposition to U.S. forces in Iraq).

<sup>100</sup> An example of this could be seen in the effort to have female detainees only searched by female servicemembers to help comply with Islamic customs of propriety.

U.S. forces created, Op Law JAs helped decrease civilian anger over U.S. activities.<sup>101</sup>

Another legal change that reflected the evolving COIN fight was MNC-I's decision to redefine EOF procedures. Suspecting that the enemy was trying to exploit EOF incidents that resulted in civilian casualties, the Op Law Division reexamined how U.S. forces conducted EOF procedures with the goal of reducing the number of serious EOF incidents. Additionally, reducing the number of EOF incidents resulting in death or serious injury emphasized the COIN principle of working alongside the Iraqi citizenry while helping to remove the counterproductive stigma of an occupation force.

A theater-wide assessment concluded that servicemembers were regularly engaging local national vehicles that were driving too closely to convoys, regardless of local threat conditions. Multi-National Corps-Iraq Op Law JAs, working with other staff sections, conducted a review of historic enemy attack data on Iraqi roads while keeping in mind local Iraqi driving habits. Based on this analysis and in coordination with the MNC-I Commander, Op Law JAs developed a "Share the Road" EOF policy.<sup>102</sup> Under this policy, U.S. forces were to permit Iraqi local nationals to travel in and among U.S. convoys when practicable under local conditions. If necessary, U.S. forces would employ non-lethal measures in response to a developing but ambiguous threat situation. Finally, servicemembers were expected to use intelligence of the operating area to shape their responses to various ambiguous threat situations.<sup>103</sup>

The stop the bleeding stage of a COIN operation is an intense fight requiring flexibility on the part of commanders and staff sections.<sup>104</sup> An Op Law Division can provide tangible results to a commander during this phase by creating targeted restraints on the use of force, crafting ROE mindful of cultural and religious sensitivities, providing operational approval guidelines, and giving real-time legal

advice to commanders conducting offensive operations. Though every COIN is different, all Op Law JAs should consider utilizing these tools during the initial stage of a COIN operation.

## B. Inpatient Care—Recovery

*"Do not try to do too much with your own hands. Better the Arabs do it tolerably than that you do it perfectly. It is their war, and you are to help them, not to win it for them. Actually, also, under the very odd conditions of Arabia, your practical work will not be as good as, perhaps, you think it is."*<sup>105</sup>

In COIN doctrine, the focus throughout this stage of operations is to establish the foundation for long-term stability.<sup>106</sup> Once the volume of attacks recedes as a result of COIN efforts during the outpatient care phase, the COIN force should focus on establishing and expanding the host nation's security forces, developing civil capacity, and spurring economic growth.<sup>107</sup> Success in this stage depends largely on COIN forces taking advantage of the decrease in violence. As at any point during a COIN campaign, success can be tenuous. The efforts of COIN practitioners can quickly slip back into just trying to control the violence if gains are not made during the inpatient care stage.

During the inpatient care phase, the traditional structure of an OSJA is stretched to meet all of the commander's mission requirements in a COIN struggle.<sup>108</sup> Operational Law JAs should be prepared to expand their practice outside the kinetic focus of conventional armed conflict into areas that include local host nation laws, economic or fiscal considerations, and working closely with civilian organizations, including non-governmental organizations and entities within the U.S. Government.<sup>109</sup> Operational Law JAs can help commanders take advantage of the decrease in violence with three particular objectives: (1) shifting the focus from kinetic, U.S. forces-centered operations to civil capacity, host nation-centered operations; (2) expanding the emphasis on rule of law; and (3) leveraging the expertise of civilian organizations.

<sup>101</sup> An example of this was the policy of U.S. forces avoiding entry into mosques, which was reported as far back as 2004. This policy was put in place to avoid inflaming Iraqi views of Americans as crusaders. See John F. Burns et al., *U.S. Soldier Is Killed as Helicopter Is Shot Down in Iraq*, N.Y. TIMES, Jan. 3, 2004, available at <http://www.nytimes.com/2004/01/03/world/us-soldier-is-killed-as-helicopter-is-shot-down-in-iraq.html>.

<sup>102</sup> See Policy Letter, Headquarters, Multi-National Corps-Iraq, Lieutenant General Lloyd J. Austin III, U.S. Army, subject: Employing Escalation of Force (EoF) TTPs (May 2008) (June 9, 2008); see also MNC-I OPOD 09-01(U) (1 Jan. 2009), at tab K to app. 11 (escalation of force) to annex C (operations) (document is classified Secret).

<sup>103</sup> In addition, Op Law JAs created a training packet developed in coordination with various MNC-I staff sections to go with the MNC-I Commander's guidance. This training packet explained how and when to use non-lethal munitions. Using vignette-based scenarios, the packet helped servicemembers test their understanding of threat-based employment of EOF procedures.

<sup>104</sup> FM 3-24, *supra* note 2, at 5-2.

<sup>105</sup> T. E. Lawrence, *27 Articles*, ARAB BULL., Aug. 20, 1917, art. 15.

<sup>106</sup> FM 3-24, *supra* note 2, at 5-2.

<sup>107</sup> *Id.* at 5-2.

<sup>108</sup> See FM 1-04, *supra* note 20, at 5-1. Field Manual 1-04 promulgates the doctrine that governs the roles and responsibilities of JAs. Rule of law though provided for in FM 1-04, does not constitute a core legal discipline for JAs; therefore, OSJAs generally do not include a Rule of Law Division. The XVIII ABN Corps OSJA team provided information and direct accounts of the COIN in Iraq to the Center for Legal and Military Operations (CLAMO), which influenced the *Rule of Law Handbook*.

<sup>109</sup> At various times during our deployment Op Law JAs worked with representatives from the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the U.S. Department of State, the United Nations (U.N.), and the International Committee of the Red Cross (ICRC) among many others.

During the course of XVIII ABN Corps's deployment, the COIN fight moved into the inpatient care stage as the Government of Iraq gained increased legitimacy after successful campaigns in Basra and Sadr City.<sup>110</sup> This phase occupied the longest part of XVIII ABN Corps's deployment. Attacks continued to decrease from their highest points, and Coalition forces repositioned themselves to focus more closely on stability operations.<sup>111</sup>

As the operational face of the OSJA, Op Law JAs often found themselves involved in issues that were outside of a traditional Op Law context. Op Law JAs answered questions from all over theater and within the MNC-I staff sections involving Iraqi constitutional issues, Iraqi law questions, and fiscal subjects. Iraqi law questions became paramount as commanders at all levels began to focus on defining and quantifying success in rule of law operations throughout Iraq. It was during this stage, partly as a response to these novel and challenging issues, that the Op Law Division was divided into two separate sections: the Op Law Division, which handled traditional operational law issues, and a completely separate Rule of Law Division.<sup>112</sup>

### 1. Civil Considerations in a COIN

*"COIN operations require a greater focus on civil considerations . . . than conventional operations do."*<sup>113</sup>

The shift from military-specific to civilian-related objectives is critical as violence decreases and essential services increase, resulting in the host nation's government gaining legitimacy.<sup>114</sup> Counterinsurgency forces must provide the impetus and the direction to achieve this shift in focus by ensuring that the host nation's government and security forces follow its lead. Commanders must be creative in finding incremental ways to transition the burdens of the COIN fight to the host nation without creating too much strain on the government's limited resources or its newly trained security forces.<sup>115</sup>

Judge advocates, particularly Op Law JAs, are uniquely suited to assist commanders during this stage of a COIN

operation, often acting as a force multiplier.<sup>116</sup> Specifically, JAs are familiar with the rules, regulations, and laws governing disciplines across the spectrum of military operations.<sup>117</sup> This knowledge allows JAs to analyze host nation laws and utilize U.S. federal statutes and military regulations to train servicemembers on the legal considerations necessary to operate within a COIN during the inpatient care stage. Additionally, JAs can assist the commander's rule of law objectives by creating programs which strengthen judicial institutions and promote governmental legitimacy through interactions with legal and political professionals.<sup>118</sup>

Stability operations during this phase can prove to be as difficult as traditional kinetic operations. To ease this burden, the MNC-I commander early in XVIII ABN Corps's deployment began the transition from U.S.-led kinetic operations to operations in which Iraqis were in the lead. He advised his staff and all leaders under his command that operations should be conducted "by, with, and through" the Iraqis.<sup>119</sup> In accordance with this guidance, every operation was to use Iraqi forces, Iraqi guns, and Iraqi money as much as possible. This approach, which became the mantra for all staff sections and planners, pushed units to conduct operations with their Iraqi counterparts and reduce unilateral operations. Though this doctrine made the execution of operations more difficult in the short term, it furthered the ultimate goal of MNC-I's COIN strategy.

As MNC-I shifted focus to stability and civil capacity operations, commanders in the field were forced to deal with the reality that their units dedicated to kinetic war fighting were increasingly needed in supporting roles and would less frequently be the primary actors in operations. Instead,

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<sup>116</sup> An example of this from MNC-I can be seen in the desire of U.S. commanders to allow Iraqi forces to ride in U.S. vehicles thereby allowing more combat troops get to an area of operations. Judge advocates worked to find an answer that was compatible with both U.S. statutes and military regulations ultimately concluding that Iraqis could ride in U.S. vehicles as necessary and under certain circumstances.

<sup>117</sup> See generally FM 1-04, *supra* note 20, at D-1 to D-4.

<sup>118</sup> At the brigade-level this work can entail meeting with local judges and legal professionals. At the corps-level or above it can entail working with institutions and professionals on the level of the U.S. Supreme Court or the American Bar Association Executive Board. In either case, this work can often be as simple as creating informational sessions explaining the usage of forensic evidence.

<sup>119</sup> Lieutenant General (LTG) Lloyd Austin III recognized early on that the operating environment in Iraq was moving more and more toward stability based on the security successes gained from the surge strategy. In a proactive effort to bolster the strength and confidence of the Iraqi security forces and in anticipation of Iraq's desire to assert its sovereignty, LTG Austin directed all commanders to accomplish their missions through their Iraqi counterparts. This strategy had the effect of both expressing the U.S. intent to handover the responsibility of securing Iraq to the Iraqis, as well as providing the Iraqi security forces with an opportunity to gain confidence by practicing their military craft alongside trained and skilled members of the U.S. forces. In the end, this strategy not only resulted in the training of the Iraqi security forces, but it also allowed U.S. forces to prepare for expanding Iraqi sovereignty under the SA.

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<sup>110</sup> The operation in Basra named "Charge of the Knights" started on 25 March 2008. Operations in Sadr City were given the overall name of "The Battle for Sadr City" these operations picked up intensity following the heavy bombardment, by motors and rockets, of the Green Zone (also known as the International Zone) in Baghdad on 25 March 2008. The effectiveness of these operations was borne out in later operations in Amarah where MNC-I received no major resistance while clearing the city of insurgents.

<sup>111</sup> See *supra* note 76.

<sup>112</sup> See *supra* Part III.B.2 (providing a more detailed discussion on the development of the Rule of Law Division).

<sup>113</sup> FM 3-24, *supra* note 2, at 4-6.

<sup>114</sup> *Id.* at 5-2 to 5-3.

<sup>115</sup> *Id.* at 5-3.

commanders found themselves relying more heavily on units dedicated to stability and civil capacity operations, including engineering units, route clearance teams, and civil affairs teams. Often, following MNC-I's lead and against their training, commanders and staff members had to stand by and allow the Iraqis to decide their own path, utilizing their own style of organization and leadership.<sup>120</sup>

During this phase, JAs created training aids identifying legal issues associated with operating alongside host nation forces for servicemembers to carry in the field.<sup>121</sup> Operational Law JAs also served in a variety of roles such as detention operations experts, interrogation advisors, engineers, executive officers, multi-national force trainers, liaison officers to various coalition forces, and intelligence officers. In one instance, JAs advised the MNC-I Commander which Iraqis, based on their rank and level of authority, would be the appropriate counterpart for U.S. commanders to contact and partner with for decision-making purposes. In order to accomplish this task, Op Law JAs scrutinized the Iraqi Constitution and federal laws in an attempt to determine the appropriate individuals within the Iraqi government and military. These Op Law JAs again contributed to the Corps's overall effort by interpreting both Iraqi and U.S. laws and regulations and by providing reasoned guidance to other members of the force.

Operational Law JA's also used the fragmentary order (FRAGO) and OPORD process to accomplish the MNC-I commander's COIN doctrine.<sup>122</sup> Since COIN doctrine was heavily emphasized, planners at MNC-I were attuned to writing orders that took these precepts into account. Planners sought out and welcomed Op Law JAs adjusting the focus and direction of orders to more efficiently apply the principles of COIN doctrine.<sup>123</sup> To assist staff planners,

Op Law JAs were members of joint planning teams<sup>124</sup> (JPTs) and helped write parts of OPORD 08-02, which asserted the need for Coalition forces to foster partnerships with the Government of Iraq and the Iraqi security forces.

As the next section will show, by incorporating "by, with, and through" into doctrine, Op Law JAs helped establish the legitimacy of U.S. and host-nation security forces with the populace because these forces were following and respecting local law. By assisting in the FRAGO and OPORD drafting processes, Op Law JAs directly adjusted doctrine, thereby influencing action on the ground. With all that Op Law JAs can achieve during this phase, the one constant is the need to be flexible and ready to adjust to the mercurial legal issues that will arise.

## 2. Development of Effective Governance

*"The primary objective of any COIN operation is to foster development of effective governance by a legitimate government."<sup>125</sup>*

In COIN operations, fostering development of effective governance is a two-pronged effort. First, the populace must view the efforts of the COIN force as legitimate, and second, the actions of the COIN force must support the efforts of the legitimate government.<sup>126</sup> Commanders on the ground must utilize both their military and political capabilities to help foster the aims of the legitimate host nation government.<sup>127</sup> At the corps level, commanders and senior staff must focus on key leader engagements within the host nation's government and security forces.

In maintaining a COIN forces' compliance with international law and norms, Op Law JAs can assist in the overall goal of creating a stable and legitimate host nation government. By ensuring COIN forces operate within the standards of international law, human rights law, and in some cases assisting the commander to add additional restrictions well inside the limits of international law, the citizens of the host nation will be more likely to recognize the legitimacy of the host nation government.<sup>128</sup> This also

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<sup>120</sup> While the U.S. military follows the military decision making process to address a commander's needs, the Iraqi Army due to its logistical limitations, less established command and control functions, and certain cultural differences arrived at answers to questions that arose on the battlefield in a more improvisatory fashion. While U.S. forces offered advice and doctrinal examples for the Iraqis during this process, the learning that the Iraqis were doing on the battlefield was helping them to establish their own methods for military decision making that suited their military, political, and cultural needs.

<sup>121</sup> See FM 3-24, *supra* note 2, at 5-2.; see also FM 1-04, *supra* note 20, at D-1-D-4.

<sup>122</sup> See FM 5-0, *supra* note 18, at G-5 to G-6.

<sup>123</sup> One such example was the need to create a more restrictive ROE for U.S. forces operating in an area where two local factions had long standing tensions and cultural differences with one another. The MNC-I Commander wanted to re-affirm the U.S. servicemember's right to self-defense, but at the same time wanted to ensure that U.S. forces did not pick a side in the historical power struggle. The MNC-I Op Law JAs had to carefully draft an order that gave commanders on the ground the confidence and flexibility to conduct operations but at the same time provided the necessary restrictions to prevent any marginalization of a cultural sect within Iraqi society.

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<sup>124</sup> See generally FM 5-0, *supra* note 18, at 1-1 to 1-29. At MNC-I, the G-3 used the model of JPTs to accomplish the dynamic and rapid planning cycle required by real world operations. When required, a potential command decision was assigned to a JPT leader who assembled subject matter experts in all of the relevant areas to discuss and develop plausible courses of action for the MNC-I Commander.

<sup>125</sup> FM 3-24, *supra* note 2, at 1-21.

<sup>126</sup> *Id.* at 5-2 to 5-3.

<sup>127</sup> *Id.*

<sup>128</sup> While the LoW, using the Geneva Conventions as the main body of that law, is a standard that world opinion confers legitimacy and recognizes as complying with the LoW, ultimately it is the population of a host nation that offers legitimacy to the aims of military forces operating on its territory. For instance, a population may expect forces operating on its territory to

entails persuading the host nation's forces conducting COIN operations to comply with the same international laws and norms.

In Iraq, the effort to create an effective government was complicated as a result of the abuses by governmental officials that were taking place in Iraqi prisons.<sup>129</sup> Allegations of abuse by Iraqi police officers<sup>130</sup> and rampant corruption within both the national and provincial governments eroded popular trust in Iraqi government institutions.<sup>131</sup> To combat these abuses and corruption, MNC-I utilized resources as varied as civil affairs, psychological operations, and information operations. Multi-National Corps-Iraq also aggressively pushed the use of Police in Transition Teams (PiTTs) and Military in Transition Teams (MiTTs) in an attempt to control security force abuses at local levels.<sup>132</sup> Multi-National Corps-Iraq also pressed the Government of Iraq to confront the endemic corruption that plagued the Iraqi system.<sup>133</sup>

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follow laws which are more stringent than Geneva's basic protections in order to avoid trampling on what the population views as their rights. Additionally, even within the host nation's population legitimacy for military forces is ultimately about perspective. As an example, if an individual thinks that everyone in a particular sect in the host nation should be killed than the fact that a military force operating in the country doesn't focus operations on eliminating that sect may prevent that individual from viewing that military force as legitimate. To reconcile different perspectives, COIN doctrine by definition seeks to strengthen a legitimate national government while preventing alienation of the population even if this effort may require the military forces to operate in a manner which is more restrictive than the basic protections of the LoW.

<sup>129</sup> See Erica Goode, *U.N. Urges Iraq to Address Human Rights During Lull*, N.Y. TIMES, Mar. 16, 2008, available at <http://www.nytimes.com/2008/03/19/world/middleeast/19iraq.html>.

<sup>130</sup> See David Johnston, *U.S. Struggles to Tutor Iraqis in Rule of Law*, N.Y. TIMES, Feb. 16, 2008, available at <http://www.nytimes.com/2008/02/16/world/middleeast/16justice.html>.

<sup>131</sup> See Alissa J. Rubin, *Iraqi Trade Officials Ousted in Corruption Sweep*, N.Y. TIMES, Sept. 23, 2008, available at <http://www.nytimes.com/2008/09/24/world/middleeast/24iraq.html>.

<sup>132</sup> These MiTTs and PiTTs were initially pushed forward by the Iraq Study Group's findings in December of 2006. Recommendation 57 stated,

Just as U.S. military training teams are imbedded within Iraqi Army units, the current practice of imbedding U.S. police trainers should be expanded and the numbers of civilian training officers increased so that teams can cover all levels of the Iraqi Police Service, including local police stations. These trainers should be obtained from among experienced civilian police executives and supervisors from around the world. These officers would replace the military police personnel currently assigned to training teams.

See James A. Baker, III et al. (James A. Baker, III Inst. for Pub. Pol'y (Dec. 2006), available at [http://www.bakerinstitute.org/publications/iraqstudy\\_group\\_findings.pdf](http://www.bakerinstitute.org/publications/iraqstudy_group_findings.pdf).

