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Education and Outreach for The Judge Advocate General's Corps

2015 in this edition:

Operations and International Law

Domestic military operations involve an expanding list of required legal competencies.

ops & international law | military justice | legal assistance | training | leadership | book review | ethics corner

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About Us

THE REPORTER is published by The Judge Advocate General's School for the Office of The Judge Advocate General, United States Air Force. Contributions from all readers are invited. Items are welcomed on any area of the law, legal practice, or procedure that would be of interest to members of The Judge Advocate General's Corps.

VIEWS EXPRESSED herein are those of the author. They do not necessarily represent the views of The Judge Advocate General, Department of the Air Force, or any other department or agency of the United States Government.

ITEMS OR INQUIRIES should be directed to The Judge Advocate General's School, AFLOA/AFJAGS, 150 Chennault Circle, Maxwell AFB, AL 36112. (334) 953-2802/DSN 493-2802. AFLOA.AFJAGS@us.af.mil

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On the Cover: Aerial Port Expeditor Program students offload a pallet of household goods July 7, 2015 at Travis Air Force Base, California. (U.S. Air Force photo/Airman First Class Amber Carter)

Message from The Commandant

The field of operations and international law that members of the Air Force JAG Corps practice every day is diverse, challenging, and often complex. This reality is evident in the breadth of topics addressed by the featured articles in this edition of *The Reporter*. Captain Dean Korsak's article, *The First Frontier: Domestic Military Operations*, discusses an area of operations law that is often overlooked, but there are significant legal limitations on the domestic use of military forces. Major Ryan Albrecht and Captain Ross Brown's articles focus on aspects of fiscal law that enable coalition operations and training of coalition partners, acquisition and cross servicing agreements and recently implemented statutory authority to utilize operations and maintenance funds to train foreign military forces. Next, Major Matthew Dunham leverages his experience as the staff judge advocate for Office of Military Cooperation at the United States Embassy in Kuwait, to explain the unique opportunities available to judge advocates assigned to one of a number of security assistance/cooperation missions. Finally, Major Israel King writes an insightful article on the current use of force jurisprudence as it is applied to cyber warfare by examining the recent cyber-attack perpetuated against Sony, Inc.

In addition to our featured articles, we are especially indebted to retired Major General Charles Dunlap for sharing a favorite list of quotes and thoughts that will help each of us set our "leadership compasses" for success.

Mr. Thomas Becker's thoughtful article on the recent changes to Article 32 of the UCMJ makes up this issue's military justice section.

In the military justice section, Major Nate Himert's timely article explains recent changes to the Truth in Lending Act, which is important for legal assistance practitioners across the Air Force.

The training section of this issue contains Major Amber Brugnoli's article, *G.I. Joe to GQ*, which provides valuable career guidance and suggestions for military members transitioning from wearing a uniform to wearing business attire. Major Mathew George provides training on reviewing contracting officer final decisions and explains how the Contract Law Field Support Center can assist practitioners in the field.

This issue's book review continues with the operations and international law theme. Lieutenant Colonel Matthew Burris writes an excellent review of *Predator: The Secret Origins of the Drone Revolution*.

Finally, the ethics corner contains a short description of how violations of the rules of professional conduct are processed.

Thank you to those who submitted articles for this issue of *The Reporter*. I encourage each of you to write and submit articles for publication.

DECLARING WAR ON THE MOVIES

A (Legal) Review of North Korea, Sony, and *The Interview*

BY MAJOR ISRAEL D. KING, USAF

While it seems as if the drama surrounding Sony Pictures and *The Interview* has since faded, the situation remains an interesting case study for the current rules and issues that surround the concept of conflict in cyberspace.

The first sign of trouble came on 24 November 2014.[1] On that day, employees of Sony Pictures America arrived at work to find a ghastly image of a skeleton on their monitors.[2] Over this image was superimposed a message by a group calling itself the Guardians of Peace, threatening to release terabytes of Sony's company communications, documents, and other media unless the studio cancelled the release of *The Interview*, a motion picture starring James Franco and Seth Rogan as entertainment reporters who cooperate with a CIA plot to assassinate North Korea's leader, Kim Jong Un.[3]

When the deadline of 11:00 PM GMT set by the Guardians of Peace came and went with no action by the studio, Sony's world began to fall apart. Over the next month, the Guardians of Peace would release approximately 38 million files culled from Sony's internal network, covering everything from employee performance reports and e-mails to movie scripts and digital copies of actual as-yet unreleased movies.[4] Perhaps most devastating was the release of the personal information of Sony employees, to include social security, bank account, and credit card numbers.[5]

[1] David Robb, *Sony Hack: A Timeline*, Deadline (Dec. 22, 2014), http://deadline.com/2014/12/sony-hack-timeline-any-pascal-the-interview-north-korea-1201325501/.

[2] *Id.*

[3] Mark Seal, *An Exclusive Look at Sony's Hacking Saga*, Vanity Fair (Mar. 2015), http://www.vanityfair.com/hollywood/2015/02/sony-hacking-seth-rogen-evan-goldberg.

[4] *Id.*

[5] *Id.*

NORTH KOREA

On 19 December 2014, the Federal Bureau of Investigation (FBI) released a statement saying that it had sufficient evidence to conclude that the government of North Korea had been behind the attack.[6] The FBI asserted that North Korea's hacking unit had targeted Sony employees with "spear-phishing"[7] attacks that, once successful, had afforded North Korea the access needed to systematically map, control, and destroy data on Sony computers and servers from within.[8] Also on 19 December, President Obama vowed that the U.S. would "respond proportionally" to North Korea's attack "in a place and time and manner that we will choose."[9] On 22 December 2014, North Korea's connections to the Internet mysteriously went dark for approximately 10 hours.[10] The U.S. government denied being responsible for the outage.[11]

CONFLICTS IN CYBERSPACE

While it seems as if the drama surrounding Sony Pictures and *The Interview* has since faded, the situation remains an interesting case study for the current rules and issues that surround the concept of conflict in cyberspace. For one thing, assuming that North Korea was responsible for the actions of the Guardians of Peace, did those actions constitute a "use of force" against the U.S. as envisioned in Article 2(4) of the United Nations (U.N.) Charter or, more importantly, an "armed attack" under Article 51 of that document, which would allow the U.S. to launch an attack in self-defense? If not, did the attack violate any other principle or norm of international law? If so, what if any action could the U.S. take in response? What limitations would be placed upon the form of that response? The purpose of this article is to provide insight into the legal framework within which we can examine these questions.

INTERNATIONAL LAW

Perhaps the best place to start is to analyze whether the actions against Sony fall within the range of activities covered by the body of international law governing the use of hostilities by one state against another. For the past seventy years, the legality of a state's aggressive actions against other states has been determined by reference to the Charter of the United Nations, signed and ratified on 26 June 1945.[12] Article 2(4) of that document states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[13]

In 1977, the International Court of Justice (ICJ), in an advisory opinion on whether the threat or use of nuclear weapons would be in any circumstance permitted under international law, held that the prohibitions of Article 2(4) apply to any use of force, regardless of the weapons employed.[14] Many experts believe that this aspect of the ICJ's opinion has developed into customary international law, and it seems that the United States shares this view with respect to cyberspace operations, as the U.S. 2011 International Strategy for Cyberspace proclaims that "long-standing international norms guiding state behavior — in times of peace and conflict — also apply in cyberspace."[15] Former U.S. Department of State Legal Advisor Harold Koh confirmed this view in a 2012 speech at the USCYBERCOM Inter-Agency Legal Conference, in which he stated that "cyber activities may in certain circumstances constitute uses of force within the meaning

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[6] FBI National Press Office, *Update on Sony Investigation*, The Federal Bureau of Investigation (Dec. 19, 2014), http://www.fbi.gov/news/pressrel/press-releases/update-on-sony-investigation.

[7] Spear-phishing attacks typically take the form of e-mails that appear to be from an individual or business that the recipient knows, asking the recipient to provide personal information to address some matter of common concern. *See* Federal Bureau of Investigation, *Spear Phishers: Angling to Steal Your Financial Info*, The Federal Bureau of Investigation (Apr. 1, 2009), http://www.fbi.gov/news/stories/2009/april/spearphishing_040109.

[8] *Id.*

[9] David E. Sanger et al., *Obama Vows a Response to Cyberattack on Sony*, The New York Times (Dec. 19, 2014), http://www.nytimes.com/2014/12/20/world/fbi-accuses-north-korean-government-in-cyberattack-on-sony-pictures.html?_r=0.

[10] Nicole Perlroth & David E. Sanger, *North Korea Loses Its Link to the Internet*, The New York Times (Dec. 22, 2014), http://www.nytimes.com/2014/12/23/world/asia/attack-is-suspected-as-north-korean-internet-collapses.html?_r=0.

[11] Ted Bridis et al., *U.S. Denies Responsibility for North Korea Cyberattack, But Plays Cards Close to Chest*, The Huffington Post Canada (Jan. 9, 2015), http://www.huffingtonpost.ca/2015/01/09/north-korea-cyberattack_n_6444880.html.

[12] Michael Byers, War Law: Understanding International Law and Armed Conflict 2-3 (2005).

[13] U.N. Charter art. 2, para. 4.

[14] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, § 39 (July 8).

[15] Barack Obama, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World 9 (2011).

of Article 2(4) of the UN Charter and customary international law."[16]

CYBER USE OF FORCE

Thus, if we are to presume that some actions in cyberspace can amount to a "use of force" under Article 2(4), what type of actions would qualify? At the very least, experts and officials seem to agree that cyber operations that lead to injury or death to people or destruction to property would qualify as a use of force.[17] Outside of that box, however, the answer is not quite as clear. In 2013, an international group of experts headed by Professor Michael Schmitt of the U.S. Naval War College, at the invitation of the NATO Cooperative Cyber Defense Center of Excellence, published the "Tallinn Manual on the International Law Applicable to Cyber Warfare" in order to provide a codification of treaty and customary international law applicable to offensive activities in cyberspace.[18] Although unable to come up with a "black-letter" definition of a cyber use of force, the group of experts surmised that states would classify a cyber operation as a use of force by analogizing the effects of that operation to the effects of a kinetic operation using several salient factors, to include the *severity* of the effects, the *immediacy* with which they are felt, the *directness* of their connection to the causal act, the *invasiveness* of their intrusion into cyber systems of national interest to the state, their *measurability* or quantifiability, and the strength of their nexus to *military* and/or *state involvement*.[19] This is generally consistent with the way the United States approaches the issue, which is to "evaluate factors: including the context of the event, the actor perpetrating the action…the target and location, effects and intent, among other possible issues."[20]

So, assuming North Korea was the source of the hack against Sony, would its actions qualify as a "use of force" by North Korea against the United States using the Tallinn factors discussed above? Probably not. From what we know, the cyber operation against Sony did end up destroying a known quantity of sensitive data and releasing other sensitive data to the public.[21] Further, some defined number of computers were unable to reboot properly due to the loss of data on them. While the effects of the hack could thus be said to have been reasonably "immediate" in their revelation, "direct" in their attenuation, "measurable" in their quantification, and of a "military or state-sponsored character," it cannot be said that the hack was "invasive" in the sense that it did not target or penetrate systems of importance to national security, such as military networks or those controlling critical

If we are to presume that some actions in cyberspace can amount to a "use of force" under Article 2(4), what type of actions would qualify?

[16] Harold Hongju Koh, Legal Advisor, U.S. Dept. of State, Address at the USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012).

[17] *Id.*

[18] Tallinn Manual on the International Law Applicable to Cyber Warfare 1-4 (Michael N. Schmitt, ed., 2013).

[19] *Id.*, at 48-51.

[20] Koh, *supra* note 16.

[21] Michael Schmitt, *International Law and Cyber Attacks: Sony v. North Korea*, Just Security (Dec. 17, 2014), http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/.

Does the characterization of North Korea's actions as something less than a "use of force" mean that the United States has no recourse against North Korea for what it did?

national infrastructure.[22] Further, in examining "severity," "the most significant factor in the analysis," [23] while one cannot dismiss the individual privacy rights violated by the public release of personal information in this case, it would be difficult to say that the consequences of the Sony hack impinged upon the critical national interests of the United States to any great degree. Further, the consequences of the Sony hack fall far shy of those of other cyber operations that experts have deemed sufficiently severe to qualify as uses of force, such as the damage to Iranian nuclear power plant centrifuges caused by the Stuxnet virus in 2010.[24]

Given the conclusion that North Korea's actions against Sony would not qualify as a use of force, there is no need to further analyze whether those actions would qualify as an "armed attack" within the context of Article 51 of the U.N. Charter, which provides that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."[25] However, it is worth noting that while most nations subscribe to the view that the actions of a state which constitute the "use of force" must meet a higher threshold of severity to be considered an "armed attack,"[26] the United States has shunned the idea of a higher threshold, taking the position that "the inherent right of self-defense potentially applies against any illegal use of force."[27] That being said, this lower threshold still requires as a prerequisite to the use of force in self-defense, actions of a state that constitute an illegal "use of force." Therefore, applying the United States' interpretation of when self-defense is authorized does not change the analysis with respect to North Korea's actions vis-à-vis Sony.

RECOURSE

Does the characterization of North Korea's actions as something less than a "use of force" mean that the United States has no recourse against North Korea for what it did? Not necessarily. Even though we cannot call North Korea's actions a "use of force," it was likely still a breach of U.S. sovereignty.[28] Arguably originating in the 1648 Peace of Westphalia that dissolved the Holy Roman Empire into a large number of independent European authorities, the notion of sovereignty presupposes that (subject to its voluntary treaty obligations, the precepts of customary international law, and legitimate uses of force with the state's consent, in self-defense, or as authorized by the United Nations Security Council) a state is indepen-

[22] Tallinn Manual on the International Law Applicable to Cyber Warfare, *supra* note 18, at 49-51.

[23] *Id.* at 48.

[24] Kim Zetter, *Legal Experts: Stuxnet Attack on Iran was Illegal 'Act of Force'*, Wired (Mar. 25, 2013, 12:53 PM), http://www.wired.com/2013/03/stuxnet-act-of-force/.

[25] U.N. Charter art. 51.

[26] Schmitt, *supra* note 21.

[27] Koh, *supra* note 16.

[28] Schmitt, *supra* note 21.

dent from and legally impermeable in relation to foreign powers on the one hand, and possesses exclusive jurisdiction and supremacy over its territory and inhabitants on the other.[29]

In the cyber context, the right of a state to assert jurisdiction and control over its territory inherently gives it the right to assert jurisdiction and control over cyber infrastructure within that territory.[30] According to the group of experts that drafted the Tallinn Manual, this applies even to infrastructure owned by private entities and individuals, given that such infrastructure is naturally subject to legal and regulatory control by the state.[31] Thus, it would be reasonable to characterize North Korea's actions against Sony as manipulating U.S. cyber infrastructure and emplacing malware on systems located within that infrastructure for the purpose of such manipulation, actions that would clearly violate U.S. territorial sovereignty under the framework delineated above.[32]

What actions then can the United States take in response to this violation of its sovereignty? Although not a treaty acceded to or ratified by any state government, the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts ("Articles") provides assistance in answering this question.[33] The 2001 Articles were drafted and adopted by the International Law Commission of the United Nations General Assembly, as a codification of customary international law in the area of state responsibility.[34] Article 49 of the Articles allows a state to take "countermeasures" against another state that has committed an "internationally wrongful act," which is defined in Article 2 as action or inaction that is attributable to the offending state under international law and constitutes a breach of an international obligation of that state.[35] The Articles do not provide a list of what constitutes an "international obligation." Yet, it is reasonable to believe — given the importance attached to the idea in the U.N. Charter and other key international laws stretching back hundreds of years — that respect for the territorial sovereignty of a state would be one such obligation.[36]

This is an important conclusion to reach, as Articles 49 and 50 of the Articles provide that any "countermeasures" taken by an injured state against an offending state are "limited to the non-performance for the time being of international obligations"

What actions then can the United States take in response to this violation of its sovereignty?

[29] Miyoshi Masahiro, Sovereignty and International Law 2-3 (unpublished manuscript) (on file with the author).

[30] Tallinn Manual on the International Law Applicable to Cyber Warfare, *supra* note 18, at 16.

[31] *Id.*

[32] Schmitt, *supra* note 21.

[33] James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, Audiovisual Library of International Law (2012), http://legal.un.org/avl/ha/rsiwa/rsiwa.html.

[34] *Id.*

[35] Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, 34, 129, U.N. Doc. A/56/10; GAOR, 56th Sesss., Supp No. 10 (2008).

[36] The Law of Nations: An Introduction to the International Law of Peace 7-16 (Sir Humphrey Waldock, ed., 6th ed. 1963).

of the victim state towards the offending state, and are not to affect "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations."[37] Thus, legitimate countermeasures by the United States against North Korea would presumably include actions that violate the territorial sovereignty of North Korea, but would not include actions that would rise to the level of a "use of force" under Article 2(4) of the U.N. Charter. While it would be difficult to envision a kinetic strike against North Korea that would not rise to the level of a "use of force" given the propensity of such acts to cause harm to people or property, in the cyber context, the Articles' allowance for countermeasures would effectively allow for the United States to "hack back" against North Korean cyber assets.

Even so, there are further limitations on what form such U.S. cyber countermeasures against North Korea could ultimately take. Customary international law has long recognized the requirement originating from just war theory that uses of force in self-defense must comply with the principles of "necessity" and "proportionality" to be legitimate.[38] Perhaps the most famous statement of these principles flowed from the pen of Daniel Webster in a letter debating the legality of the British Government to use force in self-defense against American citizens aiding in the Canadian Rebellions of 1837. In that case, Webster said,

> It will be for that [British] Government to show a *necessity* of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada…did nothing *unreasonable or excessive*; since the act justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.[39]

In its modern formulation, the principle of necessity requires that before responding with force in self-defense, the defending state "is obligated to verify that a reasonable settlement of the conflict in an amicable way is not attainable."[40] Proportionality, on the other hand, generally requires that the defending state limit the magnitude, scope, and duration of its response to that which is reasonably necessary to counter the threat or attack it was subjected to.[41]

The 2001 Articles on the Responsibility of States for Internationally Wrongful Acts appear to recognize the extension of these customary international law principles to situations outside that which would normally prevail when a state is legitimately able to use force in self-defense. Article 52 of the Articles requires an injured state to first notify the offending state of its intent to use countermeasures, and offer to negotiate with the offending state before doing so.[42] Further, Article 51, aptly titled "Proportionality," states that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the intentionally wrongful act and the rights in question."[43]

LEGAL ISSUES

Given these limitations, if we assume for argument's sake that North Korea's loss of Internet connectivity on 22 December was the result of an offensive cyberspace operation perpetrated by the United States, did that operation qualify as a legal countermeasure to North Korea's hack of Sony? Looking first at whether it met the criterion of necessity, one may argue that President Obama's statement that the United States would respond at a time and place and manner of its choosing served as the notice of the United States' intentions necessary under Article 52 of the Articles. Furthermore, the lack of evidence of negotiations between the United States and North Korea on the matter does not mean that no negotiations occurred. Case in point, the U.S. Government conducted secret meetings with Iran on its nuclear program for months without the knowledge of the U.S. public.[44] Similar meetings

[37] Rep. of the Int'l Law Comm'n, *supra* note 34, at 129-31.

[38] Christine Gray, International Law and the Use of Force 105 (2000).

[39] British-American Diplomacy: The Caroline Case, *The Avalon Project: Documents in Law, History and Diplomacy*, http://avalon.law.yale.edu/19th_century/br-1842d.asp (last visited Mar. 9, 2015).

[40] Yoram Dinstein, War, Aggression and Self-Defense 184 (2001).

[41] Gray, *supra* note 37, at 106.

[42] Rep. of the Int'l Law Comm'n, *supra* note 34, at 135.

[43] *Id.* at 134.

[44] Julian Borger & Saeed Kamali Dehghan,

could certainly have occurred with North Korea in this case. If so, then it is not outside the bounds of reality to believe that the criterion of necessity would have been satisfied.

The next criterion to consider in this hypothetical operation is proportionality. While President Obama asserted that the U.S. response would be proportionate, looking at the operation side-by-side with North Korea's actions reveals several important distinctions. First, while North Korea's attack targeted a single company, the operation against North Korea targeted all of North Korea's Internet connections, to include those maintained by the civilian and military aspects of North Korea's government.[45] Thus, it could certainly be argued that the operation against North Korea had a greater strategic impact on North Korea's key governmental interests than that perpetrated against Sony. On the other hand, to our knowledge, the operation against North Korea did not permanently destroy data on networked systems, nor did it release sensitive information about North Korea or individual citizens of North Korea to the public, as the attack on Sony did. Furthermore, the duration of North Korea's internet outage, a matter of hours, pales in comparison to the duration of the attack against Sony, which could be measured in months from tooth to tail.

In the end, this author would find it difficult to categorize the hypothetical operation against North Korea as being disproportionate, principally because the severity of the effects of the operation appear to have been much less egregious than the attack against Sony, even if it could be said that the operation was more invasive given its impact upon government and military Internet connections. However, reasonable minds can differ, and ultimately it would be for the leaders of the international community to establish a consensus on the issue by signaling their approval or disapproval through means available in the United Nations and other multilateral organizations. Ultimately, the point is moot. The operation against North Korea, if it was an operation, has not been definitively attributed to any state, group, or person at this point, and thus there is no focus for international acclaim or approbation.

WRAP UP

And thus we reach the end of the saga of North Korea, Sony, and *The Interview*. While there are certainly other legal issues that could have been discussed in this article, and legal issues that were discussed that could have received more thorough treatment, it is the hope of this author that these words nonetheless provide an impetus for further research and study on the fascinating intersection between cyberspace and the law. As President Obama stated in his 2015 National Security Strategy, "[t]he danger of disruptive and even destructive cyber-attack is growing," and it is the U.S. military that will be called upon to deter and defeat cyber threats posed to the homeland.[46] Thus, it is clear that Air Force legal professionals, as part of the organization whose mission it is to "fly, fight, and win" in air, space, and cyberspace, should at the very least take note of this area of the law.

Secret Talks Helped Forge Iran Nuclear Deal, The Guardian (Nov. 25, 2013), http://www.theguardian.com/world/2013/nov/24/secret-usa-iran-talks-nuclear-deal.

[45] Perlroth & Sanger, *supra* note 10.

[46] Barack Obama, *National Security Strategy* 1 (2015).

Major Israel D. King, USAF

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THE FIRST FRONTIER

Domestic Military Operations

BY CAPTAIN DEAN W. KORSAK, USAF

> Domestic operations can also be more complex than overseas operations due to increased restrictions on the domestic use of military forces.

A member of the 89th Airlift Squadron trains on CBRN defense techniques while preparing for a training flight at Wright-Patterson Air Force Base, Ohio. CBRN stands for chemical, biological, radiological and nuclear defense and includes protective measures taken in situations involving those hazards. The protection procedures could also be used by flight crews active in the fight against Ebola. (U.S. Air Force photo/Frank Oliver)

Domestic military operations focused on homeland defense and in support of civil authorities are often overshadowed by overseas contingency operations. However, these domestic missions are the first frontier for our nation's military. Missions like missile defense, air defense sectors, and posturing to respond to natural disasters will continue long after any overseas conflict ends. Domestic operations can also be more complex than overseas operations due to increased restrictions on the domestic use of military forces. For this reason competent legal advisors are essential in mission accomplishment. The material below introduces military legal professionals to the homeland defense and defense support to civil authority (DSCA) mission, describes the spectrum of operations within this mission, and provides practical insight on the role members of the Judge Advocate General's Corps fulfill in this mission.

