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**Uses and Abuses of O & M Funded Construction: Never Build on a Foundation of Sand**  
*Major Brian A. Hughes*

**The Use of Article III Case Law in Military Jurisprudence**  
*H.F. "Sparky" Gierke*

**Azimuth, Distance, and Checkpoints:  
Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates**  
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**Center for Law and Military Operations (CLAMO) Report**  
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**National Training Center Transformation and Change—A Primer for Brigade Operational  
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## Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand

Major Brian A. Hughes<sup>1</sup>

*The war on terror [will] be a lengthy war, a different kind of war, fought on many fronts in many places . . . . This will take time and require sacrifice. Yet we will do what is necessary, we will spend what is necessary, to achieve this essential victory in the war on terror, to promote freedom, and to make our own nation more secure.*<sup>2</sup>

### Introduction

The Global War on Terror (GWOT) has required U.S. forces to re-deploy from their Cold War garrisons to new battlefields throughout the world.<sup>3</sup> Commanders have quickly built small, temporary bases to support military forces in underdeveloped countries worldwide. Some of these bases are required for staging, logistics, and training, while others directly support joint and combined combat operations. While U.S. forces have had great tactical success in meeting new threats, the legal framework for funding military construction has not adapted to the new security environment. Maintaining the initiative in the GWOT requires agile forces able to deploy, operate, and sustain themselves on short notice anywhere in the world. Military construction funding, however, remains mired in a multi-year budgeting cycle, with appropriations geared toward maintaining the existing Cold War infrastructure.

Commanders want to avoid this cumbersome process by using their operations and maintenance (O&M) funds to pay for combat and contingency construction. Fiscal law, however, generally prevents the use of O&M dollars to fund military construction projects that cost more than \$750,000 or more than \$1.5 million to correct threats to life, health, or safety.<sup>4</sup> Faced with this constraint, commanders often pressure their operational lawyers to find fiscal law solutions to satisfy mission requirements.<sup>5</sup> Judge advocates (JA) may be tempted to interpret fiscal law creatively, funding projects with O&M dollars rather than more scarce military construction (MILCON) funds. Given the congressional response to previous attempts at finessing fiscal law, however, such a course of action would be unwise and ultimately counterproductive. The solution to the problem requires clear recognition of the conflicting interests of the legislative and the executive branches. Any lasting solution must balance commanders' responsibilities for mission accomplishment with Congress's responsibility to ensure public funds are wisely spent.

This article begins by identifying the constitutional tension between Congress's power of the purse and the President's executive power as the Commander-in-Chief. The article then examines the rise and fall of the *Reres* Doctrine, which attempted to solve the problem of funding combat and contingency-related construction.<sup>6</sup> Finally, the article suggests military approaches and legislative alternatives that can assist in reconciling these competing interests in ways that will support ultimate victory in the GWOT.

### Checks and Balances: The Constitutional Tension

In a 1998 *Military Law Review* article, Colonel (COL) Richard D. Rosen presented the operational lawyer's dilemma concerning O&M funding of military construction, as well as the inevitable conclusion that fiscal law requires.

To operational lawyers, the proposition that a presidential spending authority exists independent of Congress is particularly alluring. During military operations, intense pressure exists to find fiscal

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<sup>1</sup> Presently assigned as an Administrative Law Attorney, Personnel Law Branch, Office of the Judge Advocate General, U.S. Army. This article was submitted to satisfy, in part, the Master of Laws requirements for the 53d Judge Advocate Officer Graduate Course.

<sup>2</sup> President's Address to the Nation on the War on Terror, 39 WEEKLY COMP. PRES. DOC. 1164 (Sept. 7, 2003).

<sup>3</sup> "From Pakistan to the Philippines to the Horn of Africa, we are hunting down al Qaeda killers." *Id.* at 517 (quoting the President's Remarks from the USS *Abraham Lincoln* at Sea off the Coast of San Diego, California, on 1 May 2003).

<sup>4</sup> 10 U.S.C. S. § 2805(c)(1) (LEXIS 2005). This article refers to this as the statutory O&M threshold throughout.

<sup>5</sup> "The [staff judge advocate's] contract law responsibilities include . . . providing legal advice to the command concerning battlefield acquisition, contingency contracting, Logistics Civil Augmentation Program (LOGCAP) . . . and overseas real estate and construction . . . . The [staff judge advocate's] fiscal responsibilities include furnishing legal advice on the proper use and expenditure of funds." U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-6 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>6</sup> See *infra* note 48.

tools—any fiscal tools—to accomplish the mission. The notion that either congressional inaction or congressionally prescribed prohibitions may be disregarded is indeed seductive. If the proposition is sustainable, it would greatly simplify the operational lawyer’s job, ensuring that, at least in situations the President deems essential to national security, funding authority will always be available . . . . [H]owever, neither the Constitution nor the nation’s experience supports such a conclusion. Congress’s power to appropriate—while not plenary—is certainly exclusive.<sup>7</sup>

The Constitution provides the foundation for understanding why the military must conduct its operations within the constraints of fiscal law, even when the need to accomplish the mission seems paramount. To secure liberty, the Constitution first limits the power of government to certain spheres. To prevent the abuse of even these limited powers, the Constitution then divides the government’s powers through a system of checks and balances. As one of the Founding Fathers explained:

[S]eparate and distinct exercise of the different powers of government . . . is admitted on all hands to be essential to the preservation of liberty . . . . But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.<sup>8</sup>

The current problems encountered by commanders exasperated by fiscal constraints are therefore not unique to the GWOT. This tension between Congress and the executive branch is an integral and necessary feature of our political system, and its resolution requires identifying and satisfying the legitimate interests of both branches of government.

### The Congressional Power of the Purse

Article I of the Constitution vests the power of the purse in Congress. “No money shall be drawn from the treasury, but in consequence of Appropriations made by law.”<sup>9</sup> The power of the purse is Congress’s most powerful institutional check on the executive branch. For the Founding Fathers, this legislative check on the executive branch, and especially the President’s capacity to make war, was essential to the preservation of liberty.<sup>10</sup> The Constitution assigns Congress the responsibility of guarding the public fisc, and therefore also bestows the opportunity to influence the Executive’s conduct of foreign policy.<sup>11</sup>

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<sup>7</sup> Colonel Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL L. REV. 1, 13 (1998).

<sup>8</sup> THE FEDERALIST NO. 51, at 159-60 (James Madison) (Roy P. Fairfield ed., 1981).

<sup>9</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>10</sup> In debating the Constitution, one anti-federalist observed, “[T]he subject of revenue . . . requires . . . the most numerous and exact provisions of the legislature. The command of the revenues of a state gives the command of everything in it. — He that has the purse will have the sword, and they that have both, have everything.” Brutus, *Letter to the People of the State of New York V*, N.Y. J., Dec. 13, 1787, reprinted in DEBATE ON THE CONSTITUTION 503 (Bernard Bailyn ed., 1993). A federalist contrasted the army fielded by the English King to the proposed army under the U.S. Constitution. “The Army when raised is the Army of the People, it is they who raise & pay them [and] it is they who judge of the Necessity of the Measure . . . . I think we are safe in the Exercise of those Powers by Congress.” Letter from Samuel Parsons, to William Cushing (Jan. 11, 1778), reprinted in DEBATE ON THE CONSTITUTION *supra*, at 750. When Thomas Jefferson praised the Constitution for checking “the Dog of war by transferring the power . . . of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay,” he referred not only to Congress’ sole power to declare war, but also to Congress’s power of the purse as a limit on the Executive’s capacity to make war. Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander-in-Chief*, 80 VA. L. REV. 833, 834 (1994) (citing a Letter from Thomas Jefferson, to James Madison (Sept. 6, 1789)), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958). Alexander Hamilton counseled Congress to maintain close oversight and to “deliberate upon the propriety of keeping a military force on foot . . . . [Congress is] not *at liberty* to vest in the executive department permanent funds for the support of an army, if they were even incautious enough to be willing to repose in it so improper a confidence . . . .” THE FEDERALIST NO. 26, at 73 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (emphasis in original).

<sup>11</sup> See Louis Fisher, *The United States Constitution in Its Third Century: How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758, 761-66 (1989).

Congress has used its power of the purse to create an extensive body of fiscal law to control military spending, and thereby check executive power.<sup>12</sup> Before undertaking any mission, a commander must have express legal authority for each expenditure of public funds.<sup>13</sup> Furthermore, all expenditures must meet three basic fiscal controls. First, an expenditure must be necessary and incident to the general purpose of a congressional appropriation or make a material contribution to an authorized function.<sup>14</sup> This concept is known as having the proper “color of money.”<sup>15</sup> Second, an expenditure must occur within the time limits applicable to a congressional appropriation.<sup>16</sup> Third, an expenditure cannot exceed the amount appropriated by Congress or established by a subdivision of funds within the executive branch.<sup>17</sup> Additionally, for construction expenditures in particular, any official who “knowingly contracts for the erection, repair, or furnishing of any public building, or for any public improvement, to pay a larger amount than the specific sum appropriated for such purpose, shall be fined . . . or imprisoned not more than one year, or both.”<sup>18</sup> An official who obligates funds for an improper purpose or with the wrong “color of money” will therefore be culpable because Congress has not appropriated any amount at all for that purpose.<sup>19</sup>

Failure to observe these requirements may result in a violation of the Anti-Deficiency Act (ADA), which requires an immediate report to the President and Congress.<sup>20</sup> A violation of the ADA can carry mandatory administrative sanctions or even criminal penalties, depending on the circumstances of the case.<sup>21</sup> Violations of the ADA require mandatory disciplinary action that can include suspension from duty without pay or relief from office.<sup>22</sup> As the investigative arm of Congress, the Government Accountability Office (GAO) monitors expenditures to ensure compliance with fiscal laws and regulations.<sup>23</sup>

Under the Constitution, the executive branch has traditionally directed foreign affairs. Through a number of fiscal mechanisms, however, Congress can often influence and sometimes control the President’s conduct of foreign policy. First,

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<sup>12</sup> “Fiscal law is the application of domestic statutes and regulations to the funding of military operations.” FM 27-100, *supra* note 5, para. 3-6. For a useful methodology to analyze fiscal law issues in the area of construction funding, see INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 274-78 (2005) [hereinafter OPLAW HANDBOOK].

<sup>13</sup> “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>14</sup> The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made.” 31 U.S.C. § 1301(a) (2000).

It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless . . . Congress has specifically legislated for certain expenses [elsewhere] . . . creating the implication that such expenditures should not be incurred except by [that] express authority.

Comptroller General McCarl to Major General Anton Stephan, Commanding Officer, D.C. Militia, Comp. Gen. A-17673, Mar. 25, 1927, 6 Comp. Gen. 619 (1927); see also I.R.S. Fed. Cred. Union, 66 Comp. Gen. 356, 359 (1987) (“Under [the Purpose] test, an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law.”).

<sup>15</sup> Brigadier General James C. Roan Jr., USAF, TJAGSA Practice Notes, *Streamlining Government Acquisition (Or, “Why Can’t the Government Figure Out How to Use Commercial Practices?”)*, ARMY LAW., May 1995, at 60.

<sup>16</sup> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability. . . . However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502.

<sup>17</sup> An officer or employee of the U.S. Government may not “(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made.” *Id.* §§ 1341(a)(1), 1511-19 (prohibiting violations of administrative apportionment).

<sup>18</sup> 18 U.S.C. § 435.

<sup>19</sup> “However much money may be in the Treasury at any one time, not one dollar of it can be used in payment of any thing not previously sanctioned. Any other course would give fiscal officers a most dangerous discretion.” *Reese v. Walker*, 52 U.S. 272, 291 (1851).

<sup>20</sup> “If an officer . . . violates section 1341(a) . . . , the head of the agency . . . shall report immediately to the President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. § 1351.

<sup>21</sup> *Id.* § 1350 (“An officer . . . knowingly and willfully violating [the ADA] . . . shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.”).

<sup>22</sup> *Id.* § 1349.

<sup>23</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO STRATEGIC PLAN 2004-2009, GAO-04-543SP, at 4 (2004).

Congress determines the total amount of appropriations.<sup>24</sup> Second, Congress can specify exactly how an appropriation must be spent.<sup>25</sup> Third, Congress can forbid the expenditure of appropriations for certain purposes when policy disagreements with the executive branch develop.<sup>26</sup> Finally, Congress can require the Executive to account for the expenditure of funds through regular reporting requirements.<sup>27</sup> Given the powerful tools granted to Congress by the Constitution, it is small wonder that “hardly an important executive branch decision is taken without considering the reaction in Congress.”<sup>28</sup>

### The Executive as Commander in Chief

The Constitution provides that “the Executive Power shall be vested in a President of the United States . . . . The President shall be the Commander in Chief of the Army and Navy of the United States.”<sup>29</sup> As the Commander in Chief, the President is responsible for U.S. national security. Executive authority flows from the President through many channels to the Secretary of Defense, the Service Secretaries, the Joint Staff, the Combatant Commanders, and finally down to all of the subordinate commanders in the field. During the Cold War, the military construction funding process was cumbersome indeed, but it did not straightjacket the Executive’s strategic reach. United States forces were already forwardly deployed in permanent bases or available for projection from bases in the United States directly to a theater of combat. During the Cold War, most military construction projects aimed at improving these permanent bases, while contingency construction usually involved joint or combined exercises or humanitarian assistance.<sup>30</sup> Since the end of the Cold War, however, the Army has shifted its doctrine to become more deployable, and the GWOT has required rapid worldwide force projection and the construction of U.S. bases in a matter of weeks rather than years.<sup>31</sup>

To defend the nation, the Commander in Chief requires maximum flexibility in determining the time and place to commit U.S. forces.<sup>32</sup> During combat and contingency operations, subordinate commanders must be capable of undertaking emergency construction of facilities for supply, storage, power, mobility, communications and life support. Commanders

<sup>24</sup> “The following sums are appropriated . . . for military construction, family housing, and base realignment and closure functions administered by the Department of Defense [DOD], for the fiscal year [FY] ending September 30, 2005, . . . in support of the functions of the Commander-in-Chief, \$1,981,084,000.” Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220, 1222 (2004) [hereinafter FY 2005 MILCON Appropriation Act].