<sup>133</sup> See U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ (Sept. 2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA487170&Location=U2&doc=GetTRDoc.pdf>; see also Glenn Kessler, *Ex-Investigator Details Iraqi Corruption*, WASH. POST, Oct. 5, 2007, available at <http://www.washingtonpost.com/wp-dyn/content>

As noted earlier, the MNC-I OSJA decided to create a Rule of Law Division, which operated separate and apart from the Op Law Division, during this phase of operations. This new division consisted of Op Law JAs who had previously provided legal advice and analysis on kinetic operations. The increased emphasis on compliance with Iraqi law, on topics ranging from detention operations to the constitutional question of the prime minister's power to control branches of the security forces or his ability to fire government officials,<sup>134</sup> necessitated the creation of a division with expertise in Iraqi law and indigenous rule of law institutions. Operational Law JAs whose primary focus was on U.S. kinetic operations could not maintain the knowledge base necessary to continuously answer rule of law questions. As the Rule of Law Division stood-up, Op Law worked hand in hand with rule of law to provide a seamless transition ready to answer all questions coming to the corps legal office from the divisions and staff sections.<sup>135</sup> During this phase, MNC-I Op Law and rule of law JAs were consulted so frequently to explain various aspects of Iraqi law, it sometimes seemed they were required to be "barred" to practice law in Iraq.<sup>136</sup>

In hindsight, the MNC-I OSJA could have approached the issue of responding to the needs of the COIN campaign in the inpatient care phase differently. The existence of two distinct legal sections resulted in periodic miscommunication. The two independent branch chiefs had slightly different work priorities and mission focus; although JAs within the rule of law and Op Law divisions often worked closely together because many issues did not fit neatly within one section or the other and were best resolved by utilizing the expertise of both of these sections. Operational Law JAs might consider an alternative to deploying with two distinct sections. With extensive pre-deployment preparation and by maintaining the flexibility required to shift priorities and personnel at the proper time, it is possible to deploy with a single Op Law Division under one branch chief and two separate but coexisting teams—a

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/article/2007/10/04/AR2007100401305.html.

<sup>134</sup> See Timothy Williams & Mudhafer al-Husaini, *Iraqi Local Counsel Rejects Premier's Police Appointee*, N.Y. TIMES, Jan. 17, 2009, available at <http://www.nytimes.com/2009/01/18/world/middleeast/18iraq.html>

<sup>135</sup> This transition meant the Rule of Law Division took over the responsibility for the monthly travel requirement to provide legal training on Iraqi law to MiTTs and PiTTs arriving in Iraq in support of anti-corruption efforts. While at the same time the Op Law Division supported MNC-I's efforts to use MiTTs and PiTTs by providing legal advice to teams in southern Iraq that coordinated with the Op Law JA in Basra. Even after the transition, many rule of law questions continued to come to the Op Law Division because the embedded Op Law JAs within the different staff sections of MNC-I continued to be the face of the OSJA to those staff sections. Over time, as Op Law JAs became more familiar with rule of law by receiving assistance and working with the Rule of Law Division, they were able to answer those questions directly.

<sup>136</sup> Iraqi lawyers receive bachelor of laws (LL.B.) degrees from a university. The only prerequisites for practicing law in Iraq are a law degree and payment of dues to the Iraqi Bar Association; however, the Bar Association does not actually provide a 'license' for Iraqi attorneys.

traditional or kinetic Op Law team and a capacity-building or rule of law team. This method has the benefits of clearer lines of communication and a single chain of command when issues need to be addressed at a higher level, as well as a unity of effort between rule of law and traditional Op Law personnel.

### 3. Civilian Agencies on the Battlefield

*“Whenever possible, civilian agencies or individuals with the greatest applicable expertise should perform a task.”*<sup>137</sup>

Counterinsurgency doctrine dictates that civilian agencies perform tasks that are part of their specific mission set and expertise rather than members of the military.<sup>138</sup> By using civilians, COIN commanders can take advantage of subject matter experts and resources available to civilian agencies. The presence of civilians on the battlefield also helps demilitarize the COIN operation in the eyes of host nation citizens. This demilitarization helps strengthen the political reconciliation necessary to achieve comprehensive success in a COIN operation.<sup>139</sup> Civilian agencies working with the host nation’s government provide legitimacy for the government’s aims and decrease the legitimacy of the insurgency itself.<sup>140</sup>

For JAs, interaction with civilian agencies often raises a host of questions, such as: Can civilian agents utilize military assets for command and control? Can military forces protect civilian agencies? If so, to what extent? How can military forces work with non-governmental organizations, such as the International Committee of the Red Cross (ICRC) or the U.N. Assistance Mission–Iraq? Operational Law JAs must understand U.S. regulations with regards to receiving support from or supplying support to these organizations, including manpower, maneuver, and technical support.<sup>141</sup> Operational Law JAs must also be aware of the host nation’s laws to make sure that actions taken by civilian agencies do not open their employees up to criminal or civil prosecution under host nation laws. Finally, Op Law JAs support commanders in this endeavor by understanding the legal basis for military operations in the host nation and determining when cooperation between

military forces and civilian agencies is permissible under the authorization to operate in the country.<sup>142</sup>

Civilians were an integral part of MNC–I’s operations and planning effort during this phase of operations. A number of civilians attended JPTs held by various staff sections: federal law enforcement agents sat in on detention operations JPTs; State Department personnel opined on issues involving northern Iraq; and Provincial Reconstruction Team (PRT) members offered expertise on engineering and civil reconstruction projects.<sup>143</sup> One example of how commanders at various levels also incorporated the advice of civilians was the use of law enforcement professionals, who helped Iraqi security forces, partnered with U.S. forces, to create and prepare criminal case files on insurgents for prosecution in the Iraqi court system.<sup>144</sup> Multi-National Corps–Iraq also worked with civilians from international organizations, such as the ICRC, which inspected detention facilities across Iraq to ensure they complied with international standards.

At MNC–I, Op Law JAs strived to maximize the use of civilian agencies and contractors and succeeded by following a number of approaches.<sup>145</sup> For instance, MNC–I provided contractors with training packets on the RUF for

<sup>137</sup> FM 3-24, *supra* note 2, at 2-9.

<sup>138</sup> *Id.* Additionally, civilian agencies do not bring a martial presence during interactions with host nation populations. This helps decrease the heavy footprint that a military can have on a host nation’s soil.

<sup>139</sup> *Id.* at 2-4.

<sup>140</sup> *Id.*

<sup>141</sup> See generally CTR. FOR LAW & MILITARY OPERATIONS, U.S. GOVERNMENT INTERAGENCY COMPLEX CONTINGENCY OPERATIONS ORGANIZATIONAL AND LEGAL HANDBOOK (24 Feb. 2004) [hereinafter CLAMO CONTINGENCY OPERATIONS].

<sup>142</sup> During U.S. operations in Kosovo in 1999, JAs, looking at both the authority under the North Atlantic Treaty Organization’s OPLAN for Operation Joint Guardian and the UN Participation Act, were able to allow the U.S. task force in the Kosovo peacekeeping operation to provide transportation, security, and facility support to the International Criminal Tribunal for the Former Yugoslavia. See CTR. FOR LAW & MILITARY OPERATIONS IN KOSOVO: 1999–2001 LESSONS LEARNED FOR JUDGE ADVOCATES (15 Dec. 2001); see CLAMO CONTINGENCY OPERATIONS, *supra* note 141.

<sup>143</sup> Having Provincial Reconstruction Team (PRT) members on some of these JPTs was particularly useful because the PRTs were heavily reliant on military transportation assets to accomplish the missions they had been tasked to achieve. By learning their limits and requirements military planners could better account for what assets would be needed to help accomplish both their mission and the militaries mission.

<sup>144</sup> See, e.g., Captain Ronald T. P. Alcala, *Prosecution Task Forces and Warrant Applications in Multinational Division–Center*, in THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., CTR. FOR LAW & MILITARY OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 291–93 (2009). Judge advocates at MNC–I Rule of Law Division worked to develop prosecution task forces at various levels of command throughout MNC–I. These prosecution task forces incorporated the experience and knowledge of lawyers, police officers, Soldiers, and civilians with the goal of developing the necessary procedures that Iraqi security force members needed to take a case from investigation all the way to prosecution in an Iraqi court of law.

<sup>145</sup> United States military commanders were attempting to maximize the use of civilian agencies and contractors because they were trying to reduce the U.S. Armed Forces footprint without losing the level of support provided to the Iraqi Government. Using contractors can be a politically sensitive issue and some commanders may be frustrated with the prospect of having to spend money to achieve objectives perfectly within the capabilities of U.S. servicemembers. Commanders should consider, however, the strategic impact that a large troop presence has on a host nation during a COIN operation.

their own use.<sup>146</sup> Department of Defense (DoD) civilian workers were also provided with emergency jurisdiction cards explaining their status under the U.S.-Iraq SA in case they were detained by Iraqi security forces.<sup>147</sup> Multi-National Corps-Iraq Op Law JAs additionally worked with MNF-I on interpreting the SA<sup>148</sup> in order to afford Coalition forces maximum flexibility while operating under a new legal framework in Iraq. In Basra, the MNC-I Op Law JA even helped organize military transportation from the Forward Operating Base (FOB) so civilian PRT personnel could complete their missions.<sup>149</sup>

The inpatient care period of a COIN can set the conditions for continuing success. If the COIN force fails to establish a firm foundation upon which the host nation can build, it becomes exceedingly difficult to achieve sustainable security. Operational Law JAs can use their training in international law and legal reasoning to develop innovative solutions for the commander. By shifting the focus from kinetic operations to capacity building, expanding the emphasis on the rule of law, and utilizing civilian expertise, Op Law JAs can provide significant input for commanders and their staffs at various levels during this crucial phase. As noted in this section, MNC-I JAs discovered this firsthand in Iraq by ensuring all the staff sections were focused on conducting operations “by, with, and through” the Iraqi security forces; by creating a distinct Rule of Law Division focused on developing and fostering Iraqi rule of law projects;<sup>150</sup> and by recommending that civilian experts work in the planning sections and on the ground with tactical units to serve as force multipliers. These examples demonstrate how Op Law JAs can and should plan ahead during COIN operations. Such forethought can prove decisive in the final phase of COIN: the movement to self-sufficiency.

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<sup>146</sup> Headquarters, MNC-I, OPORD 08-02, at tab G (rules for the use of force for contractors) to app. 11 (rules of engagement) to annex C (operations) (10 May 2008).

<sup>147</sup> The jurisdictional card given to Department of Defense (DoD) civilians was similar to those issued to servicemembers. See *infra* note 178.

<sup>148</sup> Security Agreement, *supra* note 46. The SA was an overarching agreement that had general provisions that provided guidance on the continued U.S. presence in Iraq.

<sup>149</sup> In Basra, the Rule of Law Division of the PRT was led by U.S. State Department members working under the British Foreign Commonwealth Office. As a result, U.S. PRT members relied on the U.K. military forces for security when traveling off the FOB. One of the Op Law JAs working down in Basra helped the PRT members more effectively utilize British military forces to get off the FOB on a regular basis.

<sup>150</sup> In addition, those JAs working in rule of law were able to share with the MNC-I staff sections the unique perspective of Iraqi lawyers, judges, judicial protections officers, prison wardens, police officers, and political figures they came into contact with during their efforts to strengthen the rule of law in Iraq.

## C. Outpatient Care—Movement to Self-Sufficiency

*“Unless these men were faced with the urgency of a time limit, there would always be procrastination. As long as Britain held power it was always possible to attribute failure to her. Indians must be faced with the fact that in a short space of time they would have responsibility thrust upon them.”*<sup>151</sup>

The final stage of COIN operations involves the least amount of conventional military involvement; however, it can be the most fragile stage of a COIN struggle.<sup>152</sup> As the host nation begins to formally take control over its territory, military forces from other nations assisting in the COIN fight must begin to reduce their presence.<sup>153</sup> While this process occurs, there is always the possibility for fall back if the host nation’s forces are unable to take control without the benefit of those external military forces assisting in the COIN.<sup>154</sup>

In the outpatient care phase, Op Law JAs are intimately involved in defining, interpreting, and implementing the long-term relationship between the host nation and the nations assisting in the COIN. During the development of this relationship with the host nation, Op Law JAs must assist non-domestic military forces respect the host nation’s sovereignty by restraining their application of force. These military forces must allow the host nation’s fledgling government to develop its security and stability resources. The role of Op Law JAs in this phase is to assist the COIN force in providing the host nation’s government the flexibility and leeway to administer its countries problems in its own way through its own resources and legal mechanisms.

The XVIII ABN Corps OSJA was wrapping up its deployment during the initial stages of the outpatient care phase in Iraq. Notwithstanding the fact that the XVIII ABN Corps was not present for the duration of the outpatient care phase, the signing of the SA, can serve as an example of what types of issues Op Law JAs will face trying to define, interpret, and implement a long-term relationship with the host nation during the final phase of a COIN operation. Shifting the emphasis to host nation sovereignty and responsibility during this final stage of a COIN can create a critical foundation for the continued development of stability and security in the host nation.<sup>155</sup>

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<sup>151</sup> MANMATH NATH DAS, PARTITION AND INDEPENDENCE OF INDIA—INSIDE STORY OF THE MOUNTBATTEN DAYS 29 (1982). This quote from Clement Richard Attlee, Prime Minister of Britain from 1945–1951, regarded the need to announce a deadline for the transfer of power from the British RAJ to an independent and national Indian Government.

<sup>152</sup> FM 3-24, *supra* note 2, at 1-27.

<sup>153</sup> *Id.* at 5-25.

<sup>154</sup> *Id.* at A-5.

<sup>155</sup> I Corps OSJA received the mission to continue building success in the outpatient care phase of the Iraqi COIN. As they complete their tour, their

## 1. The U.S.-Iraq Security Agreement

*“The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.”*<sup>156</sup>

The signing of the SA proved to be one of the most interesting and unique legal issues faced by the MNC-I OSJA.<sup>157</sup> As Thanksgiving 2008 approached, rumors circulated that the SA, which would allow U.S. forces to stay in Iraq past the expiration of the UNSCR, was going to pass the Iraqi Council of Representatives<sup>158</sup> (COR).<sup>159</sup> The expiration of the UNSCR meant that the Government of Iraq would exercise full sovereignty over the country. This transfer of authority would occur as weekly attacks were dropping below a hundred per week for the first time since 2004.<sup>160</sup> Nevertheless, the passage of the SA and the requirement to conduct all operations in partnership with Iraqi security forces<sup>161</sup> created a new burden for MNC-I. The SA truly put the onus on Iraqi security forces to take responsibility for the security in their country. Separately, U.S. commanders at every level wanted to know whether this new legal framework for operations created any new risks or challenges for their servicemembers. All the MNC-I staff sections prepared for this major change in the Iraqi operational scheme; however, the MNC-I Op Law Division played a primary role in guiding staff sections with respect to the implementation of the SA.

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experiences, techniques, and solutions to some of the difficult questions faced during this phase of the operation may prove to be the final chapter of this look into Op Law as it relates to COIN Doctrine. We recommend that any students of COIN doctrine who viewed this article as useful read the after action reports and articles that will inevitably follow I Corps's successful tour.

<sup>156</sup> FM 3-24, *supra* note 2, at 1-27.

<sup>157</sup> It is important to note that the MNC-I OSJA was not closely involved with the negotiations that led to the SA. Those negotiations were led by attorneys at MNF-I, the DoD, and the Department of State. While MNC-I JAs provided comments during the negotiation stage on different rough drafts of the SA, the MNC-I OSJA's primary function was with the implementation of the SA across all coalition forces and foreign contractors in Iraq.

<sup>158</sup> The Iraqi Council of Representatives is the national level legislative body currently comprised of 275 members from various ethnic and religious sects of Iraqi society.

<sup>159</sup> See Security Agreement, *supra* note 46. This was an incredibly difficult period for Op Law JAs at all levels, because commanders wanted guidance so they could train and prepare their servicemembers for the new operating environment. Operational Law JAs had to tread a fine line. On the one hand, JAs at MNC-I had to be able to articulate why this new agreement would result in few to no changes in the process and procedures employed by the servicemembers on the ground since the beginning of the Iraq conflict under the authority of the UNSCR. However, on the other hand, the Op Law JAs had to impress upon the corps staff that the SA was a major and fundamental change in the legal framework of operations within Iraq so as to ensure all sections adequately planned for the implementation of the agreement.

<sup>160</sup> See U.S. DEP'T OF DEF., REPORT TO CONGRESS, MEASURING SECURITY AND STABILITY IN IRAQ, *supra* note 76.

<sup>161</sup> See *supra* note 46.

The MNC-I Op Law JAs worked closely with the MNF-I OSJA to define and interpret all the sections of the SA in a way that would provide maximum flexibility to operational commanders. Subordinate units and MNC-I staff sections sought the advice of Op Law JAs as to how the SA would affect their activities.<sup>162</sup> However, pushing information out to units so that servicemembers at all levels would feel confident and comfortable operating within the new legal framework created by the SA was a challenge. The two areas in particular that caused the most concern and required the most operational legal analysis were the possibility of Iraqi jurisdiction over U.S. servicemembers and the need for Iraqi involvement in the approval of U.S. military operations.<sup>163</sup> The MNC-I Op Law JAs took a two-tiered approach to each of these issues. First, they interpreted the agreement in a manner consistent with its language but favorable to U.S. goals. Second, they provided servicemembers with a tangible product to assist them in understanding and operating within the new legal framework. Two subjects addressed in the SA—military operations and jurisdiction—serve to illustrate how the MNC-I Op Law Division approached the implementation of the new legal framework.

### a. Military Operational Approval Under the SA

*“All such military operations that are carried out pursuant to this Agreement shall be conducted with the agreement of the Government of Iraq. Such operations shall be fully coordinated with Iraqi authorities.”*<sup>164</sup>

A plain reading of the language from article 4(2) of the SA would appear to severely hinder the flexibility and initiative of U.S. commanders. As the U.S.-Iraqi bilateral committees,<sup>165</sup> which were responsible for interpreting and

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<sup>162</sup> For example, the targeting section at MNC-I met with Op Law JAs to establish what impact the SA had on their ability to approve individual targets for contingency operations vis a vis article 4 of the SA which requires coordination and approval by the government of Iraq for military operations.

<sup>163</sup> Security Agreement, *supra* note 46. There are numerous sections of the SA that raised concerns with commanders and operational planners; however, during the XVIII ABN Corps tenure, these issues were the ones that required immediate and rapid attention. Again, in looking at a holistic view of the Iraq COIN operation, one should consider the additional lessons learned by the I Corps OSJA when evaluating or planning for the outpatient phase of COIN operations.

<sup>164</sup> *Id.*

<sup>165</sup> “The coordination of all such military operations shall be overseen by a Joint Military Operations Coordination Committee (JMOC) to be established pursuant to this Agreement. Issues regarding proposed military operations that cannot be resolved by the JMOC shall be forwarded to the Joint Ministerial Committee.” *Id.* art. 4. Since the SA was not approved by the Government of Iraq until early December 2008, less than thirty days before it would go into effect, there was not enough time for the United States and their Iraqi counterparts to establish these committees. Basic questions as to who would be on these committees, or where and how often these committees would meet were still unanswered by 1 January 2009 when the SA was suddenly in full effect across Iraq. Even well after 1

defining the terms of the SA, were not functioning immediately after the adoption of the SA, it fell to Op Law JAs from MNC-I and MNF-I to provide a reasonable interpretation of this section to commanders. Mindful of the SA, commanders sought advice from the legal offices at MNC-I and MNF-I on how to conduct operations in their respective battlespaces without violating the terms of the SA and without coming into conflict with the Iraqi security forces operating alongside U.S. forces. The MNC-I Op Law Division worked hard to limit the impact of article 4(2) on U.S. military operations in Iraq.