The Federal military's participation in homeland defense and DSCA includes but is not limited to helping local communities struck by natural disasters, responding to specialized threats involving weapons of mass destruction, chemical, biological, and nuclear (CBRN) exposure, and sophisticated threats such as thwarting missile attacks. The military's

homeland defense mission rapidly shifted and expanded after the September 11, 2001 attacks. Even with the creation of the cabinet-level Department of Homeland Security in 2002[1] the military maintains many separate and distinct responsibilities. The U.S. Northern Command (NORTHCOM) was established in October 2002 to lead military homeland defense and DSCA efforts.[2]

Homeland defense and DSCA operations involve coordination across multiple Federal, State, and local agencies that can often be complex and challenging. The organization of these missions has evolved with the pace of natural and manmade emergencies. The modern military role in such operations is rooted in a 1995 presidential policy directive for a Federal response to domestic incidents involving CBRN materials.[3] The impetus for this action was the World Trade Center bombing in 1993 and perceived future threats. The modern response framework allowing for a flexible deployment of trained personnel and resources has grown out of this policy directive. Critical changes to the response framework occurred in the past decade based on lessons learned responding to Hurricane Katrina in 2005. During Katrina "no one had the total picture of the forces on the ground, the forces that were on the way, the missions for which forces had been allocated, and the missions that still needed to be done."[4] The disjunctive response was due in part to state National Guard and Federal forces conducting their own operations with no central command and control for the entire effort. Now response procedures are the same for a manmade attack or a natural disaster and the authorities and procedures for conducting domestic operations have been revised to standardize a unified disaster response protocol.[5]

One of the most important developments came when Congress granted the legal authority to appoint a dual-status commander (DSC).[6] A DSC is a unique position in that both the President or Secretary of Defense and a governor authorize a military commander to direct both Federal and State military personnel as a unified force.[7] This legal authority enables a single commander to direct a joint military effort in responding to domestic disasters and emergencies. The status of subordinate military

Homeland defense and DSCA operations involve coordination across multiple Federal, State, and local agencies that can often be complex and challenging.

[1] Congress established the Department of Homeland Security through the Homeland Security Act of 2002, Pub. L. No. 107-296 (codified at 6 U.S.C. §§ 111-115).

[2] Unified Command Plan, April 30, 2002 (classified, but see key official extract available at http://www.whs.mil/library/Key47-04/viii.pdf).

[3] Presidential Decision Directive 39, U.S. Policy on Counterterrorism, (June 21, 1995) [hereinafter PDD-39].

[4] U.S. Gov't Accountability Office, GAO-06-643, Hurricane Katrina: Better Plans and Exercises Needed to Guide the Military's Response to Catastrophic Natural Disasters, 27 (2006).

[5] *See* Ctr. for Law & Military Operations, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Domestic Operational Law 2013 Handbook for Judge Advocates, ch. 2 (October 2013) (discussing authorities and procedures under the national framework for incident management).

[6] National Defense Authorization Act for Fiscal Year 2012, §515(c)(1), Pub. L. 112-81, 125 Stat. 1394 (2011).

[7] Joint Chiefs of Staff, Joint Pub. 3-28, Defense Support to Civil, at C-5, (July 31, 2013).

Members of the 39th Aerial Port Squadron along with C-130 loadmasters assigned to the 731st Airlift Squadron push a U.S. Forest Service Modular Airborne Fire Fighting System unit onto a 302nd Airlift Wing C-130, Aug. 2, 2015. Two Air Force Reserve C-130s were called up to support the U.S. Forest Service wildland fire fighting efforts in California and the Northwestern United States. (U.S. Air Force photo/Staff Sergeant Nathan Federico)

units is not a factor since both the Federal and State executive authorized the commander to control the unified forces. The central focus of the DSC joint action plan is to maximize unity of effort while acknowledging "the sovereign status of Governors in managing and directing the response to emergencies within their states, as well as the responsibility of the president [to ensure] safe, legal and effective employment of Federal forces when requested."[8] The ability of a DSC to control a joint response resulted in a more successful response to Hurricane Sandy than what was achieved by the military response to Hurricane Katrina.[9]

Events like hurricanes, oil spills, and wildfires may require a Federal military response if requested by a governor or if Federal interests justify a response. However, such events do not usually justify Federal military involvement. States have the lead role in natural and manmade disasters, emergency response, and recovery operations. Even incidents like the Boston Marathon bombing did not justify or involve a visible Federal military response other than supporting Federal law enforcement efforts as requested. While state National Guard units may be involved in such events under the control of a governor, the response and investigation will be led by Federal, state, and local law enforcement, not Federal military

[8] Bert B. Tussing, Robert McCreight Homeland Defense and Defense Support to Civil Authorities (DSCA): The U.S. Military's Role to Support and Defend, 33 (Bert B. Tussing & Robert McCreight eds., CRC Press 2015).

[9] *See* Gen. Charles H. Jacoby, Jr. and Gen. Frank J. Grass, *Dual-Status, Single Purpose: A Unified Military Response to Hurricane Sandy* (Mar. 11, 2013), http://www.ang.af.mil/news/story.asp?id=123339975 and Donna Miles, *Sandy Response Reaffirms Value of Dual-status Commanders*, American Forces Press Service (Jan. 11, 2013), http://www.defense.gov/news/newsarticle.aspx?id=118975.

Florida National Guard Regional Emergency Response Network systems line up in preparation for emergency operations at Camp Blanding Joint Training Center, Fla., May 21, 2009. (U.S. Air Force photo/Technical Sergeant Thomas Kielbasa)

forces.[10] The same is true for civil disturbances like the national protests that sometimes turned violent in Ferguson, Missouri, Baltimore, Maryland, and other cities. Civil unrest has triggered a Federal military response at times in our nation's history but no such response was requested or needed in these recent incidents. Federal military forces are involved in prevention and response efforts as the complexity of a threat and the actual or potential impact on national defense increases.

RESPONSE SPECTRUM AND CURRENT OPERATIONAL POSTURE

The spectrum of homeland defense missions Federal military forces accomplish is expansive. U.S. NORTHCOM is the combatant command responsible for the security of the United States homeland.[11] On one end of the spectrum, U.S. NORTHCOM provides specialized organizations guidance on complex homeland defense needs. An example of this is maintaining missile defense capabilities. To accomplish this mission, the Missile Defense Agency operates under the Office of the Secretary of Defense to develop and deploy ballistic missile defense systems. However, the requirements to defend against such threats come from operational military commanders, primarily from U.S. NORTHCOM for homeland defense capabilities.[12] The combatant

[10] Local law enforcement's use of military equipment has been scrutinized leading to new training requirements and oversight of excess federal military equipment that is given to local law enforcement. *See* Review: Federal Support for Local Law Enforcement Equipment Acquisition, Executive Office of the President (Dec. 2014).

[11] Office of History, U.S. Northern Command, A Short History of United States Northern Command, 5 (31 Dec. 2013) available at http://www.northcom.mil/AboutUSNORTHCOM.aspx [hereinafter Office of History].

[12] U.S. Dep't of Def., Dir. 5134.09, paras.

It is important to note that state and local governments are primarily responsible for disaster and incident response within their borders through varying levels of emergency management capabilities.

commander maintains operational control over the fielded weapons systems protecting the homeland while more focused efforts to improve such systems are performed by specialized agencies. U.S. NORTHCOM directs the operations of subordinate units including U.S. Special Operations Command, North; Marine Forces Northern Command; Air Forces North; U.S. Army North; and a number of joint task forces (JTF-North, JTF-Civil Support, JTF-Alaska, and JTF National Capital Region). Each subordinate unit maintains distinct capabilities targeted for specific missions.[13]

The opposite end of the spectrum from homeland defense operations are activities in support of civil authorities involving hazards requiring a large-scale or specialized response. For example, Joint Task Force – Civil Support (JTF-CS) anticipates, plans, and prepares for CBRN response operations.[14] JTF-CS consists of both National Guard and Federal forces. Military legal advisors are essential members of JTF-CS. A key concern of JTF-CS leadership is operating within legal parameters. This concern is captured in the JTF-CS core principles of maintaining public confidence by acting consistent with the U.S. Constitution and acting within the boundaries of Federal law.[15] All response elements are required to complete training and an operation exercise prior to serving as a part of the primary response force. Response elements and forces are grouped by size and specialty. Each group must be able to respond to an incident within a certain amount of time and know the legal parameters of the operation.

A brief explanation of the JTF-CS organization provides a glimpse into the current DSCA mission posture. It is important to note that state and local governments are primarily responsible for disaster and incident response within their borders through varying levels of emergency management capabilities. Governors direct state National Guard forces to respond when local first responder capabilities are overwhelmed. The National Guard is a competent and dependable force states can scale in response to specific needs. The Guard serves local communities when there is a flood, tornado, hurricane, wildfire, snowstorm, other natural disaster, or in cases where local law enforcement require additional security resources. Guard members live and work in the states they serve for long periods of time compared to transient federal forces stationed near local communities. In addition to maintaining the military's primary connection to the local community,

6.c.(11)-(13) (Sept. 17 2009) (mandating the Missile Defense Agency employ close working relationship with Combatant Commanders and the warfighter community in developing and fielding ballistic missile defense capabilities).

[13] *See* Office of History, *supra* note 10 at 25 (listing current U.S. NORTHCOM subordinate units).

[14] PowerPoint Presentation, Joint Task Force Civil Support, JTF–CS 101 Version 5.4, presentation on slide 5 (Mar. 25, 2015) available at http://www.jtfcs.northcom.mil/Documents/JTF-CS%20101%20Brief%20v5.5%20(28%20APR%202015).pdf [hereinafter JTF-CS 101].

[15] *Core Principles Fact Sheet*, Joint Task Force Civil Support, http://www.jtfcs.northcom.mil/CorePrinciples.aspx (last visited on June 24, 2015).

the Guard provides specific capabilities when joint response is required.

Currently, JTF-CS provides operational oversight of 57 National Guard teams with rapid hazardous material assessment capabilities. [16] These teams must be prepared to deploy no later than three hours after an incident such as a nuclear detonation on U.S. soil.[17] There are currently 17 units with search and extraction, decontamination, and emergency medical capabilities that must be prepared to deploy no later than six hours after an incident. Ten additional units with similar capabilities accompanied by security forces and command and control structures must be prepared to deploy within 12 hours of an incident. The Federal force posture is able to scale to 5,000 personnel with a full array of assets including sustained command and control, aviation, ground transport, logistics, field hospitals, engineering, and related capabilities. Deployment of such forces is accomplished in two waves: the first within 24 hours and a second within 48 hours of an incident. Additional Federal response forces consist of a primary and secondary response element with 1,500 personnel each. These smaller elements supplement the larger forces or are used to respond to smaller incidents not requiring deployment of the larger force.

[16] JTF-CS 101, *supra* note 13 at 9.

[17] *Id.*

Military personnel who comprise the response force are highly trained and capable to perform missions that would be impractical for state and local first responders to sustain. Like the brave first responders who saved lives and mitigated suffering during the September 11th attacks and other incidents, the National Guard and Federal forces take on these missions knowing the risks and dangers. Personnel tasked to assess hazards, perform search and rescue, extraction, and decontamination all know the risks of operating in a CBRN hot zone and voluntarily take on those risks. While lawyers do not suit up to take radiation readings, there is much we can do to support these efforts.

HOW THE JAG CORPS FITS IN

The Air Force Judge Advocate General's Corps supports the homeland defense mission by assigning personnel to units that have a direct role in that mission. Air Force JAG Corps personnel directly support the DSCA mission on a sustained basis. In 2012, at my second active duty station, I volunteered for any homeland defense or DSCA assignment I could get. My interest in this work came from witnessing the devastation of Hurricane Katrina while living in Mississippi, volunteering on a Red Cross disaster response team, and previous work as an Air National Guard judge advocate before transitioning to active duty. With the concurrence of my supervisory chain, I was assigned to augment one of the 1,500 personnel response elements, designated C2CRE-A.[18] The augmentee assignment functioned as a collateral duty to my work as an assistant staff judge advocate at the Joint Base San Antonio – Randolph legal office. There was training to complete both online and at the U.S. Army North Headquarters at JBSA-Fort Sam Houston. The training to become part of the certified DSCA response force involves online courses, briefings at U.S. Army North, and then culminates in a live two-week exercise. The exercise is designed to prepare forces for real world missions. It includes being placed on contingency deployment orders and deploying with U.S. Army North to a field environment. The gear that is issued remains with the assigned augmentee for the duration of the one year collateral duty assignment. Many Air Force JAG Corps personnel have gained valuable experience through this augmentation assignment.

The exercise consisted of an 18 day deployment for the C2CRE-A team as part of Joint Task Force 51 (JTF-51), which is now Task Force – 76.[19] This task force is a Contingency Command Post subordinate to JTF-CS for domestic response. The size of the task force is scaled through

[18] "C2CRE-A" stands for Command and Control (C2) CBRN (the "C") Response Element (RE). The "A" simply means the Alpha team as opposed to the Bravo element, which was the secondary response element undergoing training for the following year.

[19] JTF-51 has transitioned its mission to JTF-76 based out of Salt Lake City, Utah. Sgt. Brandon Anderson, Task Force -76 Public Affairs, *Task Force 51 prepares to hand off emergency management mission* (Jun. 26, 2014), http://www.jbsa.af.mil/news/story.asp?id=123415895.

joint augmentation relative to the incident requiring a Federal response.

During my rotation, the JTF-51 commander was an Army National Guard major general who would begin each commander's briefing by entering the large tent with a roaring "strength of the nation, huah!" Being one of only a handful of non-Army personnel in the deployment, I volunteered for the night shift so I could learn the pages of Army acronyms and not sound like a fool when called upon to provide legal advice. It worked. I learned, forged new relationships, and had a blast doing it.

The certification exercise involved the judge advocate - paralegal team scrubbing mission sets and fragmentation orders to operational units in the field. Legal scenarios were based on lessons learned from past operations. The scenarios included questions concerning whether troops distributing food could set up a camera to capture facial photos of aid recipients and share that information with a local law enforcement gang unit. Commanders wanted to know things like what level of command must approve the use of a military asset capturing aerial digital imagery on the U.S. population during disaster recovery operations. Another scenario dealt with a military unit handling a local sheriff blocking the road at a county line and refusing to allow Federal forces to enter his jurisdiction. While these situations may not be common issues that a judge advocate working in a base legal office might face, as explained below, every installation legal office has a critical role in sustaining effective homeland defense and DSCA operations.

Many JAG Corps personnel have already been exposed to a number of the processes and issues associated with the DSCA mission. For example, each installation maintains Emergency Support Functions (ESFs) that are called upon to manage incidents that impact the installation. This process is part of the National Incident Management System (NIMS). This response framework applies when a fuel tanker crashes on a highway, when a train derails, when an aircraft crashes, when state government requests Federal assistance, and when the Federal military is responding to a nuclear detonation.

DSCA operations are in integral part of the overall homeland defense mission. The chart at Figure 1 depicts both the types of domestic military operations and the need to scale the size of a contingency response force depending on the incident.[20] The homeland defense mission seeks to prevent manmade disasters such as a missile strike or nuclear detonation. The focus of DSCA is to be postured to respond to one of these worst case scenarios. The graph also demonstrates that a larger force and more Federal involvement will be required based on the complexity of an incident and the impact on national interests rather than a local community. The Federal military leads homeland defense efforts that preserve the survival of our nation. The DSCA mission focuses on community safety and recovery. All homeland defense and DSCA activity are controlled by the same NORTHCOM chain of command.

Air Force and sister service JAGs are involved in every aspect of homeland defense and DSCA missions. Familiarity with domestic operational law enables legal advisors to provide commanders with legally sufficient options when an incident occurs. It is critical that JAGs advising on domestic operations understand the legal constraints placed upon the military in domestic responses to local and national disasters.

FOUNDATIONS AND FUTURE OF DOMESTIC OPERATIONAL LAW

The practical role that military legal personnel have in homeland defense and DSCA operations is to incorporate foundational legal principles into operations. This role is similar to the role military legal personnel play in overseas operations and when handling routine issues at installations: identify and develop legally sufficient options for commanders. The starting point for domestic operations legal analysis is the constitutional principle expressed in the Tenth Amendment limiting Federal power over the States and people.[21] Based on this principle, there are specific statutory restrictions and authorizations on domestic military operations.

[20] Figure 1 is a partial graphic from a publicly released presentation by General Charles J. Jacoby, Jr., August 13, 2014, Huntsville, Alabama. Available at http://smdsymposium.org/wp-content/uploads/2014/08/W-0930-GEN-Charles-H-Jacoby.pdf (last accessed January 15, 2015).

[21] U.S. Const. amend. X.

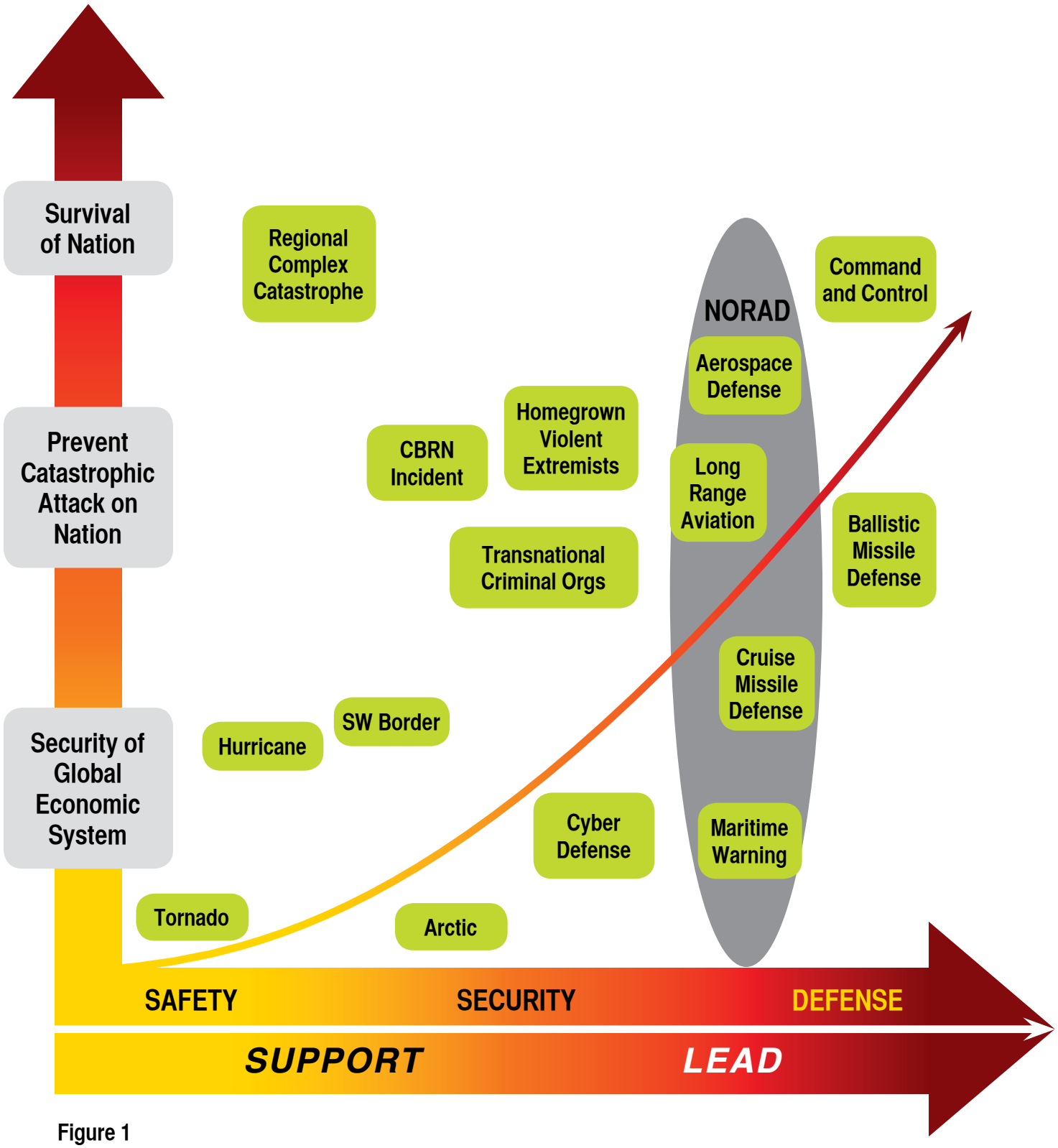
Survival of Nation
Prevent Catastrophic Attack on Nation
Security of Global Economic System
Regional Complex Catastrophe
CBRN Incident
Homegrown Violent Extremists
Transnational Criminal Orgs
Hurricane
SW Border
Cyber Defense
Tornado
Arctic
NORAD
Command and Control
Aerospace Defense
Long Range Aviation
Ballistic Missile Defense
Cruise Missile Defense
Maritime Warning
SAFETY
SECURITY
DEFENSE
SUPPORT
LEAD

Figure 1

Domestic military operations involve an expanding list of required legal competencies.

One commonly known restriction prohibits Federal military personnel from acting in an unauthorized law enforcement capacity within the United States; statutorily referred to as a "posse comitatus".[22] Congress recently reiterated the importance of the Posse Comitatus Act noting that it "has served the Nation well in limiting the use of the Armed Forces to enforce the law."[23] Like many laws, the statutory criminal prohibition on summoning Federal military forces to enforce domestic laws has many exceptions. The language of the statute allows for exceptions "in cases and under circumstances expressly authorized by the Constitution or Act of Congress."[24]

The phrase "posse comitatus" conveys the notion rooted in the early law enforcement practice of the hue and cry. That practice involved a local official summoning a group from the community to help enforce laws as needed.[25] The United States Constitution provides the legislative branch the power "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[26] The earliest and most well-established statutory exception to summoning state militia forces was the Calling Forth Act of 1792.[27] This congressional delegation of power to the President exists today in a set of statutes sometimes referred to as the Militia Acts,[28] Insurrection Act,[29] and Enforcement Act.[30] These statutes have been the legal basis that presidents have relied on to deploy Federal forces to enforce Federal court orders to desegregated schools during the civil rights era[31] and restore law and order during the 1992 Los Angeles riots.[32] The focus of these statutes is to clarify "when and how the President can use the Armed Forces in the homeland."[33] What exactly does a specific statutory authority allow? An installation legal office will benefit from a working knowledge of some of these authorities, and more importantly, which office to call for expert guidance.

Domestic military operations involve an expanding list of required legal competencies. Requests for support by local authorities to a military installation will not always be due to

[22] *See e.g.* 18 U.S.C. § 1385 (2013) ("Posse Comitatus Act" original enactment at 20 Stat. 152 (1878), amended in 1981).

[23] 6 U.S.C. §466(a)(3) (2013), Pub. L. 113-276 (2014) (Sense of Congress reaffirming the continued importance and applicability of the Posse Comitatus Act).

[24] *Id.*

[25] Robert M. Regoli and John D. Hewitt, *Exploring Criminal Justice, The Essentials*, 91 (1st ed., 2010).

[26] U.S. Const. Art. 1, Sec. 8.

[27] 1 Stat. 264 (1792).

[28] 10 U.S.C. §§331-334 (2013). *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Conference Report, 152 Cong. Rec. S. 10805 (2006) (referring to the "Militia Acts").

[29] *See e.g.* Thaddeus Hoffmeister, *The Transformative Power of Law: Article: An Insurrection Act for the Twenty-First Century*, 39 Stetson L. Rev. 861 (2010) (using "Insurrection Act" and "Enforcement Act" discussing 10 U.S.C. §§ 331-333).

[30] *Id.*

[31] 10 U.S.C. 332 (2013); Ex. Or. No. 10730 (1957); Ex. Or. No. 11053 (1962); Ex. Or. No. 11111 (1963); Ex. Or. No. 11118 (1963).

[32] 10 U.S.C. 331 (2013); Ex. Or. No. 12804 (1992).