<sup>25</sup> “For the United States share of the cost of the [NATO] Security Investment Program for the acquisition and construction of military facilities and installations (including international military headquarters) and for related expenses for the collective defense of the North Atlantic Treaty Area . . . , \$165,800,000, to remain available until expended.” *Id.* at 1223

<sup>26</sup> Under the Cooper-Church Amendments, Congress denied the expenditure of any military assistance funds in Cambodia. “None of the funds authorized or appropriated pursuant to this Act may be used to finance the introduction of ground combat troops into Cambodia.” Special Foreign Assistance Act of 1971, Pub. L. No. 91-652, 84 Stat. 1942, 1943 (1971). The Boland Amendment prohibited the DOD and the Central Intelligence Agency from using appropriated funds to support the Contras in overthrowing the Sandinista government in Nicaragua. Defense Appropriations Act for Fiscal Year 1983, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865 (1982). Violations of this fiscal law resulted in the Iran-Contra Affair. *See generally* THE IRAN-CONTRA AFFAIR: REPORT OF THE CONGRESSIONAL COMMITTEES 19-25 (Daniel K. Inouye & Lee H. Hamilton eds., 1988).

<sup>27</sup> “None of the funds made available in this Act may be used to initiate a new installation overseas without prior notification to the Committees on Appropriations of both Houses of Congress.” FY 2005 MILCON Appropriations Act of 2005, *supra* note 24, § 110.

<sup>28</sup> Phillip R. Trimble, *The President’s Foreign Affairs Power*, 83 AM. J. INT’L L. 750, 751 (1989).

<sup>29</sup> U.S. CONST. art. II, §§ 1-2.

<sup>30</sup> OPLAW HANDBOOK, *supra* note 12, at ch. 12, §§ VII-X, XIV.

<sup>31</sup> Within two weeks of 11 September 2001, the Commander in Chief had deployed U.S. forces throughout the world to defeat global terrorism. Consistent with the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) and Senate Joint Resolution 23, Authorization for the Use of Force, 107 Pub. L. No. 40, 115 Stat. 224 (2001), President Bush informed Congress that:

In response to these attacks on our territory, our citizens, and our way of life, I, [President George Bush, have] ordered the deployment of various combat-equipped and combat support forces to a number of foreign nations in the Central and Pacific Command areas of operations . . . . I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive.

President’s Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1157, 1157 (Sept. 24, 2001).

<sup>32</sup> Again, consistent with the War Powers Resolution and Senate Joint Resolution 23, President Bush informed Congress, that:

In the future, as we act to prevent and deter terrorism, I may find it necessary to order additional forces into these and other areas of the world, including into foreign nations where U.S. Armed Forces are already located . . . . It is not now possible to predict the scope and duration of these deployments, and the actions necessary to counter the terrorist threat to the United States. It is likely that the American campaign against terrorism will be a lengthy one.

*Id.*

must also satisfy obligations imposed by international law. The Geneva and Hague Conventions, for instance, set minimum standards for the care of civilians and enemy combatants, and place responsibility for the administration of occupied territory squarely on the occupying power.<sup>33</sup> Commanders must construct these necessary facilities quickly, effectively, and efficiently. Fiscal constraints on the resources available inevitably impede mission accomplishment, and create pressures to find a way out of the fiscal conundrum.

### A Cautionary Tale: The Fort Lee Fiasco

Commanders in the field often chafe at fiscal laws, especially when a mission imperative requires military construction. Fiscal law requires MILCON dollars, but a commander often only has O&M funds available. To meet the commanders' intent, JAs may be tempted to skirt the fiscal law issue by creating an imaginative solution that would permit O&M funding. Rather than giving in to temptation, however, a JA should firmly resist engaging in any subterfuge. As the following incident illustrates, Congress takes violations of fiscal law extremely seriously.

In June 1962, the House Committee on Government Operations (the Committee) examined illegal actions in the construction of an airfield at Fort Lee, Virginia. Though requests for \$876,000 in MILCON funds to build the airfield had been repeatedly denied, the post commander decided to build the airstrip anyway, and directed his staff to use available O&M funds.<sup>34</sup> "The mission having been decided by higher command . . . , the subordinate officers and officials regarded the fulfillment of the mission as paramount and the means for doing so merely incidental, even if illegal."<sup>35</sup> To skirt the fiscal constraints, the command low-balled cost estimates, engaged in project-splitting, and arrived at tortured definitions to justify the use of O&M funding.<sup>36</sup> The Committee found these practices unacceptable: "This particular incident furnishes an almost unbelievable example of the workings of the military and bureaucratic mind. A change in nomenclature, clever gimmick, and an easy acceptance of subterfuge cannot change a fact, no matter how much a military mind wants them to do so."<sup>37</sup> Perceived military requirements do not permit a commander to disobey fiscal law.

The Committee censured the conduct of the responsible military officers, including the staff judge advocate (SJA) by name.<sup>38</sup> Referring to the ADA and Department of the Army (DA) regulations governing construction (*AR 415-series*), the Committee found that "a number of statutes and sections of the Uniform Code of Military Justice had been deliberately violated by several officers . . . who had deliberately expended or conspired to expend moneys in excess of statutory and administrative limitations."<sup>39</sup> Though recognizing that "sometimes, military people get put in a terribly bad position,"<sup>40</sup> the Committee drew particular attention to its finding that:

Subordinate officers felt compelled to go along with their superiors in the performance of acts which they knew were illegal and improper, . . . [and] the superiors felt they could compel such subservience on the part of the subordinates. These officers were disloyal to their public trust, to their subordinates, and to the Army. Conduct of this kind which brings into public disrepute high-ranking officers can only result in loss of confidence in the integrity of our Military Establishment.<sup>41</sup>

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<sup>33</sup> See CENTER FOR LAW & MILITARY OPERATIONS [CLAMO], THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED: AFGHANISTAN AND IRAQ: VOLUME I: MAJOR COMBAT OPERATIONS [11 SEPTEMBER 2001 - 1 MAY 2003], at 125 (2004) [hereinafter CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ]; see also Jonathan D. Clark, *Overcoming the Critical Challenges of Contingency Contracting: Understanding the Flexibility Permitted by CICA, Simplified Acquisition Procedures, and Small Purchases*, 28 PUB. CONT. L.J. 503, 509 (1999); Memorandum for Record, Captain Thomas E. Randall, U.S. Navy, Deputy Legal Adviser, subject: Funding for operation [sic] Provide Comfort (16 Apr. 1991) (recording Deputy Legal Counsel, Joint Chiefs of Staff, advice to use O&M funds to build Kurdish refugee camps in Iraq).

<sup>34</sup> H.R. REP. NO. 87-1858, at 4 (1962).

<sup>35</sup> *Id.* at 36.

<sup>36</sup> *Id.* at 7.

<sup>37</sup> *Id.* at 36.

<sup>38</sup> The U.S. Department of Justice initiated a criminal investigation into the matter and pursued a civil action for personal liability against the commander and comptroller. Secretary of the Army, B-133316, 1963 U.S. Comp. Gen. LEXIS 2448 (June 20, 1963).

<sup>39</sup> H.R. REP. NO. 87-1858, at 2.

<sup>40</sup> *Id.* at 38.

<sup>41</sup> *Id.* at 2.

The Committee observed that the officers' disregard of fiscal law to complete the mission as they saw fit, rather than in accordance with the law, was "exceedingly dangerous to the principle of civilian control, [and] it led directly to an erosion of honor and respect for the law among the officers concerned."<sup>42</sup> The Committee further denounced as intolerable the spread of a mindset where "the interests of the taxpayers generally and the concern of Congress with the expenditure of funds seem to be of no particular importance to the officers."<sup>43</sup> Finally, the Committee stated:

It is obvious to the committee that in these days when hundreds of billions of dollars are being spent on the military services, many military officers cannot be trusted to police their own ranks to see that the laws governing these expenditures are carried out. To them, such laws and the related regulations, directives, and orders are merely troublesome, civilian-imposed obstacles which are to be violated or evaded with impunity unless one is caught by civilians . . . . For these reasons, constant surveillance by the General Accounting Office [sic] and the appropriate committees of Congress is necessary and must be maintained.<sup>44</sup>

It would be difficult to find a clearer rejection by Congress of the notion that the military can operate in disregard of fiscal law.<sup>45</sup>

### **The Legal Framework of Military Construction**

Judge advocates should have a clear understanding of the entire statutory and regulatory framework that controls military construction when reviewing proposals for combat and contingency construction. Until recently, the military had two broad approaches ("colors of money") to fund combat and contingency construction. The first approach used the statutory framework of the Military Construction Codification Act (MCCA) provided by Congress, which broadly defines military construction and provides certain funding mechanisms for military construction projects.<sup>46</sup> The second approach, known as the *Reres* Doctrine, transmogrified<sup>47</sup> some types of "military construction" projects into expenses necessary and incident to combat and contingency operations thereby "permitting" the use of O&M funds.<sup>48</sup> The following sections examine both approaches. This section establishes the statutory framework that governs the proper method of funding military construction. The next section chronicles the rise of the *Reres* Doctrine, and its ultimate fall at the hands of Congress in a rebuke very similar to the reprimand Congress issued in the Fort Lee fiasco of forty years ago.

### **Military Construction Defined**

In the field of military construction, Congress exercises its power of the purse by channeling appropriations through a multi-year military construction funding process.<sup>49</sup> Consistent with the congressional desire to provide close oversight on military construction projects, the definitions provided by the MCCA sweep very broadly, both physically and geographically. Under the MCCA, the term "military construction" means "any construction, development, conversion, or extension carried out with respect to any military installation, whether to satisfy *temporary or permanent* requirements."<sup>50</sup> The term "military installation" is defined as every structure that the military might use for any amount of time, including

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<sup>42</sup> *Id.* at 13.

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

<sup>44</sup> *Id.* at 14.

<sup>45</sup> Congress periodically revisits the issue of improper use of O&M funds. In 1989, the House Armed Services Committee issued a blistering report concerning the improper use of O&M appropriations to fund military repair projects. The Committee objected to the Air Force building a new officers' club with \$10 million in O&M funds, the Army renovating a building with \$26 million in O&M funds, and the Navy restoring a building with \$13 million in O&M funds. Major M. Warner Meadows, *Military Construction Funding: Variation in Cost Rules*, ARMY LAW., Aug. 1998, at 24 nn.43-44 (citing H.R. REP. NO. 101-21 (1989)).

<sup>46</sup> See Major Earle D. Munns, *An Analysis of the Military Construction Codification Act*, ARMY LAW., Nov. 1987, at 19 (examining the legislative intent behind the MCCA).

<sup>47</sup> In the comic strip *Calvin and Hobbes*, a transmogrifier is a simple corrugated cardboard box that has the power to change one object into any other object desired. See BILL WATTERSON, WEIRDOS FROM ANOTHER PLANET! 55 (1990), available at <http://dlazechk.dl.funpic.org/weedaytransmogrifyintoatiger.html>. The *Reres* Doctrine mystically transmogrified O&M dollars into MILCON funds.

<sup>48</sup> Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep't of Army, to Assistant Secretary (Financial Management & Comptroller), subject: Construction of Contingency Facility Requirements (22 Feb. 2000) [hereinafter *Reres* Memo] (on file with the author). The *Reres* doctrine takes its name after the Deputy General Counsel who approved the policy, Matt Reres.

<sup>49</sup> See generally Munns, *supra* note 46, at 19-21 (detailing the MILCON appropriations process in Congress).

<sup>50</sup> Military Construction Codification Act, 10 U.S.C. § 2801(a) (LEXIS 2005) (emphasis added).

such facilities as “a base, camp, post, station, yard, center, or other activity under [military jurisdiction] or, in the case of an activity in a foreign country, under [military] operational control, *without regard to the duration of operational control.*”<sup>51</sup> Because of these broadly defined terms, the MCCA is designed to regulate every kind of military construction anywhere, and of every size, from Camp Victory, Iraq, to the Pentagon in Washington, D.C.

The MCCA further specifies that a “military construction project” includes “all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.”<sup>52</sup> The process of determining what constitutes a “complete and usable facility” is called scoping the project. The purpose of scoping is to ensure that the military construction project encompasses *all* military construction work necessary to produce the *complete and usable* facility. The exclusion of structures necessary to construct a complete and usable facility is known as project-splitting.<sup>53</sup> Illegal project-splitting occurs when a military construction project is broken down into several smaller projects to reduce its cost below applicable statutory thresholds.<sup>54</sup> The temptation to engage in project-splitting occurs most frequently when the command contemplates the construction of several projects contemporaneously and in close proximity. To prevent project-splitting, the JA should determine the proper scope by analyzing two questions. First, what components are necessary to meet the mission’s requirements and fulfill the commander’s intent? For example, the commander requires the establishment of a base camp in a foreign country. The base camp will be used for an indeterminate duration, but certain facilities such as a perimeter fence and a command and control bunker are required immediately. Other facilities, such as a helipad and a motor pool, would be welcome, but are not strictly necessary.<sup>55</sup> Second, the JA should determine whether the individual components (in this case, the fence, the bunker, the helipad, and the motor pool) are interdependent or merely interrelated. Interdependent components must be aggregated to determine the total cost of the military construction project; interrelated components may be funded separately.

Interdependent facilities are “mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space, and lighting are mutually dependent to accomplish the intent of the construction project.”<sup>56</sup> In other words, a project that is interdependent with another project is not a “complete and usable facility” if built by itself. *All* of the construction costs related to making the facility “complete and usable” must be lumped together to determine the total cost. In the base camp example, the command could not scope the project to fund the perimeter fence separately from the command and control bunker. The command would not build the fence, but for the necessity of protecting the bunker, and the command would not build the bunker, but for the protection offered by the security fence. Based on these facts, the two projects are interdependent.

In contrast, interrelated facilities:

have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities. Their common purpose to support health, welfare, and morale creates an interrelationship. However, neither facility is necessary for the operation of the other.<sup>57</sup>

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<sup>51</sup> *Id.* § 2801(c)(2) (emphasis added).

<sup>52</sup> *Id.* § 2801(b). The definition of construction excludes maintenance and repair of military installations. “The term ‘repair project’ means a project to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose.” *Id.* § 2811(e). Maintenance is “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” U.S. DEP’T OF ARMY, REG. 420-10, MANAGEMENT OF INSTALLATION DIRECTORATES OF PUBLIC WORKS 16 (15 Apr. 1997) [hereinafter AR 420-10]. Construction of new facilities or additions to existing facilities may not be mischaracterized as maintenance or repair to avoid funding thresholds. *See id.* para. 4-6.

<sup>53</sup> U.S. DEP’T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING 12 (15 Apr. 1998) [hereinafter AR 415-32].

<sup>54</sup> *Id.* Neither is it permissible to spread construction of separate components of the same project over several fiscal years to avoid a statutory threshold. The entire cost of the complete and usable facility must be determined up front. Breaking a project down into sequential tasks where one “phase” of the project will not produce a complete and usable facility without construction of subsequent companion “phases” is illegal. U.S. DEP’T OF ARMY, REG. 415-15, ARMY MILITARY CONSTRUCTION PROGRAM DEVELOPMENT AND EXECUTION para. 3-2(f) (4 Sept. 1998) [hereinafter AR 415-15].