First, per the language of the SA, article 4 only applies to “military operations.”<sup>166</sup> While the MNC-I and MNF-I Op Law JAs’ specific interpretation of what the term “military operations” encompassed continues to remain classified, it is important to note that the Op Law JAs at both MNC-I and MNF-I viewed this term as a limitation on the scope of operations that required agreement and coordination with Iraqi authorities.<sup>167</sup> In other words, U.S. commanders, planning operations that could not reasonably be characterized as military operations based on guidance from MNC-I and MNF-I, were not required to seek prior approval or coordinate with Iraqi authorities. Notwithstanding the limitation of article 4’s application to military operations, the MNC-I Op Law JAs advised subordinate units and commanders to empower and facilitate the development of Iraqi security forces by planning and coordinating as many of their operations as possible with their Iraqi counterparts.<sup>168</sup>

Article 4 also requires that all military operations be “conducted with the agreement of the Government of Iraq. Such operations shall be fully coordinated with Iraqi authorities.”<sup>169</sup> United States commanders in Iraq expressed concern that this provision would require coordination with multiple layers of bureaucracy within the Iraqi chain of command in order to conduct operations in a responsive and timely fashion. In response, Op Law JAs at MNC-I

examined the language and determined that the SA did not specify the level of coordination or agreement required prior to conducting military operations. Since MNC-I’s guidance was to conduct all operations “by, with, and through” the Iraqi security forces, MNC-I Op Law JAs advised commanders to continue conducting operations in the same manner as they had prior to implementation of the SA. In other words, U.S. commanders conducting operations “by, with, and through” the Iraqi security forces, were de facto seeking the agreement of and coordinating with the Iraqi Government.<sup>170</sup>

As noted earlier, Op Law JAs also created products to assist servicemembers in the field adjust to the different legal challenges and concerns in Iraq as a result of the SA. For example, MNC-I JAs created a *Leader’s Guide to the Security Agreement* tri-fold and two SA training presentations to help commanders and servicemembers understand article 4 of the SA. The *Leader’s Guide* was a quick reference sheet providing basic information on the SA. One of the presentations was an unclassified brief and the other a classified brief detailing exactly how the operating environment in Iraq had changed as a result of the SA. These products provided a vast amount of information on the SA and included specific information about interacting and operating alongside Iraqi security forces.<sup>171</sup>

United States commanders are rightfully cautious about placing the approval of their operations in the hands of a fledgling host nation security force; however, during the outpatient phase of COIN, it is important to focus commanders and staff members on the transition from combat to sustainment operations and the goal of legitimizing the new host nation government. By interpreting future agreements like the SA in a manner that fosters decision-making at lower levels among parallel U.S. and host nation commanders, Op Law JAs can achieve the twin goals of bolstering the legitimacy of host nation

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January 2009, these committees were not particularly well-staffed by Iraqi counterparts from their military and governmental structure.

<sup>166</sup> *Id.*

<sup>167</sup> Multi-National Force-Iraq and MNC-I classified many of their interpretations of the SA, not because this information affected any specific sources or methods of U.S. intelligence collection, but rather because the U.S. Government was engaging in high level negotiations with the Iraqi government as to the interpretation and implementation of this SA. In order to protect the integrity of those negotiations as well as to prevent the Iraqi government from drawing any negative inferences from the MNF-I and MNC-I interpretations of the SA for the purposes of immediate implementation, U.S. forces kept certain interpretations at a classified level.

<sup>168</sup> As stated previously in this article, one of the overall goals of COIN is to provide legitimacy to the host nation government. By allowing Iraqi commanders to take the lead in all operations, U.S. forces facilitated legitimacy for these commanders both in the eyes of the populace and the Iraqi servicemembers who served in their command. See generally FM 3-24, *supra* note 2, at 1-21

<sup>169</sup> Security Agreement, *supra* note 46, art. 4.

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<sup>170</sup> In article 4 of the SA, there are provisions for handling disputes between Iraqi and U.S. officials that commanders could utilize in the event there was a disagreement as to whether U.S. forces had the authority to conduct certain types of operations. It was the goal of both U.S. and Iraqi forces to avoid elevating issues to the highest diplomatic levels. Consequently, U.S. commanders continued to conduct military operations by, with, and through their parallel or mirror commanders to great effect without having to resort to high-level negotiations.

<sup>171</sup> For the two SA PowerPoint training presentations, MNC-I Op Law JAs provided detailed notes for each presentation with the intent that JAs and leaders at all levels could take the presentations and use them to train their servicemembers. The *Leader’s Guide to the SA* tri-fold was a quick reference sheet that contained the MNC-I Commander’s guidance for operating under the SA and information that would be useful to leaders when they had questions about situations on the ground and needed quick answers. In order to ensure maximum distribution, these products were available for download on the MNC-I web portal. In addition, MNC-I Op Law and rule of law JAs administered SA training to units upon request. Furthermore, utilizing the FRAGO process, all servicemembers in Iraq were required to carry the *Leaders Guide to the SA* tri-fold on their persons when they were outside of U.S.-controlled operating bases.

security forces and protecting the commanders' interest in maintaining operational flexibility.

*b. Jurisdiction Under the SA*

*"Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status."<sup>172</sup>*

Article 12 of the SA on first impression appeared to provide Iraq with a great deal of authority over U.S. servicemembers, and commanders wanted to know how they should respond if Iraqi security forces attempted to arrest a U.S. servicemember. Since the U.S.-Iraqi bilateral committees, as mentioned earlier, were not functioning immediately after the adoption of the SA, MNC-I and MNF-I Op Law JAs were responsible for interpreting the terms of article 12. They interpreted three specific sections of this article in a manner that would provide the maximum amount of protection for U.S. servicemembers, while still promoting the outpatient care goals of the COIN fight at this stage.

First, article 12 states that Iraq maintains jurisdiction over U.S. servicemembers only for "grave premeditated felonies enumerated pursuant to paragraph 8."<sup>173</sup> Thus, Iraqi security forces could only arrest and prosecute U.S. servicemembers for the suspected commission of certain grave premeditated felonies. However, because the committees responsible for determining which felonies qualified for Iraqi jurisdiction over U.S. forces still did not exist, MNC-I Op Law JAs advised commanders that until such a list was promulgated, Iraq could not assert jurisdiction over U.S. forces.

Next, article 12 states that in order to fall within the ambit of Iraqi jurisdiction, the crime must have been committed outside of a U.S. operating base by a servicemember not on duty status.<sup>174</sup> This provision circumscribed the scope of Iraqi jurisdiction, and commanders could thus limit servicemembers' exposure to this jurisdiction by ensuring that servicemembers only left U.S. bases when they were on official business.<sup>175</sup> The MNC-I Op Law Division also advised commanders that servicemembers traveling outside U.S. facilities on official business should always be in the official duty uniform and never in civilian clothing.

Lastly, article 12 provides that, when Iraq exercises jurisdiction pursuant to the SA, "members of the U.S. forces and of the civilian component shall be entitled to due process standards and protections consistent with those available under U.S. and Iraqi law."<sup>176</sup> This language was viewed by OP Law JAs at MNC-I and MNF-I as providing a catchall protection for U.S. servicemembers. Op Law JAs advised commanders that Iraq could assert its jurisdiction over U.S. servicemembers only in a way that was consistent with the criminal procedure protections present within the U.S. Constitution.<sup>177</sup> If Iraq did not offer criminal procedure protections that were consistent with the U.S. Constitution, then Iraq could not arrest or prosecute a U.S. servicemember under the plain language of the SA.

In addition to interpreting and providing guidance on the SA, MNC-I Op Law JAs produced tangible reference guides to inform both commanders and individual servicemembers of jurisdiction and due process protections under the SA. Operational Law JAs also created a guide to inform Iraqi security forces of their jurisdictional constraints over U.S. servicemembers under the SA. The finished product took the form of a card, which became known as the "Emergency Jurisdictional Chit."<sup>178</sup> The jurisdictional chit

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<sup>172</sup> Security Agreement, *supra* note 46, art. 12. Paragraph 8 of the Security Agreement reads,

Where Iraq exercises jurisdiction pursuant to paragraph 1 of this Article, members of the United States Forces and of the civilian component shall be entitled to due process standards and protections consistent with those available under United States and Iraqi law. The Joint Committee shall establish procedures and mechanisms for implementing this Article, including an enumeration of the grave premeditated felonies that are subject to paragraph 1 and procedures that meet such due process standards and protections. Any exercise of jurisdiction pursuant to paragraph 1 of this Article may proceed only in accordance with these procedures and mechanisms.

*Id.*

<sup>173</sup> *Id.*

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<sup>174</sup> *Id.*

<sup>175</sup> Though the specific guidance given to commanders after the implementation of the SA regarding the conditions for when servicemembers could leave coalition bases and for what purposes is classified, the plain language of SA provides a common sense approach. Simply stated, as long as servicemembers were conducting official business whenever they were outside of U.S. bases, they were sufficiently limiting their exposure to Iraqi jurisdiction.

<sup>176</sup> *Id.*

<sup>177</sup> Again, the committees responsible for establishing joint procedures that would ensure compliance with the processes and procedures present in the U.S. criminal justice system were not yet established when the SA came into effect. Consequently, MNF-I and MNC-I Op Law JAs viewed this particular section of article 12 as a limit on Iraqi jurisdiction until such procedures could be established. The final determination as to the procedures developed by these committees during I Corps tenure in Iraq would be instructive for future COIN operations with similar jurisdictional questions that will inevitably spring up during the outpatient phase.

<sup>178</sup> The card became known as the 'Emergency Jurisdictional Chit,' because it was seen as an important document for servicemembers to carry with them at all times. Similar to the 'blood chits' carried by pilots during armed conflicts, which encouraged the local population to assist in the return of a

was a two-sided card containing information in English and Arabic that described Iraqi jurisdiction under the SA. It instructed Iraqi security force members to return seized U.S. servicemembers to a coalition base and to work out jurisdictional issues through the bilateral committee system as provided in the SA. The Emergency Jurisdictional Chit, like the ROE card, eventually became one of the documents every servicemember was required to carry with them when they left coalition bases. Many small units even required servicemembers to present the jurisdictional chit during pre-combat inspections and rehearsed how to use the jurisdictional chit if detained by Iraqi security forces.

Though the SA is unique to the Iraq theater of operations, it is likely that future COIN operations will include a legal framework similar to the SA during the outpatient care phase. Operational Law JAs must be prepared to draft as well as interpret agreements between the United States and a host nation involved in a COIN that establish a new legal framework for operations.<sup>179</sup> Under any legal framework, the extent of host nation jurisdiction over U.S. servicemembers will always be a central concern.<sup>180</sup> By interpreting agreements in a way that is consistent with the plain language of the document yet still supportive of U.S. goals, Op Law JAs can prevent jurisdictional issues from muddying operational planning and mission execution. In addition, designing a tangible product, like the jurisdictional chit that provides servicemembers with a means of protecting themselves from jurisdictional overreaching by a host nation, can be valuable.<sup>181</sup>

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pilot who was shot down, the jurisdictional chit instructed Iraqi security forces to return U.S. servicemembers to their bases. *See generally* R.E. BALDWIN, *THE LAST HOPE: THE BLOOD CHIT STORY* ((1997). However, unlike a blood chit, the jurisdictional chit provided no reward for the return of a U.S. servicemember to a base and instead cited the provisions of the SA as authority for the speedy return of any U.S. servicemember to his or her base.

<sup>179</sup> During negotiations, Op Law JAs should analyze historical legal frameworks negotiated during past operations that help inform any current negotiations. Once a new agreement is in place, Op Law JAs must be able to interpret and provide a clear understanding of the agreement to their commanders identifying and explaining any legal concerns.

<sup>180</sup> There is a growing perception among the international community, whether justified or not, that U.S. forces prosecute wars indiscriminately against civilians within the host nation. This perception is something that our leaders, planners, and Op Law JAs must be prepared to deal with when negotiating and implementing future agreements like the SA in Iraq. Future host nations will inevitably want to expand their jurisdiction over U.S. servicemembers. By adopting an approach similar to that described in this article, Op Law JAs can provide their commanders with a significant level of protection against unnecessary risk to the servicemembers within their command. *See* Sayed Salahuddin, *Air strike Killed 37 Afghan Civilians*, REUTERS, Nov. 9, 2008, available at <http://www.reuters.com/article/latestCrisis/idUSISL410925>; David Zucchino, *'The Americans . . . They Just Drop Their Bombs and Leave,'* L.A. TIMES, June 2, 2002, at A2; BBC, *Children Die in Afghan Air Raid*, BBC, June 18, 2007, available at <http://news.bbc.co.uk/2/hi/6762549.stm>.

<sup>181</sup> An anecdotal but important lesson learned by the XVIII ABN Corps Op Law JAs during the development of the jurisdictional chit was to vet this product, which had instructions in Arabic and English, through multiple

The outpatient phase of a COIN is undoubtedly the most challenging for U.S. Armed Forces. Instead of overwhelming the enemy by force and speed, U.S. servicemembers must patiently support a nascent host nation government as it slowly increases its military strength and domestic legitimacy.<sup>182</sup> Operational Law JAs must be proactive and provide advice to commanders that ensures the safety of servicemembers, while, at the same time, bolstering the legitimacy of the host nation's government. By succeeding in the outpatient stage of a COIN, U.S. forces can set the conditions that will lead to lasting security for the host nation.<sup>183</sup>

#### IV. Conclusion

As is the case for all COIN conflicts, the COIN in Iraq will undoubtedly be unique when compared to future conflicts. However, the experiences faced by the Op Law JAs of the XVIII ABN Corps, during their tour in Iraq from 2008–2009, can provide a valuable primer for those attorneys who will face the dynamic legal challenges of future COIN environments. Using this case-study in the planning and execution of future COIN operations, will allow Op Law JAs to use their unique and important legal perspective to further their commander's COIN goals.

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Arabic speakers to determine the colloquial meaning of the phrases used on the chit. After completion of the jurisdictional chit, an Arabic-speaking rule of law JA at XVIII ABN Corps discovered that the classification markings on the Arabic side of the card read 'Unofficial' instead of 'Unclassified for Official Use Only.'

<sup>182</sup> FM 3-24, *supra* note 2, at 1-27.

<sup>183</sup> Ultimately the goal for any COIN is this simple explanation regarding British operations in Malaysia, "The real achievement in Malaya was not simply that the British mounted an effective counterinsurgency effort but that they created a durable political, economic and social infrastructure capable of defending and governing the country after they withdrew." THOMAS R. MOCKAITIS, *BRITISH COUNTERINSURGENCY, 1919–60*, at 124 (1990).

Thomas Barnard and James Ewing†

## I. Introduction and Background

Preparing to defend a client suffering from a mental illness or injury presents many unique challenges. Defense counsel are faced with the unenviable reality that the client's conduct—for which he or she has been criminally charged—probably constituted a crime. However, if the client is suffering from a mental illness or injury, he or she may not have had the specific intent, or *mens rea*, required to be found guilty of a criminal offense.<sup>1</sup> This concept is complicated by several key realities. First, judges, jurors, and prosecutors tend to accept the reality of what they can see and prove remaining skeptical of explanations that depend on the internal functioning of the human brain, which are difficult to either prove or disprove. Second, most jurisdictions require a great deal procedurally from an accused presenting a defense of lack of mental responsibility. For example, in military courts-martial a defendant who pleads not guilty by reason of lack of mental responsibility has the burden of proving this by clear and convincing evidence.<sup>2</sup> Since these issues tend to arise as early as the first meeting with the client, defense counsel must be attuned to the unique challenges of representing a client suffering from a mental illness or injury from the

beginning of the representation. Accordingly, this article is focused on practical tips defense counsel should use *prior to trial* to set the stage for the best possible outcome, either at trial or through an alternative disposition prior to trial.<sup>3</sup> This article will not directly address the inherent difficulties in representing mentally ill criminal defendants once the trial has started.

Successfully representing a client who is or may be suffering from a mental illness or injury requires good timing, creativity, and the willingness to approach the task in a manner that may defy the normal progress of a criminal case. The timing, structure, and process of the criminal trial lessen the opportunity for an appropriate result for a mentally ill client as the trial progresses. However, while defense counsel endeavors to achieve a specific result in a case, his approach to preparing the case must be disciplined, organized, and consistent in theme; the evidence and its presentation require the most forward-thinking, careful planning, and creative pre-trial negotiating of any case he will undertake.

This article offers five basic steps for preparing to represent a client with mental illness or injury. This structure comes from personal experience representing clients. While these recommendations were developed within the military court-martial system,<sup>4</sup> the principles are applicable to

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<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULES FOR COURTS-MARTIAL 916(k)(1)-(3) (2008) [hereinafter MCM] (setting out the lack of mental responsibility defense in a court-martial).

<sup>2</sup> *Id.* (explaining that “[t]he accused is presumed to have been mentally responsible at the time of the alleged offense,” and that “[t]his presumption continues until the accused establishes, by clear and convincing evidence, that he or she was not mentally responsible at the time of the alleged offense”). There is a two-step process for a finding of lack of mental responsibility. In the first step, as in any other court-martial proceeding, at the close of the evidence the panel votes on whether the government has “proven the elements of the offense beyond a reasonable doubt.” *Id.* R.C.M. 921(c)(4). If two-thirds of the panel members vote guilty as to this question, in cases where the defense of lack of mental responsibility is raised, a second vote is taken. *Id.* If a majority of the panel votes that the defense has carried its burden of demonstrating “lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results.”

<sup>3</sup> See generally Jeremy A. Ball, *Solving the Mystery of Insanity Law: Zealous Representation of Mentally Ill Servicemembers*, ARMY LAW., Dec. 2005, at 1 (providing a detailed discussion of the many legal aspects of mental health issues in the military).

<sup>4</sup> In order to appreciate the context in which this article is written, it is important to have a basic understanding of how a case moves through the military justice system. There are no standing trial courts in the military; rather, each case must be independently referred to a court-martial trial by the appropriate level of commanding officer. Commanding officers administer the military justice system and are advised by their attorneys, Judge Advocates serving in a prosecutorial role. In a court-martial setting, the initial step is the preferral of charges, or official charging determination, against an accused. This preferral of charges is normally accomplished by the soldier's immediate commander with the prosecuting Judge Advocates drafting the charges for the commander. At each subsequent level of command, each commander has independent discretion to make recommendations as to the disposition of the charges and to potentially dispose of the charges at his or her level short of a formal trial. Prior to an accused standing trial at a General Court-Martial (the military's felony-level court), a pretrial hearing called an Article 32 investigation must also be held. 10 U.S.C. § 832 (2006). The Article 32 investigation may be thought of as the military's equivalent of a grand jury proceeding, with the exception that the accused and defense counsel have a right to be present and put on evidence. Additionally, the hearing is conducted by an Investigating Officer rather than a jury of officers or members. *Id.* § 832(b). After the charges have been through the various levels of command for recommendation without being disposed of, the General Court-Martial Convening Authority, normally a General or Flag officer, will determine whether to refer the case to a trial by court-martial. *Id.* § 834. Understanding this system is important in the context of raising a potential insanity defense because each level of command, reviewing commander,

representation of clients with mental illnesses in any forum. The basic steps to representing this type of client are: (1) identifying potential mental health issues; (2) determining the relevancy of the mental health issues to the proceedings; (3) understanding how the public and potential jurors view mental health defenses; (4) determining the appropriate *time* to raise the mental health issue; and (5) determining the appropriate *method* to raise the mental health issue. This article will discuss each of these five steps in turn.