[33] John Warner National Defense Authorization Act for Fiscal Year 2007, Conference Report, 152 Cong. Rec. S. 10805 (2006).

a large scale disaster or catastrophic attack on the homeland. Most military legal professionals know that deploying military police or security forces in a local community to supplement the police department during emergencies is problematic. What about more involved but somewhat routine issues? The U.S. Army Center for Law and Military Operations (CLAMO) produces a joint quick reference guide entitled "Domestic Operational Law Handbook for Judge Advocates" and other resources available online here: http://loc.gov/rr/frd/Military_Law/CLAMO.html. That office is physically located at the Army JAG School in Charlottesville, Virginia and may be reached at (DSN) 521-3248/3210.

Air Force installations routinely receive requests from Federal, state, and local authorities for assistance in search, rescue, and even law enforcement operations. Many installations maintain assets including all-terrain vehicles, infrared scanners, manned aircraft, and unmanned aircraft systems (UAS). For air assets, the North American Aerospace Defense Command (NORAD), Continental Region (CONR) Air Operations Center (AOC) maintains expertise that can guide installation legal offices through the proper domestic use. For example, that office would be able to advise installation legal personnel on the Deputy Secretary of Defense policy for domestic use of a UAS, including intelligence oversight restrictions and if a proper use memorandum (PUM) is required to authorize the use.[34] The CONR AOC can also coordinate requests to the Air Force Search and Rescue Coordination Center to notify active duty, Guard, and Civil Air Patrol organizations of the need for military air assets. Knowing which office to call for guidance can help local legal offices provide installation commanders the legally sufficient options available to them in a timely manner so that they can choose the best course of action. A working knowledge of domestic operational law is a welcomed area of competence for any legal office. Air Force legal offices with questions on specific topics may contact the following offices for operational coordination and guidance:

CONR-1 AF (AFNORTH) Office of the Staff Judge Advocate, (DSN) 523-0620

101st Air & Space Operations Group and 601st Air and Space Operations Center Office of the Staff Judge Advocate, (DSN) 523-5334

CONCLUSION

Every aspect of the homeland defense mission is meaningful to the nation it protects. Even more meaningful is that the military internally values the legal constraints placed on domestic operations. From National Guard responses, joint task force training, to missile defense operations, senior leaders care about preserving the trust the public places in the military. This trust is accomplished by the legal use of military capabilities to protect the homeland.

All military personnel could be called upon at any moment if the need arises to assist our communities or defend against threats to the survival of our nation. Present and future defense threats demonstrate the need for domestic military operations. The historic traditions forged in the founding years of our nation continue to dictate when and how Federal military forces operate domestically. Legal counsel is critical to planning and executing domestic missions. The commitment and competence of the Armed Forces, guided by the rule of law, is the strength of the nation and will ensure the existence of the First Frontier for generations to come. R

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[34] Policy Memorandum 15-002, Guidance for the Domestic Use of Unmanned Aircraft Systems, U.S. Deputy Secretary of Defense, February 17, 2015 (available at https://whsddpubs.dtic.mil/secpolicymemo/PM15002_CAC.pdf).

British Army parajumpers from the 16th Air Assault Brigade load onto a C-130J Super Hercules assigned to the 317th Airlift Group, Dyess Air Force Base, Texas, April 11, 2015, at Pope Army Airfield, N.C. During Combined Joint Operational Access Exercise 15-01, U.S. Air Force and Army personnel worked together with Royal Air Force and British Army personnel. Several days of training culminated with more than 2100 parajumpers and hundreds of pounds of equipment being dropped during a Joint Forcible Entry Exercise. (U.S. Air Force photo/Senior Airman Peter Thompson)

"WE'RE HERE FOR THE PARTY"

Supporting Coalition Partners Using Acquisition Cross-Servicing Agreements (ACSAs)

BY MAJOR RYAN J. ALBRECHT, USAF

During the initial stand-up of OPERATION INHERENT RESOLVE (OIR) and the coalition that supported it, the 386th Air Expeditionary Wing (AEW) played a key role in providing beddown and logistical support, often with little or no notice, for our coalition partners. For example, in the early days of OIR, a coalition nation "advance team" flew commercial into the host nation and walked into a local hotel, asking (1) were their rooms available, and, (2) did the manager know anyone at the air base down the road? Another coalition nation "advance team" simply showed up at the gates of a host nation air base and said they were here to join the coalition and requested support. Fortunately, the hotel owner had an Embassy contact, and the host nation Air Base Commander knew the 386 AEW Commander. The question ultimately posed to the 386 AEW was — "can we send them to you, and can you support them?" Our coalition partners wanted to start bedding down immediately and join the fight as soon as possible. The coalition partner who showed up at the hotel was one of the first countries in the coalition to fly sorties and put bombs on target. This, however, was only made possible because of U.S. support, provided via a pre-existing Acquisition Cross-Servicing Agreement (ACSA).[1]

As the United States continues to engage our enemies as part of a coalition force, a JAG's ability to understand and apply the fiscal authorities authorized under an ACSA is a critical skill. This article provides a basic overview of ACSAs — their origin and operation — and provides lessons learned by the 386 AEW/JA office during the kick-off of OIR.

As the United States continues to engage our enemies as part of a coalition force, a JAG's ability to understand and apply the fiscal authorities authorized under an ACSA is a critical skill.

ACSA

Background

As the U.S. military began drawing down its forces in Europe in the 1970s, the level of support troops also declined, which created a need to rely on NATO and the unwieldy authority of foreign military sales and formal commercial contracting for our logistical support.[2]

"For example, if a U.S. commander wanted to 'feed a company of U.S. troops in an

[1] The coalition nations supported at the 386 AEW had pre-existing ACSAs with the United States, thus this article focuses only on processing ACSA transactions, not on negotiating and entering into ACSAs.

[2] Major Ryan A. Howard, *Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity*, 2013 Army Law 26, 27 (2013), *citing* H.R. Rep. No. 96-612, pt. 1, at 5 (1979); Captain Fred T. Pribble, *A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979*, 125 Mil. L. Rev. 187, 192-193 (1989).

A JAG reviewing a potential ACSA transfer of LSSS should consider not just "can we," but "should we" provide or request the specific support.

> allied mess hall (because they were operating away from their own),' the commander was required to use commercial contract procedures, and if that commander wanted to 'help a nearby allied unit with some spare parts or ammunitions,' he was forced to 'go through [foreign military sales (FMS)] procedures.'"[3]

Seeking a simpler procurement process, DoD requested legislative relief from Congress, who passed the NATO Mutual Support Act of 1979 (NMSA).[4] The NMSA exempted DoD from a number of U.S. procurement regulations and specifically permitted DoD to enter into cross-servicing agreements to supply and receive logistic support, supplies, and services (LSSS).[5] Ultimately, the authority to enter into ACSAs provided the flexibility and relief from stringent procurement regulations that DoD desperately needed. Currently there are over 100 ACSAs in place.[6]

Authority of an ACSA and Processing ACSA Transactions

ACSAs allow the United States "to Provide Logistic Support, Supplies and Services to Military Forces … in Return for the Reciprocal Provision of Logistic Support, Supplies and Services (LSSS) by such government or organization to elements of the armed forces."[7] They are generally exercised during wartime, exercises and training, deployments, contingency operations, and other similar engagements; accordingly, they are usually implemented by the Unified Combatant Commands.[8]

ACSA transactions, the actual ordering process that occurs under the authority of an ACSA, allow the United States to supply and request LSSS; however, not all LSSS is permitted to be transferred under an ACSA. Table 1-1 at provides a general list of the most common permitted and prohibited LSSS:[9]

Although ACSAs authorize support, they mandate the United States be reimbursed for all support provided. 10 U.S.C. § 2344 specifies three different methods of reimbursement. "Logistics support, supplies, and services may be acquired or transferred by the United States under the authority of this subchapter on a reimbursement basis or by replacement-in-kind or exchange of supplies or services of an equal value."[10] Payment on a reimbursement basis (payment in-kind)

[3] *Howard*, 2013 Army Law at 27.

[4] *Supra,* note 2.

[5] 10 U.S.C. § 2342 (2013).

[6] ACSA Country List, 7 Nov. 14, (Dec. 6, 2014), https://intellipedia.intelink.gov/wiki/ACSA.

[7] 10 U.S.C. § 2342(a)(2) (2013).

[8] Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, Acquisition and Cross Servicing Agreements, (Dec. 9, 2014), http://www.acq.osd.mil/ic/ACSA.html.

[9] 10 U.S.C. § 2350 (2013); U.S. Dep't of Def., Dir. 2010.9, Acquisition and Cross-Servicing Agreements, para. 4.5.1. and 4.5.2., (Apr. 28, 2003) [hereinafter DoDD 2010.9]; and Chairman, Joint Chiefs of Staff, Instr. 2120.01D, Acquisition and Cross-Servicing Agreements, Appendix A (May 21, 2015) [hereinafter CJCSI 2120.01D].

[10] 10 U.S.C. § 2344 (2013).

PERMITTED LSSS	PROHIBITED LSSS
• Food • Water • Billeting • Transportation (including airlift) • Petroleum, oils, and lubricants • Clothing • Communication services • Medical services • Ammunition (excluding guided missiles, naval mines and torpedoes, and nuclear ammunition • Base operations support (and construction incident to base operations support), storage services and use of facilities • Training services • Spare parts and components, repair and maintenance services, calibration services, and port services	• Weapons systems • Military equipment not designated as Significant Military Equipment on the United States Munitions List (22 U.S.C. § 2778 (reference (g)) • Guided missiles • Naval mines and torpedoes • Nuclear ammunition and included items such as warheads, warhead sections, projectiles, demolition munitions, and training ammunition • Cartridge and propellant-actuated devices • Chaff and chaff dispensers • Guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control agents)

Table 1-1

permits the receiving nation to fund provision of LSSS using its currency.[11] Replacement-in-kind enables the receiving nation to pay for the LSSS by transferring to the suppliers the same or substantially similar LSSS. Finally, Equal Value Exchanges allow the receiving nation to pay for the LSSS with different LSSS, valued at roughly the same amount.[12] Note that the in-kind transfers must occur within one year.[13]

Although ACSAs are international agreements, once established they give overarching fiscal authority to allow the installation level parties to enter into ACSA transfers of LSSS. The first step in the ACSA transaction or order process is to determine the type, quantity, and timing of the LSSS.[14] Once the ACSA manager (usually from A4 or LRS), and sometimes the JAG depending on the complexity of the request, determines the requested LSSS is permissible under the ACSA, the ACSA manager and foreign country counterpart will

[11] U.S. Dep't of Def., Financial Management Regulation, 7000.14-R, Vol. 11A, Ch 8, 080201. (Nov. 2014)

[12] *Id.*

[13] *Id.*

[14] *See* CJCSI 2120.01D, *supra* note 9,enclosure D.

ACSAs are required to provide support, but IAs can make providing that support and processing the ACSA transactions more efficient by setting up procedures and processes.

negotiate the terms (type, quantity, delivery location, schedule, billing, and price). The requesting party then formally starts the transaction by initiating an ACSA transaction form — generally the CC Form 35 request form will be used. The details of the LSSS that have been negotiated will be included in the CC Form 35 and, once signed by both parties (with the authority to bind their representative governments), will constitute a binding international commitment.[15] The entirety of this ACSA transaction should be entered into and tracked in the ACSA Global Automated Tracking and Reporting System (AGATRS), a web-based system that can build, track, and manage ACSA transactions and orders for LSSS.[16]

Implementing Arrangements/Agreements

While ACSAs provide the fiscal and legal authority to provide or receive support, Implementing Arrangements (IAs) can provide the specific guidance on how to implement the support and process the paperwork. IAs are not required, but can be especially useful when recurring support is needed. For example, the coalition forces billeted at the 386 AEW had recurring care, support, and feeding costs that were billed monthly. IAs are "a supplementary arrangement for logistics support, supplies, or services that prescribes details, terms, and conditions to implement cross-servicing agreements effectively."[17]

[15] This is a general outline, for more detailed steps see *Id.*

[16] *See Id. at* glossary, part II.

[17] DoDD 2010.9, *supra* note 9, para. E2.1.8.; *see also* Air Force Instruction 25-301, Acquisition and Cross-Servicing Agreements, para 2.3. (May 5, 2011).

Thus, they can make processing and tracking ACSA transactions more efficient, provide a clearer delineation of responsibilities, and include sample forms and instructions. For example, an IA may be used to set forth local procedures for requests, pick up, transfer, and delivery; describe the level of medical care available; require the coalition nation to satisfy requirements from their home station to the greatest extent possible prior to requesting LSSS; or, explain the CC Form 35 completion and routing process. Although the length and detail of an IA may vary, they must be consistent with the ACSA and are not financially binding.

LESSONS LEARNED

An ACSA Provides Authority for Support, It Does Not Mandate It

An ACSA only provides a mechanism to provide support and conduct ACSA transactions; it does not mandate or require support or set monetary limits.[18] Therefore, a JAG reviewing a potential ACSA transfer of LSSS should consider not just "can we," but "should we" provide or request the specific support. For example, a coalition partner requested the U.S. provide vehicles for their use under the current 386 AEW leasing contract. Initially, the request was for a modest amount of vehicles — less than six; however, that amount grew to almost 50 vehicles. First, 10 U.S.C. § 2348 prohibits increasing U.S. inventory to provide support under an ACSA.[19] Despite whether the 386 AEW had the vehicles to

[18] DoDD 2010.9, *supra* note 9, para. 4.3.9.

[19] *See also* CJCSI 2120.01D, *supra* note 9, para. 5(d).

spare and the ACSA permitted this type of support, allowing a coalition nation to use 50 U.S. leased vehicles unnecessarily increased U.S. liability. Even with indemnity and hold harmless agreements, the 386 AEW wanted to avoid having to process and respond to claims against the coalition nation, and certainly wanted to avoid any issues where a coalition nation driver in a U.S.-leased vehicle was involved in a serious accident. Thus, despite the coalition nation's protestations that the ACSA required the United States to provide such support, the 386 AEW declined the support request.

A similar concern arose when a group commander stationed at a geographically separated air base asked whether host nation pilots could receive care from U.S. flight doctors. The ACSA clearly permitted medical care, but at that point in time, there were only a couple medical providers responsible for the 386 AEW and two other geographically separated air bases. Simply put, there was a real risk that providing support under the ACSA would affect the U.S. mission. The analysis for this situation hinged on whether this was a one-time request or the host nation was looking for another avenue to seek medical care for their pilots. After requesting more details, and expressing these concerns, the group commander relayed that this was a one-time support request. One of the host nation's premier pilots had been having back problems and our flight doctor had specialized in managing back pain. Not only was the flight doctor able to help, but the group commander also likely gained valuable "wasta"[20] in the exchange and helped reinforce relationships with the host nation. Of course, just like any ACSA transaction, the host nation and medical group completed the CC Form 35 and the U.S. was reimbursed for that care.

[20] "[W]asta is Arabic for connections, pull." *See* Daniel Pipes, *Wasta: The Hidden Force in Middle Eastern Society*, Daniel Pipes Middle East Forum, http://www.danielpipes.org/642/wasta-the-hidden-force-in-middle-eastern-society (last visited Mar. 30, 2015).

An Air Force munitions crew chief directs his crew members on lifting an inert Mk-84 bomb, May 6, 2015, at Moody Air Force Base, Georgia. (U.S. Air Force photo/Airman First Class Dillian Bamman)

We Can Provide Bombs, But Not What Makes Them "Smart"

The same coalition partner that was so eager to get into the fight, quickly found itself running short on Mk-84 bombs. This prompted a call from the munitions commander to the 386 AEW/JA asking whether the U.S. could provide another nation with bombs. 10 U.S.C. § 2350(l) specifically includes ammunition in the definition of LSSS, which includes "bombs (cluster, fuel air explosive, general purpose, and incendiary)."[21] As noted in Table 1-1, guidance kits for bombs or other ammunition are prohibited. Therefore, the ACSA permitted the transfer, but we could only provide the bodies of the bombs, not any guidance systems. This request for support was then coordinated with AFCENT/JA and forwarded through AFCENT/A4 Munitions and the coalition nation received the requested support.

Determine and Apply a Standard Support Rate

One of the categories of support permitted under an ACSA is base operations support (and construction services incident to base operations support), which includes, for example, maintenance of facilities, grounds keeping, perimeter security, laundry services and minor construction incident to host nation support agreements. A key recommendation coming from the U.S. Army Audit Agency's report on "Cost Sharing: Logistics Support, Services, and Supplies," which reviewed USFOR-A's reimbursements of LSSS from coalition nations in Afghanistan, was to use the Under Secretary of Defense (Comptroller)-promulgated flat rate for subsistence and sustainment to allocate costs to coalition partners until adoption of an alternate method."[22]

The 386 AEW applied this standard "support rate," but not every coalition nation was taking advantage of the same amenities. This led to a request from a coalition nation to go through the "support rate" line by line to minimize the cost. Although everything is negotiable, tread lightly going line by line on such general "support costs." The 386 AEW explained that every coalition nation was billed the same rate and that rate represented an estimated average based on support costs and did not reflect a compiled cost for every amenity or support offered. The coalition nation eventually relented when they realized the standard rate represented a fair representation of the support they were receiving. Of note, as of the date of this article, Financial Management (FM) was in the process of reviewing that standard rate to better capture increased costs associated with such rapid growth. For example, the network bandwidth on the installation had to be doubled in just a month in order to support our partners.

When You Don't Have an Implementing Arrangement, Make a Guide

As previously stated, ACSAs are required to provide support, but IAs can make providing that support and processing the ACSA transactions more efficient by setting up procedures and processes. An issue the 386 AEW ran into was there were not pre-existing IAs with all the coalition nations and we lacked the authority to implement IAs at the installation level. Per CJCSI 2120.01D, creating an IA requires coordination with affected Combatant Commanders, and possibly with Joint Staff if the IA would be considered policy significant or exceeds the scope of the original agreement.[23] Although higher levels of command were working the IAs, the 386 AEW needed to quickly establish procedures on processing ACSAs due to the volume of support requested.

In essence, the ACSA manager started drafting an IA-like document that captured what the U.S. was going to do, what type of support we could offer and the general cost, the POCs for the support, and what we expected our coalition partners to do. For example, it explains that a CC Form 35 must be submitted and signed by the coalition representative, signed by the 386 AEW, and then forwarded to the 386 AEW/FM and AFCENT/A4 for reimbursement and tracking in the ACSA Global Automated Tracking and Reporting System (AGATRS).[24]

[21] 10 U.S.C. § 2350(l) (2013).

[22] U.S. Army Audit Agency, *Cost Sharing: Logistics Support, Services, and Supplies*, Audit Report A-2013-0110-MTE, 13 June 2013, Executive Summary, *available at*: http://media.washtimes.com.s3.amazonaws.com/media/misc/2014/04/07/army-audit.pdf [hereinafter "Army Audit Report 2013].

[23] CJCSI 2120.01D, *supra* note 9, para 6(g).

[24] Tracking ACSAs in AGATRS was also a recommendation in the Army Audit Report 2013, and is a requirement in CJCSI 2120.01D.

The goal of this guide is to allow the 386 AEW to disseminate important information concerning the general types of LSSS available, the process for requesting and routing the CC Form 35s, and the POCs for LSSS — all of which enabled the 386 AEW to better capture the costs and make the process more efficient. One of the findings in the U.S. Army Audit Agency's report on "Cost Sharing: Logistics Support, Services, and Supplies" was a lack of sufficient processes and procedures in place to identify and equitably allocate costs of LSSS shared with coalition partners. ASCA coordinators didn't prepare CC-35 transaction reports to capture the cost of services provided to coalition partners.[25] This guide helps ensure squadrons and flights accurately capture and record all the support costs and submit CC Form 35s in a timely manner.

In addition to the processing instructions in the guide, it also includes something akin to an Installation Support Agreement Catalog (ISAC) as an appendix. The ACSA manager requests that the groups and squadrons provide cost data for the most common type of requested support and the costs associate with that support. Not only is this useful for our coalition partners in understanding categories of support, standard costs, and adds transparency to our transfers, but it also is a useful internal exercise internal for the wing by requiring the supporting functions to consider what support they could provide and accurately capturing that cost.

[25] Army Audit Report 2013, *supra* note 22.

Granted, because the coalition nations did not sign off on the guide, it wasn't enforceable. That, however, wasn't the goal. The goal was simply to set forth procedures and guidelines to make the request for support and processing an ACSA transaction as clear and simple as possible. This assists our coalition partners with how to request the support, and the wing in capturing and accounting for the support provided. Having authority under an ACSA is one thing; capturing all the costs, routing the requests and CC Form 35s, reminding everyone providing support that they have to capture the costs and seek reimbursement, all while accomplishing the mission, is the challenging part.

ACSAs Represent Only One Tool

In one instance, the 386 AEW was requested to transport equipment from one coalition nation to another. We determined that we could provide such transportation support under the existing ACSA. However, the coalition nation balked at using the ACSA and, instead, preferred using an existing foreign military sales (FMS) or foreign military finances (FMF) case. This was permissible and, in fact, commanders should consider whether it is more appropriate to fulfill requests for LSSS through other means, such as FMS, direct commercial sales, or military drawdown authority.[26] After careful review and discussions with AFCENT/JA and A4, we determined the FMS/FMF option was appropriate. While ACSAs are valuable tools to provide fiscal flexibility, they are not the only tools.

[26] CJCSI 2120.01D, *supra* note 9, enclosure A, para. 5(f).

CONCLUSION

Although ACSAs are not the only method of supporting a coalition — FMS and FMF cases, as discussed above, may also be permissible — during the stand-up of OPERATION INHERENT RESOLVE, the flexibility to provide support under ACSAs was invaluable. The 386 AEW/JA played an important role assisting A4 and the Logistics Readiness Squadron, who owns the ACSA process, and FM in understanding ACSA authority, scope, and more importantly, helping the wing develop procedures to accurately capture the costs. Deploying JAGs would be well-served by reviewing general ACSA guidance, determining whether an ACSA exists for the country to which they are deploying, and considering some scenarios that may arise during their deployment that may call for support under an ACSA. Certainly, during the stand-up of OIR — from providing cots, to meals, to bombs — ACSAs were pivotal in supporting our coalition partners. R

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We Can Train Them With O&M, RIGHT?

Tecnic Tercero Hugo Armando Medina, a Colombia Army Survival, Evasion, Resistance and Escape soldier, recovers equipment after a parachute lands near the target for the Colombian air force Casa 295 aircraft after the first air drop. (U.S. Air Force Photo/Technical Sergeant Matthew Hannen)

A Guide to Using Operations and Maintenance Funds to Train (with) Foreign Forces under § 1203 of the 2014 NDAA

BY CAPTAIN ROSS A. BROWN, USAF

It is the kind of thing that makes a fiscal law attorney's "spidey sense" tingle: an operations planner from a supported unit walks into your office and proudly announces he or she has plans for using Operations and Maintenance (O&M) funds to conduct extensive training with foreign forces. Prior to the National Defense Authorization Act for Fiscal Year 2014 (2014 NDAA), that would have been a cause for concern with most practitioners and the jumping off point for a lot of questions. With the passage of § 1203 of the 2014 NDAA, however, there are still questions that need to be asked, but there is now broader statutory authority to train with foreign forces using O&M funds.

Previously, only some special operations forces and general purpose forces falling into a couple of specific exceptions could use O&M funds to engage in any training with foreign forces beyond interoperability training.[1] Section 1203, however, represents a shift in how and when Congress allows general purpose forces to train with foreign forces. In addition to authorizing $10 million annually to defray the incremental expenses of foreign forces training with United States (U.S.) general purpose forces,[2] § 1203 also authorizes our general purpose forces to spend O&M funds to train with those foreign forces, so long as certain requirements are met.[3] In some respects, this blurs the line between the "little t" training of foreign forces typically seen as permissible with O&M funds and the "big T" training typically seen as *verboten*.[4] As I shall discuss, however, this authorization still comes with specific guidelines that limit how the funds may be used and that ensure the U.S. forces conducting the training receive a direct benefit.