<sup>55</sup> This hypothetical example is based upon an actual proposed construction project in Tuzla, Bosnia. Major Paul Manq *in* CENTER FOR LAW & MILITARY OPERATIONS (CLAMO), THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, FISCAL LAW LESSONS LEARNED 19 n.1 (10 Aug. 1999) (PowerPoint presentation (fiscal II.ppt)) (on file with CLAMO)). Scoping determinations are extremely fact-intensive. Since sound legal conclusions will depend upon the specific facts (time, location, and purpose) pertaining to each proposal, the judge advocate must carefully examine the base camp master plan.

<sup>56</sup> AR 415-32, *supra* note 53, at 12. One might wonder whether the abuses found in the Fort Lee case influenced the selection of an airfield to illustrate the regulatory definition.

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

Interrelated facilities are each “complete and usable” in their own right, and may be properly funded as separate military construction projects. In the base camp example, the command could scope the helipad and motor pool separately from the command and control bunker and perimeter fence only if the former are not necessary for the operation of the latter. Whether the helipad and motor pool will be built at all will be highly fact-specific, and will likely depend on a number of unknown factors, such as their purpose, the durability of the material used, and the length of the overall mission.

Defining a military construction project as encompassing *all* military construction work necessary to produce a *complete and usable* facility also prevents illegal incrementation, or what Congress has called “the foot in the door technique.”<sup>58</sup> Under this fiscal dodge, a minor project “will arrive at a point of construction where new and allegedly unanticipated requirements for the project become apparent.”<sup>59</sup> This incomplete project is then used as the basis for a request for “further funds . . . necessary to protect or enhance an already large investment which has not yet resulted in full realization of its objective.”<sup>60</sup> Congress and executive budget authorities are then placed on the horns of a dilemma: either continue the flow of funds to complete the project or write off the sunk costs at a loss.<sup>61</sup> The Fort Lee case provides a prime example. The commander illegally engaged in project-splitting just to initiate the project for \$536,373. Then, to make matters worse, the command requested incremental appropriations of another \$1 million in order to make the airstrip functional.<sup>62</sup> Congress has made abundantly clear that it “condemns all such stratagems as violating both the letter and the spirit of [the law].”<sup>63</sup>

After completing the first and most important step of scoping a military construction project, the JA must ensure that the cost of the project is correctly calculated. Only then can the appropriate funding mechanism and approval authority be determined.<sup>64</sup> For purposes of determining the cost of a military construction project, the funded cost is the amount “charged to the appropriation designated to pay for the project.”<sup>65</sup> Funded costs are “out-of-pocket” expenses, and include, but are not limited to, materials, supplies, and services applicable to the project (including those owned by the government), installed capital equipment, transportation costs, civilian labor costs, overhead and support costs, travel and per diem costs, O&M costs for government equipment (e.g., fuel and repair parts), and site preparation costs.<sup>66</sup> Unfunded costs are “sunk” costs “charged to a different appropriation from that which is paying for the project.”<sup>67</sup> Unfunded costs include, among other items, military labor, depreciation of government-owned equipment, excess materials, supplies, and equipment obtained on a non-reimbursable basis from another federal entity, and some licenses, permits, and fees.<sup>68</sup> Often, the most effective way to reduce the cost of a project is to use military labor instead of civilian labor because military labor is not charged to the project.<sup>69</sup> Once the total funded cost of the project is determined, the JA should consult the statutory cost thresholds of the MCCA to determine what color of money is required to fund the project.

### Military Construction Funding

Congress makes annual military construction appropriations in the Military Construction Appropriation Act (MCAA),<sup>70</sup> and in the DOD Appropriations Act,<sup>71</sup> at times adding other pots of money through emergency supplemental

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<sup>58</sup> H.R. REP. NO. 87-1858, at 22 (1962).

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

<sup>60</sup> *Id.* at 7.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> *Id.* Apparently, in the command’s attempt to skirt fiscal regulations, it also skirted flight safety regulations. The airfield was built in an area where at least nine other structures obstructed flight patterns. *Id.* at 8.

<sup>63</sup> *Id.* at 7.

<sup>64</sup> OPLAW HANDBOOK, *supra* note 12, at 275.

<sup>65</sup> AR 420-10, *supra* note 52, at 16.

<sup>66</sup> *Id.* para. 4-6(c).

<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* para. 4-6(f). Because the actual cost of a project may exceed projected estimates, the Secretary is authorized to approve small variances that might bump a project over a statutory threshold. See 10 U.S.C. §§ 2805(a)(1), 2853 (LEXIS 2005); see also AR 415-15, *supra* note 54, para. 5-16.

<sup>69</sup> U.S. GOV’T ACCOUNTABILITY OFF., MILITARY OPERATIONS: DOD’S EXTENSIVE USE OF LOGISTICS SUPPORT CONTRACTS REQUIRES STRENGTHENED OVERSIGHT, GAO-04-854, at 40-41 (2004) [hereinafter GAO REP.: LOGISTICS SUPPORT].

<sup>70</sup> See, e.g., FY 2005 MILCON Appropriation Act, Pub. L. No. 108-324, § 110, 118 Stat. 1220 (2004). This appropriation provides funds for both specified and unspecified military construction programs.

<sup>71</sup> See, e.g., Dep’t of Def. Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004) [hereinafter FY 2005 Defense Appropriations Act]. This appropriation provides funds for miscellaneous specific construction projects.

appropriations.<sup>72</sup> Judging by the comprehensive definitions in the MCCA, Congress has clearly manifested its desire to regulate the entire field of military construction.<sup>73</sup> To reduce the monitoring costs of oversight, however, Congress has also narrowed its direct interest by creating a three-tier system that divides military construction projects into distinct categories with different monetary thresholds and separate funding sources.

#### *MILCON Funds (\$1.5 Million and Greater)*

In the appropriations acts and their related authorization acts, Congress provides annual funding to permit the DOD to carry out military construction projects specifically selected by Congress.<sup>74</sup> These specified projects usually cost more than \$1.5 million, and the military may not undertake projects expected to exceed that threshold without specific congressional authorization. These funds provide for large-scale, long-term (five or more years) permanent projects. The MCAA for FY 2005 authorized over \$1.75 billion for military construction projects in the United States and overseas.<sup>75</sup> Although the MILCON appropriation is arguably sufficient to maintain and improve existing military bases, this color of money is neither timely enough nor flexible enough to provide authority for combat and contingency construction.

#### *Unspecified Minor Military Construction (UMMC) (\$750,000 to \$1.5 Million)*

Congress also provides annual funding which permits the DOD to carry out other military construction projects not specifically selected by Congress. These unspecified projects must cost less than \$1.5 million, unless the project is “intended solely to correct a deficiency that threatens life, health, or safety,” in which case the project threshold rises to \$3 million.<sup>76</sup> If the unspecified minor military construction project costs more than \$750,000, the Service Secretary must approve the project, notify Congress, and then wait fourteen days to commence construction.<sup>77</sup> Congress provides these funds for “small, unforeseen projects that cannot wait for the normal military construction process.”<sup>78</sup> Although the special \$3 million threshold provides greater flexibility, the amount of UMMC funds available are limited. In FY 2005, the Army was limited to spending \$20 million on unspecified minor military construction (or the equivalent of fewer than seven \$3 million projects).<sup>79</sup>

#### *UMMC: O&M Construction (\$750,000 and Less)*

An important statutory exception to the MILCON/UMMC framework lies in 10 U.S.C. § 2805(c). This provision permits the Secretaries to use O&M funds to finance UMMC projects that cost less than \$750,000. If the project is “intended solely to correct a deficiency that threatens life, health, or safety,” the threshold rises to \$1.5 million.<sup>80</sup> In fact, to conserve

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<sup>72</sup> See, e.g., Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, 117 Stat. 1209 (2003) [hereinafter FY 2004 Emergency Supplemental].

<sup>73</sup> “[Where] Congress has specifically legislated for certain expenses, . . . expenditures should not be incurred except by [that] express authority.” Comp. Gen. McCarl to Major General Anton Stephan, Commanding Officer, D.C. Militia, Comp. Gen. A-17673, Mar. 25, 1927, 6 Comp. Gen. 619 (1927).

<sup>74</sup> 10 U.S.C. § 2802 (LEXIS 2005).

<sup>75</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2101 (2004) [hereinafter FY 2005 National Defense Act].

<sup>76</sup> 10 U.S.C. § 2805(a)(1). Prior congressional notification of the project’s justification and cost is required. *Id.* § 2805 (b)(2). Neither DOD nor DA have issued written standards defining what constitutes a threat to “life, health, or safety,” but U.S. Army Forces Command (FORSCOM) has issued some limited guidance. The FORSCOM policy “requires installations to document the life, health or safety (LHS) deficiencies, and . . . discuss the project and the LHS justification with FORSCOM engineers before approving O&M funded projects . . . to ensure that any decision to use the LHS authority is well reasoned, supportable, and rational.” Major Louis A. Chiarella et al., *U.S. Army Forces Command Issues Funding Guidance on the Use of the Expanded Life, Health, or Safety Authority*, ARMY LAW., Jan. 2001, at 99 (citing Memorandum, U.S. Forces Command, U.S. Army, to Deputy Chief of Staff for Personnel and Installation Management, subject: Funding and Approval Authority (6 Mar. 2000)).

<sup>77</sup> 10 U.S.C. § 2805(b).

<sup>78</sup> *FY 2005 Air Force Budget Overview for Military Construction: Hearing Before the Military Construction Subcommittee, Senate Appropriations Committee*, 108th Cong. (2004) (testimony of The Hon. Nelson F. Gibbs, Assistant Secretary of the Air Force (Installations, Environment, and Logistics)), available at [http://www.globalsecurity.org/military/library/congress/2004\\_hr/040330-gibbs-fox-brubaker-rajczak.htm](http://www.globalsecurity.org/military/library/congress/2004_hr/040330-gibbs-fox-brubaker-rajczak.htm).

<sup>79</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, 118 Stat. at 2103.

<sup>80</sup> 10 U.S.C. § 2805(c)(1) provides:

scarce UMMC funds, Army regulations actually *require* the use of O&M funds for construction projects that fall beneath the threshold.<sup>81</sup> This authority provides the military with a flexible and responsive mechanism to fund construction required by combat and contingency operations, and the services have sought to maximize use of this authority. Unfortunately, commanders in the field often require projects that exceed this O&M threshold, but only have O&M funds available. Faced with this rigid statutory framework, operational lawyers have provided some flexibility by seeking relief elsewhere.

### The Rise and Fall of the *Reres* Doctrine

Congress created the three-tiered system of MILCON, UMMC, and O&M funding in 1982.<sup>82</sup> During peacetime, Congress provided close oversight, maintaining the existing Cold War military infrastructure while delivering pork barrel spending to their home districts.<sup>83</sup> While the system worked reasonably well under normal circumstances, during contingencies the system was cumbersome and slow.<sup>84</sup> Even Congress recognized that “the lack of a dedicated source of funding for contingency construction needs . . . [can] impede timely response to urgent requirements of armed conflict.”<sup>85</sup> Paradoxically, the end of the Cold War actually increased the number of contingency operations, and in the case of military construction funding, necessity became the mother of invention. Starting in Operation Desert Shield and continuing through Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF), the military struggled to fund necessary construction projects when MILCON funds were simply not available.<sup>86</sup> To respond to these combat and contingency construction requirements, the Army created a fiscal construct to transmogrify O&M funds into MILCON funds—a mechanism that eventually became known as the *Reres* Doctrine.<sup>87</sup>

### Operations Desert Shield and Desert Storm

During the Cold War, the United States could project power from a string of permanent bases worldwide. Contingency construction was limited to projects required for joint and combined exercises.<sup>88</sup> The first large-scale, post-Cold War U.S. military operation that required long-term deployment to an immature theater occurred during Operations Desert Shield and Desert Storm. For example, U.S. Central Command (CENTCOM) required the construction of a \$1 million heliport to support operations in Kuwait. The cost greatly exceeded the statutory O&M threshold, which was only \$200,000 at the time.<sup>89</sup> The SJA, 22nd Support Command, determined that:

The heliport did not fall under the statutory provisions governing minor military construction. Accordingly, it was not subject to the O&M expenditure cap applicable to such construction. DESERT SHIELD was an operation . . . . Paving the desert was a project more akin to building bunkers or constructing anti-tank revetments. As limits to spending O&M funding did not apply to real-world operations or to combat-related military construction, no bar existed to building the heliport.<sup>90</sup>

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The Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than-- (A) \$ 1,500,000, in the case of an unspecified minor military construction project intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening; or (B) \$750,000, in the case of any other unspecified minor military construction project.

<sup>81</sup> AR 420-10, *supra* note 52, para. 4-1(c). The regulation has not been updated to reflect the increase in the statutory threshold from \$500,000 to \$750,000. The DA Assistant Chief of Staff for Installation Management, however, issued a memorandum increasing the regulatory thresholds to match the statutory thresholds. Memorandum, Assistant Chief of Staff for Installation Management, U.S. Dep’t of Army, to Commanders, subject: MACOM Maintenance and Repair Project Approval Authority (18 Jan. 2002) (on file with author).

<sup>82</sup> Munns, *supra* note 46, at 28.

<sup>83</sup> George C. Wilson, *Pentagon Choking on Congressional Pork*, 34 NAT’L J. 484, 484 (2002).

<sup>84</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>85</sup> *Id.*

<sup>86</sup> FREDRIC L. BORCH, JUDGE ADVOCATES IN COMBAT 145-46 (2001).

<sup>87</sup> CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATION JOINT ENDEAVOR, AFTER-ACTION REVIEW I-232 to I-252 (1997) [hereinafter OPERATION JOINT ENDEAVOR AAR] (on file at CLAMO).

<sup>88</sup> See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., HONDURAS: U.S. NATIONAL GUARD CONSTRUCTION EXERCISES, GAO-87-66, at 1-12 (1987).

<sup>89</sup> 10 U.S.C.S. § 2805(c) (LEXIS 2005) (amended by Act of Dec. 5, 1991, to \$300,000; amended by Act of Sept. 23, 1996, to \$500,000; amended by Act of Dec. 28, 2001, to current amount of \$750,000); see also Lieutenant General William G. Pagonis & Colonel Michael D. Krause, *Observation on Gulf War Logistics*, ARMY LOGISTICIAN, Sept.-Oct. 1992, at 8.

<sup>90</sup> BORCH, *supra* note 86, at 145-46.