## II. Identifying Mental Health Issues

The first major step in any type of representation is the initial interview with the client. At this first interview, defense counsel may have little or no collateral information with which to evaluate the client, so the questions asked and the verbal and non-verbal responses will provide critical information about the client's awareness, state of mind, and memory of the relevant facts. The focus of the interview should begin with the general, non-controversial facts before moving on to more detailed facts about the allegation. For instance, begin by asking the client his name, facts about his service history, and details about some of his assignments. These details will indicate the strength of the client's long-term memory and may also indicate the client's combat experience or other assignments that may raise flags for traumatic brain injuries or posttraumatic stress disorder (PTSD). While conducting a client interview, counsel should pay particular attention to any aberrant or strange behavior by the client, such as the inability to form coherent sentences or comprehend concepts, the presence of body tics or inappropriate movements, or the general inability to interact normally with counsel. Counsel's personal observations may become vital in a subsequent request that a mental health expert be added to the defense team.

The interviewer should conduct research regarding the client's educational and training background. Researched facts can later be compared with the personnel records received through discovery as well as the information the client provides in the client questionnaire. Furthermore, the client questionnaire will establish the level of the client's education, will further test the accuracy of client's memory, and will identify portions of the client's history that he may intentionally or inadvertently obscure or leave out altogether.

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prosecuting Judge Advocate, and Article 32 Investigating Officer, represents a separate and distinct audience to which the defense counsel may choose to present the evidence of the accused's mental illness in the hopes of avoiding trial altogether. *See generally* James B. Roan & Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185 (2002) (providing an overview of the Uniform Code of Military Justice (UCMJ)).

The interviewer should question the client about his relationships to identify family and friends and to obtain contact information for those people. The individuals with whom the client regularly associates may be potential points-of-contact to interview about the client. The inclusion of many contacts or friends, or the identification of none, may itself provide another indicator of a problem.<sup>5</sup> With many of the traumatic-response or anxiety illnesses seclusion or isolation can be a symptom.<sup>6</sup> Further, lack of social associates may be evidence that the client has been isolated by others as a result of anti-social behavior and erratic conduct.<sup>7</sup>

After these general background questions, the interviewer should begin asking questions about the occurrences that gave rise to the charges at issue. Again starting with general questions and moving to specific questions, counsel should compare the level of detail that the client reported before and after the incident to the level of detail about the incident itself, and the client's claimed ability or inability to remember details. Many clients will detail facts leading up to a particular action, like a fight. For example, consider a situation that started as a fight, but later led to a stabbing or a shooting. The client may describe where he was, what he was drinking, and what was said before the fight. However, when counsel asks him how the fight started or how it escalated, a client may be unable to explain or even remember the steps or actions as they occurred. This may be a sign that something happened in the initial events that altered the client's state of mind or ability to focus, like a traumatic head injury, which may impact his culpability for subsequent events.<sup>8</sup>

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<sup>5</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 468 (4th ed. 2000) [hereinafter DSM-IV] (noting that feelings of detachment or estrangement, as well as efforts to avoid associations, thoughts, or "conversations associated with the trauma" can be evidence of the "persistent avoidance" diagnostic criteria for PTSD). For a military member, everyone the soldier comes into contact with may remind him or her of the battlefield traumatic event. For example, after a combat tour soldiers may be given a school assignment as an instructor in an attempt to give that soldier a break from field duty, as well as let him share with students the lessons he learned. If this returning soldier is suffering from PTSD, he could essentially be asked to relive and talk about experiences on a daily basis. This may lead to poor performance, missing work, or not associating with other people at work.

<sup>6</sup> *Id.*

<sup>7</sup> The isolation factors alone are not enough to find that someone has PTSD. The fourth edition of the Diagnostic Statistical Manual (DSM-IV) covers diagnostic criteria for all the recognized mental illnesses and lays out requirements for the diagnostic criteria of each. *See id.* For instance, while isolation from others may point toward an anxiety disorder like PTSD, it may also point to a personality disorder, such as schizoid personality disorder. *Id.* at 308, 468. The implications and causes of both disorders differ greatly, and understanding that is critical to deciding the best use of a diagnosis at trial.

<sup>8</sup> "Physical trauma to the head can cause a variety of cognitive problems, including memory loss, distractibility, trouble thinking abstractly, coordination problems, and difficulty learning new information." JAMES WHITNEY HICKS, 50 SIGNS OF MENTAL ILLNESS 190 (2005).

At the end of the initial interview, the defense attorney should obtain a signed release of medical and mental health information from the client.<sup>9</sup> In some instances clients may have been previously diagnosed with mental health issues that they either seek to conceal or of which they simply do not understand the importance. The medical and mental health history may provide critical information and records of problems, and may also identify potential patterns of behaviors or prior diagnoses of mental health problems.

At the end of the first interview, attorneys should give their client a questionnaire to fill out at home and bring back to their next interview. Counsel should emphasize to the client the confidential nature of this questionnaire and the importance of being forthcoming when answering the questions. These questions should span all of the topics covered in the initial interview, but in more detail. Additionally, the questionnaire should include questions that were not asked in the interview that may elicit more personal information, such as prior psychiatric diagnoses or problems, family history of psychological disorders, hospitalizations, or prior criminal acts. Questions should also call for the client's personal assessment of his memory of the event and his personal assessment of his state of mental well-being. Not surprisingly, clients may include significant details on a written questionnaire that they would not provide in an oral interview. For instance, many soldiers will not want to admit prior in-patient psychological treatment or drug treatment. The presence of drug treatment in a soldier's record may itself be a sign of mental illness or brain injury because the use of drugs can be a common response to depression, and the desire for narcotic stimulus is a symptom of a possible frontal lobe injury.<sup>10</sup>

### III. Determining the Relevancy of Mental Health Issues to the Proceedings

There are three ways mental health problems are relevant to a case: (1) problems may affect the client's mental responsibility at the time of the offense or offenses; (2) problems may affect the client's competency to stand trial; and (3) problems may constitute a defense on the merits for the *mens rea* element of the charge or that mitigate the client's criminal culpability and thus affect his sentence.

<sup>9</sup> See, e.g., Authorization for the Disclosure of Medical or Dental Information (2003), available at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2870.pdf>. A client can execute a standard release form, DD 2870. Other releases can include a simple memorandum, including the hospital or records center concerned, the nature of the records sought (clarifying that they include mental health), the identity of the person to whom records can be released, and a signature from the releaser.

<sup>10</sup> See HICKS, *supra* note 8, at 190 (noting that head trauma can make people become more impulsive) "Addicting behaviors all involve impulses." *Id.* at 166 (describing the relationship between the inability to control impulses and different impulsive behaviors like drug use).

### A. Diminished Mental Health As an Affirmative Defense

Evidence of a mental disease or defect that would be relevant to the affirmative defense of lack of mental responsibility essentially comes in two forms: evidence showing the client had an altered perception of reality at the time of the offense, or evidence showing the client's mental processes were inhibited in some way. For either of these to be considered a possible defense, the client's mental disease or defect must be severe.<sup>11</sup> The test of whether a mental disease or defect is severe depends on the nature of the illness itself and the frequency and scope of the diagnostic symptoms.<sup>12</sup> A reasonable test, prior to getting an expert opinion, is to look at whether the illness impacts a person's daily functioning in a significant way.<sup>13</sup> This may be evaluated by observing the client's on-the-job performance including notable drops in efficiency reports. In addition, demonstration of erratic behavior, sudden increases in minor misconduct, obvious changes in the client's personal life and relationships, or evidence of alcohol or drug abuse may all be signs that there is a problem severely impacting the client's life.<sup>14</sup> Laying these events on a timeline may assist counsel in making the connection between these behaviors and a traumatic event in the client's life, such as combat service, a severe automobile accident, or being the victim of a crime. These sorts of drastic changes may be good circumstantial evidence of the severity of the disease. However, the dispositive evidence of whether a mental disease or defect is severe must come from a mental health expert.<sup>15</sup>

<sup>11</sup> See generally Ball, *supra* note 3, at 16-23 (discussing the elements of the defense of lack of mental responsibility). An important starting point in the case evaluation is the presumption of mental responsibility and competency. See MCM, *supra* note 1, R.C.M. 916(k)(3), 909(b). Furthermore, the issue of mental competency is a question of law for the judge often resolved before the trial on the merits begins, and the preponderance of the evidence burden is lower than the mental responsibility requirement. *Id.* R.C.M. 909(e).

<sup>12</sup> What constitutes *severe* is not specifically defined in the Rules for Courts-Martial (R.C.M.) or in the UCMJ, but there is some guidance in R.C.M. 706(c)(2)(A) and in the *Military Judges' Benchbook*. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 817, para. 6-2 (2002) ("The standard of proof on [the issue of mental capacity at the time of trial] is whether the accused is presently suffering from a mental disease or defect rendering him/her mentally incompetent to the extent that he/she is unable to understand the nature of the proceedings or to cooperate intelligently in the defense of the case."), available at <http://www.jag.navy.mil/documents/MJBenchbook.pdf>; see also Ball, *supra* note 3, at 17-18 (discussing the definition of severity).

<sup>13</sup> See, e.g., PTSD support.net, PTSD & the Global Assessment of Functioning (GAF) Scale, [http://www.ptsdsupport.net/ptsd\\_gafscores.html](http://www.ptsdsupport.net/ptsd_gafscores.html) (last visited May 15, 2009). The impact on daily life is often measured on a sliding scale of evaluation known as the Global Assessment of Functioning, or GAF. After an individual assessment, a number between 1 and 100 indicates the impact of PTSD on a person's functioning.

<sup>14</sup> See *id.*

<sup>15</sup> Unlike other affirmative defenses, the military judge has a *sua sponte* obligation to order an inquiry into the mental health of the accused if it appears that it is an unresolved question. In other words, the question of a lack of mental responsibility is not left up to the judge or the parties—if it is

The second prong to a defense of lack of mental responsibility is often difficult to establish. While different jurisdictions employ different “tests” for this prong, the majority of jurisdictions, including the military, utilize some form of the following test: assuming the severe mental disease or defect existed at the time of the offense, was the client able to determine right from wrong?<sup>16</sup> Stated differently, the test asks whether the accused “was unable to appreciate the nature and quality or the wrongfulness of his . . . acts.”<sup>17</sup> This is a substantial burden that, as noted above, defense counsel will be required to prove by clear and convincing evidence.<sup>18</sup> Many clients may have a severe mental disease or defect but still know right from wrong. For example, a person who develops a substance addiction secondary to a mental disease may know that the conduct is wrong, but he may not be able to stop himself or may not care.

## B. Competency to Stand Trial

The issue of mental competency is directly tied to a person’s right to a fair trial and representation because a person must be able to understand the proceedings and be able to participate in his own defense.<sup>19</sup> Defense counsel should review with the client the basic rights advisement covering the nature of the potential court-martial, the rights of representation, the rights pertaining to a jury trial, and the nature of the charges. After going over the charges, defense counsel should have the client explain back some of the issues. The client’s comprehension of these initial matters may be a good indicator of competency. At a minimum this step may provide warning signals if there is a problem, such as a learning disability.<sup>20</sup> Reviewing the client’s testing

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at issue, it must be addressed by a mental health professional. *See, e.g.,* United States v. Shaw, 64 M.J. 460, 465 (C.A.A.F. 2007); *see also* Learning Disabilities Association of America, Screening for Adults with Learning Disabilities, <http://www.ldanatl.org/aboutld/adults/assessment/screening.asp> (last visited May 15, 2009) [hereinafter Screening for Adults with Learning Disabilities] (explaining that with regard to learning disabilities a “formal assessment is carried out by a professionally-trained educational diagnostician, counselor, psychiatrist or psychologist . . .”). *See generally* MCM, *supra* note 1, R.C.M. 706 (noting that the evaluation board shall include either a “psychiatrist or a clinical psychologist”).

<sup>16</sup> *See* Ball, *supra* note 3, at 16-23 (discussing the elements of the defense of lack of mental responsibility).

<sup>17</sup> MCM, *supra* note 1, R.C.M. 916(k)(1).

<sup>18</sup> *Id.* R.C.M. 921(c)(4).

<sup>19</sup> *See* Ball, *supra* note 3, at 1-2 (discussing the elements of the defense of lack of mental competency).

<sup>20</sup> Screening for Adults with Learning Disabilities, *supra* note 15.

The following behaviors may indicate the possibility of a learning disability if observed over a considerable period of time: Difficulty absorbing major ideas from an oral presentations (instructions, lectures, discussions); information must be repeated and reviewed before understanding is achieved; problems with following directions; difficulty

records, job performance records, and academic history may also indicate problems with intelligence.<sup>21</sup> Counsel’s personal observations of the client’s demeanor and ability to focus during conversations are critical to an evaluation of competency. For example, defense counsel may be going over rights and procedures, and the client may be looking around the room, may be staring blankly, or may be simply nodding along with what is said. The client may repeatedly indicate to counsel that he understands, but in order to determine whether the client truly understands what is being explained, counsel’s questions during the interviews should be non-leading. After a few interviews, counsel may also test the client by troubleshooting his explanation of events. The client’s reaction to defense counsel’s confrontation, or the client’s reaction to being asked to explain things from his supervisor’s perspective, may also reveal indicators of deeper problems. For instance, a soldier charged with disorderly conduct or disrespect may have a very different perspective of what happened; he may even believe that he was attacked, contrary to the testimony of eye witnesses. After pressing the client on this issue, he may have a very aggressive or violent reaction showing that even minor confrontations lead him to act irrationally. This may be an indicator of a mental disorder that could seriously inhibit his ability to make rational decisions at trial, to make informed selections with regard to forum, or to even maintain composure in the courtroom.<sup>22</sup>

## C. Mental Incompetency as a Defense on the Merits or as a Mitigating Factor

If a client’s mental disease or defect does not rise to the level of proof by clear and convincing evidence that the client did not know right from wrong at the time of the offense, the matter still may be relevant regarding the *mens rea* element of the offense. This is commonly known as the quasi-mental health defense.<sup>23</sup> Additionally, evidence that an

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retaining information without excessive rehearsal and practice; cannot recall familiar facts on command, yet can do so at other times.

*Id.*

<sup>21</sup> *See id.* (“[T]he information-gathering process can include . . . reviews of school, medical, and employment records (wherein patterns of problems may be evident and should be noted) . . .”).

<sup>22</sup> *See* ELIZABETH BRONDOLO & ZAVIER AMADOR, BREAK THE BIPOLAR CYCLE: A DAY BY DAY GUIDE TO LIVING WITH BIPOLAR DISORDER 11-18 (2008). Symptoms of bipolar disorders include mania symptoms, such as “abnormally and persistently elevated, expansive or irritable mood[s].” DSM-IV, *supra* note 5, at 357. This can include “hallucinations or delusions,” and a person “may have difficulty distinguishing dreams from reality” in progressed manias. BRONDOLO & AMADOR, *supra* at 11, 13.

<sup>23</sup> The term “quasi-mental health defense” refers to a situation in which an accused is charged with a specific-intent crime, and while there is evidence that the accused has mental health issues, this evidence does not rise to the level of a successful affirmative defense of a lack of mental responsibility. *See supra* Section III.A. In this situation, rather than mount an affirmative defense of lack of mental responsibility, defense counsel can utilize the “quasi-mental health” defense to attack the government’s ability to prove

accused has mental health issues is often highly relevant during the sentencing portion of a trial. These uses are the most common applications of mental health issues in the courtroom, and they should not be overlooked by defense counsel. Because the evidentiary burden for these uses is unique and heavy on the defense, defense counsel should avoid taking on evidentiary burdens in a criminal trial unless absolutely necessary. The quasi-mental health defense undermines the government's proof of *mens rea* and allows the defense to present expert mental health evidence while keeping the burden on the government to prove its case.<sup>24</sup> By using the quasi-mental health defense, counsel may also avoid difficult jury instructions that highlight the burden on the defense to establish the elements of lack of mental responsibility.<sup>25</sup>

Mitigation in the sentencing phase of trial is another very common use of this type of evidence by the defense. Many clients will have issues or problems in their lives, some may even have been diagnosed with mental health problems, which may be a rationale or reason for certain actions. Take, for instance, a person charged with drunk driving. This client may have PTSD or another combat-related stress syndrome, which may cause both nightmares and flashbacks that the person has learned to suppress through the use of alcohol or other drugs.<sup>26</sup> While this does not excuse the behavior, it is something that many potential panel members can relate to as the average panel member typically has a significant amount of experience in the military<sup>27</sup> and has probably encountered a person with a

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beyond a reasonable doubt that the accused had the requisite *mens rea*, or specific intent, to commit the offense in question. In this way, evidence of the accused's mental health issues—presented on the merits—is no different than any other defense evidence presented in an attempt to undermine the government's proof of an element of the offense at issue.

<sup>24</sup> See MCM, *supra* note 1, R.C.M. 916(k)(2), discussion. See generally, Ball, *supra* note 3, at 23, 27, 31 (discussing mens rea and the mental health defense).

<sup>25</sup> Ball, *supra* note 3, at 27.

<sup>26</sup> “The longer someone has PTSD, the more likely he'll develop drug or alcohol abuse . . . .” Marilyn Elias, *Post-traumatic Stress Is a War Within for Military and Civilians*, U.S.A. TODAY, Oct. 27, 2008, at 7D. This article also cites a RAND study which found that only “about half of recent veterans with PTSD symptoms” have sought treatment. *Id.* The tendency to use drugs or alcohol can be explained by looking at the type of symptoms associated with PTSD. Symptoms like re-experiencing the trauma and hyper-vigilance can be disturbing and may cause the person to be unable to function in their daily lives. See LAURIE B. SLONE & MATTHEW J. FRIEDMAN, *AFTER THE WAR ZONE: A PRACTICAL GUIDE FOR RETURNING TROOPS AND THEIR FAMILIES* 152-53 (2008). To cope with the discomfort associated with these symptoms, individuals may use “drugs or alcohol to numb out the difficult thoughts, feelings, and memories,” especially since these seem to offer a quick fix as an alternative to the more difficult process of working through the underlying problems. *Id.* at 175-76. Furthermore, troops returning from a war zone where no alcohol is available are likely to see the availability of alcohol as an appropriate outlet. *Id.* at 177.

<sup>27</sup> See 10 U.S.C. § 825(d)(2) (2006) (mandating that convening authorities shall detail court members who are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament”).

similar problem on more than one occasion in their career.<sup>28</sup> This empathy may potentially contribute to mitigation at sentencing.

#### IV. Understanding How the Public and Potential Jurors View Mental Health Defenses

Historically, the general public has not embraced lack of mental health responsibility defenses as legitimate excuses for otherwise criminal behavior.<sup>29</sup> This public opinion was most evident in the aftermath of the assassination attempt of President Reagan and criminal trial of John Hinckley.<sup>30</sup> After he was acquitted based on his lack of mental responsibility, Congress responded with the modern framework for mental health as a defense, placing a substantial burden on the defense in criminal cases.<sup>31</sup>

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<sup>28</sup> “About one out of seven service members have returned from deployments with symptoms of PTSD.” Elias, *supra* note 26, at 7D. As a result, most military members have worked with or met someone suffering from PTSD while serving in the military.