[1] *See, e.g.*, 10 U.S.C. § 2011 (2011); and National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1206.

[2] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1203(c).

[3] Pub. L. No. 113-66 at § 1203(a)-(b).

[4] *See, generally,* Contract & Fiscal Law Dep't, The Judge Advocate General's Legal Ctr. & School, U.S. Army, Fiscal Law Deskbook, 10-6, 10-7 (2014) for a description of the differences between "little t" and "big T" training. In general terms, "little t" training is small scale training of foreign forces that promotes interoperability with U.S. forces, while "big T" training is training meant to increase the capacity or operational readiness of foreign forces.

THE BATTLE OF THE PREPOSITIONS: TRAINING "WITH" VERSUS TRAINING "OF"

When operators shape their § 1203 training, and when lawyers review the plans for legal sufficiency, it is important to keep a few key points in mind. First among those is that this is training "with" foreign forces, not training "of" foreign forces.[5] While this is the type of lawyerly distinction that may generate smirks and raised eyebrows among operators, it is part of what keeps § 1203 training from drifting all the way into "big T" territory. This is because training "with" foreign forces means that U.S. forces are also receiving training intended to increase the capacity and capability of those forces. While the foreign forces will undoubtedly have their own capacity increased beyond what one would normally expect in a "little t" training event, the benefit they receive must be seen as collateral to the benefit the U.S. forces receive. Therefore the benefit the foreign forces gain may be an advantage to training with the U.S. forces, but it must not be the driving consideration behind the event.

THE KEYS TO UNLOCKING § 1203

Another key point is that § 1203(b) states that training must do three things "to the maximum extent practicable:" (1) support the U.S. unit's Mission Essential Tasks (METs), (2) be with foreign forces that have equipment that is functionally similar to the U.S. unit's equipment, and (3) include elements that promote human rights, fundamental freedoms, and respect for legitimate civilian authority within the country concerned.[6]

Mission Essential Tasks

Let us first address the METs requirement. METs are specific, documented and approved unit objectives that practitioners should be able to obtain a copy of through coordination with their supported units. Though § 1203(b)(1) mentions METs plural,[7] the statute's "maximum extent practicable" language allows for enough flexibility to conclude that not all METs must be supported in any given training event. This is especially important if a unit has a diverse range of METs — in fact, just a single MET may meet the intent of this requirement depending on the training and MET being supported.[8]

Additionally, a U.S. unit's METs may allow for significant training of foreign forces in the course of the § 1203 training event — something that would lawfully take the training even further beyond what one would normally expect to see in O&M-funded training with foreign forces. For example, some mobility support advisory squadrons have METs that call for the squadrons to teach air mobility concepts to partner nations. One good way for those advisory squadron advisors to train on how to execute those METs is to actually train partner nation personnel directly during the § 1203 event. This of course raises the question of how one distinguishes in those scenarios between executing a mission and training to execute a mission. This is a crucial distinction under § 1203, which I will address later in this article.

Functionally Similar Equipment

The second § 1203(b) requirement is the training must occur "with a foreign unit or organization with equipment that is functionally similar" to the U.S. unit.[9] This requirement is easily met in most cases since U.S. forces generally have little incentive to train with foreign forces that do not have the same basic function, and therefore have functionally similar equipment as the U.S. unit. Still, there is no statutory requirement that U.S. forces train with functionally similar *units*, so there will inevitably be instances where the reviewing attorney has to look closely to determine whether functionally similar *equipment* is being used.

First, note that the "maximum extent practicable" language applies here as well. This phrase can be both a blessing and a curse, leaving attorneys to help operators strike a balance between meeting statutory intent and maximizing the training mission. While the word "practicable" adds a level of flexibility that is not seen in similar funding authorizations, the word "maximum" still indicates the key requirements must not simply be given lip service then allowed to fade into the operational background like a fiscal Cheshire cat.

For an example of balancing mission desires and legal requirements, one

[5] Pub. L. No. 113-66 at § 1203(a)(1).

[6] *Id.* at 1203(b).

[7] *Id.* at 1203(b)(1).

[8] It is worth noting that the current Joint Staff form used for coordination of § 1203 requests also allows for only one unit MET to be supported by a mission.

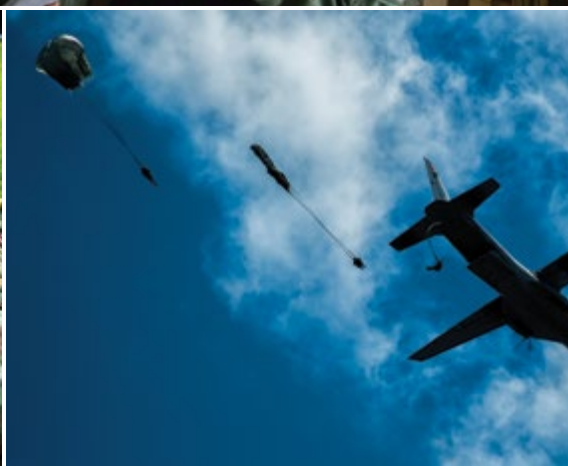
[9] Pub. L. No. 113-66 at § 1203(b)(2).

can look again to mobility support advisory squadrons. These squadrons have little to no equipment of their own — instead, they assemble experts in the use of certain types of U.S. equipment and train partner nation militaries in the use of those militaries' own functionally similar equipment. Under the "maximum extent practicable" language, § 1203 training events involving U.S. units who have no equipment of their own but who have expertise in certain types of equipment can meet this "functionally similar equipment" requirement by training with a foreign force that uses equipment that is functionally similar to that which the U.S. unit has expertise in, even if the U.S. unit does not have any equipment of its own. Through working missions that require a Joint multi-layered approval process, [10] I have found that this is also the consensus among other Department of Defense stakeholders. The takeaway for the wider legal audience is that the § 1203(b)(2) "functionally similar equipment" element, just like the other two elements, is a baseline requirement that must be met but that can be informed by a good faith incorporation of the statute's "maximum extent practicable" language.

Human Rights

The third and final § 1203(b) requirement is that the training must "include elements that promote — (A) observance of and respect for

[10] Section 1203 mission proposals run a governmental gauntlet before being approved for execution, working their way through a list of players that includes the relevant geographic combatant command, the Joint Staff, the State Department, Congress, and the Secretary of Defense.



BOGOTA, Colombia — Members of the 571st Mobility Support Advisory Squadron from Travis Air Force Base, California perform air drop training with members of the Colombian air force. (U.S. Air Force photos/Technical Sergeant Matthew Hannen)

human rights and fundamental freedoms; and (B) respect for legitimate civilian authority within the foreign country or countries concerned."[11] For purposes of this article, I refer to this as the human rights and rule of law requirement. Here again, the maximum extent practicable language is a key element of the requirement. The language is especially worth noting for those who have previously reviewed missions executed under § 1206 of the National Defense Authorization Act for Fiscal Year 2006 (§ 1206)[12] or similar authorizations. Section 1206 authorizes the use of O&M funds to build the counterterrorism and stability operations capacity of foreign militaries and includes a human rights and rule of law requirement that is very similar to that found in § 1203.[13] It does not contain the "maximum extent practicable" language, however, and also states the human rights and rule of law elements are to be incorporated into the overall training "program" but does not require that it be incorporated into the main training itself. This is a key distinction between § 1203 and other foreign training authorizations that contain nearly identical human rights and rule of law training requirements. For example, in addition to § 1206, § 1207 of the National Defense Authorization Act for Fiscal Year 2012 (§ 1207) also has human rights and rule of law training requirements, but also does not contain the "maximum extent practicable" language.[14] This indicates the human rights and rule of law training called for under § 1203 does not need to be as robust as training provided under § 1206 and § 1207, and can be adapted more flexibly as circumstances require. While § 1203 requires the training event include elements promoting human rights and rule of law, the statute does not require those elements be as robust as human rights and rule of law training mandated under similar authorizations.

WHAT CONSTITUTES "TRAINING" AND OTHER POINTS TO CONSIDER

While planning the Department of Defense's inaugural § 1203 missions, several issues arose that may repeat themselves when other practitioners evaluate similar proposals for their own units.

One issue is what constitutes "training." That term is not defined in the statute, and neither is it defined in the DoD Dictionary of Military and Associated Terms.[15] Some units may have Air Force Instructions or other guidance that can help determine what constitutes training, but any such materials will likely not have been written with § 1203 in mind.[16] Definitions or discussions of "training" in those materials therefore may be informative but will not be dispositive. It is up to the reviewing attorney, to determine how to interpret "training" as used in the statute and as applicable to his or her unit.

In the absence of any additional statutory or regulatory guidance, I argue that training must necessarily involve some method of instruction or evaluation — otherwise, there will be scenarios where it is difficult, if not impossible, to distinguish training from standard mission execution. Attorneys may find that operators argue executing the mission *is* training in the sense that it helps maintain one's currency or proficiency. For an advisory squadron-specific example, there could be a § 1203 event where only one U.S. member is sent to "train with" foreign forces by instructing those foreign forces. Such an event would certainly help the U.S. member maintain currency and build proficiency, but it is difficult to call it training when there is no means of effectively instructing that U.S. member or at least evaluating and providing feedback on his or her performance. To consider that to be training of the U.S. member would eliminate the distinction between training and mission execution. Absent more specific guidance from the Department of Defense or the Air Force, the question of what constitutes training will be left to each practitioner to evaluate in his or her own fact-specific scenarios. In most cases this should be a quick and easy analysis, but one should be

[11] Pub. L. No. 113-66 at § 1203(b)(3).

[12] Pub. L. No. 109-163 at § 1206.

[13] *See* Pub. L. No. 109-163 at § 1206(b)(2); Pub. L. No. 113-66 at § 1203(b)(3).

[14] *See* Pub. L. No. 109-163 at § 1206(b)(2); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 § 1207(c)(2)

[15] *See* Pub. L. No. 113-66 at § 1203; Joint Publication 1-02, *DoD Dictionary of Military and Associated Terms* 08 November 2010, as amended through 15 November 2014.

[16] *See, e.g.,* Air Mobility Command Instruction 16-141 vol. 1, *Building Partner Capacity Procedures and Programs,* ch. 4, for a distinction between training activities, currency activities, and proficiency activities as it relates to Mobility Support Advisory Squadrons. This instruction was published before the passage of NDAA 2014.

wary when a unit proposes a training event where U.S. forces are not being instructed or where their performance is not evaluated in a meaningful way.

Another point to consider is how the human rights and rule of law training will be presented.[17] In some cases the U.S. unit may be concerned that providing human rights and rule of law training will hinder that unit's relationship with the foreign forces because it may be perceived as hypocritical or condescending. This may be a valid concern, but the human rights and rule of law element is a statutory requirement and it is up to the U.S. unit, in conjunction with its servicing legal counsel, to determine the best way to meet that requirement if the unit wants to utilize the § 1203 authority.

Here again, the "maximum extent practicable language" gives operators and practitioners a level of flexibility in presenting the human rights and rule of law training that is not available under other authorizations. For example, there is no requirement that the human rights and rule of law element be presented as a distinct training block — in fact, U.S. units may find it more effective to incorporate this element into the rest of their training in the form of side notes and sub points within the primary training. Additionally, there is no statutory requirement that lawyers present the material to the foreign forces. While human rights and rule of law are legal concepts and attorneys may be involved in developing instruction material, it may be most effective for the operators who have been working with the foreign forces to be the ones who present the training. Ultimately, it will be up to the practitioner to work with the supported unit to determine the best way to shape and incorporate the human rights and rule of law elements into each mission, and to document that those elements are in fact being taught.

CONCLUSION

Though § 1203 authority has existed since December 2013, the Department of Defense's first § 1203 mission was not approved and executed until the spring of 2015. Now that the procedural paths have been forged, I predict a marked increase in § 1203 proposals and missions. I am told by others involved in the § 1203 approval process that Air Force Reserve and Air National Guard units are becoming increasingly interested in § 1203, and our sister services are also busy planning their own § 1203 missions. Legal practitioners within the Department of Defense should see an increase in § 1203 mission requests since, unlike similar authorizations, there is no statutory restriction to how much O&M funds may be used to support U.S. units, and the type of partner nation training possible under § 1203 goes beyond the "little t" training traditionally associated with O&M funds.

Since § 1203 training events are new to the Air Force and to the Department of Defense, one can expect the processes and requirements for these events to evolve. Practitioners can therefore use this article as an introduction and initial guide to § 1203 training, but then work with their units and combatant command air components to ensure they stay current on the latest developments. The Air Force may ultimately benefit from issuing an Air Force Instruction on the use of § 1203-authorized funds, much like how it has for Latin American and African cooperation funds.[18] Until then, practitioners will need to take more of an ad hoc approach to ensuring all legal requirements are satisfied. But at least now, when that excited operations planner comes into your office with foreign training plans and O&M lines of accounting in hand, you can tell your jumpy spidey sense to relax just a little. R

[17] I will briefly note that § 1203(b)(3) human rights and rule of law training is completely different from "Leahy Vetting," a process by which partner nation forces are screened for human rights abuses before receiving training from the U.S. *See* 22 U.S.C. at § 2304. Many U.S. operators will be familiar with Leahy Vetting and may assume that Leahy Vetting and § 1203(b)(3) training are the same thing, but they are two entirely distinct processes with completely different objectives.

[18] *See* Air Force Instruction 16-102, *Latin American Cooperation (LATAM COOP) Fund* (2014) and Air Force Instruction 16-125, *African Cooperation (AFR CO-OP) Fund* (2012).

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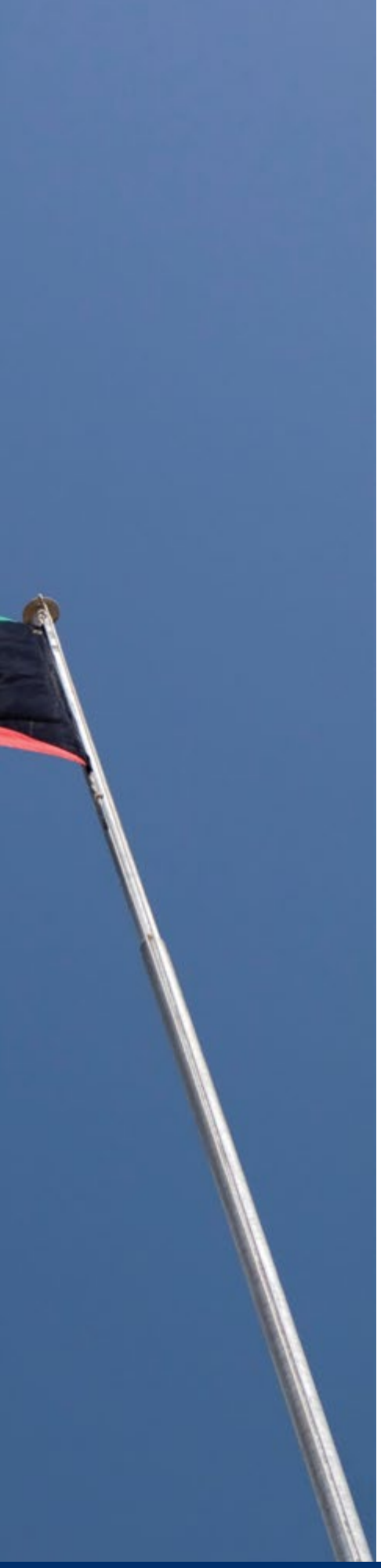

A Most "Irregular" Assignment

A View into the Inner Workings of a Security Cooperation Organization

BY MAJOR MATTHEW E. DUNHAM, USAF

My father's first words when I told him I was given an accompanied assignment to the Office of Military Cooperation (OMC) in Kuwait were "Can't you just get a regular assignment?" After assuring him that his grandchildren would be perfectly safe, but realizing a parental visit was highly unlikely, I tried to explain what I would be doing there. In retrospect, I realize I did not know much about what an OMC actually did, what challenges there would be or what I would be expected to do. This article takes a look at Department of Defense (DoD) operations at U.S. Embassies and provides some of the information I wish I had then.

"OMC" EXPLAINED

"Office of Military Cooperation" is only one term for a Security Cooperation Organization (SCO). A SCO is a DoD organization permanently located in a foreign country with responsibilities for carrying out all security cooperation management functions with the host nation.[1] Depending on political sensitivities within a host nation, a SCO may be known by any number of names, including Office of Defense Cooperation or Military Liaison Office.

[1] U.S. Dep't of Defense, Dir. 5205.75, DoD Operations at U.S. Embassies 16 (Dec. 4, 2013).

> Security cooperation encompasses all DoD interactions with foreign defense establishments to build defense relationships that promote specific U.S. security interests, develop allied and friendly military capabilities for self-defense and multinational operations, and provide U.S. forces with peacetime and contingency access to a host nation."[2]

Put another way, "[security cooperation] is the means by which DoD encourages and enables countries and organizations to work with the United States to achieve strategic objectives."[3]

A significant portion of a SCO's responsibilities include managing and executing security assistance programs under the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act of 1976, as amended. While the Department of State (DoS) has primary responsibility for implementing security assistance, many programs are executed by the DoD, including Foreign Military Sales, Foreign Military Financing and International Military Education and Training.

Security cooperation, however, is not limited to security assistance, nor is security assistance a SCO's only responsibility. As the principal DoD link to the host nation defense establishment, a SCO is responsible for coordinating various activities such as military exercises, basing and storage of DoD personnel and assets, information sharing, intelligence cooperation, logistical support arrangements, and transit of military aircraft and personnel through the host nation.

A SCO is usually located at or near the U.S. Embassy in the host nation and is headed by the Senior Defense Official/Defense Attaché (SDO/DATT). The SDO/DATT serves under the direction of the Ambassador, also known as the Chief of Mission, with joint oversight by the respective Geographic Combatant Commander (GCC); the Director, Defense Security Cooperation Agency; and the Director, Defense Intelligence Agency.[4] The SDO/DATT is a member of the Embassy's Country Team and is the Ambassador's principal advisor on defense issues, including planning, coordinating and supporting U.S. defense activities in the host nation.[5] In addition, the SDO/DATT liaises with host-nation defense establishments and represents the Secretary of Defense, GCC, and the DoD Components to host-nation counterparts and other foreign diplomats accredited to the host nation.[6] In these various roles, the SDO/DATT is responsible for selling U.S. military equipment to the host nation, helping the host nation defense forces obtain military education and training, and building and maintaining the U.S.-host nation defense relationship to secure U.S. present and future interests.

CHALLENGES (A.K.A. OPPORTUNITIES TO EXCEL)

Like all organizations, a SCO is only as effective as its people, and to be effective, a SCO requires strong leadership and adaptable personnel who are able to build relationships. Building relationships is a challenging endeavor under any circumstance, but it can be even more difficult in a foreign, interagency and joint environment. Three common challenges for SCO personnel are: (1) adapting to the physical and cultural differences in the host nation, (2) maximizing interagency collaboration, and (3) ensuring effective communication among all DoD actors involved in security cooperation activities.

One of the most immediate challenges to building host nation relationships is being able to adapt to the physical and cultural environment of the host nation, which is likely to be vastly different from the typical DoD assignment. Some examples are: the climate may be extreme; there may be differences in food and entertainment options, language barriers, clothing restrictions, and tolerance for speech and religious activities; freedom of movement may be diminished; and

[2] Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States I-11 (Mar. 25, 2013).

[3] Joint Chiefs of Staff, Joint Pub. 3-22, Foreign Internal Defense I-10, (Jul. 12, 2010); *see also* U.S. Dep't of Defense, Dir. 5132.03, DoD Policy and Responsibilities Relating to Security Cooperation, para. 4(a) (Oct. 24, 2008) (*stating*, "[s]ecurity cooperation…is an important tool of national security and foreign policy and is an integral element of the DoD mission").

[4] U.S. Dep't of Defense, Dir. 5205.75, DoD Operations at U.S. Embassies para. 9(a) (Dec. 4, 2013); Joint Chiefs of Staff, Joint Pub. 3-22, Foreign Internal Defense III-13 (Jul. 12, 2010).

[5] U.S. Dep't of Defense, Dir. 5205.75, DoD Operations at U.S. Embassies para. 9(b) (Dec. 4, 2013).

[6] *Id.* at para. 9(d-f, i).

the usual support networks (AAFES, clinics, etc.) may be lacking. There will also be cultural differences in how business is accomplished. That is, the American way of doing business is not the host nation way of doing business. For example, it is rare for a defense official from one of the Arabian Gulf countries, such as Kuwait or Saudi Arabia, to say "no" to a request even if he (and it most likely will be a "he") does not agree or cannot assent. Rather, the official may demur or give a vague reply, or he might even appear to agree only to back away from it later. It is critical for SCO personnel to understand cultural norms and sensitivities to avoid offending host nation counterparts or unnecessarily putting them in uncomfortable positions. Otherwise, host nation officials may resist future meetings or harbor ill feelings, which can strain channels of communication and impact the ability of the SCO and the U.S. Embassy to accomplish its larger mission.

In most cases, physical and cultural differences are exciting and interesting, and they often lead to greater self-awareness of how we are perceived as Americans. To be effective, it is vital for SCO personnel to be able to adapt to (or at least understand and respect) these differences. If not, personal resentment or feelings of superiority over the host nation way of doing things could bleed into official representations and negatively impact U.S.-host nation relations.

Another challenge is working with interagency partners. Being able to work with other agencies, especially

One of the most immediate challenges to building host nation relationships is being able to adapt to the physical and cultural environment of the host nation….

Top Photo: At the camel races — handlers prepare for the next heat (photo courtesy of Sara Tanzi-Dunham)
Bottom Photo: Selling dates — Old Souk in Kuwait City (courtesy of Major Matthew Dunham)

In addition to host nation and interagency relationships, a SCO may face challenges working within the joint DoD community.

Department of State Foreign Service officers, is paramount to success. Dr. Catherine Sweet, currently the Political/Economic Counselor at the U.S. Embassy in Abu Dhabi, is a career diplomat and has been posted at a variety of locations with a large military presence. She notes that in as much as SCO personnel have to cope with cultural differences in adapting to the host nation, they must also adjust to the very different institutional cultures within various U.S. government agencies.[7]

According to Dr. Sweet,

> SCO personnel are most effective when they keep the mission's overall strategic objectives at the forefront, recognizing that each agency brings its own strengths (and blind spots) to the table. Once identified, these strengths can be amplified — and relative weaknesses mitigated — by working together as a cohesive team in service of the mission's goals.[8]

This is, in effect, the interagency version of the DoD's "one team, one mission" principle. On the other hand, interagency squabbling and turf wars can hinder the ability to accomplish the greater U.S. mission in the host nation. When there is cohesion, working with DoS can be one the most rewarding parts of working at a SCO, both personally and professionally — something Dr. Sweet states is also true for State Department personnel working with DoD.[9]

In addition to host nation and interagency relationships, a SCO may face challenges working within the joint DoD community. Mission sets, agendas, priorities, personalities and egos abound in foreign countries where there is a sizable DoD presence. At the very least, there are instances when DoD commanders lean far forward to get a particular mission accomplished without full appreciation for the implications. This is understandable, especially if local commanders rotate frequently. SCO personnel, who are more permanent, should anticipate and mitigate these issues through strong working relationships.

To illustrate how varying mission sets among DoD components operating in a host nation can create challenges, consider the following scenario: the Army requests "X" from the host nation to accomplish "Y", while the Air Force needs "A" from the host nation to accomplish "B." The Air Force's request for "A" will make it difficult for the host nation to grant the Army's request for "X." Meanwhile, off the coast the Navy is routinely doing "Z" near host nation territorial waters. The host nation has declared it will not answer any request from the U.S. military until the Navy stops doing "Z." In this scenario, the SCO is the narrow part of the funnel where these issues collide. The Army and Air Force may not know or care

[7] Correspondence from Dr. Catherine Sweet, Political and Economic Counselor, U.S. Embassy, Abu Dhabi, to author (Feb. 24, 2015) (on file with author).