The Chief Counsel of the Army Corps of Engineers concurred, and the opinion served as the legal basis for many other combat construction projects during Operations Desert Shield and Desert Storm.<sup>91</sup> The flaw in the analysis, of course, is that the statutory definition does not create any “real-world” or “combat-related” exception to the all-encompassing definition of “construction” provided by Congress. Bunkers, anti-tank revetments, and helipads all fall within the statutory definition of “military construction,” and the notion of an operational exception to the statutory framework was simply manufactured out of whole cloth.

### Humanitarian Intervention: Somalia, Haiti, and the Balkans

Similar fiscal issues arose in Somalia, Haiti, and the Balkans. In those operations, the tension involved the added wrinkle of whether O&M funds could be used, not just as a substitute for military construction appropriations, but also as a substitute for humanitarian assistance appropriations. In Haiti, commanders spent more than \$96 million of O&M funding on LOGCAP support.<sup>92</sup> “Missions included electrifying 23 buildings, installing perimeter lighting and security fencing, [and] constructing base camps.”<sup>93</sup> In Bosnia, the Dayton Peace Accords required the construction of a two-lane, all-weather road to link separated Bosnian enclaves. Construction of the road fell to U.S. forces.<sup>94</sup> In Kosovo, virtually all military construction, including Camps Bondsteel and Monteith, were deemed exempt from the restrictive cap on O&M funding.<sup>95</sup> Using logic similar to the Desert Shield reasoning concerning helipads, the consensus legal opinion was that these projects were temporary operational requirements and not military construction. Therefore, O&M funds were the appropriate funding source.

### The Army Patents the Transmogrifier

During these earlier operations, the legal authority for O&M-funded military construction in excess of the statutory threshold was informal and granted only on a case-by-case basis.<sup>96</sup> In February 2000, however, the Army recognized the utility of the transmogrifier, and formalized the practice by issuing a policy memorandum “regarding the proper funds to use for construction of facilities to support military operations.”<sup>97</sup> Relying on the Purpose statute, the Department of the Army’s Office of the General Counsel reasoned that “O&M funds were the primary funding source supporting contingency or combat operations.”<sup>98</sup> Therefore, O&M funds were “the appropriate funding source for acquisition of materials and/or costs of erection of structures . . . that are clearly intended to meet a temporary operational requirement [during] combat or contingency operations.”<sup>99</sup> The memorandum sought to distinguish these contingency “acquisitions” from “military construction” by noting that “such structures may not be used for the purpose of satisfying the requirements of a permanent nature at the conclusion of combat or contingency operations.”<sup>100</sup>

While the memorandum did reinforce the fiscal rule that MILCON funds “shall be used in all other situations, including all construction . . . after the termination of military operations,” the *Reres* Doctrine resurrected COL Rosen’s alluring myth

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<sup>91</sup> *Id.*

<sup>92</sup> LOGCAP is an acronym for Logistics Civil Augmentation Program. U.S. DEP’T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) 7 (16 Dec. 1985) [hereinafter AR 700-137].

<sup>93</sup> See CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 138-42 (2004) [hereinafter CLAMO LESSONS LEARNED: HAITI].

<sup>94</sup> Rosen, *supra* note 7, at 2.

<sup>95</sup> E-mail from Lieutenant Colonel Roger Washington, Office of the Judge Advocate, U.S. Army Europe, to Matt Reres, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep’t of Army (July 29, 1999) (on file with CLAMO).

<sup>96</sup> CENTER FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 148-49 (13 Nov. 1998) [hereinafter CLAMO LESSONS LEARNED: BALKANS] (discussing language in the 1995 *Oplaw Handbook* that presaged the *Reres* Doctrine and implied an “operational exemption to fiscal law”); see also The Judge Advocate General’s Legal Center & School, TJAGSA Practice Note: *Contract Law Note (Funding Issues in Operational Settings)*, ARMY LAW., Oct. 1993, at 38 n.69 (citing a presentation by Army Deputy Counsel for Fiscal Law and Policy, Matt Reres, at the 1993 Government Contract Law Symposium held at The Judge Advocate General’s Legal Center & School on 12 Jan. 1993).

<sup>97</sup> *Reres* Memo, *supra* note 48.

<sup>98</sup> Major James M. Dorn, *Combat and Contingency Related Construction: “Upon this Point, a Page of History is Worth a Volume of Logic,”* ARMY LAW., Jan. 2005, at 178.

<sup>99</sup> *Reres* Memo, *supra* note 48.

<sup>100</sup> *Id.*

of presidential spending power.<sup>101</sup> The *Reres* Doctrine defined “construction supporting combat operations” as different from “construction” generally, and purported to authorize the use of O&M funds for combat and contingency construction. This legerdemain allowed commanders to divert funds from the purpose for which Congress originally appropriated them (O&M) to another purpose for which Congress had specifically appropriated elsewhere (MILCON). Whereas the MCCA requires the use of MILCON funds for all but the smallest projects costing under \$750,000, the *Reres* Doctrine transmogrified O&M dollars into any amount of MILCON funds necessary to accomplish the mission. In its broad effect, therefore, the *Reres* Doctrine eliminated congressional limitations as to both purpose and amount.

### **The Department of Defense Buys a Transmogrifier Too**

Three years after the initial *Reres* memo and while the U.S. military was conducting Operation Enduring Freedom in Afghanistan and staging forces for Operation Iraqi Freedom, the DOD General Counsel recognized the usefulness of the Army policy and endorsed the DA position.<sup>102</sup> In February 2003, the Undersecretary of Defense, with the concurrence of the DOD General Counsel, authorized using O&M funds for construction under “narrowly limited conditions.”<sup>103</sup>

Specifically, operations and maintenance appropriations may be obligated and expended for construction *if*:

- There is a properly documented determination that the construction is necessary to meet an urgent military operational requirement of a temporary nature, while U.S. Forces are participating in armed conflict or contingency operations . . . ;
- The construction will not be carried out at a military installation, as defined under 10 U.S.C. § 2801, or at a location where the U.S. is reasonably expected to have a long-term interest or presence; and
- The United States has no intention to use the construction after the operational requirement has been satisfied and the nature of the construction is the minimum necessary to meet the temporary operational need.<sup>104</sup>

Thus, as in the *Reres* memo, the DOD granted commanders authority to use O&M funds for combat and contingency construction, regardless of whether the total cost of the project exceeded the statutory O&M threshold.

### **Operation Iraqi Freedom**

The timely DOD adoption of the *Reres* Doctrine was a critical factor in the successful build-up for Operation Iraqi Freedom where military operations required the completion of thousands of construction projects in Kuwait and Iraq. Many projects executed by small units fit easily beneath the \$750,000 threshold because the construction was rudimentary and the majority of the projects’ costs were classified as unfunded. For example, under the regulatory accounting definitions, the cost of military labor incurred to create berms around field camps qualifies as an unfunded cost, while the cost of fuel and repair parts for the earthmovers count as funded costs.<sup>105</sup> Army engineers, constructed dozens of base camps and Logistical Support Areas (LSAs), hundreds of helipads, C-130 airstrips, and unmanned aerial vehicle landing strips, and improved hundreds of kilometers of roads and pipelines.<sup>106</sup> On occasion, these projects exceeded the basic \$750,000 threshold for O&M funding, and, just as often, the expanded \$1.5 million life, health, or safety threshold as well. For example, “during its planning for the invasion of Iraq, the I Marine Expeditionary Force (I MEF) identified a need for more bridging assets to cross the numerous rivers along its attack route through the eastern regions of Iraq.”<sup>107</sup> To accomplish the mission, I MEF

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<sup>101</sup> See Rosen, *supra* note 7, at 13.

<sup>102</sup> Memorandum, Under Secretary of Defense (Comptroller), to Assistant Secretary of the Army (Financial Management & Comptroller) et al., subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) (on file with author).

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

<sup>104</sup> *Id.*

<sup>105</sup> Recall that funded costs count against the statutory threshold whereas unfunded costs do not. AR 420-10, *supra* note 52, at 16-17. Since the troops are paid whether building berms or conducting training, the cost of military labor is a sunk cost, and counts as unfunded. Fuel and repair parts, on the other hand, would not have been expended, “but for” the construction of the berms, and are therefore funded costs charged against the project. *Id.*

<sup>106</sup> Colonel Gregg F. Martin & Captain David E. Johnson, *Victory Sappers, V Corps Engineers in Operation Iraqi Freedom, Part I: The Attack to Baghdad and Beyond* . . . , ENG’R, July-Sept. 2003, at 5.

<sup>107</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 149.

wanted to purchase pre-fabricated bridges that cost several million dollars each, well over the statutory O&M threshold. The Marine SJA and Comptroller relied upon the DA and the DOD memos to recommend the use of O&M funds as a “legally defensible alternative course of action.”<sup>108</sup>

### The Global War on Terror

To fight the GWOT, the military has established many forward operating bases throughout Eastern Europe, the former Soviet Republics, and the Horn of Africa.<sup>109</sup> Using the *Reres* Doctrine, the U.S. spent nearly \$4 million to improve the infrastructure of an airbase in Romania, including a \$900,000 fence to secure the airfield as a staging area for OIF.<sup>110</sup> Given the necessity of striking quickly in the GWOT, the DOD could not have waited for the completion of an entire appropriations cycle before making the deployments.<sup>111</sup> Furthermore, the DOD simply could not anticipate its actual requirements at any single location in advance. The utility of any particular forward base depended on the support of allied nations, the enemy’s reaction, and our own success in accomplishing the mission. Since the end of the Cold War, the uncertain security environment has prevented the DOD from relying solely on annual MILCON appropriations to project U.S. forces. The unresponsiveness of the multi-year budgeting and appropriations process has practically forced a reliance upon the more flexible and forgiving gadgetry of the *Reres* Doctrine.

### Congress Rejects the *Reres* Doctrine and Dismantles the Transmogripher

For more than a decade, from Desert Shield through the opening stages of Operation Iraqi Freedom, the *Reres* Doctrine allowed commanders to unilaterally redefine “military construction” to effectively exclude contingency and combat construction from the statutory definition provided by Congress. As in the Fort Lee fiasco, Congress eventually responded to this military disregard of fiscal controls by reasserting its power of the purse and dismantling the O&M transmogrifier. In April 2003, only two months after the DOD adopted the *Reres* Doctrine, Congress passed the FY 2003 Emergency Wartime Supplemental Appropriations Act.<sup>112</sup> “Unfortunately for DOD, buried in the Act’s conference report was harsh language stating the conferee’s legal objections to the [*Reres* Doctrine]. The Conference Report had the practical effect of invalidating the [*Reres* Doctrine].”<sup>113</sup> Significantly, Congress amended the MCCA definition of “military installations” to include:

not only buildings, structures, and other improvements to real property under the *operational* control of the Secretary of a military department or the Secretary of Defense, but also any building, structure, or other improvement to real property to be used by the Armed Forces, *regardless of whether such use is anticipated to be temporary or of longer duration.*<sup>114</sup>

By amending the statutory definitions to include even temporary requirements built at installations that are under only the operational control of the military, Congress stripped the gears that drove the transmogrifier.

In explaining their decision, congressional appropriators complained that “approximately \$750 million appropriated to operation and maintenance accounts has been obligated for construction activities supporting the global war on terrorism and operations in Iraq. Funds for these projects have been expended without providing notice to Congress despite repeated

<sup>108</sup> I Marine Expeditionary Force ultimately chose a different course of action, and acquired the bridges with procurement dollars. *Id.* at 150.

<sup>109</sup> Peter Slevin, *U.S. May Set Up Bases in Former Soviet Republics*, WASH. POST, Jan. 27, 2004, at A16.

<sup>110</sup> Josh White, *Romania Lobbies to Host U.S. Military Base*, WASH. POST, Oct. 12, 2004, at A24.

<sup>111</sup> The appropriations process is a long, tortuous affair. See Munns, *supra* note 46, at 19-21 (detailing the lengthy legislative process behind how a bill becomes a law). To meet the annual military construction appropriations cycle for FY 2002, the DOD submitted its budget request on 27 June 2001. CONG. RES. SERV., APPROPRIATIONS FOR FY 2002: MILITARY CONSTRUCTION ii (2002). Because of the 11 September attacks, Congress began serious consideration of the request on 20 Sept. 2001, and passed the appropriations act on 18 Oct. 2001. *Id.* at 4. The President signed the FY 2002 Military Construction Appropriations Act on 5 Nov. 2001. *Id.* Meanwhile, the United States had begun military operations in Afghanistan on 7 Oct. 2001. CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 11. The next annual appropriations cycle did not begin until June 2002, and the FY 2003 Military Construction Appropriations Act did not become law until 23 Oct. 2002. Pub. L. No. 107-249, 116 Stat. 1578, 1578 (2005).

<sup>112</sup> Pub. L. No. 108-11, § 1901, 117 Stat. 559, 587 (2003) [hereinafter FY 2003 Emergency Supplemental].

<sup>113</sup> Dorn, *supra* note 98, at 178.

<sup>114</sup> FY 2003 Emergency Supplemental, Pub. L. No. 108-11, § 1901(d), 117 Stat. 559, 587 (2003) (emphasis added). The National Defense Authorization Act for Fiscal Year 2004 codified this amended definition, and also re-defined “military construction” as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, *whether to satisfy temporary or permanent requirements.*” Pub. L. No. 108-136, § 2808(c)(1), 117 Stat. 1392, 1723 (2003) [hereinafter FY 2004 National Defense Act] (emphasis added).

requests for information . . . and as required by law.”<sup>115</sup> Congress observed that the DOD had circumvented “the statutorily mandated military construction process” and “created a class of construction activities for which it deemed operation and maintenance funds could be expended.”<sup>116</sup> “[W]ithout benefit of legal authority or regulation, the statutory definition of ‘military construction’ was obviated for certain types of construction projects.”<sup>117</sup> Congress went on to reject the DOD’s argument that “long-standing practice [enabled] it to utilize this legal construct under certain circumstances despite its effect of vitiating and/or amending the underlying statute.”<sup>118</sup> Specifically, Congress denied the DOD the authority to issue a policy that “turns an alleged practice into de facto law.”<sup>119</sup> As in the Fort Lee fiasco, this harsh language should serve as an unmistakable warning to JA to strictly adhere to fiscal controls on military construction funding. Meanwhile, the demise of the *Reres* Doctrine right in the middle of OIF operations cast the entire fiscal rationale for combat and contingency construction in doubt, and left operational lawyers scrambling for new solutions.