<sup>29</sup> See, e.g., John P. Martin, *The Insanity Defense: A Closer Look*, WASH. POST, Feb. 27, 1998, available at <http://www.washingtonpost.com/wp-srv/local/longterm/aron/qa227.htm> (tracing the history of the insanity defense back to the *M'Naughten* case in England in 1843 and noting the consistent public opinion that the defense is unfair or overused).

<sup>30</sup> The case of John Hinckley is perhaps the most well known case of an insanity defense in the United States in the last fifty years. On March 31, 1981, John Hinckley shot President Ronald Reagan in the chest outside of the Washington Hilton Hotel in Washington, D.C. See, e.g., Howell Raines, *Reagan Wounded in Chest by Gunman; Outlook 'Good' After 2-Hour Surgery; Aide and 2 Guards Shot; Suspect Held*, N.Y. TIMES, Mar. 31, 1981, at A1. Hinckley fired six shots, which hit four people, including President Reagan and his press secretary James Brady. See Douglas Linder, *The Trial of John Hinckley*, The University of Missouri/Kansas City Faculty Project 2002, <http://www.law.umkc.edu/faculty/projects/ftrials/hinckley/hinckleyaccount.html> (last visited May 15, 2009) (providing an exhaustive account of the ensuing trial). At trial, a “battle of the experts” ensued, with the defense experts claiming that Hinckley was insane and government experts claiming that he was competent at the time of the shootings. *Id.* Importantly, reflecting the state of the law at the time of the trial, at the close of the evidence, the trial judge instructed the jury that in order to convict Hinckley the government had to prove “beyond a reasonable doubt” that he was *not* insane. *Id.*; see Martin *supra* note 29. Hinckley was subsequently found not guilty by reason of insanity on June 21, 1982. Stuart Taylor, *Hinckley Is Cleared but Is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1. The Linder study of the case cites to an ABC News poll conducted the day after the case which found that 83% of respondents believed that “justice was not done.” Linder, *supra*. This public backlash formed the impetus for Congress to pass the Insanity Defense Reform Act of 1984. See generally 18 U.S.C. § 17 (2006).

<sup>31</sup> A major structural change of the Insanity Defense Reform Act of 1984, was to transform the insanity defense from a defense which, when raised by “some evidence,” must be disproved by the government beyond a reasonable doubt to an “affirmative defense” in which the burden is on the defense to raise the issue. 18 U.S.C. § 17(a). The Insanity Defense Reform Act sets a high bar for defendants wishing to raise this defense—namely that they must prove the existence of the defense by “clear and convincing evidence.” See *id.* § 17(b). The timing of this change to the federal law as well as numerous state laws regarding the insanity defense can be directly linked to the Hinckley verdict. See Linder, *supra* note 30 (“Within three years after the Hinckley verdict, two-thirds of the states placed the burden on the defense to prove insanity, while eight states adopted a separate

In the last decade, however, mental health issues have become important to the public in several areas. First, mental health evidence has become increasingly important to sentencing in capital murder cases.<sup>32</sup> A second major area that has developed over the last few years is the increased attention to combat-related mental illnesses and traumatic brain injuries.<sup>33</sup> However, since interest in this area has been primarily one of compassion, a general misunderstanding about the nature of these illnesses still exists.<sup>34</sup> This distinction is significant when assessing how to bring mental health issues to a jury. The case may require defense counsel to debunk myths and to educate jury members on the aspects of the illness that are critical to the arguments the defense is putting forth. However, given confusion about the nature of mental illness and the difficult burdens of proof regarding lack of responsibility as an affirmative defense,<sup>35</sup> counsel has to plan the incorporation of this evidence carefully, especially in determining when to bring it to the court's attention.

#### V. Determining the Appropriate Time to Raise the Mental Health Issue

Once defense counsel has identified information or evidence that shows a client has a mental illness, the next difficult step is deciding when the best time is to alert the government or the court to the potential issues. Since there are many levels of decision-makers involved in getting a case to court-martial, the answer to this question is probably unique to the military justice system: the earlier the better.<sup>36</sup>

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verdict of 'guilty but mentally ill' and one state (Utah) abolished the defense altogether.”).

<sup>32</sup> See, e.g., *United States v. Kretzler*, 59 M.J. 773, 776 (A. Ct. Crim. App. 2004); see also Ball, *supra* note 3, at 36 (“The message from *Kretzler* is fairly clear. In a capital case, defense counsel has a heightened duty to present mitigating evidence of mental illness . . . .”); HARRY HENDERSON, CAPITAL PUNISHMENT 43, 81-82, 99 (3d ed. 2006) (discussing the role of mental health in capital punishment and the unwillingness to sanction execution of the mentally ill).

<sup>33</sup> See, e.g., Deborah Sontag & Lizette Alvarez, *In More Cases, Combat Trauma Takes the Stand*, N.Y. TIMES, Jan. 27, 2008, at A1 (reporting on a murder trial in South Dakota in which the accused had recently returned from Iraq and had been diagnosed with severe PTSD; the article is part of a larger series by the New York Times on the topic of veterans of the Iraq and Afghanistan wars who have been charged with killings upon returning home to the United States); Associated Press, *Pentagon Totals Rise for Stress Disorder*, N.Y. TIMES, May 28, 2008, at A18 (reporting over 40,000 military personnel have been diagnosed with PTSD since 2003).

<sup>34</sup> “Despite all the public attention, myths about PTSD abound.” Elias, *supra* note 25, at 7D (quoting Farris Tuma, Chief of the Traumatic Stress Program at the National Institute of Mental Health).

<sup>35</sup> See generally Ball, *supra* note 3, at 16-23 (discussing the elements of the defense of lack of mental responsibility).

<sup>36</sup> The military justice system is managed primarily by a system of key decision-makers known as convening authorities. In the standard model, there are three levels of convening authorities: Summary Court-Martial Convening Authority, Special Court-Martial Convening Authority, and General Court-Martial Convening Authority. See generally 10 U.S.C. §§

In the military, defense counsel should identify the issue to trial counsel early by requesting a mental health evaluation pursuant to R.C.M. 706.<sup>37</sup> This request should be made if defense counsel has any evidence that raises questions about either the competency or the mental responsibility of the defendant.<sup>38</sup> Failure to explore this question has been grounds for claims of ineffective assistance of counsel and even for reversal.<sup>39</sup> The rationale for these concerns is clear. If an issue of lack of mental responsibility for an offense goes unexplored by defense counsel and is therefore unresolved, it is unclear how the client could either (1) properly plead guilty to an offense at trial and attain the benefit of a plea agreement, or (2) properly mount a competent defense in a contested trial on the merits. Furthermore, in light of the liberty interest of the client, the assistance of a medical expert at no financial cost to the government should be completed when a question has been raised.

When this issue is raised with trial counsel, defense counsel should take the time to explain the process to the various commanders and to interview them and other unit leaders about the behavior, personality, and habits of the client. Getting a feel early on for their opinions of his conduct and behavior can be important in deciding when to bring mental health evidence at trial. For instance, witness testimony indicating the client exhibited irregular behavior,

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822-24 (2006). Each of these convening authorities has a different and distinct authority, and they have different appropriate courses of action to take upon considering any one particular case. Compare MCM, *supra* note 1, R.C.M. 403, and MCM, *supra* note 1, R.C.M. 404, with MCM, *supra* note 1, R.C.M. 407. Each level is required to exercise independent discretion on a particular case. 10 U.S.C. § 837(a) (stating the statutory underpinning for the prohibition on unlawful command influence).

<sup>37</sup> MCM, *supra* note 1, R.C.M. 706. If it appears to defense counsel “that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial,” this section requires that defense counsel *shall* transmit the reasons for that belief to an officer “authorized to order an inquiry.” *Id.* R.C.M. 706(a). Prior to the referral of charges, that officer is “the convening authority before whom the charges are pending.” *Id.* R.C.M. 706(b)(1). After referral, that officer is typically the military judge with some minor exceptions. *Id.* R.C.M. 706(b)(2). The military judge can order an inquiry regardless of any previous decision by a convening authority. *Id.* The inquiry is conducted by a board “consisting of one or more persons,” at least one of which is a psychiatrist or clinical psychologist. *Id.* R.C.M. 706(c)(1). Every member must be either a physician or clinical psychologist. *Id.*

<sup>38</sup> See MCM, *supra* note 1, R.C.M. 706(a) (placing an affirmative obligation on defense counsel to report, through the appropriate channels, the belief that an accused lacks mental responsibility or competency to stand trial).

<sup>39</sup> Defense counsel has a duty to diligently explore matters in mitigation which might tend to lessen their client's culpability; this includes adequate investigation into the client's mental health. In *Wiggins v. Smith*, the U.S. Supreme Court found ineffective assistance of counsel in a case where “[c]ounsel's investigation into Wiggins' background [to include his mental health] did not reflect reasonable professional judgment.” *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); see also *United States v. Kretzler*, 59 M.J. 773, 784 (A. Ct. Crim. App. 2004) (finding ineffective assistance of counsel despite a completed R.C.M. 706 evaluation because “[d]efense counsel's investigation into appellant's mental health background fell short of reasonable professional standards”).

talked to himself, or had periodic seizures may add merit to an expert request or defense. On the other hand, testimony that the client was intelligent, deliberative, or thoughtful at work may weaken a defense in the eyes of a potential judge or jury. Jurors will want to know how the defendant acts on a daily basis at work to put his behavior in a context they can understand and with which they are comfortable.

Early discussions with the command will also commit command leaders later to their early opinions and behavior assessments. If command opinions change later, defense counsel could raise new discovery questions concerning the basis for command's opinion change, providing possible basis for a claim of unlawful command influence.<sup>40</sup> At the least, such a change in command opinion would be fertile ground for cross-examination.<sup>41</sup> Further, early discussions help build a theme for the client and force discussions to be more about his potential illness and defense than about his underlying potential misconduct. This is the discussion and the climate that defense counsel must create to get the best possible outcome for the client. This issue is forced by presenting the case to each and every level of command or convening authority.

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<sup>40</sup> It is a bedrock foundation of military life that commanders of higher ranks give orders to commanders of lower ranks on all types of issues, both in peacetime and in combat. These orders carry the force of law. However, in regards to the administration of military justice, this arrangement changes. At each level of command, each commander is required to utilize his or her best judgment in the handling and disposition of a particular case, and it is *unlawful* for a superior commander to order a subordinate commander to dispose of a particular case in a particular way. This arrangement recognizes the "quasi-judicial" role of commanders in the military justice setting. Commanders who violate this maxim give rise to defendant's claim of "unlawful command influence." The concept of unlawful command influence has been called the "mortal enemy of military justice." See *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986)). "Where [unlawful command influence] is found to exist, judicial authorities must take those steps necessary to preserve both the actual and apparent fairness of the criminal proceeding." *United States v. Lewis*, 63 M.J. 405, 407 (C.A.A.F. 2006) (citing *United States v. Rivers*, 49 M.J. 434, 443 (C.A.A.F. 1998)); see *United States v. Sullivan*, 26 M.J. 442, 444 (C.A.A.F. 1988). Where the mental competency of an accused is at issue, and a commander later changes his or her position on the issue of mental competency or his or her evaluation of the accused's mental state, it is important for defense counsel to ascertain whether the commander had engaged in any communications with a superior commander on the topic.

<sup>41</sup> MCM, *supra* note 1, MIL. R. EVID. 608(c) makes it clear that cross-examination of witnesses is always relevant and allowable to demonstrate a motive to misrepresent or a bias against a particular individual. Where a commander initially gives a favorable response to defense counsel regarding a potential defense of lack of mental responsibility and later changes that position, it is prudent to pursue whether this change was the product of personal bias against the client or a motive to "get rid of" an individual the commander likely deems a "problem soldier" in his or her unit.

The defendant's lack of mental responsibility should be pressed at the Article 32 hearing, or equivalent civilian pretrial hearing because a favorable recommendation from the Article 32 officer could have an impact on the convening authority.<sup>42</sup> Further, if defense counsel has legitimate concerns about an accused's competence to stand trial, defense counsel should have the same concerns about the accused's competence to stand at a pretrial hearing, whether it is an Article 32 investigation or an equivalent civilian pretrial proceeding. In the military system, the impact of the Article 32 officer's recommendation could be limited by the communication between the convening authority and Staff Judge Advocate under Article 34 of the Uniform Code of Military Justice (UCMJ).<sup>43</sup> However, defense counsel is entitled through discovery to know what Article 34 advice was given to the convening authority.<sup>44</sup>

## VI. Methods for Using Evidence of Mental Illness

There are several methods for presenting the client's case to commanders. In Article 32 hearings, most attorneys will have access to the client's medical records. The client may have been subject to a command referral for a mental health evaluation,<sup>45</sup> may have already seen a mental health specialist on a self referral,<sup>46</sup> or may have even been

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<sup>42</sup> After the Article 32 proceeding, the convening authority is advised by the Staff Judge Advocate pursuant to Article 34 as to whether the specifications properly allege offenses under the UCMJ, whether the specifications are warranted by the evidence, and whether a court-martial has jurisdiction over the accused. 10 U.S.C. § 834(a)(1), (3) (2006). This advice should include the results of the Article 32 investigation and the recommendation of the Article 32 Investigating Officer to the convening authority regarding the disposition of the case. *Id.* § 834(b)(1)-(2). A case cannot be referred to a trial by general court-martial without this Article 34 advice from the Staff Judge Advocate. *Id.*

<sup>43</sup> Compare M.C.M., *supra* note 1, R.C.M. 405(j), with *id.* R.C.M. 406.

<sup>44</sup> The defense is entitled to copy and inspect "[a]ny paper which accompanied the charges when they were referred to the court-martial . . ." MCM, *supra* note 1, R.C.M. 701(a)(1)(A). For a general court-martial, these papers would include the Staff Judge Advocate's Article 34 advice. 10 U.S.C. § 834(b). If the Article 34 advice does not reference the recommendation from the Article 32 Investigating Officer or if it misstates this advice, this could be grounds for a motion for an improper referral of charges to the court-martial. *Id.* § 834(c).

<sup>45</sup> Department of Defense Directive 6490.1 (DoD Directive) is the specific Directive which governs referrals for mental health evaluations. DEP'T OF DEF., DIRECTIVE NO. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (1997) [hereinafter DoD DIRECTIVE 6490.1]. The regulation is the source of authority for the procedure and protections afforded to a service member who is referred for evaluation. *Id.* para. 1.

<sup>46</sup> The DoD Directive specifically states that the procedure does not apply to self-referrals and evaluations under R.C.M. 706. *Id.* para. 4.3.5. Self-referrals for treatment are privileged psychotherapist-patient communication. MCM, *supra* note 1, MIL. R. EVID. 513. Further, the DoD Directive "does not modify any authorities or responsibilities about the . . . prosecution of offenses under the UCMJ . . ." DoD DIRECTIVE 6490.1, *supra* note 45, para. 4.9. As discussed earlier, issues concerning the mental responsibility or competency of an individual pending charges are required to be reported to an appropriate officer. MCM, *supra* note 1, R.C.M.

hospitalized in one of the Army Medical Centers. These records should be easily obtained through a medical release from the client and a request to the appropriate location. This request should not be funneled through the command or through trial counsel unless they already have the records because of a command referral. Mental health records are not open to command or law enforcement review absent one of the various exceptions to the privileges. Law enforcement officials may not know this, and the individuals working at the clinic may not be sure of whether they have to give those records to law enforcement.<sup>47</sup> However, absent notice to the court of an expert or the intent to introduce mental health evidence, that information should not be disclosed. Furthermore, with regard to the reports generated under R.C.M. 706, information need not be provided to government counsel until information is actually presented at trial.<sup>48</sup> As a precautionary measure, when defense counsel

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706(a). Defense counsel should be mindful of efforts by a commander to bypass the R.C.M. 706 procedures by using a command directed evaluation. Evaluations done pursuant to the DoD Directive lack procedural and other protections provided under Rule 302 of the Military Rules of Evidence and will provide more information to the command, and by necessity, the prosecution.

<sup>47</sup> See U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD ADMINISTRATION AND HEALTHCARE DOCUMENTATION 4, para. 2-2 (2008) (setting forth penalties for improper dissemination of military members' medical records, including mental health records, and also delineating the limited ways that information from records may be released to law enforcement officials for identification purposes). The regulation sets forth the following:

Disclose PHI [protected health information] to a law enforcement official if the employee is a victim of a crime and provided that the PHI is about a suspected perpetrator of the criminal act and is only limited to identification information. In response to law enforcement requests for limited information for identification and location purposes, the MTF may disclose only items listed in (a) through (h) below. (Note: PHI for the purpose of identification or location does not include DNA or DNA analysis, dental records or typing, samples or analysis of body fluids or tissue (see DOD 6025.18-R, para C.7.6.2.2).)

- (a) Name and address.
- (b) Date and place of birth.
- (c) Social Security number.
- (d) ABO blood type and Rh factor.
- (e) Type of injury.
- (f) Date and time of treatment.
- (g) Date and time of death, if applicable.

(h) A description of distinguishing physical characteristics, including height, weight, gender, race, and eye color; presence or absence of facial hair (beard or mustache); scars; and tattoos.

*Id.* para. 2-2(g)(5).

<sup>48</sup> MCM, *supra* note 1, R.C.M. 706(c)(5) ("No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to trial counsel any statement made by the accused to the board or any evidence derived from such statement."). Any statement made by the accused under R.C.M. 706 is privileged, as is any derivative evidence from that statement. See *id.* MIL. R. EVID. 302(a). However, this privilege is waived if the accused introduces these statements. See *id.* MIL. R. EVID. 302(b)(1). Additionally, if the accused offers expert testimony

requests the records, counsel should also include a brief letter to the clinic as a reminder of the obligation not to disclose any information absent a release from the client or a court order.

The R.C.M. 706 report may be the most significant piece of evidence the defense will have. The report comes in two forms, a short and a long form, both of which answer the necessary questions to determine if competency and mental responsibility are at issue.<sup>49</sup> The government will only get the short form, which contains a diagnosis and discrete answers in the affirmative or negative to the questions regarding mental health.<sup>50</sup> The long form contains the same information as well as information indicating the tests that were performed, the information relied on in making the findings, and the statements of the accused. The long form usually informs defense counsel about the strengths and weaknesses of any potential defense.<sup>51</sup> It is imperative that the medical professionals performing the evaluation on the client understand the confidentiality requirements of a government-ordered mental health examination such as R.C.M. 706 or the civilian equivalent.

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concerning his mental health, "the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to R.C.M. 706." *Id.* MIL. R. EVID. 302(c). It is important to note from this rule, that the right to move for disclosure comes after the evidence is actually offered, not upon notice to bring an expert witness. The government, therefore, will have to either request a continuance or recess to review the report and consult with their expert witness. Both are often unappealing choices, especially with a military panel waiting. Knowing that such an event will occur, defense counsel should have a copy of the report prepared with all the statements of the accused redacted ahead of time. That way, when the judge grants the government motion to produce the report, defense counsel can give a copy of the original and the redacted version for the judge for an *in camera* review, and he will then provide the redacted copy to trial counsel. Note that if defense counsel, either through the accused or an expert, introduces statements by the accused that he made during the R.C.M. 706 examination, then the government will be entitled to an unredacted report. See *id.* R.C.M. 706(c)(3)(B).