[8] *Id.*

[9] *Id.*

about the Navy doing "Z," and they each are likely to hold their respective requests as paramount. Meanwhile, the Navy's "Z" operations may be entirely legitimate (it also may not know or care about the Air Force and Army needs).

It is up to the SCO to understand the DoD components' positions and true needs, comprehend the host nation position, communicate with all parties involved and facilitate resolution. To do this, it is essential for the SCO to have a full sight picture of all DoD happenings in the host nation. Only then can the SCO effectively liaise with the host nation and advise the Ambassador and GCC. A solution to complex multi-component challenges is usually workable as long as the parties have a strong working relationship and communication is open, regular and honest. This is important not only for solving immediate issues, but for preserving host nation good will for long term strategic interests. Consider, for example, how the above scenario could degenerate into crisis if the Army, Air Force and Navy were independently engaging the host nation (i.e., not coordinating with the SCO), and at one of those engagements, a host nation official was seriously offended. Not only would the SCO lack situational awareness, so would the Ambassador and the GCC, and depending on the gravity of the situation and host nation's reaction, such an instance could seriously jeopardize greater U.S. strategy.

Whatever the challenge a SCO may be facing, the legal advisor to the SDO/DATT is likely to be involved, which makes the assignment anything but boring. The next sections of this article discuss some of the roles and responsibilities of the legal advisor to the SDO/DATT, as well as some of the benefits of an Embassy assignment.

ROLE OF THE LEGAL ADVISOR TO THE SDO/DATT

The legal advisor at a SCO occupies a Staff Judge Advocate (SJA) position and has all the typical JAG responsibilities, including advising on international agreements, ethics, military justice, foreign criminal jurisdiction, labor law, fiscal law and contracts. Some issues and tasks can be exciting and have long term impacts, such as drafting international agreements or new laws. However, the legal advisor role is not constrained to traditional JAG requirements. Because a SCO is a small organization and personnel resources are limited, the legal advisor is expected to be an action officer. Generally, these tasks will have a legal flavor and may include drafting general officer correspondence, briefing the Combatant Command (COCOM) J-Staff or the Ambassador, coordinating on DoS cables, or providing input to the Country Team on issues like human rights vetting for recipients of U.S. security assistance. But sometimes the flavor of the task has nothing to do with law. For example, the legal advisor might be asked to be the Public Affairs point person for the SCO, plan or execute visits for distinguished visitors like the Secretary of Defense or assist the Consul General on visa issues for American citizens working for DoD. A personal favorite was

The legal advisor at a SCO occupies a Staff Judge Advocate (SJA) position and has all the typical JAG responsibilities, including advising on international agreements, ethics, military justice, foreign criminal jurisdiction, labor law, fiscal law and contracts.

Air Force JAGs have the opportunity to be assigned as SJAs at several SCOs worldwide, including locations in Australia, Greece, Kuwait, Saudi Arabia, Spain and Turkey.

being tasked to obtain a host-nation entry visa for a third-country national to avoid accusations of human smuggling after the individual had been rescued at sea and flown into the sovereign territory of the host nation by the U.S. Navy to be treated at a DoD medical facility.

While a legal advisor's responsibilities are many, perhaps the most important role is that of counselor. Because of the confidential aspect of the legal profession and because lawyers are trained to think critically, the SDO/DATT will rely on the legal advisor for substantive input and honest feedback. This is not likely to happen through regular staff work, but by staying constantly engaged with the SDO/DATT and knowing what he or she is doing on a day-to-day basis. This occurs by attending various meetings and functions, by developing relationships with the Embassy staff, host nation officials, COCOM staff and DoD component personnel, and by staying involved in the larger community.

Major General Rick Mattson, who is currently the J7 for USCENTCOM and previously served as the SDO/DATT in Kuwait for three years, states that "the perspective of a well 'plugged in' JAG is crucial in forming the recommendations and decisions SDO/DATTs are required to give to our nation's most senior leaders."[10] In addition to being experts on the law, he notes that "JAGs must be able to effectively communicate, integrate, collaborate, and most importantly, understand the nuanced and subtle cultures of mil/non-mil, DoD/DoS, international and host nation partners on a playing field of dotted organizational lines where relationships are critical, and success is achieved through trust and candor."[11] Maj Gen Mattson maintains that an individual's value to a SCO's mission is less about their rank or title than about the "capability" they bring to the table, and when a legal advisor possesses the capabilities noted above, a SDO/DATT will keep their JAG "joined at the hip."[12]

THE VALUE OF AN "IRREGULAR" ASSIGNMENT

Air Force JAGs have the opportunity to be assigned as SJAs at several SCOs worldwide, including locations in Australia, Greece, Kuwait, Saudi Arabia, Spain and Turkey. While every assignment and experience will be different, much of the value gained from these "irregular" assignments is universal. A SCO assignment opens the aperture and allows JAGs to participate in U.S. foreign policy outside the DoD. I am aware of no other assignment where a relatively junior JAG has the opportunity to collaborate with a variety of interagency and joint partners, brief Ambassadors, COCOM staff and leading host nation defense officials, and have a direct influence on international relations. Similarly, the

[10] Correspondence from Major General Rick B. Mattson, Director, CCJ7, U.S. Central Command, MacDill AFB, FL, to author (Feb. 26, 2015) (on file with author).

[11] *Id.*

[12] *Id.*

Major General William Beydler, USCENTCOM/J3, and Major General Abdulrazaq Alawadhi, KMOD/J3, sign an international agreement drafted by the OMC-K/SJA. (photo courtesy of Major Matthew Dunham)

opportunity to witness how another nation perceives the U.S. military (both positively and negatively) will forever impact your perspective.

Colonel Michael Tomatz, the SJA at Third Air Force, Ramstein Air Base, Germany, agrees that embassy assignments offer unique value for JAGs. He states the following regarding his time as the SJA at the U.S. Embassy in Canberra, Australia:

> Working with the Defense Attaché was absolutely fascinating. The depth and breadth of issues was truly unique, and being an effective legal advisor required liaising with a wide variety of personnel on the country team. You always had the sense that the issues were critical to the overall defense relationship between the United States and our host country, and the legal knowledge and experience judge advocates brought to the table was both respected and appreciated. I also had the good fortune of working with two terrific Air Force paralegals, and both were instrumental to our success. They engaged effectively with a broad range of host government agencies and addressed a number of issues of concern, not just to the DoD, but to a wide range of other U.S. agencies working in the Embassy.[13]

Beyond professional value, living in a foreign country is an adventure. While I could have done without 140-degree summers and the local driving habits, being able to experience the Middle East for two years with my family was invaluable. Not only did we become intimately familiar with another place and culture, we were able to travel to unique places like Jordan, Oman and Sri Lanka. The experiences and friendships we made will have a lasting and positive influence on my family.

Finally, if having a direct impact on international relations and sharing wild adventures with your family in foreign lands is not enough, you might also get the chance to temporarily trade in those ABUs for State Department camouflage…because (believe it or not) it breaks down barriers and helps build relationships!

[13] Correspondence from Col Michael Tomatz, Third Air Force Staff Judge Advocate, Ramstein AB, Germany, to author (Feb. 25, 2015) (on file with author).

HOW TO GET ONE OF THE SCO ASSIGNMENTS

While there is no single track to one of these "irregular" specialty assignments, a Masters of Law (LL.M.) in international law or contracts and fiscal law will not hurt one's chances. If history is any indicator, the positions in Australia, Kuwait and Saudi Arabia are usually filled by a major, while the Greece, Spain and Turkey spots are generally filled by lieutenant colonels. Please feel free to contact me if you want to know more about working at a SCO and don't hesitate to get a different perspective from others who have had these assignments. Finally, if you are already convinced, put the SCO assignments on your Web PDI!

Major Matthew E. Dunham, USAF

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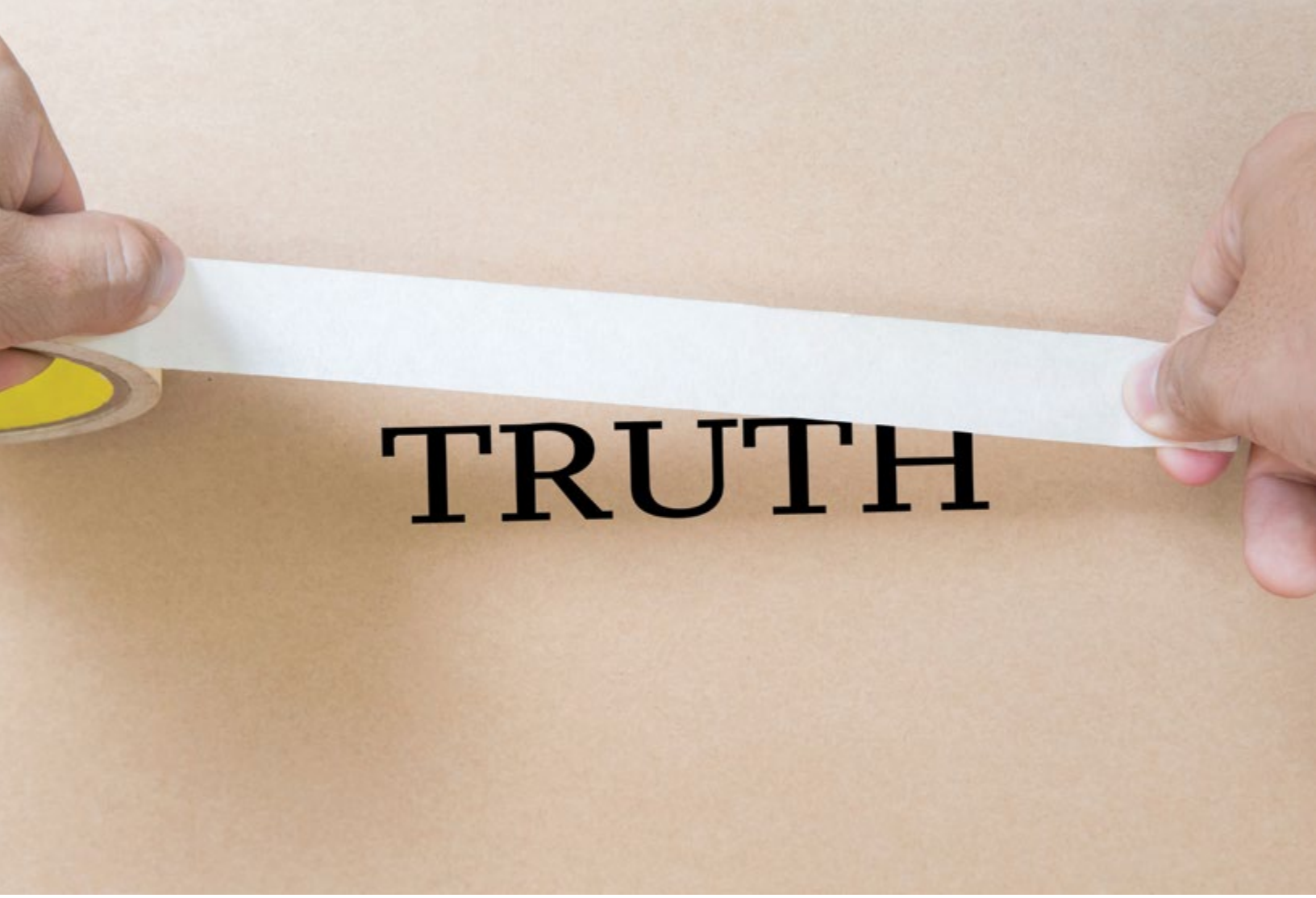

ALAS, POOR TRUTH, WE KNEW YOU[1]

Reflections on the Transformation of Article 32, UCMJ: "Investigations" into Pretrial "Hearings"

BY MR. THOMAS G. BECKER

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Editor's Note: *Mr. Becker emphasizes the views expressed in this article are his own and do not necessarily reflect those of the Commandant, the Commander of the Air Force Legal Operations Agency, or The Judge Advocate General.*

Through the magic of Lexis, I'm confident there is no current federal or state statute that establishes "truth" as a standard of proof in any criminal or civil proceeding. Even the stringent "beyond a reasonable doubt" standard required to satisfy Due Process in criminal cases[2] doesn't guarantee, or even promise, that a conviction reflects the truth.[3] I once heard noted criminal defense lawyer (and big fan of the military justice system) F. Lee Bailey say that one of the first things he tells a client is that truth is irrelevant to whether the client will be convicted at trial.[4]

That may be an accurate statement about criminal trials, but at least one criminal justice system — the military justice system — actually had "truth" as a standard of proof in its pretrial investigations of charges before referral to a general court-martial (GCM)…until 26 December 2014, that is. On that date, as part of the mutilation of military justice known as the National Defense Authorization Act (NDAA) for Fiscal Year 2014 (FY14),[5] Congress gave us all the holiday gift that keeps on giving — the banishment of truth from consideration when considering referral of charges to a general court-martial.

> The truth-seeking investigation under Article 32 has been described by commentators as a screening device designed to protect against referral to trial of baseless charges…

"[T]HE TRUTH OF THE MATTER...."

For more than six decades, Article 32, Uniform Code of Military Justice (UCMJ), set out the functions of the pretrial investigation as follows:

> No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. ***This investigation shall include inquiry as to the truth of the matter set forth in the charges,*** consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.[6]

The adoption of the Uniform Code of Military Justice (UCMJ) in 1950 included many, for its time, radical innovations in military law.[7] But one thing it didn't mess with was the truth-seeking purpose of the pretrial investigation. In nearly identical language to its successor statute, Article 70 of the Articles of War provided:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. ***This investigation will include inquiries as to the truth of the matter set forth in said charges,*** form of charges, and what disposition of the case should be made in the interest of justice and discipline.[8]

[1] Apologies to William Shakespeare. The quotation is, "Alas, poor Yorick, I knew him, Horatio." Hamlet, Act 5, Scene 1.

[2] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970).

[3] *See* University of Michigan Law School, National Registry of Exonerations at http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (2014). As of this writing, 1,511 persons convicted of crimes have been subsequently exonerated by DNA evidence. The *Registry* lists each case and the principal reasons for the wrongful conviction, e.g., faulty eyewitness identification, witness perjury, false confession, faulty forensic evidence, official misconduct by police and/or prosecutors, and/or inadequate legal defense.

[4] "Those who think the information brought out at a criminal trial is the truth, the whole truth, and nothing but the truth are fools. Prosecuting or defending a case is nothing more than getting to those people who will talk for your side, who will say what you want said." *New York Times* (20 Sept. 1970), *reproduced at* Wikiquote at http://en.wikiquote.org/wiki/F._Lee_Bailey (2014).

[5] 113 P.L. 66, 127 Stat. 672 (2013), hereinafter "NDAA FY14."

[6] Art. 32(a), UCMJ, 10 U.S.C. § 832(a) (2014) (emphasis added), *amended by* Nat'l Def. Auth. Act FY2014 § 1702(a), effective 26 Dec. 2014.

[7] *See, e.g.,* Art 27, Uniform Code of Military Justice (hereinafter UCMJ), 10 U.S.C. § 827 (qualifications of trial and defense counsel); Art 31(b), UCMJ, 10 U.S.C. § 831(b) (advice of rights mandated before interrogation); Art 37, UCMJ, 10 U.S.C. § 837 (unlawful command influence prohibited).

[8] Articles of War, Art 70 (1920) (emphasis

The Article 32 investigation has become yet another casualty of the frenzied and futile attempt to make so-called "zero tolerance" of sexual assault into a reality.

The truth-seeking investigation under Article 32 has been described by commentators as a screening device designed to protect against referral to trial of baseless charges, provide convening authorities with necessary factual and legal predicates for either referral or other disposition of charges, and give the defense — indeed both sides — discovery of evidence for use at trial, should charges be referred.[9] Congress threw all of this out the window, and more than 200 years of truth-seeking continuity in the military's pretrial process, in favor of another standard. It's got to be a better one, right? Hmmm…not so much.

GOOD-BYE TRUTH, HELLO PROBABLE CAUSE

As of 26 December 2014, Article 32 now reads in pertinent part:

(a) Preliminary Hearing Required.

(1) No charge or specification may be referred to a general court-martial for trial until completion of a ***preliminary hearing.***

(2) ***The purpose of the preliminary hearing shall be limited*** to the following:

(A) Determining whether there is ***probable cause*** to believe an offense has been committed and the accused committed the offense.

(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

(C) Considering the form of charges.

(D) Recommending the disposition that should be made of the case.[10]

So now the Article 32 "investigation" becomes a "preliminary hearing," with a standard of proof of "probable cause." Moreover, the purpose of the hearing is statutorily ***"limited"*** to "probable cause". A hearing officer can't inquire into the truth even if he or she wants to. Instead, Congress has imposed what the courts have described as a "low standard"[11] requiring something more than "mere suspicion" but less than a "preponderance of the evidence."[12]

added). The Articles of War were the first military legal code of the United States, adopted in 1775 (largely from the British Articles of War) and, except for minor amendments, remained unchanged until their first (and only) major reissuance in 1920. *See*, Col William Winthrop, Military Law and Precedents 17-24 (2nd Ed. 1920).

[9] David A. Schlueter, Military Justice Practice and Procedure §§ 7-1, 7-2 (7th Ed. 2008); Col Francis A. Gilligan, *The Bill of Rights and Service Members,"* The Army Lawyer, 1987 at 3 (1987).

[10] Art. 32, UCMJ, 10 U.S.C. § 832, *as amended by* NDAA FY14 § 1702(a)(1) (emphasis added).

[11] *See, e.g., Armstrong v. Asselin*, 784 F.3d 984, 991 (9th Cir. 2013)((unpub); *Hoxha v. Levi*, 465 F.3d 554, 559 (3rd Cir. 2006) (citing U.S. District Court decision in the case); *United States v. DiNapoli*, 8 F.3d 909, 915 (2nd Cir. 1993).

[12] *United States v. Cowgill*, 68 M.J. 388, 393 (C.A.A.F. 2010) (quoting *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)).

Compounding this affront to truth is new subsection (d)(3) of Article 32, which provides that a "victim may not be required to testify at the preliminary hearing [and] shall be deemed to be not available for purposes of the preliminary hearing" if such person declines to testify.[13] For this purpose, new subsection (h) defines "victim" as anyone ***"alleged"*** to have suffered harm and ***"is named in one of the specifications."***[14] Moreover, such a "victim" may now shield him or herself from confrontation by the accused and defense counsel, or examination by anyone interested in testing the witness's credibility, until trial.[15]

With these NDAA FY14 provisions, Congress has turned one of the best features of the military justice system into a legal speed bump with little value in assessing the ultimate truth of an allegation. The Article 32 investigation has become yet another casualty of the frenzied and futile attempt to make so-called "zero tolerance" of sexual assault into a reality.

[13] Art. 32(d)(3), UCMJ, 10 U.S.C. § 832.

[14] *Id.* (emphasis added).

[15] NDAA FY14 § 1702(d)(3). Even prior to the NDAA FY14 amendments, Article 32 investigating officers lacked power to issue subpoenas to civilian witnesses. R.C.M. 703(e)(2)(C) (subpoenas may be issued by a summary court-martial, trial counsel of a special or general court-martial, president of a court of inquiry, or officer detailed to take a deposition; Article 32 investigating officers or, as they are now, hearing officers are not mentioned). Military witnesses, however, are made available by their commanders (i.e., ordered to appear at the Article 32) if determined to be "reasonably available." R.C.M. 405(g)(2)(A). Military members alleged to be victims are no longer subject to such orders.

"ZERO TOLERANCE" AND OTHER FAIRY TALES

Glib, hackneyed, and banal only begin to describe the phrase "zero tolerance" as a response to any organizational or social problem. Yet we continue to use it to describe our proposed cure for all manner of ills, whether it's drugs and violence in schools or the military's battle against its share of America's sexual assault problem, notwithstanding that no one believes it.[16] Even then-Secretary of Defense Hagel found the term embarrassing — "It's not good enough to say we have a zero-tolerance policy. How does that translate into changing anything?"[17] Good question. So far, the only change I've seen coming from a literal application of "zero tolerance" is smart people start doing dumb things, like school administrators treating Midol the same as black tar heroin[18] and a pair of nail clippers the same as a machete.[19] That's what has happened to the Article 32 process. By eliminating any search for the truth from the pretrial investigation process, proponents hope to somehow stop sexual assault by making sure even the most patently incredible allegation gets to a trial by court-martial. Well, they're wrong. Eliminating truth from the pretrial investigation calculus doesn't stop misconduct; it won't even put a dent in it. How do I know? I've been there. I've seen the collision of "zero tolerance" and the military justice system's pretrial investigation process. It was ugly.

[16] *See, e.g.,* Lawrence Downs, *How the Military Talks About Sexual Assault*, New York Times Online, 26 May 2013 ("Does the Pentagon know what 'zero tolerance' means?").

[17] *Id.*

THE STRATEGIC AIR COMMAND'S "ONE JOINT GCM" POLICY

[18] Mary Nash Wood, *Are School Zero-Tolerance Policies Too Harsh?* USA Today Online, 4 Dec. 2011 (middle school girl providing Midol pill to another student disciplined for violating "zero tolerance" policy against drugs).

[19] John W. Whitehead, *Student Sentenced to One-Year Expulsion for Possession of Nail Clippers*, The Rutherford Institute Online, 19 July 1999 (high school student violated "zero tolerance" policy against weapons because the clippers had a small knife attachment).

But there's one predictable consequence to removing the truth-seeking and liberal discovery functions of the Article 32 investigation — a dramatic increase in the risk of wrongful convictions of the innocent.

In the late 1970s and early 1980s, Strategic Air Command (SAC) had had enough of its airmen using drugs. "Zero tolerance" had yet to be coined,[20] so that cliché wasn't available. In fact, I don't know if the policy had an official name as it was just one of those things that was understood to be without having anything in writing. I can tell you what we (the circuit trial counsel in the First Circuit, covering most of the SAC Northern Tier bases) called the policy — the "One Joint GCM." That is, any allegation of drug use or possession, even the smallest trace of marijuana or a single toke on a number,[21] was going to a general court-martial without any regard to witness credibility or corroborating evidence. SAC's drug problem would thus be solved by guaranteeing all airmen would face general court-martial for any — and I mean ***any*** — drug allegation, thereby motivating them to steer clear of drugs or anyone that might associate them with drugs. Or so the theory went. Part of that "zero-tolerance" policy was the *de facto* removal of truth seeking from the Article 32 investigation process.

What the NDAA FY14 did *de jure*, SAC did by an unwritten policy making sure that no Article 32

Investigating Officer (IO) dug into the truth of any drug charge. It became standard practice for an IO to call the drug informant as a witness at the Article 32 — usually just one airman, himself caught up in a drug apprehension and looking for a way out — ask him to identify his written statement to OSI investigators, and then ask no more questions. The defense counsel invariably chose to pass on any cross-examination because she knew that nothing was going to stop this case from being referred to a GCM, the better to conceal the considerable fruits of her labor in investigating the informant's credibility until springing the trap at trial. So it continued…one lousy case after another went to trial and acquittal. At one base, we lost eight cases in a row, all based on the uncorroborated testimony of one airman who was a case study in all conceivable methods of impeachment under the Military Rules of Evidence to include prior conviction in civilian court for grave robbery. "Zero tolerance" indeed.

The "One Joint GCM" era at SAC ended with the DoD drug testing program which, experience has shown, has had a real effect on deterring drug use by military members. Until then, so-called "zero tolerance" — which included turning the Article 32 investigation from a search for the truth into a meaningless exercise — had no effect in reducing drug-related

[20] According to that font of all knowledge — Wikipedia — the phrase "no tolerance" was first used in a 1994 report on community policing strategy and the term soon morphed into "zero tolerance." *Zero Tolerance*, Wikipedia Online § 2 fn. 5, 6 (2014). I first heard the term when I was assigned to the DoD General Counsel's Office in the mid-late 1990's. It seemed every press release, published statement, or whatever from the Secretary's office touted one "zero tolerance" policy or another. More than once, I wrote drafts of policy statements that didn't include the term only to learn someone else added it later.