### **Permissible O&M Funding: The Same Old Rules and a Temporary New One**

As a result of the congressional rejection of the *Reres* doctrine, military construction projects may now use O&M funds in only two situations.<sup>120</sup> First, under 10 U.S.C. § 2805(c), O&M funds can still be used for projects that cost less than \$750,000 or less than \$1.5 million for projects that correct threats to life, health, or safety.<sup>121</sup> Second, while specifically rejecting the *Reres* Doctrine, Congress did recognize the military’s untenable position. The FY 2004 Emergency Supplemental therefore provided the Secretary of Defense with a new Temporary Authority to use O&M funds for combat or contingency construction projects outside the United States, subject to certification of certain requirements and notification to Congress.<sup>122</sup> The amount for this Temporary O&M Authority was initially set at \$150 million,<sup>123</sup> and was later raised to \$200 million.<sup>124</sup> The \$200 million cap provided by the Temporary O&M Authority may be exceeded, if the Secretary of Defense determines the project vital to national security.<sup>125</sup> In FY 2005, Congress continued the Temporary O&M Authority at the same funding level, but made the use of O&M funds contingent on the submission of quarterly reports by the Secretary of Defense (SECDEF).<sup>126</sup>

To use the Temporary O&M Authority, the SECDEF must certify the following:

- (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. [§] 1621), or a contingency operation.
- (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence.
- (3) The United States has no intention of using the construction after the operational requirements have been satisfied.

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<sup>115</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>116</sup> *Id.*

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

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> The temporary authority provided by [§ 1301 of the FY 2004 Emergency Supplemental] and the limited authority provided by [10 U.S.C. § 2805(c)] to use appropriated funds available for operation and maintenance to carry out a construction project are the only authorities available to use appropriated funds available for operation and maintenance to carry out construction projects.

FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301(e), 117 Stat. 1209, 1221 (2003).

<sup>121</sup> 10 U.S.C.S. § 2805(c) (LEXIS 2005).

<sup>122</sup> FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301, 117 Stat. 1209, 1221 (2003). This article refers to this authority as the Temporary O&M Authority throughout.

<sup>123</sup> *Id.* § 1301(b).

<sup>124</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(c)(1), 117 Stat. 1392, 1723 (2003).

<sup>125</sup> *Id.* § 2808(c)(2).

<sup>126</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2103 (2004).

(4) The level of construction is the minimum necessary to meet the temporary operational requirements.<sup>127</sup>

Furthermore, the SECDEF must notify Congress within seven days of obligating the O&M funds, and describe the purpose and estimated cost of the project.<sup>128</sup> Finally, the SECDEF must also provide a quarterly roll-up of the status of all such expenditures.<sup>129</sup>

When examining the military's justification for seeking relief in the *Reres* Doctrine from the inflexibility of the annual MILCON funding process, Congress candidly admitted that "the statutorily-mandated military construction process is cumbersome and can be slow. Another complication is the lack of a dedicated source of funding for contingency construction needs."<sup>130</sup> Congress also frankly acknowledged that "these problems impede timely response to urgent requirements of armed conflict."<sup>131</sup> Nevertheless, Congress also asserted that a return to the strict statutory framework would not "hamstring the commanders in the field who need to execute projects quickly and efficiently."<sup>132</sup> At first, however, the DOD's implementation of the Temporary O&M Authority firmly contradicted that assertion. The DOD did not even issue implementing guidance until more than ten months later.<sup>133</sup> Furthermore, the DOD imposed bureaucratic procedures that required approval by the Joint Staff, DA, and the DOD before combat or contingency construction could begin.<sup>134</sup> Far from adequately replacing the *Reres* Doctrine, DOD's implementation of Congress's rather generous grant of Temporary O&M Authority was initially burdensome, time-consuming, and unresponsive to tactical requirements. Operational lawyers therefore continued to search the U.S. code for other fiscal authorities that might provide other sources of funding for combat and contingency construction.

### Other Available Authorities During a National Emergency

On 14 September 2001, President Bush declared that "a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States."<sup>135</sup> The events of 11 September 2001, and the subsequent GWOT, activated latent authorities that exist in the MCCA. These statutory authorities permit reprogramming MILCON funds to address urgent requirements during national emergencies. Unfortunately, they also carry their own problems, and commanders have not widely used them.

### Emergency Construction (10 U.S.C. § 2803)

Under this statutory authority, the SECDEF and the Service Secretaries may undertake a "military construction project not otherwise authorized by law if the Secretary determines (1) that the project is vital to the national security . . . , and (2) that the requirement for the project is so urgent that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security."<sup>136</sup> The Secretary must first notify Congress of the decision by providing a report that justifies the project and estimates its cost, and then the DOD must wait at least twenty-one days before beginning construction.<sup>137</sup> The main disadvantage to the Emergency Construction Authority is that § 2803 merely provides authorization to spend funds, and not an actual appropriation.<sup>138</sup> "[F]unds to finance the authorization must be

<sup>127</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(a), 117 Stat. at 1391, 1723.

<sup>128</sup> *Id.* § 2808(b).

<sup>129</sup> *Id.* § 2808(d); FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810(2), 118 Stat. at 2128.

<sup>130</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Memorandum, Deputy Secretary of Defense, to Secretary of the Army et al., subject: Use of Operation and Maintenance Appropriations for Construction During Fiscal Year 2004 (1 Apr. 2004) [hereinafter Temporary O&M Authority] (on file with the author).

<sup>134</sup> *Id.*

<sup>135</sup> Proclamation No. 7,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (declaring a "State of National Emergency by Reason of Certain Terrorist Attacks").

<sup>136</sup> 10 U.S.C.S. § 2803(a) (LEXIS 2005). Procedures for requesting this authority can be found in chapter 5 and Appendix C of AR 415-15, *supra* note 54, and U.S. DEP'T OF DEFENSE, DIR. 4270.36, DOD EMERGENCY, CONTINGENCY, AND OTHER UNPROGRAMED [sic] CONSTRUCTION PROJECTS (17 May 1997) [hereinafter DOD DIR. 4270.36].

<sup>137</sup> The authority is limited to \$45 million in any fiscal year. Only a seven-day wait is required if notification is made electronically. 10 U.S.C.S. § 2803(a) and (b).

reprogrammed (with congressional approval) from unobligated MILCON funds . . . , [and] Congress would be reluctant to approve cancellation of a required project to fund an emergency construction project unless there were a truly dire need.”<sup>139</sup> Given these limitations and an aversion to robbing Peter’s congressional district in order to pay Paul for contingency construction somewhere else, the military rarely invokes the Emergency Construction authority.

In 2004, however, the Army did propose reprogramming \$19.5 million in MILCON funds for emergency construction of temporary facilities for the units of action (UAs) organized at Fort Stewart, Georgia.<sup>140</sup> The request, however, did nothing to enhance the Army’s credibility with Congress. After all, Congress granted § 2803 authority to the DOD to provide “flexibility in dire situations. A true emergency project should be confined to facilities without which a critical weapons system or mission could not function.”<sup>141</sup> Since the Army has been planning the transformation to UAs for several years, failure to anticipate the military construction requirements was not a very confidence-inspiring rationale. Office space and barracks do not seem to be in the same league as facilities necessary for a critical weapons system. Congress did not object, but undoubtedly, the request raised familiar suspicions in Congress that the Army was sandbagging its budget requests.

### Contingency Construction (10 U.S.C. § 2804)<sup>142</sup>

When funds are specifically appropriated, the MCCA also allows the SECDEF and Service Secretaries to undertake “military construction project[s] not otherwise authorized by law if the SECDEF determines that deferral of the project for inclusion in the next Military Construction Authorization Act would be inconsistent with national security or national interest.”<sup>143</sup> The SECDEF must first notify Congress of the decision by providing a report that justifies the project and estimates its cost. The DOD must then wait at least twenty-one days before commencing the military construction project.<sup>144</sup> When Congress voided the *Reres* Doctrine, the accompanying Conference Report clearly indicated that 10 U.S.C. § 2804 should be the primary authority for contingency construction that exceeds the statutory thresholds for the use of O&M funds.<sup>145</sup> In fact, the FY 2003 Emergency Supplemental authorized the SECDEF to transfer \$150 million of O&M funds to this statutory authority for combat and contingency construction. Contrary to its own declared preference, however, Congress has not fully funded 10 U.S.C. § 2804 in subsequent years.<sup>146</sup> The FY 2005 National Defense Act only provides \$10 million for contingency construction under 10 U.S.C. § 2804.<sup>147</sup> Instead, Congress simply extended the separate Temporary O&M Authority from FY 2004 through FY 2005.<sup>148</sup>

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<sup>138</sup> “The use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or canceling other military construction projects.” S. REP. NO. 97-474, at 14 (1982).

<sup>139</sup> AR 415-15, *supra* note 54, para. C-4.

<sup>140</sup> Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, U.S. Dep’t of Army, to Assistant Secretary of the Army (Installations & Environment), subject: Proper Source of Funding for Unit of Action Modular Building Complexes (10 Aug. 2004) (on file with the author).

<sup>141</sup> H.R. REP. NO. 99-275, at 23 (1985).

<sup>142</sup> Although the title of § 2804 is “Contingency Construction,” this authority is separate and distinct from the Temporary O&M authority provided in § 1301 of the FY 2004 Emergency Supplemental, Pub. L. No. 108-106, 117 Stat. 1209, 1221 (2003).

<sup>143</sup> Unlike the § 2803 Emergency Construction authority to re-program funds, the § 2804 Contingency Construction authority requires a dedicated appropriation. 10 U.S.C.S. § 2804(a) (LEXIS 2005). Procedures for requesting projects under the Contingency Construction authority are found in DOD DIR. 4270.36, *supra* note 136.

<sup>144</sup> 10 U.S.C.S. § 2804(b). Only a fourteen-day wait is required if notification is made electronically.

<sup>145</sup> H.R. CONF. REP. NO. 108-76, at 59 (2003).

<sup>146</sup> FY 2003 Emergency Supplemental, Pub. L. No. 108-11, 117 Stat. 559, 587 (2003). Contingencies are by definition unknown, and the Army finds it difficult to forecast requirements for unknown activities. In past years, the Army budget request has been so meager that Congress has not fully funded § 2404. For example, in FY 92, the Army used § 2404 to fund just one project. It did not use the authority at all between FY 93 and FY 95, and again funded a single project in FY 96. In FY 97, the Army requested \$9.5 million, but Congress only appropriated \$5 million. OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at I-145.

<sup>147</sup> FY 2005 National Defense Act, Pub. L. No. 108-375, § 2404(a)(5), 118 Stat. 1811, 2114 (2004).

<sup>148</sup> Compare FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808, 117 Stat. 1391, 1723 (2003), with FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2128 (2004) (striking out only the year and keeping all other statutory text the same).

## Construction Authority in a National Emergency (10 U.S.C. § 2808)<sup>149</sup>

Upon declaration of a national emergency, the SECDEF may undertake construction projects that are necessary to support the armed forces by reprogramming funds from unobligated MILCON funds, even if not otherwise authorized by law.<sup>150</sup> The SECDEF must notify Congress of the decision and the estimated cost of the emergency construction project.<sup>151</sup> Unlike 10 U.S.C. §§ 2803 and 2804, the DOD can commence construction immediately without waiting for a period of time to elapse after notifying Congress. On 16 November 2001, President Bush issued Executive Order 13,235 which specifically invoked 10 U.S.C. § 2808 in response to the terrorist attacks.<sup>152</sup> The only other time a president has invoked this authority was during the first Gulf War.<sup>153</sup> The SECDEF, however, has not made use of the available authority, and DA has not issued any specific guidance on procedures for undertaking military construction under this authority.<sup>154</sup> While possessing the virtue of greater responsiveness than the normal three-tier system of the MCCA, these chronically ignored and underfunded emergency statutory authorities ultimately do not solve commanders' combat and contingency construction problems.

### Military Solutions

Unless modified, the statutory framework for funding military construction will continue to be complicated, burdensome, and unresponsive.<sup>155</sup> In the past, when faced with chronic shortages in contingency construction funds, the Army resorted to the *Reres* Doctrine to accomplish the mission. Although the *Reres* Doctrine no longer exists, the military does have a few approaches still available for operational lawyers to consider, including down-scoping the project, using relocatable buildings, and placing a task order under LOGCAP. This section explores the advantages and limitations of each of these alternatives.

### Down-scope the Project

Commanders have a responsibility to use resources efficiently to complete the mission. When auditors examine military construction projects, they commonly find excessive costs that result from "gold-plated" requirements.<sup>156</sup> A critical analysis of mission requirements may permit down-scoping a project until its cost is below an applicable statutory threshold. The contracting team should therefore re-examine the proposed construction, and consider whether any component can be eliminated without jeopardizing the mission.<sup>157</sup> When considering whether to down-scope a project, however, the commander must guard against the twin dangers of project-splitting and mission failure. To avoid project-splitting, the commander must ensure that the project still results in "a complete and usable facility."<sup>158</sup> "Only truly unnecessary work

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<sup>149</sup> Congress created further confusion by placing the Temporary O&M authority at § 2808 of the FY 2004 National Defense Act, Pub. L. No. 108-136, 117 Stat. 1392, 1723 (2003). The Emergency Construction authority at 10 U.S.C. § 2808 is a separate and distinct authority with different restrictions with respect to source of funds, reporting requirements, and approval authorities. The Temporary Authority currently resides at § 2810 of the FY 2005 National Defense Act, Pub. L. No. 108-375, § 2810, 118 Stat. 1811, 2128 (2004).

<sup>150</sup> 10 U.S.C. § 2808 (LEXIS 2005).

<sup>151</sup> *Id.*

<sup>152</sup> Exec. Order No. 13,235, 66 Fed. Reg. 58,343 (Nov. 20, 2001) (invoking "National Emergency Construction Authority").

<sup>153</sup> Lieutenant Colonel Michael Benjamin et al., *Contract and Fiscal Law Developments of 2002—The Year in Review*, ARMY LAW., Jan.-Feb. 2003, at 157 (citing Exec. Order No. 12,734, 55 Fed. Reg. 48,099 (Nov. 14, 1990)).

<sup>154</sup> See AR 415-15, *supra* note 54, at app. D-2. The DOD, on the other hand, does have procedures for requesting this authority. DOD DIR. 4270.36, *supra* note 136. The Army has probably declined to issue specific guidance for the same reason it has avoided use of § 2803 reprogramming authority. Since members of Congress loathe shifting MILCON dollars from their districts, the Army can lobby instead for a supplemental appropriation.

<sup>155</sup> See, e.g., The Judge Advocate General, U.S. Army, After Action Report: Operation Desert Shield/ Operation Desert Storm III-B-2 (n.d.) ("[H]igh unprogrammed costs of the operation and the limited funding available raised a number of fiscal issues. With the need for facilities in theater and the limitations on construction . . . , the restrictions on expenditure of funds for construction did cause considerable difficulty; the normal MILCON budget process obviously took too long.") (on file with CLAMO).