<sup>49</sup> After an R.C.M. 706 inquiry is completed, the board produces two reports. One report, commonly referred to as the "short form," is provided only to the officer ordering the examination and other specific officials, and it will answer only the specific questions outlined in R.C.M. 706(c)(2). See *id.* R.C.M. 706(c)(3)(A). A full report, commonly referred to as the "long form," will be provided to defense counsel and typically requires an order from a military judge to be released to anyone else. *Id.* R.C.M. 706(c)(3)(C). The contents of the full report are protected by a unique military rule of evidence, M.R.E. 302. *Id.* MIL. R. EVID. 302(c). However, as described later in this article, defense counsel does have the ability to release all or portions of the report as part of a litigation plan. *Id.* R.C.M. 706(c)(5). While some of the information in the long report may be harmful or incriminating to a client, portions may also be relevant background to help trial counsel, Staff Judge Advocate, or Convening Authority understand the nature and cause of a client's problem.

<sup>50</sup> *Id.* R.C.M. 706(c)(3)(A).

<sup>51</sup> *Id.* R.C.M. 706(c)(3)(B)-(C).

Once defense counsel gets this report, he or she is in a position to determine if a request for an expert consultant in the area of mental health is justified.<sup>52</sup> This request should explain the need for the expert and, if a report is going to be included with the request, defense counsel should only include the short form. Defense counsel can be confident that the government will not be able to summarily disapprove a request in these circumstances. If the expert is a government expert, available at no cost to the government, it is probably in the government's interest to approve the request to avoid litigating the request at a hearing and to keep the case moving. When determining whether to request an expert or how to proceed after receiving the results of the R.C.M. 706 evaluation, it is incumbent on defense counsel to become educated, to the extent possible, on the issues raised by the R.C.M. 706 or government mental evaluation of the client. This self-education can come from consulting the DSM-IV, internet sources, or through informal consultations with other medical professionals (other than the individuals who performed the government directed evaluation).<sup>53</sup> This self-education is important for a number of reasons. First, knowledge of different types of mental evaluations and diagnoses can assist counsel in recognizing inconsistencies in the government's report.<sup>54</sup> Second, it is important to note which tests the government did or did not perform during the evaluation, as this can be addressed in both the request for an independent defense mental health expert consultant and potentially in discrediting the government's findings that the client is of sound mental health.<sup>55</sup> For example, this would be problematic where defense counsel suspects that the client may have suffered a traumatic brain injury, but an

MRI of the client's brain was not conducted as a part of the government's evaluation. Third, knowledge of the underlying diagnoses and of the language of mental health professionals will be invaluable to defense counsel when, either at trial or in a pretrial proceeding, they cross-examine the government's mental health professional or conduct direct examination of the defense expert.<sup>56</sup> As in any area of litigation, counsel must strive to become as competent as possible in the nuts and bolts of their client's mental health diagnosis and in understanding what the diagnosis means. If counsel is not comfortable with the meaning of the diagnosis and its ultimate effect on the client's behavior, he will not be able to effectively articulate this to a judge or jury at trial.

Circumstantial evidence is another key source of evidence. This evidence may include demonstrated changes in a person's behavior. Circumstantial evidence can be used to show how a significant event, like an accident or injury in combat or some other traumatic event, impacts the before-and-after picture of the person's performance. For instance, some soldiers may be predictable, calm, and disciplined prior to a combat tour. However, after their return, they may have drug or alcohol problems, attendance issues, domestic disputes, and anger management problems. This sort of before-and-after image may indicate a clear intervening action and may show a change in behavior that is not consistent with an intentional change.

## VII. Conclusion

These various notes on preparing a defense for a mentally ill patient are certainly not exclusive, nor do they explain how to conduct the litigation itself. However, these logical steps help ensure that defense counsel takes advantage of every possible chance to get an equitable result for his or her client. The best chance for success is available prior to going to trial. If that approach is unsuccessful, organized preparation will ensure a better defense at the trial itself.

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<sup>52</sup> United States v. Gonzalez, 39 M.J. 459, 461 (C.M.A. 1994) (citing United States v. Garries, 22 M.J. 288, 291 (C.M.A. 1986)) (discussing the right to expert assistance and the conceptual framework for requesting an expert for the defense in a military court-martial). The *Gonzalez* court set out three questions that defense counsel must answer in order to demonstrate the need for a defense expert: (1) Why is the expert needed?; (2) What would the expert accomplish for the accused?; and (3) Why is defense counsel unable to gather or present the evidence without the assistance of this expert? *Id.*

<sup>53</sup> *Id.* Prong three of the *Gonzalez* standard for requesting expert assistance asks why defense counsel cannot gather and present the evidence without the assistance of an expert. In the realm of mental responsibility defenses, unless defense counsel is also a qualified psychiatrist or psychologist, it is doubtful that any level of self-education would completely obviate the need for a defense expert, especially in cases where the government has its own mental health professional. Additionally, even in the unlikely event that defense counsel is also a qualified mental health professional, it would still be difficult to "present" the evidence, as detailed defense counsel cannot serve as a witness in a trial proceeding. However, self-education—to the extent possible—is still vital in order to demonstrate to the court due diligence in addressing prong three of the *Gonzalez* test for expert assistance, as well as for general knowledge of the accused's mental condition.

<sup>54</sup> See generally DEMOSTHENES LORRANDOS AND TERENCE W. CAMPBELL, CROSS EXAMINING EXPERTS IN BEHAVIORAL SCIENCES §§ 5-1 to -61 (2001) (providing model transcripts for challenging diagnostic classifications and other relevant explanations). A table of contents to this two-volume set is available at <http://www.psychlaw.net/CrossExaminingExpertsTOC.pdf>.

<sup>55</sup> *Id.*

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<sup>56</sup> See generally *id.* §§ 6-1 to 7-95 (explaining potential psychological tests used by expert witnesses and providing a model transcript for cross-examination); DSM-IV, *supra* note 5.

# Medical Treatment for Foreign Nationals: Another COIN of the Realm\*

Captain Robert D. Hodges†

## I. Introduction

While judge advocates practicing administrative law in a deployed environment share many of the processes and problems familiar to their CONUS colleagues, several topics do not have corollaries in garrison. While advising investigating officers and providing miscellaneous legal advice are the bread and butter of a deployed administrative law shop, specific niche legal reviews can significantly facilitate a commander's use of the full spectrum of United States' military power. It can be challenging for judge advocates to keep the "big picture" in mind as the AR 15-6 investigations mount and financial liability investigations of property loss (FLIPLs) are brought in by the bushel, but there are opportunities to directly influence the counterinsurgency (COIN) fight as a non-traditional enabler. This article discusses a little known, but highly important legal review involving medical treatment for foreign nationals.

When the XVIII Airborne Corps assumed duties as Multi-National Corps–Iraq (MNC–I), the brigade combat teams who deployed as part of the "surge" were still in theater.<sup>1</sup> The battle for the future of Iraq was widely seen as a COIN fight.<sup>2</sup> Concisely summarized, the COIN mantra during the Sky Dragons' tenure was "by, with, and through the Iraqis."<sup>3</sup> The partnerships with the Iraqi Security Forces (ISF), and, more importantly, the Iraqi people, helped set the conditions for improvements to the security situation during the XVIII Airborne Corps's tenure as MNC–I. These partnership-style relationships flowed directly from the doctrine contained in Army and Marine Corps

Counterinsurgency Manual.<sup>4</sup> Simply put, the COIN fight is for the populace,<sup>5</sup> this style of conflict requires not only "hard" military skills but also non-traditional implements of military resources to win the populace.<sup>6</sup>

Although it may not be perfectly intuitive, the logistical and medical expertise of the U.S. Armed Forces often plays a significant role in the COIN fight. One of the more visible examples where rules and regulations complicate the use of non-traditional combat multipliers occurs in U.S. military medical care for foreign nationals. The use of these organic capabilities has tremendous leverage for U.S. forces given lack of access to comparable medical care from the Iraqi Government or the Iraqi economy.<sup>7</sup> While some may say "damn the regulations" and press forward unflinchingly, this article explains how legal advisors can provide commanders maximum flexibility with COIN medical treatment in Iraq within the limitations of applicable policies. The numerous regulatory restrictions addressing medical care exist as a virtual minefield for the incautious with "shipping lanes" for obtaining a waiver to policy even less evident. After briefly discussing the underlying fiscal background for the regulations, this article charts a course for the best practices concerning foreign national medical waivers in COIN environment.

## II. Fiscal Background

As a member of the Executive Branch, the Armed Forces are obliged to work within the funds allocated by Congress.<sup>8</sup> Generally speaking, Congress has appropriated funds for the use of members of the Armed Forces in furtherance of U.S. policy interests. While the treatment of foreign nationals may well advance U.S. policy, the use of appropriated funds to accomplish such care risks violation of the Anti-Deficiency Act<sup>9</sup> and Purpose Statute.<sup>10</sup>

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

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<sup>1</sup> See, e.g., Michael O'Hanlon, *Lloyd Austin: A U.S. Military Hero You Should Know*, USA TODAY, Apr. 23, 2009, at A11, available at [www.brookings.edu/opinions/2009/0423\\_lloyd\\_austin\\_ohanlon.aspx](http://www.brookings.edu/opinions/2009/0423_lloyd_austin_ohanlon.aspx) (describing the situation when XVIII Airborne Corps assumed the role of Multi-National Corps–Iraq).

<sup>2</sup> See, e.g., Stephen Myers et al., *Marking Five Years Bush Insists We Must Win in Iraq*, NY TIMES, Mar. 20, 2008, at A1 (exploring the continued insurgency and the appropriate response).

<sup>3</sup> "Sky Dragons" is the name for the XVIII Airborne Corps. This mantra was repeated at nearly every nearly meeting, Battle Update Assessment, or speech during the XVIII Airborne Corps's deployment.

<sup>4</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 2-6 (15 Dec. 2006) [hereinafter FM 3-24] (representing a joint endeavor of the U.S. Army and U.S. Marine Corps).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1-153.

<sup>7</sup> See, e.g., Michael Kamber, *Wounded Iraqi Forces Say They've Been Abandoned*, N.Y. TIMES, July 1, 2008 at A1 (describing the devastated state of Iraqi hospitals).

<sup>8</sup> U.S. CONST. art. I § 8.

<sup>9</sup> 31 U.S.C. §§ 1341–1350, 1517–1519 (2006). There is no specific appropriation to fund foreign national medical treatment or foreign national flight.

<sup>10</sup> *Id.* §1301(a) (stating "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.").

Furthermore, Army regulations indirectly prevent the use of taxpayer-purchased items for the benefit of a foreign national.<sup>11</sup> The language in the Army's property accountability regulation, "government property will not be sold, given as a gift, loaned, exchanged, or otherwise disposed of unless specifically authorized by law,"<sup>12</sup> seemingly precludes the "gift" of medical treatment or supplies to foreign nationals.<sup>13</sup> These regulatory constraints limit the commander's ability to act, even when there is sufficient medical capacity at a local medical treatment facility.

One potential policy solution to this sticky situation is asking Congress for a separate appropriation regarding COIN medical treatment of foreign nationals. The request for funding of medical treatment could be viewed in humanitarian terms as a corollary to existing funded infrastructure projects.<sup>14</sup> Although advancing the ability to wage an effective COIN fight, the allocation of funds for the direct benefit of individual foreign nationals has political implications at home and within the Armed Forces.<sup>15</sup> Another possible avenue of funding for COIN-associated medical treatment is through non-military U.S. governmental agencies that are currently working in the rebuilding of Iraq.<sup>16</sup> While foreign aid from agencies such as the State Department could theoretically be used to fund foreign national medical treatment,<sup>17</sup> this has yet to occur in the care of individual Iraqis. The Army fights not with the appropriations it desires, but with allotted appropriations. Thus, judge advocates must work through the current fiscal constructs.

Within the military system, there exist authorized methods to enable the care and transport of foreign nationals on a reimbursable basis. Congress has recognized the need for military cooperation and specifically permitted for cross-servicing agreements with foreign armed forces.<sup>18</sup> These agreements, which are usually bilateral and labeled as Acquisition and Cross-Servicing Agreements (ACSAs), allow the United States to recoup the resources expended for the benefit of foreign armed forces.<sup>19</sup> An ASCA is a methodology for military-to-military reimbursement authorized by Congress.<sup>20</sup> Coalition Forces from a country with an ASCA are eligible for treatment by U.S. military medical professionals with costs that are fully reimbursable under the terms of the ASCA. Despite these advantages, Iraq lacks an ASCA at this time. Given the lack of an ASCA and the statutory guidance provided by Congress, the use of funding for the benefit of Iraqis is limited to extremely narrow exceptions. Utilizing these exceptions is the key to getting to "yes" for a commander contemplating a medical approach to the COIN fight.

The fiscal law underpinnings of the regulations are not the only obstacles in providing medical treatment and travel to foreign nationals. Other policy-level and technical concerns exist in applicable regulatory guidance. The specific language and interpretation utilized by the XVIII Airborne Corps provide supplemental assistance to future practitioners facing similar issues.

### III. Foreign National Medical Treatment

While insurgents may be able to supply weapons and intimidation to the population, few insurgents can provide medical expertise. The U.S. Armed Forces, on the other hand, can provide some of the highest quality medical care in the world.<sup>21</sup> These services can be used as a tool to calcify popular support for a counterinsurgency campaign.<sup>22</sup> Regulatory implications, however, generally prevent U.S. medical professionals from treating local nationals absent

<sup>11</sup> U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY para. 2-1(f) (28 Feb. 2005) [hereinafter AR 735-5].

<sup>12</sup> *Id.*

<sup>13</sup> The other way to give property to Iraqis was to term the property "excess" and move the property through the Foreign Excess Property or Defense Reutilization and Marketing Service channels. Each of these processes has limited authorities and impacts. In reality, there were few alternatives to the waiver process.

<sup>14</sup> The U.S. Government has spent millions of dollars on creating infrastructure projects and other programs designed to put military-aged males to work. Employment helps prevent the insurgency. An allocation for saving these same military-aged males' sick children would seem to be money well spent, ultimately answering the question, "Who do you like better the doctor who saves your son, or your boss?"

<sup>15</sup> Stephen Biddle, Funding the U.S. Counterinsurgency Wars, Jun. 19, 2009, available at [http://www.cfr.org/publication/19666/funding\\_us\\_count\\_erin insurgency.html?breadcrumb=%2F](http://www.cfr.org/publication/19666/funding_us_count_erin insurgency.html?breadcrumb=%2F) (discussing the interplay between tactics, politics, and funding). This is especially true given the Department of State's role as the lead agency in the foreign assistance arena.

<sup>16</sup> See 22 U.S.C. § 2151-2220 (2006) (describing Foreign Assistance Programs administered by the U.S. Department of State, with the statutes existing as codifications of the Foreign Assistance Act of 1961).

<sup>17</sup> *Id.*

<sup>18</sup> 10 U.S.C. §§ 2341-2350 (2006). This congressional authorization trumps the language in AR 735-5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See generally U.S. DEP'T OF THE ARMY, WAR SURGERY IN AFGHANISTAN AND IRAQ: A SERIES OF CASES: 2003-2007 (Nessen et al. eds., 2008) [hereinafter WAR SURGERY CASEBOOK] (showing the quality of military trauma care).

<sup>22</sup> See, e.g., Erica Goode, *Toddler Returns to Iraq After Life-Saving Surgery*, N.Y. TIMES, Mar. 10, 2008, at A8 (observing the clear public benefit of medical treatment, even though, in this case, it was provided outside of the waiver process)). One successful tactic in COIN operations is separate the insurgents from the population, which causes the insurgency to wither on the vine. FM 3-24, *supra* note 6, at 1-29. It also improves the quality of life, demonstrating the prevention of human suffering as another effective COIN tactic. *Id.*

exigent circumstances,<sup>23</sup> as Department of Defense (DoD) guidance customarily reserves medical treatment for the benefit of DoD personnel.<sup>24</sup> The challenge of navigating the regulatory framework falls squarely on the shoulders of the judge advocate, whose primary function is determining the propriety of a foreign national medical waiver for non-emergency treatment.

The quality of organic medical care provided to the members of the U.S. military is quite strong.<sup>25</sup> This competence, while not only providing confidence to U.S. personnel, can be used as a combat multiplier in the battle for the hearts and minds of the local populace.<sup>26</sup> Though Iraq does have a strong medical tradition, the infrastructure, training, supplies, and equipment are not always to the standard normally associated with the U.S. military.<sup>27</sup> Providing medical care to the local populace, when available, proves the friendship portion of the “no better friend, no worse enemy” slogan popularized by the U.S. Marine Corps in Al Anbar province.<sup>28</sup> While the public relations benefit of providing treatment appears to be clear,<sup>29</sup> the more fundamental question is whether and when the regulatory scheme permits such treatment.

This article approaches the issue of medical treatment much like the peeling of an onion, working from general to specific. Additionally, as the application of the guidance necessarily varies for categories of prospective patients, it is necessary to explore how the restrictions apply to each subset of foreign nationals. Illustrations and examples will round out the discussion for evidence of the practical aspects of medical treatment and medical waivers.

#### A. The Regulatory Environment

The current DoD policy regarding military medical treatment and medical force protection is outlined in DoD

Instruction (DoDI) 6200.04.<sup>30</sup> Included in this document is the mandate for the Armed Forces medical community to provide treatment for contractors and civilians accompanying the force.<sup>31</sup> Non-emergent civilian medical care in a COIN fight could seemingly be an extension of the current policy.<sup>32</sup> Despite the policy arguments and current mandate for treatment of non-Service members, DoDI 6200.04 is silent on the treatment of foreign nationals.<sup>33</sup> This silence should not be inferred as acquiescence to non-emergent treatment of foreign nationals. In fact, generic foreign nationals likely do not “accompany the force,” which prevents any affirmative grant of routine treatment.<sup>34</sup> Other than the broad precedent of situations where non-emergent medical treatment of civilians is appropriate, DoDI 6200.04 provides little substantive guidance.<sup>35</sup>

The sparse direction that does exist on this topic can be found in chapter IV of Joint Publication 4-02,<sup>36</sup> particularly subsection 9(d) is on point in regards to contractor medical care available.

(1) During contingency operations in austere and nonpermissive environments, contingency contractor personnel may not have access to emergency medical support established by their employer. MTFs within the theater of operations should provide resuscitative care, limited hospitalization for stabilization and short-term medical treatment, with an emphasis on return to duty or placement in the PM [patient movement] system; and assist with PM to a selected civilian facility, in emergencies where loss of life, limb, or eyesight could occur.

(2) Contingency contractor personnel are afforded resuscitative and medical care, when life, limb, or eyesight is jeopardized,

<sup>23</sup> See *supra* notes 7–12 and accompanying text.

<sup>24</sup> See generally JOINT CHIEFS OF STAFF, JOINT PUB. 4-02, HEALTH SERVICE SUPPORT, at IV-19 (31 Oct. 2006) [hereinafter JOINT PUB. 4-02] (cautioning healthcare providers to be aware of the limits of providing non-DoD beneficiaries medical treatment).

<sup>25</sup> See generally WAR SURGERY CASEBOOK, *supra* note 23 (showing how military trauma treatment has evolved).

<sup>26</sup> Goode, *supra* note 24.

<sup>27</sup> Erica Goode et al., *For a Hundred Iraqi Doctors, A Return to Normal*, N.Y. TIMES, Apr. 30, 2008, at A10.

<sup>28</sup> See, e.g., Samantha Power, *Our War on Terror*, N.Y. TIMES, July 29, 2007, at 7-1 (speaking of Lieutenant General James Mattis’s famous motto for the Marines in Al-Anbar province).