[21] Acknowledgement to Charlie Daniels, "Uneasy Rider" (1973).

misconduct. So it will be with allegations of sexual assault.

But there's one predictable consequence to removing the truth-seeking and liberal discovery functions of the Article 32 investigation — a dramatic increase in the risk of wrongful convictions of the innocent. No matter how bad you think a case is, there's always a chance an innocent accused might be convicted. Remember F. Lee Bailey's description of the myth of truth seeking at a criminal trial?[22] Wrongful conviction, always a concern, has become especially worrisome in the current environment where DoD Sexual Assault Prevention and Response efforts risk turning an accused airman's presumption of innocence on its head.[23]

"AN EPIDEMIC" OF DUE PROCESS VIOLATIONS

In reviewing the alphabetical list compiled by the University of Michigan of convictions that we know have been wrongful,[24] I started counting the sex cases. I stopped at 40 while still in the "B's." Those who have done a more exhaustive review of the list discovered that 35 percent of the exonerations were for sex offenses.[25] In many of these cases, it was DNA evidence, obtained when scientific advances allowed for the post-conviction development of new evidence, definitively excluded the accused as the perpetrator of the act. At least one advocacy group for the wrongly convicted has raised what should be an obvious question — what about cases where there isn't dispute about the actors, but the issue is consent?[26] Accused persons in those cases are just as subject to wrongful conviction, only without the science of DNA to bail them out. Which brings us to one of the leading causes of wrongful conviction — official misconduct[27] — and its relationship to Congress's removal of truth seeking and evidence discovery from the Article 32 pretrial process.

The net effect of the NDAA FY14 changes to the pretrial process is to increase the control prosecutors have over how much the defense is able to learn about the case prior to trial. In addition to giving an alleged victim the right to refuse to appear at an Article 32 hearing and limiting the Article 32 standard to a mere probable cause determination, the NDAA FY14 also requires defense counsel seeking to interview an alleged sexual assault victim to go through the trial counsel and, upon the alleged victim's request, have the trial counsel present during the interview.[28] As a bonus prize to removal of truth seeking from

The net effect of the NDAA FY14 changes to the pretrial process is to increase the control prosecutors have over how much the defense is able to learn about the case prior to trial.

[22] *See* fn. 4.

[23] *See* Col Daniel J. Higgins and Maj Shad R. Kidd, *Start by Believing — the Accused*, The Reporter vol. 41 no. 2, 22 (2014).

[24] *See* fn. 3.

[25] Stop Abusive and Violent Environments, *Exonerations for Wrongful Conviction of Sexual Assault*, http://www.saveservices.org/falsely-accused/sex-assault/exonerations-for-a-wrongful-conviction-of-sexual-assault/ (2014). According to the banner on its website, SAVE's organizational mission is "Working for legal reform to protect all victims and stop false allegations."

[26] Community of the Wrongly Accused, *Study: Wrongful conviction rate of sexual assault "much higher than previously thought,"* http://www.cotwa.info/2012/06/study-wrongful-conviction-rate-of.html (2012).

[27] *See* fn. 3.

[28] NDAA FY14 § 1704.

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the pretrial process, we now have prosecutors as the gatekeepers for the evidence that's presented to the Article 32 hearing officers and defense access to critical witnesses. So I'm sure some readers are thinking, what's the problem? This makes our military justice system just like the civilian legal system where hard-working , ethical, career prosecutors control things, right? Hmmm…not so much here, either.

According to a veteran prosecutor who spoke at a conference I attended,[29] *Brady* violations by prosecutors — that is, the failure of prosecutors to disclose exculpatory evidence in their possession[30] — have become "an epidemic" in the United States at both the state and federal levels.[31] The military justice system hasn't been immune from *Brady* violations by its prosecutors.[32] Aside from those violations documented in appellate cases, I'm personally aware of trial counsel who suppressed recantations by alleged sexual assault victims and the defense only learned of these during defense interviews of the witnesses. I'm not naïve about recantations by complaining witnesses in sexual assault cases. I know that many recant falsely. But some recant truthfully. The point is that any recantation is exculpatory evidence that Due Process demands be disclosed, but not all trial counsel can be relied upon to disclose it. The NDAA FY14 has reduced the opportunity for the defense to learn about potential evidence of innocence by removing truth seeking as a purpose of the Article 32 hearing and screening alleged victims from defense interviews.[33]

The surest defense against wrongful conviction is simple… ***no secrets.***

NO SECRETS

A commentator on the military justice system once said about the Article 32 ***investigation:***

> Discovery is better in the military than in most civilian jurisdictions. Even in [the few] states that permit depositions in criminal cases, nothing beats the military's Article 32,

[29] The conference had a non-attribution policy, so this is as much I can tell you about the speaker without revealing the speaker's identity.

[30] *Brady v. Maryland*, 373 U.S. 83 (1963) (it is a violation of Due Process for the prosecution to fail to disclose exculpatory evidence in its possession).

[31] *See also United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (Kosinski, CJ, dissenting) ("There is an epidemic of *Brady* violations abroad in the land").

[32] *See, e.g., United States v. Claxton*, 2014 CAAF LEXIS 1015 (C.A.A.F. 2014) (setting aside decision of the Air Force Court of Criminal Appeals that failure to disclose *Brady* information was harmless error and ordering a posttrial hearing under *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967)); *United States v. Coleman*, 72 M.J. 184 (C.A.A.F. 2013) (*Brady* violations occurred but were harmless beyond a reasonable doubt); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2007) (affirming order by trial judge for a new trial after learning of *Brady* violation by prosecution); *United States v. Jackson*, 59 M.J. 330 (C.A.A.F. 2004) (reversing drug conviction because of *Brady* violation). These are just Court of Appeals for the Armed Forces (CAAF) decisions in the last decade. There are many more decisions by both CAAF and the Services' Courts of Criminal Appeals to include both reversals of convictions and affirmances where *Brady* violations occurred but the errors were found harmless beyond a reasonable doubt. These cases don't reflect the attempted *Brady* violations that were thwarted before trial and those that trial counsel managed to keep secret.

[33] And then there's my experience with a former Air Force prosecutor, long retired but whose name would be recognized by most Air Force JAGs. Although he never committed a *Brady* violation that we were aware of, it was his practice to tell defense counsel that he'd authorized AFOSI to allow an inspection of physical evidence in their custody, only to then call OSI and tell them not to show it to the defense counsel. The defense counsel would then go back to the trial counsel and receive the same authorization, only for the trial counsel to repeat his call to the OSI. This went on for several cycles, no doubt to the trial counsel's amusement. Such is what happens when you give prosecutors complete control over evidence disclosure.

UCMJ, investigation as a pre-trial discovery forum. ***Nothing guards against conviction of the innocent like full disclosure of evidence before trial.***[34]

In viewing that long list of exonerations of the wrongfully convicted on the University of Michigan site, there are only three military cases.[35] This is not an accident. The surest defense against wrongful conviction is simple…***no secrets.*** Everyone gets equal access to all witnesses and evidence before trial, except for that which is protected by evidentiary privilege. In other words, a serious search for the truth before a referral decision is made. That's what we used to have with the Article 32 investigation, but now we don't. That's a shame.

I want my military justice system back. I don't want prosecutors in charge of everything.

IN CLOSING

I admit to feeling a little bad about all my carping against prosecutors. I need to clarify things a bit. I've prosecuted. Some of my best friends have prosecuted. Only a fool would deny that prosecutors are the linchpin for any criminal justice system. My problem is with ***career*** prosecutors who don't see the other side and view everything through the dark lens of that experience: Everyone is guilty; we know that because we charged them. If we lose a trial, it isn't because of actual innocence or even failure of proof; it's because somebody lied, the defense counsel cheated, the judge was stupid, we had a rogue juror, or the law needs changing. They call it "The Walk of Shame" when a prosecutor has to go back to the office after losing a trial. When those folks get into positions where they have power to change the law, you get changes like the NDAA FY14.

I want my military justice system back. I don't want prosecutors in charge of everything. I want ***commanders*** to be in charge, just like they've been since 1775. I want to see ***truth*** returned to its honored place as the gold standard for referral decisions. I want my Article 32 investigation back. R

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[34] Thomas G. Becker, *In Defense of American Military Justice: A Comparative Analysis of the United States Military Justice System & What Happens in the Civilian World,* Nat'l Inst. for Mil Justice at 16 (Summer 2003) (emphasis added). OK, this is me. One of the pleasures of writing for publication is that sometimes you get to quote yourself. This piece was written at the invitation of the National Institute for Military Justice (NIMJ) as a response to the U.S. News & World Report article by Edward Pound, *Unequal Justice*, published 16 Dec. 2002. NIMJ graciously posted it on their website. I also presented portions of this paper at the National Conference of Women Judges in Washington DC in June 2003 at the invitation of the Honorable Susan Crawford, then-Chief Judge, United States Court of Appeals for the Armed Forces.

[35] *See* fn. 3 and the website links associated with each case. The cases are those of Todd Forbes, a Navy petty officer; Michael Mahoney, an Air Force master sergeant; and Roger House, a naval officer. Forbes and House's convictions were for sex-related offenses. Mahoney's was for drug use based on a positive urinalysis. In Forbes and Mahoney's cases, their convictions were first reversed for legal errors (in Mahoney's case, another *Brady* violation), and the exonerations came afterward. In House's case, his exoneration came years after his conviction when errors in the DNA analysis in his case were discovered. *See United States v. Mahoney*, 58 M.J. 30 (C.A.A.F. 2003); *United States v. Forbes*, 59 M.J. 934 (N-M. Ct. Crim. App. 2004), *aff'd* 61 M.J. 354 (CAAF 2005). The only published judicial history of House's case concern denials of petitions for extraordinary relief. *United States v. House*, 66 M.J. 109 (C.A.A.F. 2008), *cert. denied*, 2008 U.S. Lexis (2008); *United States v. House*, 56 M.J. 201 (C.A.A.F. 2001), *pet. recon. Denied*, 56 M.J. 229 (C.A.A.F. 2001).

A Truth in Lending Act
Victory for Consumers

JESINOSKI v. COUNTRYWIDE HOME LOANS, INC.[1]

BY MAJOR NATHANIEL G. HIMERT, USAF

Prior to the passage of the Truth in Lending Act (TILA), consumers were often ignorant of the nature of their credit obligations...

In 1968, Congress determined that the informed use of credit by consumers would increase competition among financial institutions and enhance economic stabilization. This would ultimately lead to better deals for you and me when shopping for credit by ensuring we are informed through meaningful disclosure of credit terms.[2] Prior to the passage of the Truth in Lending Act (TILA), consumers were often ignorant of the nature of their credit obligations and were oftentimes subject to fraudulent practices by lenders which prevented them from shopping for the best terms available and, at times, were assuming liabilities that they could not meet.[3] Today, the TILA is one of the most powerful and useful statutes available to a legal assistance practitioner. Its language and implementing regulations cover the fair and equal offering of credit, both open and closed ended credit

[1] 135 S. Ct. 790 (2015).

[2] 15 U.S.C. § 1601(a) (2012).

[3] Mourning v. Family Publ'ns Serv., 411 U.S. 356 (1973).

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transactions, leases, credit reporting, debt collection and electronic fund transfers.[4] One of the most valuable pieces of the TILA and its underlying regulations are the disclosure requirements that are required to be given to consumers prior to entering into certain credit transactions. This article will provide a brief overview of the disclosure requirements of the TILA, a consumer's rescission right, and when and how they can be exercised, particularly in light of *Jesinoski v. Countrywide Home Loans, Inc.*, and some pitfalls for the legal practitioner to avoid when providing advice.

TILA DISCLOSURE REQUIREMENTS

It is probably safe to say that each of us has a credit card, or has at least applied for one. Most people these days probably do not think about it but, do you ever wonder why the application is one page in length while the envelope it comes in seems to be stuffed to the gills? Lucky for all of us, Congress was looking out for the consumer when it passed the TILA. Built into the TILA are numerous disclosure requirements that creditors must abide by when issuing consumer credit.[5]

Of course, these disclosures do not simply apply to credit cards but include credit secured using the consumer's principal dwelling as security, such as refinancing, home equity loans and home equity lines of credit. Under closed ended loans (your typical refinancing, mortgage or home equity loan) consumers are entitled to a very lengthy list of disclosures, which include things as simple as the identity of the creditor and how much is being financed to more specific and less obvious disclosures like "the aggregate amount of settlement charges for all settlement services provided in connection with" a residential mortgage loan.[6] Home equity lines of credit have additional disclosures, such as an itemized list of fees imposed by the creditor and a statement that in the event of default the consumer risks losing the dwelling.[7] If the credit is being secured using the consumer's principal dwelling, the creditor must also inform the consumer of their right to rescind the transaction under certain circumstances.[8] For the most complete and up to date list of required disclosures related to credit transactions secured by a consumer's principal dwelling, and other requirements, one should turn to "Regulation Z".[9] The point to take away is that there is quite a bit a creditor must disclose to a consumer under the TILA.

TILA RESCISSION RIGHTS

If you think back to your time during the Judge Advocate Staff Officer Course, you may remember having to perform a legal assistance scenario that involved the rescission of the refinancing of a vacation home. Some of you may remember that under the TILA, a consumer has the right to rescind, by midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms, whichever is later, any consumer credit transaction where there is a security interest acquired in the consumer's principal dwelling.[10] However, this three day right to rescind may be extended for up to three years if the required "material disclosures" are not provided or the rescission forms/rescission disclosures are not delivered to the consumer.[11] While the TILA and Regulation Z list numerous disclosures that a creditor shall make to a consumer, only certain disclosures are considered "material disclosures." [12] This is important because it is only the omission of a "material disclosure" that will extend the rescission period to three years.[13] As a legal assistance practitioner you must ensure that you are looking at only the "material disclosures" when talking about rescission.

In addition to the "material disclosures," the creditor must also provide the borrower with two copies of the notice of their right to rescind.[14] Failure on the part of the creditor to provide the consumer with the required notices to rescind will also extend the rescission period up to

[4] The Truth in Lending Act, 15 U.S.C. §§ 1601-1693r (2012).

[5] 15 U.S.C. § 1631(a) (2012).

[6] 15 U.S.C. § 1638 (2012).

[7] 15 U.S.C. § 1637a (2012).

[8] 15 U.S.C. § 1635; 12 C.F.R. 1026.23(b); 12 C.F.R. 1026.15(b).

[9] 12 C.F.R. 1026.

[10] 15 U.S.C. § 1635(a) (2012).

[11] 15 U.S.C. § 1635(f) (2012).

[12] *See* 12 C.F.R. 1026.23(a)(3)(ii) for the "material disclosures" for closed ended credit transactions and 12 C.F.R. 1026.15(a)(3) for the "material disclosures" for open ended credit transactions.

[13] *See* Bonte v. U.S. Bank, N.A., 624 F.3d 461 (7th Cir. 2010).

[14] 12 C.F.R. 1026.15(b) and 12 C.F.R. 1026.23(b).

three years.[15] The rescission forms that must be provided to the consumer

> shall identify the transaction or occurrence and clearly and conspicuously disclose the following: 1. The retention of acquisition of a security interest in the consumer's principal dwelling; 2. The consumer's right to rescind, as described in [12 C.F.R. 1026.23(a)(1)]; 3. How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business; 4. The effects of rescission, as described in [12 C.F.R. 1026.23(d)]; and 5. The date the rescission period expires.[16]

What does this mean for you as the legal assistance attorney? Well, if a client comes into your office who has taken out a loan using their principal dwelling as security and three business days have passed since the transaction, you need to keep digging. There is a very real possibility that your client may still have the ability to rescind. This of course is very important. Chances are if your client has taken out a loan using their principal dwelling as security, the loan is pretty significant and the client stands to lose, or gain, quite a bit if they are able to get out of the agreement. Financial matters being some of the most stressful issues that families face these days, it is vital that as legal assistance attorneys on the front lines we are educated on the numerous consumer protections available to our clients, rescission being a very important one.

So let's say that your client comes in three weeks after the transaction but tells you that they never received any information about rescission and/or were never notified of one of the required disclosures. Clearly they can rescind, but how do they do it? Up until January 2015 the answer to that question was, "It depends." If your base was in the 3rd, 4th, or 11th circuits, you could simply draft a letter for your client to the creditor, within three years of the transaction, notifying the creditor of your client's desire to rescind the transaction. However, if you were located in the 1st, 6th, 8th, 9th, or 10th circuits, chances are you were advising your client to seek civilian counsel to actually file suit within the three years.

Fortunately on January 13, 2015, we got some clarification from the Supreme Court. The court decided, in a unanimous decision in *Jesinoski v. Countrywide Home Loans, Inc.*, that the plain language of the TILA only requires that the borrower provide written notice to the lender and that there is no requirement that a borrower must file suit to exercise the right of rescission.[17] The case involved a couple who had refinanced their home with Countrywide Home Loans. Exactly three years after borrowing the money the couple sent Countrywide and Bank of America, who had since purchased Countrywide, written notice that they were rescinding the transaction. Bank of America refused to honor the rescission. Both the district and appellate courts held that the couple needed to file suit within the three year period in order to exercise their rescission rights under the TILA. Justice Scalia wrote for the court and stated that the TILA

> "explains in unequivocal terms how the right to rescind is to be exercised: It provides that a borrower 'shall have the right to rescind…*by notifying the creditor, in accordance with regulations of the Board, of his intention to do so*' (emphasis added). The language leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. It follows that, so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely. The statute does not also require him to sue within three years."[18]

This of course was a huge victory for consumers who are now free to simply draft a letter vice spending hundreds or even thousands of dollars to hire an attorney and file suit against the lender. As a practical tip, while we can assist our clients in

[15] 12 C.F.R. 1026.15(a)(3); 12 C.F.R. 1026.23(a)(3)(i).

[16] It should be noted that these are the right to rescind disclosure requirements for a closed ended credit transaction found at 12 C.F.R. 1026.23(b), however the right to rescind disclosure requirements for an open ended credit transaction are substantially the same and can be found at 12 C.F.R. 1026.15(b).

[17] *Jesinoski*, 135 S. Ct. at 795.

[18] *Id.*

drafting these letters we need to also be advising them to send the letters certified mail with a delivery receipt. Doing so ensures that they have proof the letter was sent and received should they find themselves facing a lawsuit by the creditor.

PITFALLS TO AVOID

Despite this victory for consumers, which simplifies the rescission process, there are still areas of the TILA that the legal assistance practitioner must understand so they are not providing erroneous advice to their clients.

The first issue that attorneys need to be aware of is whether the home the client has used as security is in fact the client's "principal dwelling" as described in 15 U.S.C. § 1635. If the home in question is not a "principal dwelling" but instead a vacation home then your client most likely never received any rescission documents and there would be no rescission rights available to them. 12 C.F.R. 1026, Supplement I, section 2(a)(24)(3) states the following about a principal dwelling:

> A consumer can have only *one* principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a particular transaction (emphasis in the original).

This can become a bit tricky when looking at the interplay of the various TILA sections, specifically 15 U.S.C. § 1635 and § 1637a. Section 1637a seems to include in the definition of "principal dwelling" "any second or vacation home of the consumer."[19] Even though 15 U.S.C. § 1637a discusses required disclosures in the event of a home equity line of credit (open ended credit transaction secured by the principal dwelling), its definitions should not be confused as applying to 15 U.S.C. § 1635's rescission language. Clients should also understand that the burden will be on them to establish the residence in question as their principal dwelling.[20] So if you have a client with multiple homes, they are most likely going to have to provide some sort of evidence to show that the home that is being used to secure the loan/line of credit is in fact their principal dwelling. Failure to do so may result in a dismissal of any suit.

This of course was a huge victory for consumers who are now free to simply draft a letter vice spending hundreds or even thousands of dollars to hire an attorney and file suit against the lender.

[19] 15 U.S.C. 1637a(d) (2012).

[20] *See* Santos v. U.S. Bank N.A., 716 F. Supp. 2d 970 (E.D. Cal., 2010) (dismissing TILA rescission claim on grounds that plaintiffs were unable to show that the property was their actual "principal dwelling").

Semi-related to the "principal dwelling" issue, attorneys also need to avoid advising clients that they have a right to rescind when they otherwise do not. This can commonly happen when we are talking about a "residential mortgage transaction" or "a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property." [21] Both are excluded from rescission.[22] The latter of those two is pretty self-explanatory. If you refinance your home with the same bank you originally financed it with you will not have any rescission rights. However, one needs to be careful as this provision only applies to what we think of as a simple refinance. If the client refinances with the same bank using the same property and the "amount financed *exceeds* the unpaid interest, any earned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation," (emphasis added) the client still has rescission rights as to the additional amount financed.[23]

But what is a "residential mortgage transaction?" The TILA defines a "residential mortgage transaction" in such a way that one might be surprised about just how few loans or lines of credit are actually covered by the rescission provision of the TILA. "The term 'residential mortgage transaction' means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."[24] This means that if you have a client who is taking out a mortgage for the initial purchase of a home or for the building of a new home, and they are using that home or future home as the security, then 15 U.S.C. § 1635's rescission rights do not apply.[25] So in the end, while the Supreme Court expanded consumer protections in this area with its holding in *Jesinoski*, Congress's intent in the TILA dictates that the Court's ruling will typically only be applied to refinancing using a different bank than the one who originally financed the home and home equity loans/lines of credit.

Finally, even if the client can rescind the loan, the attorney needs to advise the client that they will have to actually tender the money or property back to the creditor pursuant to 15 U.S.C. § 1635(b). This is because ultimately one of the purposes of the TILA's rescission provision is to "return the parties most nearly to the position they held prior to entering into the transaction."[26] So while your client can now invoke rescission with a simple letter to the creditor, inability to return the money borrowed may still end with a court finding that rescission is inappropriate. In short, always ensure you are managing client expectations when advising in this area.

CONCLUSION

With the Supreme Court's decision in *Jesinoski*, the ability and ease with which we can now help our clients has increased significantly. However, we need to be aware that like most laws, the general rule (in this case the right of rescission) is not without exceptions. In order to make certain that legal assistance attorneys are providing the most accurate and on-point legal advice they should always tease out all the facts from their clients. Ensuring our Airmen can focus on the mission is essential and with the Supreme Court's recent holding, we now have another tool available to us in our fight to help ease the frustration of financial hardship in certain situations. R

[21] 15 U.S.C. 1635(e)(1) & (2) (2012).

[22] *Id.*

[23] 12 C.F.R. 1026.23(f)(2).

[24] 15 U.S.C. 1602(x) (2012).

[25] *See* Eruchalu v. U.S. Bank, N.A.,U.S. Dist. LEXIS 80459 (D. Nev. June 6, 2013); Infante v. Bank of Am. Corp., 680 F. Supp. 2d 1298 (S.D. Fla., 2010).

[26] Merritt v. Countrywide Fin. Corp., 759 F. 3d 1023 (9th Cir. 2014) (citing Williams v. Homestake Mortgage Co., 968 F. 2d 1137 (11th Cir. 1992)).

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RIGHT TO RESCIND?

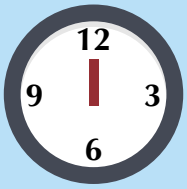
Principal Dwelling

Determine if the client qualifies for rescission. Is this the client's "principal dwelling"? Does the transaction fall within one of the rescission exceptions listed in the TILA?

Material Disclosures

If the property is the client's "principal dwelling" and the transaction does not meet one of the exceptions to rescission, was the client provided with the "material disclosures" and the notice of the right to rescind?