<sup>156</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., ARMY SHOULD DO MORE TO CONTROL CONTRACT COSTS IN THE BALKANS, GAO-00-225, at 13-14 (2000) [hereinafter GAO REP.: CONTROLLING CONTRACT COSTS].

<sup>157</sup> See, e.g., DEPUTY CHIEF OF STAFF, ENGINEERS, U.S. ARMY EUROPE, BASECAMP FACILITY STANDARDS 22-24 (1999) (placing responsibility for reviewing construction proposals on a Joint Acquisition Review Board (JARB)); CLAMO LESSONS LEARNED: BALKANS, *supra* note 96, at 144 (establishing the judge advocate role as the legal adviser to the JARB); OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at III-53 (discussing the judge advocate's ability to advise the JARB on limiting the scope of proposed projects).

<sup>158</sup> Military Construction Codification Act, 10 U.S.C. § 2801(b) (LEXIS 2005).

[can] be deleted.”<sup>159</sup> Judge advocates need to be especially aware that down-scoping a project, if made with the idea in mind that the project can later be expanded, will almost certainly be considered illegal project-splitting.<sup>160</sup> At the other extreme, aggressive down-scoping can also jeopardize future mission success by constructing “a facility that lacks capacity for future growth, making it potentially inadequate in future years.”<sup>161</sup>

By prudently down-scoping a project, the commander may be able to adopt a less ambitious proposal that both successfully meets the O&M threshold and accomplishes the mission. For example, in Bosnia, the command originally planned to construct a thirty-stall wash rack to prepare vehicles for redeployment. Since the estimated \$2 million cost was well over the statutory O&M threshold, one acceptable proposal was to down-scope the project to a ten-stall wash rack costing less than \$300,000.<sup>162</sup> Other commonly identified excesses include unnecessary redundancies, such as back-up power for non-essential systems and comfort items like climate control, flooring, and personalizing the project to the unit.<sup>163</sup> Another successful down-scoping tactic is to swap funded costs for unfunded costs. Because only funded costs count toward the statutory thresholds, the use of military labor and excess supplies, for instance, can result in significant cost-savings.<sup>164</sup> If there is no way to down-scope the project while still maintaining a “complete and usable” facility, then the only legal solution is to use the Temporary O&M Authority or seek bona fide MILCON funds.

### Relocatable Buildings<sup>165</sup>

When analyzing a construction project, one option for the command to consider is whether the use of relocatable buildings will meet mission requirements.<sup>166</sup> Relocatable buildings are “designed to be readily moved, erected, disassembled, stored, and reused.”<sup>167</sup> Theoretically, almost any structure could be relocated brick-by-brick.<sup>168</sup> To prevent abuse, Army regulations had required that the set-up and teardown costs of a relocatable building amount to less than thirty percent of the total funded and unfunded cost.<sup>169</sup> As of October 2004, a new policy, however, has restricted the definition of relocatable buildings even further. According to the new Army policy, to qualify as a relocatable building, “the estimated funded and unfunded cost for average building disassembly, repackaging, (including normal repair and refurbishment of components),

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<sup>159</sup> If construction has already commenced, then the MACOM must approve the deletion of any unnecessary work. AR 415-15, *supra* note 54 at app. B-4(b)(3).

<sup>160</sup> Meadows, *supra* note 45, at 26.

<sup>161</sup> U.S. GOV'T ACCOUNTABILITY OFF., DEFENSE INFRASTRUCTURE: LONG-TERM CHALLENGES IN MANAGING THE MILITARY CONSTRUCTION PROGRAM, GAO-04-288, at 6 (2004) [hereinafter GAO REP.: DEFENSE INFRASTRUCTURE]. If the project is scaled back so far that it is no longer functional, either the mission will fail or subsequent attempts to add necessary functions will look suspiciously like illegal incrementation.

<sup>162</sup> OPERATION JOINT ENDEAVOR AAR, *supra* note 87, at III-243.

<sup>163</sup> “When Marine Corps forces replaced Army forces in Djibouti in December 2002 (to provide humanitarian assistance and fight the Global War on Terrorism), they also took over responsibility for funding LOGCAP services. Marine commanders immediately undertook a complete review of the statement of work,” and eliminated or reduced \$2.8 million in building and construction projects. GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 37. This anecdote is included not to compare the relative “standard of living” between services, but to show that a second set of eyes on a project can reduce waste; the Marines later added their own requirements which actually raised the final costs. *Id.* at 38 n.27.

<sup>164</sup> The U.S. Army saved \$5 million in labor costs in the construction of Camp Montieth, Kosovo, by using military labor rather than contractors. GAO REP.: CONTROLLING CONTRACT COSTS, *supra* note 156, at 11. In Bosnia, the command re-used gravel and plywood from other projects to lower the funded costs of projects. Interview by Major Steve Castlen with Colonel Denise Vowell, Staff Judge Advocate, 1st Armored Division, Charlottesville, Virginia (27 Jan. 1998) (on file with CLAMO).

<sup>165</sup> See Memorandum, Assistant Chief of Staff for Installation Management, U.S. Dep't of Army, to Director, Installation Management Agency et al., subject: Interim Army Policy for Relocatable Buildings (21 Oct. 2004) [hereinafter Army Interim Relocatable Building Policy] (providing the procedures to acquire relocatable buildings) (on file with the author). See Lieutenant Colonel Brian J. Godard, Relocatable Buildings—The Rules for Classifying and Funding Them (9 Mar. 2004) [hereinafter Godard Info Paper] (providing the fiscal rules applying to relocatable buildings) (information paper on file with the author).

<sup>166</sup> E-mail from Major Brian Brady, Command Judge Advocate, Army Central Command (ARCENT), to Major Tyler Randolph, The Judge Advocate General's Legal Center & School (12 Aug 1999) (on file with CLAMO) (“Here's an issue all JAGs need to be prepared to tackle: Relocatable Buildings . . . you [sic] may feel pressure to ok the purchase—know that this is a sensitive issue.”).

<sup>167</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(b)(1).

<sup>168</sup> For example, the famous London Bridge is now in Lake Havasu City, Nevada. In 1962, an American oil tycoon bought the 130-year old bridge for \$2.5 million, and spent another \$7 million dismantling it, shipping the pieces, and reassembling them. David Orkin, *The Complete Guide to the Monuments of America*, INDEPENDENT (London), Mar. 5, 2005, at 5.

<sup>169</sup> U.S. DEP'T OF ARMY, REG. 420-18, FACILITIES ENGINEERING MATERIALS, EQUIPMENT, AND RELOCATABLE BUILDING MANAGEMENT para. 5-2(c) (3 Jan. 1992). *But see* U.S. DEP'T OF DEFENSE, INSTR. 4165.56, RELOCATABLE BUILDINGS para. 4.1 (13 Apr. 1988) (establishing twenty per cent as the threshold) [hereinafter DOD INSTR. 4165.56]. The discrepancy between the AR and the DOD Dir. is inexplicable, and may be the basis for superseding Chapter 5 of AR 420-18 with the Army Interim Relocatable Building Policy, *supra* note 165.

and nonrecoverable building components, including typical foundations [may] not exceed 20 percent of the acquisition cost.”<sup>170</sup> Given this definition, relocatable buildings typically include such structures as mobile homes, trailers, or prefabricated, pre-assembled modular buildings.<sup>171</sup>

While procuring relocatable buildings may meet mission requirements quickly and at less cost, their use does not relieve the command of the constraints of fiscal law. Relocatable buildings may be used only when they “constitute the most practical or economical means of satisfying an interim facility requirement.”<sup>172</sup> The command should consider the use of relocatable buildings as only one *means* of satisfying a construction requirement, and not as an avenue of escape from restrictions on O&M funding. The command must still abide by the applicable monetary thresholds and obligate funds from the appropriate source. The appropriate funding source for relocatable buildings is determined by their expected duration of use.

Relocatable buildings may be used in one of two ways, either as a substitute for permanent construction or as an interim facility requirement. Relocatable buildings “can be used instead of conventional permanent construction, particularly overseas, when the requirement duration is unknown.”<sup>173</sup> When the relocatable building is a substitute for permanent construction, “the project will be programmed by using proper military construction procedures and totally funded from military construction appropriations.”<sup>174</sup> Therefore, just as in any other military construction project, the JA must properly scope the project by determining what constitutes the complete and usable facility, including all clearly interdependent components to arrive at the total funded cost.<sup>175</sup> The command must then follow the normal construction funding rules, and obligate MILCON funds if the total cost is above the statutory O&M threshold. The command can only use O&M funds if the total cost is less than the statutory O&M threshold or the command gains approval to use the new Temporary O&M Authority.

Similar rules apply when using relocatable buildings to meet an interim facility requirement, rather than as a substitute for permanent construction. A relocatable building may meet interim facility requirements where “military missions, deployments, military contingency operations, disaster relief,” or other unforeseen short-term situations are expected to last fewer than three years.<sup>176</sup> In these situations, the relocatable building cannot be used beyond the three-year limit, and must be removed unless an exception is granted.<sup>177</sup> When the relocatable building is intended to be used for fewer than three years, it qualifies as personal property, not real property, and an additional source of funds may be available. Since personal property is usually classified as an investment item, the relocatable building must normally be purchased with Other Procurement-Army (OPA) funds.<sup>178</sup> If the cost is less than \$250,000, however, then O&M funds should be used instead.<sup>179</sup>

Legitimate disagreements may arise in deciding whether to classify relocatable buildings as substitutes for permanent construction or as temporary facilities. Within weeks of 9/11, the United States began establishing a military base in Karshi Kharnabad (K2), Uzbekistan, to support the hunt for Osama Bin Laden.<sup>180</sup> The command proposed spending \$3 million to buy CONEX containers and trailers to position on foundations equipped with electricity and plumbing.<sup>181</sup> The operational lawyer for Combined Joint Task Force (CJTF)-180 thought that the relocatable buildings could be classified as personal

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<sup>170</sup> “If the estimated funded and unfunded costs . . . exceed 20 percent of the acquisition cost of the relocatable building, the building will be considered real property and will be approved [and] funded under the normal MILCON process.” Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(b)(2). Note that, unlike the calculation for a normal military construction project, both the funded and the unfunded costs are included—to include the military labor involved in setting up the relocatable building.

<sup>171</sup> U.S. DEP’T OF ARMY, PAM. 420-11, PROJECT DEFINITION AND WORK CLASSIFICATION 15 (7 Oct. 1994).

<sup>172</sup> DOD INSTR. 4165.56, *supra* note 169, para. 4.1.

<sup>173</sup> *Id.* para. 5.2.2.

<sup>174</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-5(a).

<sup>175</sup> See The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991).

<sup>176</sup> Army Interim Relocatable Building Policy, *supra* note 165, para. 5-2(a).

<sup>177</sup> The Assistant Secretary of the Army (Installations & Housing) can approve continued use where the relocatable building is being used in a contingency operation. The MACOM commander can approve continued use when a military construction project for a replacement facility has been authorized and appropriated for by Congress through the normal MILCON process. *Id.* para. 5-5(a).

<sup>178</sup> Commanders must coordinate acquisition through the Director, Installation Management Agency (IMA). *Id.* app 5-A.

<sup>179</sup> The investment/expense threshold can be found in the annual Defense Appropriation Act. See, e.g., FY 2005 Defense Appropriations Act, Pub. L. No. 108-287, § 8040, 118 Stat. 951, 979 (2004).

<sup>180</sup> Robert G. Kaiser, *U.S. Plants Footprint in Shaky Central Asia*, WASH. POST, Aug. 27, 2002, at A1.

<sup>181</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 165.

property and purchased with procurement funds because they were only for temporary use and could be moved if necessary.<sup>182</sup> In contrast, the operational lawyers for the Combined Forces Land Component Commander (CFLCC) concluded that the duration of use was more properly characterized as “undetermined,” rather than “temporary,” since the structures might in fact be used for more than three years.<sup>183</sup> Furthermore, the structures could not be “readily disassembled and moved.”<sup>184</sup> To qualify as a relocatable building, it is not enough that the structure be moveable. In this case, “the estimated funded and unfunded cost for average building disassembly, repackaging, (including normal repair and refurbishment of components), and nonrecoverable building components, including typical foundations” probably would have exceeded twenty percent of the acquisition cost.<sup>185</sup> The relocatable buildings, therefore, qualified as a substitute for permanent construction. As real property, the command either had to use MILCON funds or seek permission to use the Temporary O&M Authority.<sup>186</sup>

Given the limitations on the use of relocatable buildings, commanders at the lowest levels have not gained any real fiscal advantage. Most commanders do not have access to a large pot of uncommitted OPA funds, and they can already spend up to the statutory O&M threshold out of their own budget. Furthermore, the same fiscal rules that prohibit project-splitting in construction also apply to relocatable buildings.<sup>187</sup> The total funded cost is the cost of the complete system, and encompasses all of the components necessary to accomplish the mission.<sup>188</sup> Neither the components nor the requirements can be “fragmented to circumvent application of the expense/investment [threshold].”<sup>189</sup> Although relocatable buildings represent an excellent means of satisfying a construction requirement, the same fiscal laws apply to the acquisition of relocatable buildings. They are simply not a panacea for the problems of funding combat and contingency construction.

### LOGCAP: A Necessary Solution or the Next Congressional Target?

Another attractive option for meeting construction requirements is the use of LOGCAP.<sup>190</sup> Under an umbrella contract run by the U.S. Army Materiel Command (AMC), Halliburton Kellogg Brown & Root (KBR) will provide commanders with comprehensive logistics, engineering, and construction support during a deployment anywhere in the world on a cost-plus-award-fee basis.<sup>191</sup> Since December 2002, the military has contracted for more than \$12 billion in LOGCAP services in more than half a dozen countries, including \$5.6 billion in Iraq through May 2004.<sup>192</sup> “When LOGCAP is used in support of a mission, the operational commander becomes responsible for defining services to be provided by the contractor, integrating contractor personnel into the mission, and ensuring that funding is provided.”<sup>193</sup> In Somalia, Haiti, and the Balkans, “the contractor [was] paid from the operational command’s operations and maintenance appropriation account.”<sup>194</sup> The demise of the *Reres* Doctrine, however, has called that practice into question.

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* Robin Wright, *U.S. Evicted from Air Base in Uzbekistan*, WASH. POST, K JULY 30, 2005, AT A1.

<sup>185</sup> DOD DIR. 4165.56, *supra* note 169, para. 3.2.1.