<sup>29</sup> This impact can occur both within the populace engaged by the COIN fight and among the larger public population. Maintaining domestic public support for the lengthy process of defeating an insurgency is also a significant objective.

<sup>30</sup> U.S. DEP’T OF DEFENSE, INSTR. 6200.04, FORCE HEALTH PROTECTION § 4 (9 Oct. 2004) [hereinafter DoDI 6200.04].

<sup>31</sup> *Id.* § 4.3.4.

<sup>32</sup> The argument that DoDI 6200.04 provides a basis for non-emergent treatment of civilians was not used as the authority for treatment for during the XVIII Airborne Corps’s rotation as Multi-National Corps–Iraq, Headquarters, 2008–2009. Furthermore, there was no evidence in the files of MNC–I which indicated previous reliance.

<sup>33</sup> DoDI 6200.04, *supra* note 32.

<sup>34</sup> *Id.* There may, however, be additional interpretations if indigenous people have picked up and followed the Armed Forces to work as translators, laborers, or in other supportive positions. These personnel pose a possible exception to the general rule prohibiting medical treatment for foreign nationals as a fair reading would appear imply these individuals are “accompanying the force.”

<sup>35</sup> The plain language of the source appears to be a probable and very general delegation of authority. Further guidance serves to provide a more substantive and concrete authority.

<sup>36</sup> JOINT PUB. 4-02, *supra* note 26, at IV-29.

and emergency medical and dental care while supporting contingency operations. Emergency medical and dental care include, but are not limited to: refills of prescription or life-dependent drugs (Note: contractor personnel are required to deploy with 180 days of required medication and cannot be assured that their specific medication will be included on the theater pharmaceutical formulary), broken bones, lacerations, broken teeth, or lost fillings.<sup>37</sup>

The above provisions express the general rule that the military community can provide care if the life, limb, or eyesight of the patient is in jeopardy.<sup>38</sup> This general rule provides the baseline for treatment for both contracting personnel and foreign nationals.<sup>39</sup>

The harder question to answer in practice is what constitutes a danger to life, limb, or eyesight. For instance, if an infection in a normally-functioning hand goes unchecked, the patient may lose the arm given the level of care available at the local Iraqi hospital. Applicable regulations simply did not treat this situation (and similar situations) to qualify as an actual emergency. Thus, care is not available under the exigent circumstances analysis because the infection is more of a gradual process and less immediate of an injury.<sup>40</sup> Progressive diseases such as cancer, although very deadly, likewise do not meet the definition of emergencies within the prevailing regulatory framework. A contrary interpretation would allow nearly any injury or illness to be boot-strapped into the emergency exception and effectively eviscerate the applicable policy limitations.

If medical care is provided under the emergency/resuscitative provisions, the care should be limited to stabilization of the patient until the emergency ends.<sup>41</sup> In fact, Joint Publication 4-02 states the patient should be returned to a local facility “as soon as medically

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at IV-6, IV-18 (limiting urgent medical care only to civilians, refugees, and internally displaced persons when otherwise unavailable). The limits of this urgent care are arguable given the guidance. If care is limited to urgent medical care, the waiver process may not be required. Additionally, if routine medical care is available through contract, the waiver process is also equally unnecessary. The trend appears to be moving away from language providing this routine care in the contracting process.

<sup>39</sup> This article’s treatment of contractors is discussed only as it impacts the foreign national medical treatment analysis.

<sup>40</sup> Reasonable minds can differ on where to draw the line on exigent circumstances. Consultation with medical professionals is critical to gain an understanding of the exact medical condition and accept input on the best course of action. In line with the noted anonymous adage, “A pig gets fat, but a hog gets slaughtered.” A friendly interpretation of exigent circumstances may be allowable, but can quickly become dubious.

<sup>41</sup> JOINT PUB. 4-02, *supra* note 26, at A-8 to A-13 (discussing stabilization, evacuation, short-term hospitalization policies).

feasible.”<sup>42</sup> This language is rather ambiguous and open to significant legal and medical interpretation, especially when advanced treatment simply is not available in the local medical community.<sup>43</sup> It may be impractical to move a patient under all circumstances, with necessary stabilization legitimately lasting days at a time. After this flexible “grace” period, a policy waiver generally becomes necessary for additional medical care. In other words, medical authorities must be able to articulate a fixed point when the emergency situation has terminated, thereby permitting relocation of the patient to Iraqi facilities. Despite this relatively flexible emergency standard, logical and practical considerations still limit the “wiggle room” provided by most emergency treatment provisions. Medical personnel should therefore undertake continued medical treatment in good faith, supported by well-reasoned medical and legal underpinnings.

On a practical note, coordination should occur during the transition period between a possible medical waiver and any return to the Iraqi system. The best solution is often to have the “emergency” care provided by the U.S. forces get the patient on the road to recovery in the first hours, and then transfer the patient to an Iraqi facility for follow-on care. Coordination between the Iraqi and U.S. medical personnel can leverage this initial emergent treatment to the greatest extent possible. Education of the medical professionals regarding the legal constraints for foreign national follow-on care is helpful to ensure resources are best utilized. If the medical treatment cannot be considered emergency treatment, the legal analysis does not necessarily end. The final method to facilitate U.S. military medical care is through a foreign national medical waiver request. Guidance for the Iraq Theater of Operations (ITO) is outlined in Multi-National Force–Iraq (MNF–I) Policy Memorandum 11-1.<sup>44</sup> This document reflected not only the broad intent of regulatory compliance, but also the COIN value of providing medical care to foreign nationals in limited circumstances.<sup>45</sup> Under this policy, the ITO was given a strict process for controlling non-emergency medical care of foreign nationals as reflected in DoD policy.<sup>46</sup> The approval authority for medical waivers generally rests with the Chief of Staff of MNF–I in concurrence with the MNF–I Surgeon.<sup>47</sup> The waiver requests, however, were routed through operational channels including the Multi-National

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<sup>42</sup> *Id.* at IV-30.

<sup>43</sup> When there is no comparable level of care available in local facilities, the term “medically feasible” has limited meaning. Arguably, a return to local care is never feasible when comparable care is unavailable.

<sup>44</sup> See generally Policy Letter 11-1, Multi-National Force–Iraq, subject: Chapter 14 Medical Services (2 Dec. 2007) [hereinafter MNF–I Policy 11-1].

<sup>45</sup> *Id.*

<sup>46</sup> See MNF–I Policy 11-1, *supra* note 46, at 14-50 to 14-57.

<sup>47</sup> *Id.* at 14-53.

Corps–Iraq (MNC–I) Chief of Staff and Surgeon.<sup>48</sup> Thus, the MNC–I legal reviews focused on advising the MNC–I Chief of Staff and providing the first legal look at the proposed grounds for medical treatment of a foreign national.

Each waiver request was analyzed on an individual basis given the potential patient’s medical diagnosis, demographic, and location. The outcomes were based upon the confluence of these factors, but were fundamentally a function of the patient’s demographic. An examination by demographic appears to be most instructive, as this was the largest factor in the ability U.S. forces to treat foreign nationals in non-emergency situations.

## B. Civilians on the Battlefield

Although the COIN fight is recognized to be for the people,<sup>49</sup> medical policies have not been updated to reflect this crucial strategic objective. Iraqi civilians are not generally entitled to medical care with American assets absent exigent circumstances and should seek treatment at local Iraqi facilities.<sup>50</sup> This policy reinforces the historical thinking regarding wounded civilians on the battlefield.<sup>51</sup> Third-country civilians, absent an unusual relationship with the U.S. Government, should be treated in much the same way as local civilians.<sup>52</sup> This generic analysis, however, can be impacted by the individual circumstances of the civilian, the mechanism of injury, and any “special” status the civilian may hold. In short, a medical waiver is the usual and customary route for civilian treatment of non-emergency illness.

The ITO is flush with contractors serving various aspects of the military apparatus.<sup>53</sup> The ability to provide medical care for contractors is impacted by their location of hire, contract position, and contract language. Foreign nationals may gain additional avenues of medical treatment

if they are contractors working in direct support of military operations.<sup>54</sup> Locally-hired theater support contractors, however, have no entitlement to medical care, except when injured on the job at a U.S. military facility.<sup>55</sup> For other contractors, routine medical care by the military was included in their individual contract.<sup>56</sup> A foreign national medical waiver is not needed if the U.S. Government has a contractual relationship with the injured foreign national to provide for non-emergent care. Experience has shown that few foreign nationals were able to secure this medical language in their contracts, although contractual medical requirements were more wide-spread among American citizens. Any suggestion that a medical waiver is unnecessary due to contractual relationship necessarily requires the reading and review of the individual contract in question.

The idea that non-emergency care is in the best interest of the United States can also provide the grounds for a medical waiver under the applicable policy.<sup>57</sup> Normally a “best interest” scenario occurs when U.S. forces unintentionally injure Iraqi citizens. In fact, if the injuries to a civilian occur as a direct result of U.S. action, the wounded civilians may be evacuated and treated by U.S. medical personnel.<sup>58</sup> Despite the general preference to treat Iraqi civilians in Iraqi facilities, continued treatment is in the best interest of the U.S. Government when it has caused such injury. Medical care of foreign civilians who were simply bystanders injured in combat was the most widely used foreign national waiver during the XVIII Airborne Corps’s rotation as MNC–I.

<sup>48</sup> *Id.*

<sup>49</sup> FM 3-24, *supra* note 6, at 2-6.

<sup>50</sup> *Id.*

<sup>51</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention] (explaining that civilian medical care remains the primary responsibility of civilian authorities).

<sup>52</sup> See MNF–I Policy 11-1, *supra* note 46, at 14-53. (depicting a table treating non-governmental organization workers the same as Iraqi civilians and briefly discussing existing relevant agreements). Detainees, Federal civilian employees, and United Nations personnel, however, generally had access to the full-spectrum of U.S. military medical care based upon this policy and the underlying agreements. Planning for treatment of U.S. Government employees, detainees, and others is specifically addressed in JOINT PUB 4-02, *supra* note 24, at IV-4.

<sup>53</sup> See, e.g., John Broder & David Rohde, *State Dept. Use of Contractors Leaps in 4 Years*, N.Y. TIMES, Oct. 24, 2007, at A1.

<sup>54</sup> JOINT PUB 4-02, *supra* note 26, at IV-30 (generally prohibiting host nation and locally-hired, third-country-national personnel from receiving medical treatment, but recognizing the requirement to support contractors who operate in direct support of combat operations).

<sup>55</sup> *Id.* The United States often provides theater support contractors as a non-skilled labor force to augment numerous logistical and construction requirements in deployed settings. An example of a theater support task would be to employ local nationals to help with the emplacement of earthen berms, barriers, or structures for installation protection.

<sup>56</sup> *Id.* at IV-27. These provisions typically were found with U.S. citizen contractors employed by the DoD. Iraqi Nationals who had routine healthcare in their employment contracts appear to be few and far between as the MNC–I administrative law section only read one contract with routine care provisions during OIF 2008–2009 for an Iraqi National. Contractor care, however, is generally based on a system of reimbursement. Thus, many fiscal problems associated with the use of medical resources are solved by the reimbursement requirement. Although this process requires deliberate tracking of expenses, the regulatory concerns are mollified by the reimbursement clauses. Furthermore, many contractors were former members of the U.S. Armed Forces. Armed Forces retirees have the ability to obtain routine care at most military treatment facilities on account of their retirement status. These retirement benefits may circumvent the need for additional analysis on treatment eligibility.

<sup>57</sup> MNF–I Policy 11-1, *supra* note 46, at 14-53 to 14-54.

<sup>58</sup> JOINT PUB 4-02, *supra* note 26, at IV-29 to IV-30.

The best interest exception was not limited to bystanders. Iraqi officials could also receive American medical treatment based on the nature of their job or stature under the “best interest of the United States” exception.<sup>59</sup> The prospective patient’s position should make treatment specifically advantageous in the COIN environment. The request for treatment under the “best interest” rationale must come from at least a major general or the U.S. Ambassador to Iraq.<sup>60</sup> Top officials in the Iraqi Government may be granted medical care in consultation with the Department of State and the MNF–I surgeon.<sup>61</sup> These upper-level officials’ requests are evaluated on a case-by-case basis and coordinated through the Department of State Health Attaché for maximum results.<sup>62</sup>

Additionally, treatment may be provided if the prospective patient is a high value individual or security risk.<sup>63</sup> The most applicable use of this exception occurred when the prospective patient had recognized authority outside of the official Government of Iraq and was, thus, a “high value individual.”<sup>64</sup> There is an inherent political weighing process applicable to every waiver request, as each waiver packet must be authorized in writing before treatment can begin.<sup>65</sup> Practically speaking, important sheiks and other local powerbrokers had a better chance of obtaining a foreign national medical waiver given their ability to impact the political and security environment. In fact, engaging key leaders is an important aspect of the COIN fight.<sup>66</sup> Medical treatment can build stronger relationships and serve as a source of leverage in these engagements. Iraqi leaders who were targeted by insurgents because of their cooperation with U.S. forces were also often the beneficiary of medical waivers. Although the exceptions might be interpreted as preferential treatment to the politically well-connected, this is not the case. In order for the waiver to be effectively used in a COIN environment, judicious use of medical resources must be exercised only on those whose treatment can improve conditions on the ground in some concrete way. A little wiggle room is inherent in the broad “in the best interests” or “high value” language, but articulable benefits

must be present for a medical waiver to comply with the regulatory structure.<sup>67</sup>

If the United States did not cause the injury, the civilian has no ties to the U.S. Government, and the best interest or high value exceptions are unavailable; treatment in a U. S. facility is generally precluded. While the unavailability of military medical care for these civilians is unfortunate, the fact remains the regulatory constraints simply prevent the U.S. military from serving the entirety of the civilian population on the battlefield. Even though most civilians are not eligible for medical care, there are also other populations which may avail themselves of U.S. military medicine given the appropriate conditions.

### C. Security Forces

Although the mantra of “by, with, and through” the Iraqis is still applicable, the medical treatment of Iraqi Security Forces (ISF) is not mandated by this partnership.<sup>68</sup> The Iraqi forces are properly categorized as “host nation forces” under the applicable guidelines.<sup>69</sup> Given this status, the standard answer to the question of medical treatment is that host nation forces will be treated using host nation facilities. In most respects the legal analysis for ISF mirrors the analysis for Iraqi civilians.<sup>70</sup> In fact, MNF–I policy explicitly states “MNF–I has no legal obligation to evacuate the ISF, however, MNF–I units may do so if called upon by specific reasons.”<sup>71</sup> When applying this policy, MNC–I interpreted the “specific reasons” to include the preservation of life, limb, or eyesight as listed in Joint Publication 4-02.<sup>72</sup> The non-emergent treatment of members of the ISF posed challenges where they were not injured by the Coalition or during Coalition operations.<sup>73</sup> The waivers submitted for members of the ISF were often generically based upon moral underpinnings, because the level of care provided in the Iraqi system simply was not commensurate with what the United States could provide.<sup>74</sup> While these cases may have

<sup>59</sup> *Id.*

<sup>60</sup> MNF–I Policy 11-1, *supra* note 46, at 14-54.

<sup>61</sup> *Id.* at 14-53.

<sup>62</sup> *Id.* at 14-53 to 14-54.

<sup>63</sup> *Id.* at 14-54.

<sup>64</sup> As the COIN environment matured, tribal and religious leaders played an increasingly important role coordinating with the U.S. military. Although an Iraqi national could be both a “high value individual” and a “high value target,” these terms are not synonymous. A “high value” individual in the context of medical waivers was typically a political or tribal leader.

<sup>65</sup> MNF–I Policy 11-1, *supra* note 46, at 14-54.

<sup>66</sup> FM 3-24, *supra* note 6, at 2–9 (cautioning readers to consider the impact of key leaders).

<sup>67</sup> MNF–I Policy 11-1, *supra* note 46, at 14-53 to 14-54.

<sup>68</sup> *Id.* at 14-50.

<sup>69</sup> See generally JOINT PUB 4-02, *supra* note 26 (differentiating between allied personnel and host-nation personnel).

<sup>70</sup> See generally MNF–I Policy 11-1, *supra* note 46.

<sup>71</sup> MNF–I Policy 11-1, *supra* note 46, at 14-50.

<sup>72</sup> See JOINT PUB 4-02, *supra* note 26, at IV-29.

<sup>73</sup> See discussion, *supra*, regarding Iraqi civilians obtaining medical waivers.

<sup>74</sup> Part of the security gains were attributable to tribal rejection of and resistance to extremist influence. These tribal and local militias—especially ones located in Al Anbar—would become known as the Sons of Iraq. While these men did provide security (and may have even been promised integration into the ISF), a waiver request for a Sons of Iraq was typically processed through in much the same way a request for treatment of an Iraqi civilian.

been opportunities to strengthen the partnership between the two nations, successful non-emergent waivers for standard ISF members were few and far between.

#### IV. Conclusion

At times, despite humanitarian sentiments, it is simply outside the regulatory guidelines to provide medical care for foreign nationals. While the regulations are more conducive to a garrison and cold war paradigm, judge advocates and commanders can only change behavior, not rules. Effective

COIN operations during a contingent environment require nimble commanders and all the resources of the U.S. Government. The medical waiver process can be an important component of this battle when the regulations would normally preclude the utilization of such a weapon. In coordination with the medical community, the deployed judge advocate can further focus all the resources of the U.S. military on winning the COIN fight.

## Book Reviews

### Wired for War: The Robotics Revolution and Conflict in the Twenty-First Century<sup>1</sup>

Reviewed by *Major Michael P. Baileys*<sup>2</sup>

*Man's monopoly of warfare is being  
broken. We are entering the era of robots  
at war.*<sup>3</sup>

#### I. Introduction

In *Wired for War*, P.W. Singer demonstrates that twenty-first century robots have left Deep Blue (“IBM’s chess-playing supercomputer”)<sup>4</sup> in the dust, and that humankind needs to pay attention, lest it suffer the same fate.<sup>5</sup> Bolstered by four years of research and investigation,<sup>6</sup> Singer explores everything from the history of robotics<sup>7</sup> to the plausibility of a “robot revolt.”<sup>8</sup> The result is a provocative gem that challenges readers from all walks-of-life to consider the consequences of creating robots with “artificial intelligence,”<sup>9</sup> arming them with extremely accurate weapons systems,<sup>10</sup> and deploying them into battle.<sup>11</sup> This review examines Singer’s primary arguments, the potential impact of these developments on military commanders, and the challenges the operational legal community will face because of these technological innovations.

#### II. Robots Will Change Everything We Know About War<sup>12</sup>

Singer argues that robots that participate in war are not only the “most important weapons development since the atomic bomb,”<sup>13</sup> but also that society may be in the midst of a “[robotic] revolution in warfare and technology that will literally transform human history . . . .”<sup>14</sup> In *Wired for War*, he contemplates future battlefields where robotic warriors<sup>15</sup> order shape-shifting<sup>16</sup> Howitzers to fire on enemy androids protected by a rocket-wielding droid with the appearance of R2-D2 in the acclaimed *Star Wars* series.<sup>17</sup> Through such far-fetched scenarios, Singer compels readers to consider the possibility that human Soldiers may eventually surrender their role in war to sentient robots, capable of thinking, acting, and killing on their own.<sup>18</sup>

Singer distinguishes autonomous robots’ participation in war from the development of other historical weapons by emphasizing a simple fact: robots have the capability to remove humans altogether from particular segments of the battlefield.<sup>19</sup> Before fully autonomous robots like the “Polecat,”<sup>20</sup> a machine that “will be able to carry out its mission from takeoff to landing without any human instruction,”<sup>21</sup> or the proposed “Vulture,”<sup>22</sup> which experts hope will remain aloft for five years, man has controlled the human or robot entities that fight.<sup>23</sup> Although scientists and

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<sup>1</sup> P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* (2009).