YES



If yes, then the client has until midnight of the third business day following consummation, delivery of the notice to rescind or delivery of the "material disclosures" whichever occurs last, to rescind.

NO

If no, then the client has up to three years from the date of consummation, sale of the property or transfer of all the consumer's interest in the property, whichever occurs first, to rescind.

BY MAJOR L. AMBER BRUGNOLI, USAF

G.I. JOE to GQ

Using Your Military Experience to Land a Civilian Job

70%

of legal jobs

ARE NEVER POSTED!

The civilian legal profession is all about networking — everyone you know should know you are looking for a job.

Major L. Amber Brugnoli, USAFR

(B.A. West Virginia University; J.D., West Virginia University College of Law) is an Individual Mobilization Augmentee for the Administrative Law Directorate, Headquarters United States Air Force, Joint Base Anacostia-Bolling, and the Assistant Dean for Career Services at West Virginia University College of Law.

For anyone pending separation, retirement or transition to the reserves, the stress of finding employment in the legal sector can be daunting. It is nearly impossible to research our field without finding numerous articles on the dire state of the job market. However, given recent declines in law school attendance, the field is once again opening up. So take heart — the hype is true: your skills ARE in demand, and there is light at the end of the tunnel.

LAWYER SHORTAGE

Both the *ABA Journal* and the National Association for Law Placement (NALP) have published statistics supporting the theory that by 2016/17, there will not be ENOUGH lawyers to support the job demand. This is largely due to a 45% decrease in law school applicants since 2008. Striking while the iron is hot could set you up nicely for a successful civilian career. The challenge is marketing your military experience in a way that makes sense to civilian employers. This is something I myself had to do figure out in 2008. (I spend my last week on active duty watching the stock market crash — not a good time to be looking for work.) Being well indoctrinated to the military life often leads us to believe much of what we do is common sense, especially given the prominence of military scenarios the media. But knowledge beyond Hollywood's depiction of military life is often limited. It is for that reason that no attorney or paralegal should assume employers know anything about what we do as a military legal professionals. I have been on hiring committees where other attorneys asked me what "DoD" meant.

TRANSLATING MILITARY EXPERIENCES

First, the very set-up of our offices is alien to many civilian law firms. The idea of having criminal prosecutors that also specialize in international law can be baffling. The very thought of providing wills to retirees in the morning, briefing pilots in the afternoon, and preparing for a litigated drug case in the evening is a foreign concept. You will need to explain how it is that you were government counsel on a drug case at the same time you were serving as Chief of Fiscal Law, while also providing legal aid-type help to base personnel. It may be helpful to describe the base legal office as a combination of the county prosecutor and the city attorney, with each attorney having responsibilities in both areas. Depending on your assignment history, it may also be

beneficial to create a chronological listing of previously held official duty titles and responsibilities and then list out litigation experience in a separate section.

Second, the level of responsibility given to attorneys and paralegals, both in terms of leadership and substantive legal work, is boggling to many firms. My first day as a JAG, I had four paralegals and two civilians to supervise. During my time on active duty, I tried more than a dozen cases. After leaving the Air Force, I went to work for a major firm where I shared one secretary with two attorneys and I was told I was not experienced enough to handle a deposition alone. Our eighth-year associate — who was touted as a "great litigator" — had never even argued a motion. The concept that I could successfully manage people though I was "just an associate" was hard for others to grasp. Highlight your leadership skills and experiences on your resume, but be prepared to defend every word should a potential employer doubt your accomplishments.

Third, when it comes to your actual written materials, **Civilianize everything!** Remove any acronyms, unit symbols, and military jargon. For job titles, put civilian equivalents in parenthesis. For example, "Assistant Judge Advocate, 11 WG/JA" would be similar to "Assistant In-House Counsel, Joint Base Andrews."

Employers often don't understand how we hold six jobs in two years. One approach to clear this up is to list the generic term (Ast SJA) and duty location for each job title. Then, break out each position underneath to make it clear that even though the position changed, the office remained the same. This can be especially beneficial for paralegals with numerous ancillary duties that carry significant responsibility. It may be worth listing some of those positions separately, rather than including them within general paralegal duties.

Military schools and training courses also need to be re-phrased. The NCO Academy is an "intense, in-residence, leadership development course for mid-level managers." Also, while PME should be included (though probably in the Education or Certifications section, rather than Experience), decide if it is necessary to include every school or training course attended. Civilian attorneys and paralegals don't put CLE conferences on their resumes, so it is not necessary to list every trip to the JAG school on your resume. However, this is an area where judgment is crucial — if you're applying to be a DoJ litigator, potential employers may want to know you have been to the Trial and Defense Advocacy Course.

Decorations and awards can be included, but again, use discretion. There is no rule that you have to include every ribbon you've ever received, so while achievement and commendation medals may be appropriate, that education and training ribbon may not be.

NETWORKING

Finally, some studies show that up to 70% of legal jobs ARE NEVER POSTED! The civilian legal profession is all about networking — everyone you know should know you are looking for a job. Reach back to your law school, former military colleagues who have already transitioned, and state and local bar associations where you want to practice and ask them all for advice on how to best "sell" yourself in your chosen practice area/region. Contact employers that are attractive to you — I call it "cold-calling with your resume" — and ask if you could meet with them to discuss their work. NOTE: It is advisable to cultivate the relationship before asking for employment. If one particular firm cannot help, feel free to ask for information on other firms that may be hiring. Set aside time to do this. I have students who send out 80 contacts and get 5 responses, but those five people end up being extremely helpful. It often seems awkward to a person who is used to the regimented military promotion system to have to market themselves, but think of it as the first "test" as to whether you will be able to relate your skills to clients. It is not only acceptable, it is expected.

If you have any questions, feel free to contact me at amber.brugnoli@mail.wvu.edu. As Chairperson of the JAG Corps Reserve Junior Officer Council and a civilian law school career counselor, I am happy to assist you with the next phase of your life!

Urgent and Vital

Contracting Officer Final Decisions & You

BY MAJOR GEORGE MATHEW, USAF

AFLOA/JAQK reviews three types of contracting officer "final decisions."

1 Termination for Default (T4D) decision

2 Contracting Officer Final Decision (COFD) on a contractor's claim or Request for Equitable Adjustment (REA)

3 COFD asserting a Government claim against a contractor

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It is fall season at your base. You are sipping a hot caramel mocha latte at your desk, appreciating the glory of the season, as you watch the leaves turn vibrant colors, observe the brisk morning air rustle through the trees, and listen to the symphony of a mockingbird. Your peaceful thoughts are jarred by the ringing of your telephone. It's Lt Col Hurry, the base contracting squadron commander, whom you met at an Officers' Call event a while ago. He declares two matters of extreme urgency — one involving an "irresponsible contractor" performing a vital contract, who must be dealt with by termination for default. He describes the second issue involving a "meritless claim" from another contractor with a dollar value in the millions. Your only foray into the contracts arena was during your first year in law school. With an hour left before your meeting, what can you do to get ready? The Air Force Contract Law Field Support Center is here for just such an occasion.

AIR FORCE CONTRACT LAW FIELD SUPPORT CENTER (AFLOA/JAQK)

AFLOA/JAQK provides reach-back support for judge advocates at all levels of command. Contracting officer final decisions, including terminating a contract for default and denying claims, are vitally important decisions which require a thorough legal review. A decision to hastily terminate a contract or failure to respond to a claim within a reasonable time can significantly jeopardize mission readiness.

AFLOA/JAQK reviews three types of contracting officer "final decisions." The first is a Termination for Default (T4D) decision. The second is a

Contracting Officer Final Decision (COFD) on a contractor's claim or Request for Equitable Adjustment (REA). The third is a COFD asserting a Government claim against a contractor. This article focuses on the first two types of decisions, as they are the most prevalent at the installation level legal offices.

TERMINATION FOR DEFAULT DECISION

A T4D is one of the most drastic decisions made by a contracting officer. Generally, it's a contracting officer's decision to end a contract because of a contractor's performance issues. These decisions greatly affect a contractor for two reasons. First, terminating a contract for default effectively ends performance by the contractor. Normally, contractors are entitled to certain termination settlement costs when a contract prematurely ends. With a T4D, this isn't the case. In addition, if the contract ends with a T4D, the contractor can be held liable for the additional costs the government incurs in buying the goods or services from someone else (i.e., excess reprocurement costs). Second, the T4D becomes part of the contractor's past performance history — a black-mark for a contractor's opportunities for future government procurement work. Because the decision to T4D a contract should not be made lightly, AFLOA/JAQK is required by the Air Force Supplement to the Federal Acquisition Regulation (AFFARS) to review these decisions.[1]

[1] AFFARS 5349.402-3 (2015).

T4Ds are governed by Federal Acquisition Regulation (FAR) Part 49.[2] First, the Government notifies the contractor that its present or prospective performance is not in accordance with contract terms, specifications, or the schedule. The Government then terminates the contract for default by the contractor. A T4D decision is very important taken after careful coordination between the Contracting Squadron, the base legal office and AFLOA/JAQK. Given the adverse consequences of a T4D remedy, this multi-party discussion allows us to consider alternatives to T4D, such as a no-cost Termination for Convenience.

> A T4D is one of the most drastic decisions made by a contracting officer.

The decision to T4D a contract or to deny a contractor's claim must be reviewed by AFLOA/JAQK. Prior to sending AFLOA/JAQK a **draft T4D** decision, bases must ensure, at a minimum, that copies of the following documents accompany the proposed decision: the contract or task order at issue, all amendments to the contract or task order, the Performance Work Statement (PWS), Letter of Concern, Cure Notice or Show Cause Notice, and an Assessment of Alternatives Memo in accordance with FAR 49.402-3(f).[3]

[2] FAR Part 49 (2015).

[3] FAR 49.402-3(f) (2015).

The T4D decision must contain a statement of facts that led up to the T4D decision. An analysis of the decision will address questions such as: (1) Do we have time to reprocure the item/service or do we need to get the work done?; (2) Can we negotiate a schedule extension?: OR (3) What is the degree of the Government's fault?

The draft T4D decision must also contain the following: (1) A description of the procurement, (2) A statement regarding what the contractor did OR did not do, (3) A statement of the contracting officer's T4D decision, (4) An explanation as to why the contractor is not in compliance with the contract, and (5) A decision as to whether the Government plans to reprocure.

A properly reasoned T4D decision serves to defend the Air Force on multiple fronts. It also provides the contractor with the Government's rationale for the decision, possibly eliminating an appeal. However, the contractor may choose to appeal the contracting officer's T4D decision to either the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Court of Federal Claims (COFC). The T4D document is the Government's first opportunity to showcase a well-articulated decision to the ASBCA or COFC judge. Additionally, the ASBCA or COFC judge will refer to this document throughout the appeal, thereby making it a vital cog in the entire process.

CONTRACTING OFFICER FINAL DECISION ON A CLAIM/REA

Generally, a claim is a contractor asking the government for more money, above the amount initially set forth in the contract. Claims typically arise after contract performance has begun. For example, a contractor may discover new facts or circumstances that require additional manpower or resources to complete the contract. The contractor will then submit a claim or a Request for Equitable Adjustment (REA) to the Government, asking to be compensated for additional work already done or to be completed. A dispute can arise if the government believes the work is already contemplated by the terms of the contract and included in the contract price, or if the contractor performed the additional work without proper authorization. A second common example occurs in construction contracts. The contractor will allege Government-caused delays have resulted in significant additional costs. In such scenarios, the contractor submits a certified claim to the contracting officer for the issuance of a final decision. As with T4D's, AFLOA/JAQK is required by AFFARS 5333.290(b) to review all Claim COFDs.[4]

A contractor's claim must be in writing, and must set forth the specific amount or amounts claimed and the basis for each claim in accordance with FAR 52.233-1.[5] If the value of the claim exceeds $100,000, it must be properly certified in accordance with FAR 33.207.[6] Under 41 U.S.C. § 7103 (Contract Disputes Act), for a claim of $100,000 or less, the contractor is entitled to a final decision on its claim within 60 days of submitting the claim to the contracting officer.[7] If the claim is greater than $100,000 and includes the required certification, the contractor is entitled to a final decision within 60 days or to a written statement from the contracting officer within 60 days indicating when a decision will be issued, as long as it is within a reasonable period of time.

Prior to sending AFLOA/JAQK a **draft COFD on a claim/REA**, bases must ensure that copies of the following documents accompany the proposed decision: the contract (and task order, if applicable), the claim/REA, all amendments/modifications (contract and task order) and all documents upon which the contracting officer relied when making the final decision. The draft COFD must thoroughly address the following:

(1) A description of the procurement,
(2) A description of the claim,
(3) A statement of the contracting officer's decision,
(4) A discussion of the rationale for the decision, and
(5) A notification of the contractor's appeal rights.

The COFD must contain a statement of facts that chronologically tells the story of the procurement. Each paragraph must address the actions taken by both parties, as the facts unfolded. After listing the facts, the decision must explore the validity of each allegation raised by the contractor. The legal analysis must contain a definitive Air Force position as to each specific allegation and must be supported by the evidence. After a thorough analysis of each allegation, a final contracting officer determination must be provided. The last paragraph of the decision must state the appeal rights of the contractor in strict accordance with FAR Part 33.211.[8]

If the COFD denies the contractor's claim, the contractor has the option to file an appeal with the ASBCA within 90 days or the CCOFC within 12 months. The COFD on a claim is the **single most important** document that will be provided to either the ASBCA or the COFC. Consistently, these forums emphasize the vital need for "contemporaneous" documentation as evidence for the government. The COFD should be generated in conjunction with the contracting officer's decision making process so that it will serves as the contemporaneous documentation the ASBCA and COFC are looking for.

If the contracting officer fails to issue a final decision within the time period specified by law, the contractor may treat the Air Force's inaction as a "deemed denial" and proceed as if the

[4] AFFARS 5333.290(b) (2015).
[5] FAR 52.233-1 (2015).
[6] FAR 33.207 (2015).
[7] Contract Disputes Act, 41 U.S.C. § 7103 (2011).
[8] FAR Part 33.211 (2015).

Air Force had issued a full denial of the contractor's claim. If an appeal is filed without a final decision having been issued, the Air Force will be at a significant tactical disadvantage. The 60-day deadline for the issuance of a COFD must be met; if an extension is required, communication with the contractor is paramount.

FINAL NOTE

There is no substitute for a well-documented and well-reasoned T4D decision or a decision to deny a contractor's claim. The contracts subject to termination or a claim run the gamut — from a contractor who manufactures weapon systems used by our troops in a deployed location to the contractor on a grounds maintenance or sanitation services contract at home station. Contractor appeals to the ASBCA or the COFC have the potential to delay or stop performance on a contract. Because of this, it is vital that the government's rationale in the COFD be clear, thoroughly documented, and well-reasoned.

All COFDs on both T4Ds and claims must be processed expeditiously. Bases must notify their MAJCOM legal office and AFLOA/JAQK **immediately** after the contracting squadron informs them of a possible claim/REA. It is not advisable to wait until the contracting squadron starts compiling the relevant documents or the legal office is working on the initial legal review. This is because while the deadline for issuing a final decision is 60 days, coordination between the three offices — contracting squadron, base legal and AFLOA/JAQK — takes a significant amount of time. Contacting AFLOA/JAQK early will result in identification of key issues and a swift resolution. This is the best solution for the mission to stay on track.

So the next time your phone rings and your advice is sought on a termination for default issue or a contractor claim issue, don't panic — AFLOA/JAQK is here for you. Enjoy that latte and greet Lieutenant Colonel Hurry with a smile! R

Major George Mathew, USAF

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Setting Your Compass

Some Thoughts from a (former) DJAG

BY MAJOR GENERAL CHARLES J. DUNLAP JR., USAF (RET)

While at Air Force Academy recently for some speaking engagements I had the great pleasure of visiting the Academy's legal office led by Colonel Dawn Zoldi. Colonel Zoldi very kindly invited me to speak to her staff, and I took with me a talker of sorts developed while still on active duty. It summarizes one person's thoughts about the JAG Corps, the Air Force and — in a way — life itself based on just over 34 years in uniform.

Though I haven't really thought about it much since retiring, the talker reflects ideas I found helpful in my career. Of course, each individual must develop a personal "philosophy," so to speak, but I thought seeing an example might help some folks get started. I hasten to add that I certainly don't think I have all the answers; I would simply say that although I did not always follow my own advice, the admonitions in the talker remain an important part of my personal aspirations.

VALUES THAT HELP YOU FLOURISH

As you might expect, some of the observations are idiosyncratic to my view of the world. For example, I said I especially value "service-before-self" and that remains true. I added that I "greatly admire work ethic, initiative, and a positive attitude." I still think a JAG or paralegal can distinguish him or herself in a very positive way by demonstrating those values, and — importantly — they don't depend on having superior talent or even a great intellect. There have been lots of smart people with genuine

potential who did not flourish in the JAG Corps often because they lacked the complimentary qualities that determine success in the proverbial 'real world.'

THE POWER OF PARALEGALS AND KNOWING THE CLIENT'S BUSINESS

Other ideas are, I think anyway, perennials. Here's one aimed at young JAGs: *Never forget that paralegals are the real "power of attorney(s)"!* It is still true that "experienced paralegals can help you learn about the JAG Corps and the Air Force — if you let them." Another enduring principle: "get to know the client's business." All the knowledge of the law in the world won't help you if you don't understand the facts involved, or the context in which it will be applied.

MANUAL FOR COURTS-MARTIAL AND SUPREME COURT CASES

True, a couple of the recommendations are decidedly 'old school.' For example, I recommend such labor-intensive activities as reading the *Manual for Courts-Marital* cover-to-cover, and working your way through the two or three dozen leading Supreme Court cases related to national security. Obviously, these aren't easy tasks, but becoming the professional you should want to be has never been — *and never will be* — easy. Appreciating that truth is a key step in your development.

You might ask: why, in the age of instant online research capabilities, should anyone bother to read through texts and cases that might have no immediate relevance to the issues piling up on your desk? Allow me to suggest two things: In the first place, while you may not remember the specifics, there is enormous value when confronted with a new issue to recognize that "there is something in the Manual about that" or "I think there is a Supreme Court case that has some helpful dicta." Actually, you will be amazed at what an asymmetric advantage this will give you.

Never forget that paralegals are the real "power of attorney(s)"!

Technical Sergeant Kalvin R. Johnson prepares a power of attorney for Ms. Carol Johnson. (U.S. Air Force photo illustration/Ms. Thomasa Paul)

THOUGHTS ON LEADERSHIP

- **Always remember that your word is your bond. Trust is indispensable in our business.**

- **Aim to be a force-multiplier; the best JAGs are all-purpose (not just legal) problem-solvers for command.**

- **Welcome feedback, and give it to others (including your seniors!) at the appropriate time and place.**

- **Training is the key to operational success — invest in your future, *even when it hurts!***
  - It's especially critical to make sure that you are ready to go in harm's way, physically and mentally.
  - Self-study and self-preparation are the hallmarks of the true professional.
    - Read the classic Supreme Court cases on military and national security issues.
    - Read the Manual and other basic documents cover-to-cover, not to memorize but to ensure you know the topics that are covered…get in the habit of looking at source material, not secondary sources.
    - Read Air Force and military history: get to know the 'client's business'!

- **Appreciate your leadership and officership responsibilities.**
  - In the Air Force you are a leader from "day 1" — act like one.
  - Get to know the problems, values, work habits,motivation, etc., of your subordinates.
  - Never ask others to do anything you wouldn't do yourself.
  - Have standards, make them known, and enforce them.
    - Aim to be sincerely and honorably respected; if you are also popular along the way, that's great!

- **Be sure to have a personal physical fitness program.**
  - This has as much psychological value as physical.

- **Don't let concerns fester.**
  - Communicate with your leadership — directly to TJAG if you need to do so.
    - Especially avoid becoming a rumor monger — you don't want that reputation!

- **Bad news does not get better with age.**
  - When you communicate a problem, have a plan to solve it.

- **The Air Force is NOT a one-mistake Air Force; unless it's the wrong mistake.**
  - If you're giving 110% and attempting to do your job in an honest and straight forward way, then you're covered in my book.
    - Acceptance of responsibility is a mark of real leadership and officership.
  - BUT if you do something unethical or reasonably perceived to be, it could be a "one-mistake AF."
    - Remember: you are always on parade; accept that JAGs and paralegals live under a microscope.
    - Know the difference between the extremely hard to do and the truly undoable; when the former doesn't seem cost-effective, talk to your boss; always let the boss know about the latter. Have an appropriate sense of urgency.
  - The 80% solution that's on time always beats the 100% solution that's late to need.

- **I especially value service-before-self; and I greatly admire work ethic, initiative, and a positive attitude.**

- **I think highly of those who give credit to others, and who ensure others are recognized/rewarded.**
  - You can't do it all yourself, and you can never be too gracious when you succeed.
    - Never let your ego get in the way of a better idea.

- **In my view, a successful JAG office must have a robust, fair, and efficient military justice program–this is pass/fail!**
  - Commanders are the decision makers; JAGs provide options (all of them) and reasoned advice/recommendations.

- **Seize every opportunity to improve your forensic skills — the ability to communicate and advocate is essential to success in our world.**

- **Spread the concept of the"JAG Family"; look after one another, and be especially attentive to the families of TDY and deployed personnel. Be sensitive to the needs and concerns of single people too!**

- **Never forget that paralegals are the real "power of attorney(s)"!**
  - Experienced paralegals can help you learn about the JAG Corps and the Air Force — if you let them.

- **Have a vision and specific goals. Encourage others to have them too. Tell the JAG story every chance you get.**

- **Be yourself (I try to be!)…and take care of yourself; be sure to have some fun!**

Go tell the Spartans, thou that passeth by, that here, obedient to their laws, we lie.
~Epitaph for the Spartan soldiers at Thermopylae, 458 B.C.

Fortes fortuna adiuvat. *~Terence, Roman citizen, 171 B.C.*

The world is a dangerous place to live; not because of the people who are evil, but because of the people who don't do anything about it. *~Albert Einstein,1879-1955*

Courage is contagious: when brave men take a stand, the spines of others are stiffened. *~Billy Graham,1964*

For unto whomsoever much is given, of him shall be much required; and to whom men have committed much, of him they will ask the more. *~Luke 12:48*

Discipline is the soul of the army. It makes small numbers formidable; procures success in the weak, and esteem to all.
~George Washington, 1759

The only thing necessary for the triumph of evil is for good men to do nothing. *~Edmund Burke, 1770*

Live as brave men; and if fortune is adverse, front its blows with a brave heart. *~Cicero, 106-43 B.C.*

War is an ugly thing, but not the ugliest of things. The decayed and degrade state of moral and patriotic feeling which thinks that nothing is worth war is much worse. The person who has nothing for which he is willing to fight, nothing which is more important than his own personal safety, is a miserable creature and has no chance of being free unless made and kept so by the exertions of better men than himself. *~John Stuart Mill, 1862*

I desire to so conduct the affairs of this administration that if at the end, when I come to lay down the reins of power, I have lost every friend on earth, I shall at least have one friend left, and that friend shall be down inside me. *~Abraham Lincoln, 1863*

Not failure, but low aim, is a crime. *~James Russell Lowell, 1890*

Courage is resistance to fear, mastery of fear — not absence of fear. *~Mark Twain, 1894*

Those who cannot remember the past are condemned to repeat it. *~George Santayana, 1906*

There are a lot of guys who say they want to work harder and be the best, but they never pay the price. I love paying the price.
~Quarterback Tom Brady, 2007

This is the first and true function of a leader: never to think the battle or cause is lost. The ancient Romans put up a statue to the general who saved them in one of Rome's darkest hours, with this inscription: "Because he did not despair of the Republic"
~Field Marshal Lord Wavell, 1939

Duty, honor, country: Those three hallowed words reverently dictate what you ought to be, what you can be, what you will be. They are your rallying point to build courage when courage seems to fail, to regain faith when there seems to be little cause for faith,to create hope when hope becomes forlorn. *~General Douglas MacArthur, 1964*

A man caught on rebound from failure can be a wonderful investment…[a]n opportunity to re-establish himself in his own esteem, when he has forfeited it, is something for which a man will give you a great deal in return. *~Sir John Hackett, 1982*

If you can't feed a hundred people, then feed just one. *~Mother Teresa, (1910-1997)*

Success is the result of preparation, hard work, learning from failure, loyalty to those for whom you work, and persistence.
~Colin Powell, 1997

Where there is no vision, the people perish. *~Proverbs 29:18*

You can't change the rules if you're not in the room. *~Susan Estrich, 2001*

It is not the critic who counts; not the man who points out how the strong man stumbles or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood, who strives valiantly, who errs and comes up short again and again, because there is no effort without error or shortcoming, but who knows the great enthusiasms, the great devotions, who spends himself for a worthy cause; who, at the best, knows, in the end, the triumph of high achievement, and who, at the worst, if he fails, at least he fails while daring greatly, so that this place shall never be with those cold and timid souls who knew neither victory nor defeat. *~Theodore Roosevelt, 1910*

Do not go gentle into that good night. Rage, rage against the dying of the light. *~Dylan Thomas, 1952*

The woods are lovely, dark and deep, but I have promises to keep, and miles to go before I sleep. *~Robert Frost, 1923*

The second point is that it will orient you towards looking at primary sources. Today's world is filled with secondary sources that will explain and summarize the original. The problem? They are sometimes wrong — even catastrophically so, or they omit something of particular relevance to your issue. Reading the primary sources can give a sense of the atmospherics about a matter, and can often allow you to discover an insight no squib will ever suggest. Do not undervalue serendipity in legal research!