<sup>186</sup> CLAMO LESSONS LEARNED: AFGHANISTAN AND IRAQ, *supra* note 33, at 165. The CFLCC’s legal opinion was correct in predicting that the construction would be for more than temporary use. K2 remains “a key transit and support point for operations in Afghanistan.” Associated Press, *U.S. Forces Digging in for the Long Haul, But Walking on Eggshells* (May 3, 2004), at <http://msnbc.msn.com/id/4898751> (last visited Aug. 22, 2005) (noting that the U.S. has subsequently built a \$5 million airfield, a \$1 million dining hall, a \$500,000 fitness center, and new barracks for 1750 personnel). On 30 July 2005, however, the government of Uzbekistan gave the United States 180 days to close the base. The eviction notice, no doubt, came in response to United States criticisms of Uzbekistan’s human right record.

<sup>187</sup> AR 415-32, *supra* note 53, at 12.

<sup>188</sup> Godard Info Paper, *supra* note 165, at n.19.

<sup>189</sup> “[I]f the requirement is to house 500 soldiers, one must consider the aggregate cost of the total number of relocatable buildings needed to house all 500 soldiers, because they constitute the system needed to satisfy the housing requirement.”

*Id.* Each relocatable building cannot be considered individually to be a “complete and usable facility.” *Id.*

<sup>190</sup> AR 700-137, *supra* note 92, at 1.

<sup>191</sup> LOGCAP Homepage, <http://www.amc.army.mil/logcap> (last visited Aug. 22, 2005). Under the LOGCAP III contract (DAAAA09-02-D-0007), the “general SOW [Statement of Work] provides for the award of task orders for construction. Paragraph 1.5 discusses the types of services that can be provided under LOGCAP and paragraph 1.5.3 specifically identifies construction and construction services.” ARMY FIELD SUPPORT COMMAND, AFSC LEGAL NEWSLETTER, Feb. 10, 2005, at 1 [hereinafter AFSC NEWSLETTER].

<sup>192</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 1.

<sup>193</sup> U.S. GOV’T ACCOUNTABILITY OFF., CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, GAO-97-63, at 2 (1997).

<sup>194</sup> *Id.*

Under the *Reres* Doctrine, construction performed by a LOGCAP contractor could be paid for with O&M funds where the construction was “clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations.”<sup>195</sup> Since LOGCAP was only available during wartime or contingency operations, and since the services required were always related to the Army’s operational mission, no fiscal issues arose. The LOGCAP contractor was tasked with a service, such as troop bed-down or mess support, and then built the facilities required to perform that service.<sup>196</sup> The LOGCAP contractor charged the cost of the facility as part of the contractor’s overhead, and title to the building passed to the Army.<sup>197</sup> Funneling construction through LOGCAP, therefore, allowed the Army to accomplish indirectly what fiscal laws prohibited it from doing directly. Until the demise of the *Reres* Doctrine, units in Iraq took full advantage of the LOGCAP loophole.

In July 2003, CFLCC extended the deployment of most U.S. forces in Iraq until February 2004.<sup>198</sup> To provide some comfort to the soldiers, CFLCC also ordered its subordinate commands to move soldiers out of tents and into adequate billeting.<sup>199</sup> To accomplish the mission, the 101st Airborne Division, based in Mosul, Iraq, considered three alternative courses of action.<sup>200</sup> First, the 101st could have used its organic engineer brigade to build its own housing by purchasing construction materials on the local market.<sup>201</sup> Although the troop labor constituted an unfunded cost, the estimated funded costs still amounted to nearly \$25 million for the complete and usable facilities, which included showers, power generation, and heating and air conditioning.<sup>202</sup> The 101st had to reject this course of action because fiscal law requires MILCON funds for a project of that size, and MILCON funds not available. Second, the 101st briefly considered dividing the entire housing requirement into thirty-three separate, smaller projects, each costing less than \$750,000.<sup>203</sup> All of the projects were then below the statutory threshold, and thus permitted O&M funding. The operational lawyers, however, quickly identified this course of action as a textbook case of project-splitting, and it too was summarily rejected.<sup>204</sup> Under the final course of action, which was ultimately selected, the Division obtained the housing under LOGCAP using O&M funds. In a fiscal law trifecta, the Division re-evaluated the mission to down-scope the project, used LOGCAP to contract for provide bed-down services, and then bought relocatable buildings to house the soldiers.<sup>205</sup> Unfortunately, the LOGCAP contract cost about \$65 million. That figure represented \$40 million more than the cost that the 101st estimated they would have incurred by building the camp themselves. Moreover, that did not even include another \$8 million in potential administrative costs and award fees.<sup>206</sup>

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<sup>195</sup> *Reres* Memo, *supra* note 48.

<sup>196</sup> In Haiti, for example,

the contract create[d] a generic apparatus for receiving, housing, and sustaining 20,000 troops in five base camps for 180 days. Within 15 days of notification (of an “event”), the contract requires Brown and Root to receive and support 1,300 troops per day. Within 30 days, Brown and Root is required to support 20,000 troops in one rear and four forward base camps for up to 180 days, with options to increase the size of the supported force to 50,000 troops and to extend support to 360 days. The contract provisions call for each base camp to provide billeting, mess halls, food preparation, potable water, sanitation, showers, laundry, transportation, utilities and other logistical support . . . [including] construction support, general logistics services, augmentation to engineer units, and facility engineer support.

CLAMO LESSONS LEARNED: HAITI, *supra* note 93, at 134-35 n.448.

<sup>197</sup> GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 52.245-5 (Government Property) (March 2005 [hereinafter FAR]).

<sup>198</sup> Vernon Loeb, *Pentagon Unveils Plan to Bolster Forces in Iraq: Year-Long Deployments for U.S. Troops to Be Revived for First Time Since 1985*, WASH. POST, July 24, 2003, at A8.

<sup>199</sup> Memorandum, Deputy Staff Judge Advocate, to Chief of Staff, Coalition Forces Land Component Command, subject: Legal Analysis of Funding Problems Surrounding the Concrete Masonry Unit Construction Project (13 June 2004) [hereinafter CMU Construction Project Memo] (on file with the author).

<sup>200</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 39.

<sup>201</sup> *Id.*

<sup>202</sup> Colonel Rich Whitaker, Staff Judge Advocate, 101st Airborne Division, U.S. Army, Operation Iraqi Freedom After Action Report 7 (n.d.) (report on file with CLAMO).

<sup>203</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 40.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* As it is now called, Camp Maerz is one of fourteen “enduring bases” in Iraq, and includes “satellite television and Internet cafes. The facility’s dining hall is the size of an airport hangar. The facility’s physical-fitness facility offers access to not only dozens of weight-training equipment, but also an aerobics room and a basketball court. As of mid-April 2004, a movie theater was scheduled to open.” GlobalSecurity.org, Mosul Airport, <http://www.globalsecurity.org/military/world/iraq/mosul-airbase.htm> (last visited Aug. 22, 2005).

<sup>206</sup> GAO REP.: LOGISTICS SUPPORT, *supra* note 69, at 40.

When this LOGCAP acquisition was approved in October 2003, the full implications of the congressional rejection of the *Reres* Doctrine had yet to be explored. Soon after, however, CFLCC had become uneasy about the “gray area” inhabited by LOGCAP construction and O&M funding.<sup>207</sup> By December 2004, its successor, the Multi-National Force- Iraq (MNF-I) had decided that there was no LOGCAP exception to buying construction services, especially when there were no services contemplated other than the construction itself.<sup>208</sup> Any other interpretation would allow LOGCAP to swallow MILCON funding rules entirely. The Army could order medical services and receive a hospital, no fiscal strings attached. Looking back at the Fort Lee fiasco, the Army could have had its airfield by simply ordering landing services. In light of Congress’s rejection of the *Reres* Doctrine, some clear lines must be drawn between permissible LOGCAP construction that is merely incidental to the services requested and more troublesome, if not illegal, subterfuge designed to avoid fiscal law altogether.

The Army Field Support Command has recently issued guidance that creates an analytical framework that JAs should use to determine whether LOGCAP can be legitimately used to obtain construction services with O&M funding.<sup>209</sup> Under this analysis, funds maintain their color even though they are paid to LOGCAP contractors.<sup>210</sup> The simplest case involves a statement of work or LOGCAP proposal that explicitly calls for construction.<sup>211</sup> In that case, all fiscal laws applying to military construction apply.<sup>212</sup> MILCON funds must be used, unless the project is small enough to fit under the statutory threshold for O&M funding or the Temporary O&M Authority is used.<sup>213</sup> If the Army requests medical services, and the contractor proposes building a hospital, normal construction funding rules should apply.

A more complex case occurs when, post-award, the command directs the contractor to engage in construction activities.

Here, performance with construction was not reasonably necessary, and the contractor did not propose construction, but after award, someone within the Government directed the contractor to engage in construction activities. This direction by the government to choose construction as a means for continued contract performance, rather than simply the contractor choosing construction as a means of performance, makes the activity a military construction project.<sup>214</sup>

For example, mess services are required, and the contractor proposes to meet the requirement by serving meals in the contractor’s own tents. If it is reasonably foreseeable that construction of more substantial facilities will eventually be necessary, then the command should not accept the proposal just to skirt fiscal constraints. Under those facts, having a complete and usable facility would require construction, not merely services. If the mission’s anticipated duration is short, on the other hand, then the proposal might be acceptable. If the deployment is later extended and the tents no longer satisfactorily meet the mission requirements, then a new proposal to build a dining hall must be funded through normal construction funding channels.

Under this AFSC analysis, the only time O&M funds could be used to pay a LOGCAP contract in excess of the statutory threshold is when the command’s “stated need was only for services, and not construction . . . . The choice by the contractor to engage in construction activities was not foreseeable at the time of award, not necessary for performance, and not unduly influenced by the [command].” In these cases, the command “is not purchasing construction, nor engaged in a military construction project, and the rules relating to construction funding do not apply.”<sup>215</sup> For example, the command could require power, and the contractor could propose to meet the requirement with its own electrical generators. Because of climatic

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<sup>207</sup> Interview with Major Frank March, former Chief of Administrative and Contract Law for CFLCC, at The Judge Advocate General’s Legal Center & School, Charlottesville, Virginia (10 Mar. 2005) [hereinafter Interview with Major Frank March]; see also Center for Law & Military Operations, The Judge Advocate General’s Legal Center & School, U.S. Army, Notes from III Corps Pre-deployment Conference 7 (14 Nov. 2003) (“LOGCAP. Everything they build becomes ours. If they construct something for us, it’s not simply a ‘service’—it will be reported against construction.”).

<sup>208</sup> Interview with Major Frank March, *supra* note 207.

<sup>209</sup> AFSC NEWSLETTER, *supra* note 191, at 1.

<sup>210</sup> “[T]ask orders placed under LOGCAP require the same fiscal law analysis that would be performed if the requirement were placed on any other Army contract.” *Id.*

<sup>211</sup> In response to the command’s requirements documented in the Statement of Work (SOW), the LOGCAP contractor develops and submits a proposed Rough Order of Magnitude (ROM) cost estimate or Technical Execution Plan (TEP) for approval. U.S. ARMY MATERIEL COMMAND, AMC PAM. 700-30, LOGISTICS CIVIL AUGMENTATION PROGRAM (LOGCAP) 19 (2000). Under this analysis, if the contractor proposes to meet the SOW’s requirements by charging the command for a construction project, then the purpose of those funds is construction, and MILCON funding rules must be followed.

<sup>212</sup> AFSC NEWSLETTER, *supra* note 191, at 1.

<sup>213</sup> FY 2004 Emergency Supplemental, Pub. L. No. 108-106, § 1301(e), 117 Stat. 1209, 1221 (2003).

<sup>214</sup> David Defrieze, Army Field Support Command, LOGCAP Construction (n.d.) (information paper on file with author).

<sup>215</sup> *Id.*

conditions, the contractor later decides to build structures to protect the valuable generators. When the task order is closed out, the overhead costs of the structure might be permitted as allowable costs and paid with O&M funds as an equitable adjustment.<sup>216</sup> The risk to the contractor, however, is that the costs will be disallowed, and that determination will rest upon whether the need for the structure was foreseeable.

### Legislative Solutions

Until Congress provides a responsive military construction process, commanders will continue to chafe at the conflicting responsibilities of completing the mission and complying with fiscal law. Faced with this dilemma, it is small wonder that legal fictions such as the *Reres* Doctrine and the LOGCAP dodge continue to arise. Commanders will continue to test the legal limits of creative scoping, relocatable buildings, and LOGCAP. The 101st Airborne Division's LOGCAP acquisition of relocatable buildings demonstrates that the unresponsiveness of the construction funding process imposes tens of millions of dollars in unnecessary costs. As the Fort Lee fiasco demonstrates, everybody loses whenever military officers compromise their respect for the law for the sake of the mission. The current statutory framework could provide an adequate foundation for authorizing construction necessary for military operations in support of the GWOT, if some improvements were made. By making the following changes, Congress could streamline the process and provide full funding for combat and contingency construction.

First, Congress and the Executive branch should cut down on the confusion by finally agreeing on the appropriate statutory source for contingency construction funding. Either 10 U.S.C. § 2804 Contingency Construction should be fully funded as the primary O&M construction authority (as the FY 2003 Supplemental champions) or Congress should make the Temporary O&M Authority, in fact, permanent. At this stage, the latter course is probably easier because the DOD procedures are now in place.<sup>217</sup> Although the implementing guidelines for the Temporary O&M Authority were slow in developing, a system is now in place that permits truly urgent construction requirements to receive approval in days rather than months.<sup>218</sup> In fact, the streamlined process resulted in total projects quickly reaching the \$200 million cap set by the FY 2005 National Defense Act, so the primary limiting factor now is not time, but money.<sup>219</sup> To address that issue, the Secretary of Defense already has the authority to exceed the \$200 million cap if the project were truly vital to national security.<sup>220</sup>

Second, regardless of the course it takes, Congress should also streamline the authority by adopting shorter waiting periods. Under 10 U.S.C. § 2803, construction can begin seven days after electronic notification, rather than the fourteen days required by 10 U.S.C. § 2804. An extra week can make a huge difference to a commander on the ground. Better still, Congress should dispense with prior notification altogether. A good model would be 10 U.S.C. § 2808 which only requires a follow-on report. Congress still maintains adequate oversight because the appropriation itself is limited and Congress can scrutinize the follow-on report for abuses. To quote Professor Trimble again, "hardly any important executive branch decision is taken without considering the reaction in Congress."<sup>221</sup>

Third, Congress should increase the statutory thresholds that limit O&M construction, and index these costs annually.<sup>222</sup> Though not enacted, early versions of the FY 2005 National Defense Act increased the UMMC thresholds to \$2.5 million normally and to \$4 million to correct a deficiency that threatens life, health, or safety.<sup>223</sup> Such an increase would solve many problems with respect to proposed projects in the UMMC range. To make a real impact, however, Congress would also have to significantly raise the overall UMMC appropriation above the current \$20 million.<sup>224</sup>

<sup>216</sup> FAR, *supra* note 197, subpt. 52.243-4.