<sup>2</sup> Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

<sup>3</sup> SINGER, *supra* note 1, at 41.

<sup>4</sup> *Id.* at 45.

<sup>5</sup> *Id.* at 41.

<sup>6</sup> *Id.* at 12 (detailing the various sources used: history books, military and technology journals, Internet sites, as well as interviews of various scientific, military, government, and media experts).

<sup>7</sup> *Id.* at 42.

<sup>8</sup> *Id.* at 413.

<sup>9</sup> *Id.* at 77; Interview by P.W. Singer with Sebastian Thrun, Dir. of the Artificial Intelligence Lab., Stanford Univ. (Mar. 18, 2007) (“[A]rtificial intelligence is the ‘the ability of a machine to perceive something complex and make appropriate decisions.’”).

<sup>10</sup> SINGER, *supra* note 1, at 31.

<sup>11</sup> *Id.* at 37.

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<sup>12</sup> *Id.* at 41.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 89 (describing the advances in “humanoid” robotics, where the robots have two arms and legs).

<sup>16</sup> *See id.* at 93 (“[S]cientists in Palo Alto have already made the Polybot, which uses hinged cubes to shape its entire body into all sorts of forms, such as shifting from a snake into a spider.”).

<sup>17</sup> *Id.* at 38 (“[T]he Counter Rocket Artillery Mortar technology, or CRAM for short . . . is basically R2-D2 taken off of a ship and crammed (mounted) onto a flatbed truck.”).

<sup>18</sup> *Id.* at 120 (“Drone versus drone may be the next step in warfare.”).

<sup>19</sup> *Id.* at 117.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* (defining the “VULTURE” as a “Very-high-altitude, Ultra-endurance, Loitering Theater Unmanned Reconnaissance Element drone.”).

<sup>23</sup> *Id.* at 41.

military experts vehemently affirm that humans will always be “in the loop,”<sup>24</sup> Singer suggests future robots may not only assume the nation’s toughest military missions, but they may also execute fully autonomous operations.<sup>25</sup>

### III. People Win and Lose Wars . . . Especially Counterinsurgencies

Few would argue against the tactical utility of a robot that can “. . . run four-minute miles for five hours, carrying one hundred pounds of gear,”<sup>26</sup> or a reconnaissance drone that may remain aloft for up to five years.<sup>27</sup> Even fewer would object to hunting down our country’s most wanted terrorists with drones that never have to sleep, eat, or refuel. Nevertheless, military and political leaders should ask whether these twenty-first century creations are helping us win our current conflicts?

Commanders and legislators alike are clamoring for additional unmanned systems to employ on various tactical (reconnaissance, explosive ordinance disposal, targeting, and intelligence gathering) missions.<sup>28</sup> However, neither the scientific community nor the deep thinkers at the Defense Advanced Research Projects Agency (DARPA)<sup>29</sup> have developed robots who can master the human subtleties required for Counterinsurgency (COIN) operations. Robots cannot sit down and have tea with a local sheik,<sup>30</sup> or listen to the grievances of a local governing council with the requisite mix of shrewdness and empathy required to marshal allies in a COIN environment.<sup>31</sup> The conflicts in Iraq and Afghanistan require commanders to show tremendous care and tact while prosecuting the war effort. Thus, commanders should endeavor to use robots, drones, and unmanned aerial vehicles (UAVs) with great caution, lest

our enemies turn our technological strength into an operational weakness.

Tactically, unmanned systems yield impressive results, such as the exploits of the Sky Warrior, which helped Task Force Odin kill more than 2400 insurgents in one year.<sup>32</sup> However, they are not perfect and, at times, fatally inaccurate.<sup>33</sup> Collateral damage fuels insurgent recruitment,<sup>34</sup> which poses challenges for commanders fighting for the confidence of the local populace.<sup>35</sup> One expert on Middle Eastern affairs told Singer, “[t]he average person sees it [use of unmanned systems] as just another sign of the coldhearted, cruel Israelis and Americans, who are cowards because they send out machines to fight us.”<sup>36</sup> Another Pakistani Army officer noted “One cannot deny the effect of the drones in taking out senior leadership, the militancy’s centre of gravity . . . [b]ut at the same time it has become a huge motivation to fight against the Government and the army . . . [a]ll combined, it creates a very negative impact.”<sup>37</sup> Accordingly, commanders must reflect on these observations while weighing the risks of utilizing machines in COIN campaigns. While overreliance on unmanned systems could lose the “hearts and minds”<sup>38</sup> of the local people, avoiding the use of these same systems could put more U.S. troops at risk.

The U.S. aversion to losing troops (and the military’s attempts to mitigate that risk) has created a vulnerability<sup>39</sup> that the proliferation of unmanned systems may exacerbate.<sup>40</sup> One scholar sees inherent dangers in the

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<sup>24</sup> *Id.* at 123.

<sup>25</sup> *See id.* at 126.

<sup>26</sup> *Id.* at 24.

<sup>27</sup> *Id.* at 117

<sup>28</sup> *Id.* at 65, 216.

<sup>29</sup> *Id.* at 140 (“DARPA’s overall mission is to support fundamental research on technologies that might be common twenty years from now, and to try to make them happen earlier to serve the needs of the U.S. military today.”).

<sup>30</sup> *Id.* at 76 (highlighting the current reality that robots have difficulty with certain simple human tasks, like distinguishing an apple from a tomato).

<sup>31</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 7-8 (15 Dec. 2006) [hereinafter FM 3-24] (“Another part of analyzing a COIN mission involves assuming responsibility for everyone in the AO. This means that leaders feel the pulse of the local populace, understand their motivations, and care about what they want and need. Genuine compassion and empathy for the populace provide an effective weapon against insurgents.”).

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<sup>32</sup> SINGER, *supra* note 1, at 222 (“Task Force Odin (the chief Norse god, but also short for “Observe-Detect-Identify-Neutralize) . . . was able to find and kill more than 2400 insurgents either making or planting bombs, as well as capture 141 more, all in just one year.”).

<sup>33</sup> *Id.* at 125, 397 (citing examples where innocent civilians died because of drone errors).

<sup>34</sup> FM 3-24, *supra* note 31, para. 1-141] (“An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents.”).

<sup>35</sup> *See id.* para. 1-142 (“In a COIN environment, it is vital for commanders to adopt appropriate and measured levels of force and apply that force precisely so that it accomplishes the mission without causing unnecessary loss of life or suffering.”).

<sup>36</sup> SINGER, *supra* note 1, at 309; Interview by P.W. Singer with Rami Khouri, Dir. of the Issam Fares Inst. of Pub. Policy and Int’l Affairs, Am. Univ. of Beirut (Aug. 26, 2006).

<sup>37</sup> Anthony Loyd, *US Drone Strikes in Pakistan Tribal Areas Boost Support for Taleban*, LONDON TIMES, Mar. 10, 2010.

<sup>38</sup> FM 3-24, *supra* note 31, app. A, para. A-26.

<sup>39</sup> SINGER, *supra* note 1, at 59; Major General (Ret.) Robert H. Scales, *Urban Warfare: A Soldier’s View*, MIL. REV., Jan.–Feb. 2005, at 9 (“[D]ead soldiers are America’s most vulnerable center of gravity. . . .”).

<sup>40</sup> SINGER, *supra* note 1, at 60.

overreliance on technology to produce “riskless wars.”<sup>41</sup> Comparing present robotic advances and past technologies, Dr. Douglas Peifer warns, “betting that the latest iteration of revolutionary technology will magically compel a resolute enemy to come to terms is unwise [because] [t]hinking opponents have a way of unmasking magic and bedeviling the best laid plans for riskless war.”<sup>42</sup> Commanders should heed this warning by considering the limitations of our space-age arsenal while engaged in a war against enemies who consistently exploit the technological advances of their opponents to gain an upper-hand on the battlefield.

There is no blueprint for commanders to consult when trying to balance COIN principles with the proliferation of unmanned systems.<sup>43</sup> However, no matter how accurate a robot can fire or how fast it can “run,” commanders ultimately decide which systems to use against a given enemy. The balance commanders establish will set the stage for success in a COIN environment. Judicious use of unmanned systems may limit the enemy’s ability to propagandize technical mishaps causing collateral damage. Alternatively, the less a commander employs unmanned systems, the more risk Soldiers assume while performing dangerous duties. Singer envisions “a combination of the age-old methods with the new technology . . . in these complex fights.”<sup>44</sup> Regardless of the implementation plan, the decision remains in human hands, and with that power a commander can manage the impact unmanned systems have in war.

#### IV. Lawyers Beware

As the military fields more and more unmanned systems, uniformed attorneys will find it increasingly difficult to reign in the use of these new weapons without a workable legal framework. Singer notes the shortcomings of the current state of the law by remarking generally, “while technologic change is speeding up exponentially, legal

change remains glacial.”<sup>45</sup> He continues by noting the International Committee of the Red Cross (ICRC) has not studied how robots fit into the body of International Law,<sup>46</sup> and Human Rights Watch is silent on the issue as well.<sup>47</sup> Yet, one U.S. military expert proclaims, “The lawyers tell me there are no prohibitions against robots making life-or-death decisions.”<sup>48</sup> Another opines, “There is no consensus yet on anything new and, unfortunately, I don’t think we are due for a breakthrough until something terribly bad happens.”<sup>49</sup>

As technology pushes against the barriers set by international law, military attorneys must strive to remain one-step ahead of organizations, DARPA and its cabal of experts, turning science fiction into reality.<sup>50</sup> Lawyers will have to consider cases similar to the following hypothetical: If a drone pilot in Nevada directs an aircraft to drop a bomb on a group of unarmed civilians in Afghanistan, and that bomb injures or kills those people, then who can the military hold accountable?<sup>51</sup>

Singer refers to (but does not cite) a policy that holds the pilot responsible, as if he flew the plane and dropped the bomb.<sup>52</sup> However, what if the drone malfunctioned? Would the analysis be the same if the pilot fired on the wrong group of people based on the direction of an on-scene commander? Which command handles the investigation and potential court-martial?<sup>53</sup> Would the Government have a viable breach of contract suit against the company that designed the robot?<sup>54</sup> From jurisdiction and command responsibility to products liability and negligence, unmanned systems pose more questions than answers.

Nonetheless, the United States, as the de facto leader in fielding “warbots,”<sup>55</sup> must adopt a workable standard to ensure compliance with the basic principles of the laws of

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<sup>41</sup> See Douglas Peifer, *Riskless War: Technology, Coercive Diplomacy, and the Lure of Limited War*, SMALL WARS J., May 12, 2009 (comparing robotic advances to other historical weapons developments that dupe nations into thinking “riskless wars” produce victories).

<sup>42</sup> *Id.* at 9.

<sup>43</sup> See FM 3-24, *supra* note 31, app. B, para. B-7, app. E, paras. E-7, E-16 (noting “unmanned aircraft systems” utility in providing imagery, intelligence, surveillance, and target acquisition capabilities); see also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24.2, TACTICS IN COUNTERINSURGENCY para. 6-79 (21 Apr. 2009) (acknowledging the ability of “robotics” to assist Soldiers in route clearance operations. Neither FM 3-24 nor FM 3-24.2 discusses the proposition raised in the text.

<sup>44</sup> SINGER, *supra* note 1, at 223 (citing the mission that led to Abu Musab al-Zarqawi’s demise).

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<sup>45</sup> *Id.* at 387.

<sup>46</sup> *Id.* at 385.

<sup>47</sup> *Id.* at 388.

<sup>48</sup> *Id.* at 387; Tim Weiner, *A New Model Army Soldier Rolls Closer to the Battlefield*, N.Y. TIMES, Feb. 16, 2005, at A4 (quoting Mr. Gordon Johnson of the U.S. Military Joint Warfare Center).

<sup>49</sup> SINGER, *supra* note 1, at 387; Interview by P.W. Singer with Steven Metz, Professor, U.S. Army War Coll. (Sept. 19, 2006).

<sup>50</sup> SINGER, *supra* note 1, at 140.

<sup>51</sup> See *id.* at 386.

<sup>52</sup> *Id.*

<sup>53</sup> At the very least, attorneys assigned to units utilizing unmanned systems should seek theater-specific guidance concerning applicable policies, practices, and procedures involving robots.

<sup>54</sup> SINGER, *supra* note 1, at 399.

<sup>55</sup> *Id.* at 297.

war.<sup>56</sup> Singer supports the idea of a legal framework, when considering armed, autonomous robots: “[E]ither enact a legal ban on such systems soon or start to develop some legal answers for how to deal with them.”<sup>57</sup> A ban at this time seems implausible, given the tactical utility of various unmanned systems. However, the Department of Defense could direct service attorneys to conduct weapons reviews for every unmanned system in use, and develop guidelines to educate both commanders and lawyers on the legal employment of, and proper accountability procedures for, robots in war.

One final practical challenge for lawyers grappling with the legal implications of the exponential increase in unmanned systems<sup>58</sup> is the jaundiced view many military leaders hold toward lawyers. Singer corrals a herd of naysayers who complain the expanding role of lawyers in modern operations is akin to “Monday-Morning Quarterbacking.”<sup>59</sup> Unfortunately, this negative chorus adds little to do the discussion concerning the proliferation of robot use in warfare. The “Mullah Omar” story, which involves the alleged missed opportunity to engage a vehicle convoy carrying the Taliban leader apparently for the purpose of demonstrating how military lawyers have grown “too powerful” is neither new nor fully recounted, and arguments decrying “lawfare”<sup>60</sup> by the enemy do not help to define the legal issues involved when a nation employs robots to do Soldiers’ work.<sup>61</sup> Singer overlooks the real

“Monday-Morning Quarterback” (the commander), whose duties require him to order an investigation into subordinates’ errors,<sup>62</sup> decide whether to punish those Soldiers involved, and require all personnel under his command to abide by the laws of war.<sup>63</sup> Despite objections to the contrary, lawyers are a valid part of operations, and they will continue to play a key role in defining robots’ roles in war.

## V. Conclusion

*Wired for War* is a well-written and well-researched book that should be on every military officer’s shelf. In an engaging, funny, and informative style, Singer leaves no stone unturned as he guides the reader through the momentous discoveries and monumental failures of the robotics revolution. The provocative second half of this work focuses on the manifold political, moral, ethical, and legal issues governments and individuals face as these unmanned systems find their way to different battlefields all over the world. The robotics revolution is here to stay, so purchase a copy of this book and determine if you agree that “[s]adly, our machines may not be the only things wired for war.”<sup>64</sup>

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<sup>56</sup> *Id.* at 410 (positing the application of pet law as a means of understanding autonomous system accountability).

<sup>57</sup> *Id.* at 409.

<sup>58</sup> *Id.* at 37; Lieutenant General David A. Deptula (USAF), *Unmanned Aircraft Systems: Taking Strategy to Task*, JOINT FORCES Q., No. 49 (2d Quarter 2008), at 50 (projecting “tens of thousands” of UAVs in future conflicts).

<sup>59</sup> SINGER, *supra* note 1, at 390.

<sup>60</sup> *Id.* at 391; *see also* Lawfare, the Latest in Asymmetries (transcript of Fiscal Year 2003 National Security Roundtable), Council on Foreign Relations, Mar. 18, 2003, *available at* <http://www.cfr.org/publication.html?id=5772> (“Lawfare is a strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.”).

<sup>61</sup> SINGER, *supra* note 1, 390, 391.

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<sup>62</sup> *See generally* U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).

<sup>63</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2008) (“Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”).

<sup>64</sup> SINGER, *supra* note 1, at 436.

## CLE News

### 1. Resident Course Quotas

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

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

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

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

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

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

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

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

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

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10

<b>NCO ACADEMY COURSES</b>		
512-27D30	5th Advanced Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D30	6th Advanced Leaders Course (Ph 2)	26 Jul – 31 Aug 10
512-27D40	3d Senior Leaders Course (Ph 2)	21 May – 29 Jun 10
512-27D40	4th Senior Leaders Course (Ph 2)	26 Jul – 31 Aug 10
<b>WARRANT OFFICER COURSES</b>		
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
<b>ENLISTED COURSES</b>		
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
<b>CRIMINAL LAW</b>		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10*
5F-F34	35th Criminal Law Advocacy Course	20 – 24 Sep 10*

\* Because of the high demand, the CLAC has been transformed into a one-week course that will be offered four times a year (instead of a two-week course offered twice a year). Two courses will be offered in the Fall and two in the Spring, during consecutive weeks. The new CLAC will continue to utilize small-group advocacy exercises and mock trials, so the course will remain “invitation only” on ATRRS to allow management of slots. To secure seats at the September courses, please have your Chief of Justice contact Major Chuck Neill, CLAC Course Manager, (434) 971-3343, (DSN 521) or steven.neill@us.army.mil.

<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F41	6th Intelligence Law Course	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	20 – 24 Sep 10

### 3. Naval Justice School and FY 2009–2010 Course Schedule

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

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (030)	2 Aug – 9 Oct 10
0258	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (030)	10 May – 23 Jul 10
03TP	Trial Refresher Enhancement Training (020)	2 – 6 Aug 10
4046	Mid Level Legalman Course (020)	14 – 25 Jun 10 (Norfolk)
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	1 – 3 Jun 10 (San Diego) 2 – 4 Jun 10 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)

748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
850T	Staff Judge Advocate Course (020)	5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961J	Defending Complex Cases (010)	12 – 16 Jul 10
NA	Iraq Pre-Deployment Training (040)	6 – 9 Jul 10

<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (060) Legal Clerk Course (070)	19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	24 – 28 May 10 9 – 13 Aug 10 13 – 17 Sep 10
<b>Naval Justice School Detachment San Diego, CA</b>		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	7 – 25 Jun 10 19 Jul – 6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (080) Senior Officer Course (090)	24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

#### 4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

<b>Air Force Judge Advocate General School, Maxwell AFB, AL</b>	
<b>Course Title</b>	<b>Dates</b>
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

#### 5. Civilian-Sponsored CLE Courses

**For additional information on civilian courses in your area, please contact one of the institutions listed below:**

- AAJE:** American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA:** American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL:** Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552
- ALIABA:** American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

FB: Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University Law School  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

MSU: Mississippi College of Law  
151 East Griffith Street  
Jackson, MS 39201  
(601) 925-7100, fax (601) 925-7115

NAC National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(803) 705-5000

NDAA: National District Attorneys Association  
44 Canal Center Plaza, Suite 110  
Alexandria, VA 22314  
(703) 549-9222

NDAED: National District Attorneys Education Division  
1600 Hampton Street  
Columbia, SC 29208  
(803) 705-5095

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 (in MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

TLS: Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

UMLC: University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

UT: The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

VCLE: University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

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

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail [jeffrey.sexton@us.army.mil](mailto:jeffrey.sexton@us.army.mil).

## **6. 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](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

## Current Materials of Interest

### 1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training

Date	Region	Location	Units	ATRRS Number	POCs
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

### 2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

### **3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

### **4. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General’s Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at [Daniel.C.Lavering@us.army.mil](mailto:Daniel.C.Lavering@us.army.mil).