LIFE-LONG LEARNING

Would I add anything? Maybe. What comes to mind is this somewhat opaque notion: *Always work to know what you don't know*. I've seen way more people find themselves in a fix because they thought they knew more than they did. Here's a truth: the more you learn, the more you realize what you don't know, so accept that learning is a life-long project, and apply yourself to it. Really, you won't be sorry.

MENTORS

I also might add: Find a mentor or, ideally, *mentors*. A mentor is not the same thing as a cheerleader (though good mentors cheerlead from time to time). You really want someone who will tell you what you *need* to hear versus what you *want* to hear. Believe it.

BAD DAYS...EVERYONE HAS THEM

One more: Know that you will have your bad days. By this I mean there will be days in everyone's JAG Corps career when you think you are in over your head, that you are not suited for the military, etc., etc. Recognize that *everyone* feels this way once in a while (especially while deployed) and work through it in a professional way. All things really do pass, and it will get better!

FAVORITE QUOTES

On the reverse of the talker there is a listing of favorite quotes. At the time I put it together, I thought it was just a random collection assembled over the years. But looking at it now, I realize there are a couple of themes present. These themes relate to overcoming adversity and, perhaps even more importantly, understanding that in real life, failure actually is an option and vindication is not a given. One might say that a lot of life is holding onto your values and persevering in the face of stormy uncertainty or even principled "defeat." As Teddy Roosevelt might put it, there is really no true defeat if you fail "while daring greatly." Winners always dare greatly.

FINAL THOUGHT

A final qualification, please appreciate that your current leaders may have a different perspective on some or all of the matters, so please consider my talker as simply a supplement to — *not* a replacement for — their wisdom and guidance. Now, start writing *your* own talker! R

Major General Charles J. Dunlap Jr., USAF (Ret)

(B.A., Saint Joseph's University; J.D., Villanova University School of Law) was the Deputy Judge Advocate General prior to retiring in 2010, and is now the Executive Director, Center on Law, Ethics and National Security and Professor of the Practice of Law, Duke University School of Law.

Students attending the Paralegal Craftsman Course (PCC) at the Judge Advocate General's School, Maxwell Air Force Base, Alabama. (U.S. Air Force photo/ Ms. Thomasa Paul)

An MQ-1 Predator unmanned aircraft, armed with AGM-114 Hellfire missiles, flies a combat mission over southern Afghanistan. The MQ-1 is deployed in OPERATION ENDURING FREEDOM providing interdiction and armed reconnaissance against critical, perishable targets. (U.S. Air Force photo/Lieutenant Colonel Leslie Pratt)

PREDATOR

The Secret Origins of the Drone Revolution

BY RICHARD WHITTLE, REVIEWED BY LIEUTENANT COLONEL MATTHEW D. BURRIS, USAF

For the first time in history, it would be possible to target and kill an enemy much the way a sniper does — from ambush, and with precision — but from the other side of the world. Science fiction would become science fact.

- Richard Whittle

Billy Mitchell orchestrated the first true demonstration of air power in July of 1921 with the successful aerial bombardment of the German battleship *Ostfriesland*. It is said some of the naval officers who witnessed its sinking that summer day had tears in their eyes as the mighty modern ship — to that point in time believed to be invulnerable from the air — capsized and sank. They were witness to a revolution few anticipated and few at the time welcomed.

Similarly, upon the first successful test of a nuclear device in 1945, J. Robert Oppenheimer reported some observers laughed, others cried — but all knew the world would never be the same. They too were witness to a revolution few anticipated and in the following years many would come to regret.

On February 16, 2001, at Indian Springs Air Force Auxiliary Field, Nevada, the Air Force conducted the first successful test launch of a Hellfire missile from an airborne RQ-1 Predator.[1] The Air Force captain at the controls that morning, along with those supporting him, were witness to a revolution; they then went out for breakfast at a local casino.[2]

[1] Indian Springs Air Force Auxiliary Field was later redesignated Creech Air Force Base; the RQ-1 Predator was later redesignated the MQ-1 Predator.

[2] Mark Mazzetti, The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth 96 (Penguin Books 2013).

For many, the idea of robotic warfare does not elicit an emotional response because its nature assumes the removal or, at the very least, mitigation of human suffering during war.

The inflection point for the "drone revolution," while less distinct than those associated with the birth of strategic air power or the bomb, was no less revolutionary. Originally conceived as reconnaissance vehicles, modern remotely piloted aircraft (RPA) were the product of a decades-long technological outgrowth of the Revolution in Military Affairs corresponding to the 1991 Gulf War. A decade later, when the technologies required to operate an armed RPA in theater from a ground control station in the United States ultimately coalesced, an entirely new form of waging warfare was born.

Yet it is not at all surprising no tears were shed in the Nevada desert that February morning in 2001. For many, the idea of robotic warfare does not elicit an emotional response because its nature assumes the removal or, at the very least, mitigation of human suffering during war. As Pulitzer Prize winning author Mark Mazzetti put it, "[t]he United States was developing a new weapon for war that required no one actually going to war."[3] This viewpoint, as persistent and pervasive as it is, reflects a stunning failure of the imagination, as well as a fundamental misunderstanding of the potential human costs and strategic impacts of lethal RPA operations.

It is in this vein that Richard Whittle's *Predator: The Secret Origins of the Drone Revolution* recounts the events leading up to the first lethal RPA strike on October 8, 2001, outside Kandahar, Afghanistan. It is a story of the incremental march of technology (*e.g.,* satellite signal latencies and the fine distinctions between the C-band and Ku-band radio frequencies); the Department of Defense's byzantine procurement processes; the operational test and evaluation of weapon systems; and the immutable childishness of interservice rivalries. It follows that for the first 250 pages *Predator* is not an altogether riveting account.

Recognizing this, Whittle attempts to transform his book into a character-based narrative and yet there are no iconoclasts like Billy Mitchell to anchor it; there are no "Now I am become Death, the destroyer of worlds" revelations like those experienced by the creators of the atomic bomb. Instead, much like the robotic weapon systems it describes, this narrative is marked by a steely detachment.

Thus, to this reader, *Predator* is perhaps the least interesting of the histories that could be written on the topic of armed RPAs. This is not to suggest it is not useful — the book's final hundred pages succeed in detailing the tragicomic timing of the maturation of lethal RPA technologies and the attacks of September 11th;[4] it is only to suggest the most important and vexing questions associated with the technological revolution it describes are left unanswered.

[3] *Id.*

[4] *Predator* also includes several vignettes sure to pique the interest of Air Force attorneys — including one concerning an August 2000 SAF/GC opinion holding that weaponizing the RQ-1 Predator would facially violate the 1987 Intermediate-Range Nuclear Forces Treaty with the Russians. The SAF/GC opinion was ultimately overruled.

It is somewhat ironic then that Whittle portrays *Predator*, quite unselfconsciously, as "the drone revolution's book of genesis." Were that true, he would have addressed the ultimate issue: whether armed RPAs are manna from heaven or forbidden fruit. This, in turn, would have required him to ask and answer at least three hard questions: (1) At a conceptual level, how should these weapons be employed? (2) What are the effects of this new form of warfare on those engaging in it? (3) Given the nature both of war and our current adversary, what is the potential strategic impact of the "drone revolution?"

CONCEPTUAL 100-FOOT DROP TEST

In the early 20th century, the British Artillery Committee employed a humorously pragmatic method for testing new designs of its mountain gun, wherein a new design was "taken to the top of a tower, some hundred feet high, and thence dropped onto the ground below. If it was still capable of functioning it was given further trial; if not, it was rejected as flimsy."[5] Renowned physicist Freeman Dyson believes the British methodology for testing the robustness of its mountain gun is also a useful means of testing strategic concepts, namely: "any concept which is to succeed in regulating the use of weapons must be at least as robust as the weapons themselves."[6]

Arguably, in the case the MQ-1 Predator, neither the weapon itself nor the concept regulating its use appear particularly robust. According to a recent *Washington Post* investigation, "Almost half of the Predators bought by the Air Force have been involved in a major accident."[7] Moreover, some fifteen years into the "drone revolution" it is not clear whether the concept regulating the use of armed RPAs aligns with America's most deeply held principles.

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Predator glosses over these issues. For example, Whittle casually describes a civilian contractor pilot (call sign "Big") launching a lethal RPA strike without any accompanying analysis. Yet the anecdote begs an important question: what does the employment of this weapon by non-military personnel, whether inside or outside of designated conflict zones, say about us?[8]

In the century preceding the September 11th attacks, the United States "attempted to broaden the laws of war to include acts that had previously been considered beyond the realm of objective judgment… American leaders argued that law would replace blind vengeance as a means of conflict resolution."[9] Ideologically, we rejected the maxims "necessity knows no law" and "we judge the assassin by his victim" as antithetical to the international order we were attempting to create and maintain.[10]

It was within this conceptual framework the CIA struggled with the issue of employing armed RPAs — even against the likes of Osama bin Laden — prior to September 11, 2001. Though there were high-level dissenters, the dictates of law and policy in place at the time counseled against the CIA's involvement in extrajudicial killings. Following the September 11th attacks these concerns largely vanished. According to the former head of the CIA's Alec Station, Richard Blee, "Now, we're lighting these people up all over the place."[11] At the same time, Blee continued, "Every drone strike is an execution…[a]nd if we're going to

[5] Freeman Dyson, Weapons and Hope 227 (Harper & Row 1984).

[6] *Id.*

[7] Craig Whitlock, *When Drones Fall from the Sky*, Wash. Post (Jun. 20, 2014), http://www.washingtonpost.com/sf/investigative/2014/06/20/when-drones-fall-from-the-sky/.

[8] Five years ago, I addressed this question in these pages and do not believe we are any closer to being able to provide a satisfactory answer. Matthew D. Burris, *Actions to Match Our Rhetoric or Rhetoric to Match our Actions: The CIA UAV Program in Pakistan*, The Reporter, Summer 2010, at 47.

[9] Peter Maguire, Law and War: An American Story 5 (Columbia University Press 2000).

[10] Michael Walzer, Just and Unjust Wars 199, 240 (Basic Books 1977). *See generally* Mark Mazower, Governing the World: The History of an Idea (The Penguin Press 2012) (describing the United States efforts to establish the United Nations, a global political institution geared toward conflict avoidance).

[11] Mazzetti, *supra* note 2, at 319.

hand down death sentences, there ought to be some public accountability and some public discussion about the whole thing."[12]

It appeared such a discussion would take place following the 2011 CIA RPA strike that killed Amercian citizen Anwar al-Awlaki in Yemen. Until last summer it had been frustratingly circumscribed by the secrecy surrounding the programs involved. However, in June 2014, the Second Circuit Court of Appeals ordered the release of a relatively lightly redacted version of the Department of Justice memorandum authorizing the killing of al-Awlaki.[13] For its part, the nation yawned at this muscular interpretation of state authority — seemingly content with the notion that *we judge the assassin by his victim*.

"RPA" VERSUS "DRONE": MORE THAN SEMANTICS IS AT STAKE

Whittle acknowledges this lexical debate, while missing the point of it entirely. "RPA" versus "drone" is not about clunky constructions or the military's affinity for acronyms; it is about emphasizing the human in the loop.

A drone is entirely autonomous. RPAs are piloted by human beings and, in the case of the Air Force, by rated uniformed officers. Enlisted sensor operators control the various intelligence, surveillance, and reconnaissance (ISR) assets and weapons onboard. When a lethal strike is carried out, they are the ones who see the infrared heat signature from the remains of their target dissipate; they are the ones who see the target's family members and neighbors respond and react to the aftermath of a strike; they are the ones who fire when a so-called "squirter" quixotically attempts to escape a second Hellfire missile, having survived the first; they are the ones who've likely watched the target for days, weeks, or even months, establishing positive identification and pattern of life. Technology and the RPA's ability to loiter for exceptionally long periods over a target enable all of this. From a strictly operational perspective, this is unquestionably a good thing. But what about the well-being of the pilots and sensor operators who are simultaneously *actors in* and *witnesses to* this kind of life and death *in extremis* — all in real time and with unprecedented clarity?

Combatants have long been troubled by this type of killing. It is not a question of legal authority or combatant immunity, but rather morality. This is something altogether different than launching a cruise missile from a submarine hundreds of miles from its target or dropping a bomb from an aircraft flying at 30,000 feet — it is more intimate than that. Michael Walzer recounts the experience of a WWI Italian solider who, having maneuvered close to the enemy's line, did not fire on a young Austrian officer smoking a cigarette, because he "was so entirely oblivious to the danger that threatened him."[14] The Italian soldier reasoned,

> "To lead a hundred, even a thousand, men against another hundred, or thousand, was one thing; but to detach one man from the rest and say to him, as it were: 'Don't move, I'm going to shoot you. I'm going to kill you' — that was different….To fight is one thing, but to kill a man is another. And to kill him like that is murder."[15]

Of course a lethal RPA strike carried out by uniformed military personnel is not murder. Fine legal distinctions, however, may be insufficient to mollify the true sense or feeling of those actually engaging in these operations. This moral aspect of the "drone revolution" is absent from Whittle's history. As a result, his account lacks the humanity that might make it more moving and meaningful. It is more than an afterthought, for example, that Air Force Master Sergeant Jeff "Gunny" Guay, sensor operator for the first lethal RPA strike of OPERATION ENDURING FREEDOM, died of diabetes and liver damage at the age of 45. This

[12] *Id.*

[13] Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen*, N.Y. Times (Jun. 23, 2014), http://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html.

[14] Walzer, *supra* note 10, at 142. Of course, RPA strikes against lawful targets within the context of an armed conflict are *not* murder in the case of the uniformed pilot or sensor operator; the same cannot be said of CIA agents or civilian contractors.

[15] *Id.* As I write this, the movie *American Sniper* is number one at the U.S. box office. To the extent moviegoers are able to understand and appreciate the type of psychic damage Chris Kyle suffered in Iraq, they might also save a bit of empathy for armed RPA pilots and sensor operators who are executing a very similar mission set.

MQ-9 Reaper being prepared for flight. (U.S. Air Force photo/Staff Sergeant Nadine Barclay)

too begs an important question: why? Armed RPA operators are not merely extensions of the robotic weapons they control; nor are they the stoic warrior caricatures of Hollywood scripts. That is pure fiction; yet it has crept into the pages of *Predator*.

PREDATOR AS PARADOX

Properly understood, the MQ-1 Predator is a paradox. It's a weapon system so slow and vulnerable it could be felled by Baron von Richthofen's Albatros D.II biplane — at least on the way to and from its service ceiling.[16] To be sure, absent U.S. air supremacy, the MQ-1 would arguably prove useless against an adversary with even a rudimentary air defense system or air force. But the Islamic State in Iraq and the Levant (ISIL) and its transnational contemporaries, scattered as they are across the Middle East and Africa, have neither.[17] As a result, the gangly MQ-1 — to say nothing of its more capable progeny the MQ-9 Reaper, et al. — is quite possibly the perfect weapon system to employ against them.

To suggest it is perfect under the circumstances is not to suggest it has proven decisive in any way. If war, as Clausewitz proposed, is "an act of force to compel our enemy to do our will," then no weapon system, *however effective*, will end our current conflict.[18] Our adversary's aims are at once abhorrent to liberal democratic values and absolute (the return of an Islamic caliphate) and, thus, there is no room for mutually agreeable negotiated settlement. Short of killing everyone who adheres to ISIL's perverse ideology, it follows that no degree of compellence will prove decisive.

Five years ago, one commentator likened lethal RPA strikes to "going after a beehive one bee at a time" — the problem being, "the hive will always produce more bees."[19] With approximately a thousand foreign fighters joining the quagmire in Syria and Iraq each month, this statement appears more than a little prophetic.[20] The question, at the risk of carrying the bee analogy too far, is whether the armed RPAs slowly circling above the world's most impoverished and dangerous places are counterproductively pollinating and sprouting more new terrorists than are being dispatched — like a persistent swarm of flying Abu Ghraibs. Alas, *Predator* avoids this tough question too.

Whittle's book is an undeniably useful history, it is just not the one I was hoping to read. R

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[16] An early variant of the MQ-1 Predator was also named the Albatross by its Iraqi-born designer.

[17] *But see* Cody Poplin, *Look Who Else Has Drones: ISIS and Al Nusra,* Lawfare (Oct. 24 2014, http://www.lawfareblog.com/2014/10/look-who-else-has-drones-isis-and-al-nusra/ (ISIS appears to be employing commercially-available RPA technology to plan its operations).

[18] Carl von Clausewitz, On War 75 (Princeton University Press 1976).

[19] Jane Mayer, *The Predator War*, New Yorker, Oct. 26, 2009, at 45.

[20] Eric Schmitt & Michael S. Schmidt, *West Struggles to Halt Flow of Citizens to War Zones*, N.Y. Times, (Jan. 13, 2015), http://www.nytimes.com/2015/01/13/world/west-struggles-against-flow-to-war-zones.html?_r=0.

Ethics Corner

PROFESSIONAL CONDUCT INVESTIGATION PROCESS

TJAG delegated to the SSAs the authority to close non-credible complaints for lieutenant colonels or below/ GS-14s or below, after consultation with TPRA.

No substantiated professional conduct violations were finalized and approved by TJAG during the previous quarter. With no substantiated violations to report, this edition's Ethics Corner is devoted to explaining the professional conduct investigation process. If you have any questions about this process you can contact the TJAG's Professional Responsibility Administrator (TPRA). Lieutenant Colonel Crystal Haynes is currently filling that position and is assigned to the Administrative Law Directorate, Office of the Judge Advocate General. Lt Col Haynes is departing this summer and the position will be realigned under the Professional Development Directorate, Office of the Judge Advocate General.

When an allegation of professional misconduct is reported, it is forwarded to an attorney's Senior Supervisory Attorney (SSA) if the allegation is not reported directly to the SSA in the first place. Designated SSAs are the AFLOA commander, MAJCOM SJAs and ANG Assistant to TJAG. DJAG serves as the SSA for attorneys who do not fall under any of the designated SSAs or the subject of the allegation is an SSA. In cases where the subject of an allegation is a lieutenant colonel or below or a civilian in the grade of GS-14 or below, the SSA may forward the complaint to the subject of the complaint and provide the subject an opportunity to provide an initial statement, if the subject desires to do so. After reviewing the complaint and any information from the subject, if provided,

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the SSA will access the credibility of the complaint. The SSA will review the allegation in light of the evidence gathered to determine whether it appears credible. **An allegation is credible if the information received provides a reasonable belief that a rules and standards violation occurred**.

If, upon initial review, the SSA determines the allegation is not credible, the SSA will forward the case to TPRA with a recommendation to close the case. On 4 December 14, in accordance with AFI 51-110, para 5.4.2.1.2, TJAG delegated to the SSAs the authority to close non-credible complaints for lieutenant colonels or below/GS-14s or below, after consultation with TPRA. The delegation memorandum requires TPRA to consult with TJAG's Advisory Committee on Professional Responsibility and Standards (Advisory Committee). If TPRA and the Advisory Committee agree the allegation is not credible as defined in AFI 51-110, para 5.4.2, SSAs may close the case with no further action. Four non-credible cases have been closed in 2015.

In cases where the subject of an allegation is a general officer, colonel or a civilian GS-15 or higher, the Advisory Committee is responsible for making the recommendation to TJAG that the allegation is not credible and that it be closed. The SSA still offers the subject an opportunity to provide an initial statement and reviews the complaint and any information from the subject before forwarding the case with a recommendation as to disposition. The case is then routed through the TPRA to the Advisory Committee, so that the Advisory Committee can make its recommendation.

If the allegation is found to be credible, the SSA will appoint an inquiry officer. The purpose of a formal inquiry is to develop the facts and circumstances surrounding allegations of violations of the rules and standards so that TJAG can determine whether a violation occurred and take appropriate action. A "clear and convincing" standard of proof will be used in reaching conclusions from the evidence developed.

Upon receipt and review of the report of inquiry, the SSA will provide a written recommendation to TJAG, via TPRA, regarding the disposition of the case. At a minimum the recommendation should include reasons for approving or disproving the findings of the inquiry officer and any recommended TJAG action. Upon receipt of the case files, TPRA will review the file and concur with the recommendation to close the case after a finding of no violation and forward it directly to TJAG with a recommendation to close the case; or refer the case to the Advisory Committee. The Advisory Committee may return the case for further investigation or concur with the findings and conclusion and forward a report to TJAG supporting concurrence. If the Advisory Committee determines a violation has occurred, the Advisory Committee shall submit a report including its findings, recommendations, and rationale for submission to TJAG.

TJAG is not bound by the recommendations received from DJAG, the SSA, the Advisory Committee, or TPRA. TJAG will determine appropriate action in a case is TJAG's sole discretion. If TJAG determines a violation has occurred, TJAG may provide corrective counseling, admonish or reprimand the subject attorney, forward the matter to the subject attorney's SSA for appropriate action, suspend the subject attorney's ability to practice before Air Force Courts, suspend a civilian attorney's authority to practice law in the AFJAGC, or suspend or withdraw a judge advocate's designation and/or certification.

If TJAG determines any of the rules and standards have been violated and the seriousness of the violation warrants, TJAG may direct TPRA to report the matter to the appropriate licensing authorities after notifying the subject attorney that such a report will be made. Complaint information may be released to assist appropriate licensing and disciplinary authorities to meet their investigative and disciplinary proceeding responsibilities.

TPRA will notify the subject and the subject's SSA of the findings reached in the case. Notification to the complainant will be made in accordance with the Privacy Act. TJAG's action is final and not subject to appeal.

For additional information see AFI 51-110, paragraph 5, *Processing Allegations of a Violation of the Rules and Standards*, paragraph 6, *TJAG Action on Report of Inquiry*, and paragraph 7, *Post Decision Processing*.

An A400M cargo aircraft performs during the 51st International Paris Air Show at Le Bourget Airport, France, June 16, 2015. The air show provided a collaborative opportunity to share and strengthen the United States and European strategic partnership that has been forged during the last seven decades and is built on a foundation of shared values, experiences and vision. (U.S. Air Force photo/Technical Sergeant Ryan Crane)