<sup>217</sup> Temporary O&M Authority, *supra* note 133.

<sup>218</sup> Discussions by the author with fiscal lawyers from the field at the Contract & Fiscal Law Symposium held at The Judge Advocate General's Legal Center & School (7-10 Dec. 2004) yielded mixed assessments of the Temporary O&M Authority and DOD's procedures. At first, the bureaucratic hurdles seemed insurmountable, but gradually the approval period has been reduced to less than a week for critical missions. Operational lawyers at the lowest echelons generally had a less optimistic viewpoint than those at higher levels.

<sup>219</sup> CMU Construction Project Memo, *supra* note 199.

<sup>220</sup> FY 2004 National Defense Act, Pub. L. No. 108-136, § 2808(c)(2), 117 Stat. 1391, 1723 (2003).

<sup>221</sup> Trimble, *supra* note 28, at 751.

<sup>222</sup> "Construction costs have increased 41 percent since the existing \$1.5 million threshold for using unspecified minor military construction funds and 7 percent since the existing \$750,000 threshold for using [O&M] funds were last adjusted . . . . As a result, fewer projects that are smaller in scope can now be completed." GAO REP.: DEFENSE INFRASTRUCTURE, *supra* note 161, at 7.

<sup>223</sup> H.R. 4200 EH, 108th Cong., § 2801, at 589 (2004).

<sup>224</sup> If the threshold were increased, thirty fewer projects would require congressional approval through the traditional, multiyear process, but "the number of projects eligible for funding would still be contingent upon the total amount of military construction funds appropriated by Congress . . . regardless of the

Even if Congress did raise the UMMC threshold, the Department of the Army would still have to centrally manage UMMC funds to ensure the overall UMMC appropriation was not exceeded. It would be more helpful to commanders in the field if Congress raised the statutory O&M threshold so that local commanders could meet local needs out of their own budgets. Congress could continue setting the statutory O&M threshold at fifty percent of the upper UMMC threshold.<sup>225</sup> An even more ambitious solution, however, would simultaneously raise the UMMC threshold *and* set the O&M statutory threshold at the same level, transforming the three-tier MILCON funding system into a much simpler two-tier system.<sup>226</sup> Effective oversight could be maintained by requiring Secretary of the Army approval and congressional notification.<sup>227</sup> Fearing another Fort Lee fiasco, Congress may be reluctant to take that course of action. “No system of control, [however,] can eliminate every ill-chosen project. Division and Brigade Commanders will demonstrate-- as they have done time and time again-- the optimal system is one that encourages their initiative and relies on their judgment.”<sup>228</sup>

## Conclusion

The GWOT has greatly stressed the traditional legal framework for military construction funding. The system remains cumbersome, restrictive, and often non-responsive. Commanders in the field, faced with new missions in undeveloped theaters of action, are demanding facilities for operations, force protection, and logistical support. Under its constitutional prerogative, however, Congress has repeatedly expressed its displeasure with the military whenever it has arrogated to itself the power to fund operations in a manner other than that clearly provided for by law. In the midst of this constitutional tension, operational lawyers are delicately positioned, tasked to support commanders in the field while ensuring respect for the law promulgated by civilian authority.

The impasse may tempt JAs to find dubious legal support for O&M funding of military construction by abusing scoping, relocatable buildings, and LOGCAP. Until Congress adopts new legislation, however, fiscal law provides an O&M solution in only two instances: (1) Projects costing under the statutory O&M threshold; and (2) Projects authorized to use of the Temporary O&M Authority recently provided by Congress. Although Congress could certainly do more to streamline these authorities and to make them permanent, the Army must also carry out its responsibility to protect the public fisc. Congress has appropriated over \$165 billion thus far to fight the GWOT.<sup>229</sup> As the theaters of operations mature, Congress will undoubtedly become even more keenly interested in knowing exactly how that treasure is spent. Judge advocates must always remind themselves and their commanders that fiscal laws apply even during combat and contingency operations, and there is no such thing as a “good intentions” defense to a violation of fiscal law.<sup>230</sup>

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threshold being increased.” GAO REP.: DEFENSE INFRASTRUCTURE, *supra* note 161, at 31. Currently, the Army can fund almost seven \$3 million projects. If the UMMC threshold were raised, but the overall appropriation was not, the Army could fund at most five \$4 million projects.

<sup>225</sup> H.R. 4200 EH, 108th Cong., § 2801, at 589.

<sup>226</sup> A commander could then have the flexibility to spend up to \$4 million in O&M funds, but must receive Secretary of the Army approval and notify Congress if the project exceeded \$1.25 million. *See* 10 U.S.C.S. § 2805 (LEXIS 2005).

<sup>227</sup> The House version of the FY 2005 National Defense Act would have (1) raised the O&M threshold to \$1.5 million, but (2) required Secretary of the Army approval and congressional notification if the project were above \$1 million. H.R. REP. NO. 108-491, § 2801, at 411 (2004). Under this simplified proposal, both the O&M and UMMC thresholds would be the same, and both would require DA approval and congressional notification.

<sup>228</sup> Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 19-20.

<sup>229</sup> U.S. GOV’T ACCOUNTABILITY OFF., FISCAL YEAR 2004 COSTS FOR THE GLOBAL WAR ON TERROR WILL EXCEED SUPPLEMENTAL, REQUIRING DOD TO SHIFT FUNDS FROM OTHER USES, GAO-04-915, at 9 (2004). In February 2005, the President requested an additional \$75 billion in supplemental appropriations to fight the Global War on Terror. Jonathan Weisman, *President Requests More War Funding: Money for Iraqi Forces Rises Sharply*, WASH. POST, Feb. 15, 2005, at A4.

<sup>230</sup> Clark, *supra* note 33, at 509.

## The Use of Article III Case Law in Military Jurisprudence

H. F. “Sparky” Gierke<sup>1</sup>

### Overview:

#### A Three-Part Framework for Applying Article III Case Law to the Military Justice System

This article concerns the application of Article III<sup>2</sup> case law in the military justice system, with a focus on three issues. First, how does the military justice system treat federal case law construing a statute when the identical statute is at issue in a military case? Second, how does the military justice system treat federal case law construing a statute or rule when a similar statute or rule is at issue in a military case? Third, how does the military justice system treat federal case law dealing with constitutional rights?

#### Part I: Applying Article III Case Law When Construing the Same Statute

How does the military justice system apply the case law of an Article III court that has previously construed the same statute at issue in a military case? Part of the answer to this question is easy, but part is more difficult. There is a sharp distinction between the way military courts apply Supreme Court precedent and the way they apply precedent from other Article III courts. While Supreme Court opinions construing statutes are binding, other Article III case law is considered merely persuasive authority.

#### *Supreme Court Precedent*

First, the easy part. When the United States Supreme Court has construed a statute, military courts are bound by that construction. Under the doctrine of stare decisis, that precedent is uncontroversial. For example, in *United States v. Schuler*,<sup>3</sup> the Court of Appeals for the Armed Forces (CAAF) had to determine the consequences of a change to a punitive article in the Uniform Code of Military Justice (UCMJ). Before 1996, carnal knowledge, Article 120, was a strict liability offense in the military.<sup>4</sup> No matter how honest and reasonable a belief might have been that the victim was at least sixteen years old, a mistake of fact concerning the victim’s age was not a defense.<sup>5</sup> That changed in 1996 when Congress amended Article 120 to provide that as long as the victim was at least twelve, a reasonable belief that the victim was sixteen or older would constitute a defense.<sup>6</sup> Schuler was convicted in 1994.<sup>7</sup> At that time, his providence inquiry indicated that he believed his victim was of college age.<sup>8</sup> She was actually fourteen.<sup>9</sup> Could Schuler invoke the 1996 amendment of Article 120 to retroactively challenge his 1994 conviction?

The CAAF held that he could not.<sup>10</sup> In reaching that conclusion, the CAAF relied on the federal “savings” statute,<sup>11</sup> which explains the retroactive application of a change in federal law.<sup>12</sup> The savings statute says, in part, that “[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute,

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<sup>1</sup> Chief Judge, United States Court of Appeals for the Armed Forces. This article is based on speeches the author delivered on 16 September 2004, at the William S. Fulton, Jr., Appellate Military Judges Conference in Washington, D.C., and on 22 January 2005, at the Florida State Bar’s Military Law and Legal Assistance Symposium in Miami, Florida. The author is grateful to his colleague, the Honorable James E. Baker, for suggesting that the remarks be published.

<sup>2</sup> U.S. CONST. art. III.

<sup>3</sup> 50 M.J. 254 (1999).

<sup>4</sup> See generally *id.* at 255.

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

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

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

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

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

<sup>10</sup> *Id.* at 256.

<sup>11</sup> 1 U.S.C. § 109 (2000).

<sup>12</sup> *Schuler*, 50 M.J. at 255-56.

unless the repealing Act shall so expressly provide.”<sup>13</sup> The UCMJ is, of course, a federal statute, so the savings statute governed the outcome of Schuler’s case.<sup>14</sup> In applying the federal savings statute, the CAAF followed the Supreme Court’s interpretation in *Pipefitters Local Union No. 562 v. United States*.<sup>15</sup> In *Pipefitters*, the Supreme Court held that the federal savings statute nullified the common law doctrine of abatement, at least to the extent that the successor statute “retains the basic offense” and does not “substitute a right for a crime.”<sup>16</sup> The CAAF then directly applied *Pipefitters* to the 1996 amendment of Article 120.<sup>17</sup> The CAAF noted that the amendment “retained the basic offense of carnal knowledge. The amendment did not alter the elements of proof; nor did it substitute a right for a crime.”<sup>18</sup> The CAAF did not analyze whether *Pipefitters* was applicable in the military justice system; the CAAF simply applied it as the governing case law.

Contrast that approach with the CAAF’s recent decision in *United States v. Marcum*.<sup>19</sup> In *Marcum*, the CAAF expressly considered the applicability of the Supreme Court’s *Lawrence v. Texas* decision<sup>20</sup> to the military justice system.<sup>21</sup> It is somewhat surprising that the Supreme Court’s construction of statutes governs the CAAF’s decisions to a greater extent than the Supreme Court’s construction of the United States Constitution; yet that is the case. When the Supreme Court construes a statute, the CAAF is bound by its construction. When the Supreme Court construes the Constitution, however, the CAAF must consider the extent to which that constitutional provision applies to the military justice system.

#### *Other Article III Precedent*

A more complicated issue can arise when another federal appellate court or a United States district court has interpreted a statute at issue in a military justice case. Such case law is persuasive, but not binding, authority.<sup>22</sup> One particularly interesting application of Article III precedent to the military justice system is *Garrett v. Lowe*.<sup>23</sup>

*Garrett v. Lowe* involved a challenge to the sentence that was adjudged in a felony murder case.<sup>24</sup> Because Private First Class (PFC) Garrett was sentenced for felony murder in a non-capital proceeding, confinement for life was a mandatory portion of his sentence.<sup>25</sup> The military judge instructed the members that they need not vote on the confinement portion of the sentence, since confinement for life was mandatory.<sup>26</sup> The military judge instructed the members that each of the remaining portions of the sentence required a two-thirds vote.<sup>27</sup> Garrett’s case proceeded through direct review and was affirmed in 1987.<sup>28</sup>

Garrett’s co-conspirator, PFC Dodson, was also court-martialed.<sup>29</sup> Dodson was found guilty of felony murder, and his case remained death-eligible when it entered the sentencing stage.<sup>30</sup> The military judge instructed the members that there were two authorized sentences—death and confinement for life—and that a unanimous vote was required for a death

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<sup>13</sup> 1 U.S.C. § 109.

<sup>14</sup> See *Schuler*, 50 M.J. at 256.

<sup>15</sup> 407 U.S. 385 (1972).

<sup>16</sup> *Id.* at 435 (internal quotation and citation omitted).

<sup>17</sup> *Schuler*, 50 M.J. at 256.

<sup>18</sup> *Id.*

<sup>19</sup> 60 M.J. 198 (2004).

<sup>20</sup> 539 U.S. 558 (2003).

<sup>21</sup> See generally *Marcum*, 60 M.J. at 200-07; see *infra* notes 185-93 and accompanying text.

<sup>22</sup> See *Garrett v. Lowe*, 39 M.J. 293, 296 n.4 (C.M.A. 1994).

<sup>23</sup> 39 M.J. 293, 297-98 (C.M.A. 1994) (Cox, J. & Gierke, J., each dissenting separately).

<sup>24</sup> *Id.* at 294.

<sup>25</sup> See UCMJ art. 118(e)(1) (2002).

<sup>26</sup> *Garrett*, 39 M.J. at 296.

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

<sup>28</sup> *Id.* at 294.

<sup>29</sup> *Dodson v. Zelez*, 917 F.2d 1250 (10th Cir. 1990).

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

sentence.<sup>31</sup> He instructed the members that if they did not unanimously vote for death, the outcome was confinement for life, since that was a mandatory sentence if death was not imposed.<sup>32</sup> The military judge did *not* tell the members that a three-fourths vote was required to adjudge a sentence of confinement for life.<sup>33</sup>

Dodson's case was appealed to the Navy-Marine Corps Court of Military Review<sup>34</sup> and the CAAF.<sup>35</sup> Except for a minor adjustment to the findings to cure a multiplicity issue,<sup>36</sup> the findings and sentence were affirmed. Then, surprisingly, in 1990 the Tenth Circuit granted him habeas relief in *Dodson v. Zelez*.<sup>37</sup> The relief was based largely on an interpretation of Article 52 of the UCMJ,<sup>38</sup> which requires a three-fourths vote of the members to impose a sentence greater than confinement for ten years. The Tenth Circuit held that compliance with that provision was mandatory and issued a writ of habeas corpus.<sup>39</sup>

No doubt inspired by his co-conspirator's success, Garrett then filed a petition for a writ of habeas corpus in federal district court in Kansas and sought a *writ of error coram nobis* from the CAAF.<sup>40</sup> In his pro se petition to the CAAF, Garrett argued that there was no need to address the legal merits of his Article 52 claim, since that issue had already been decided in his favor by the Tenth Circuit.<sup>41</sup> This argument provided the CAAF with an opportunity to address the effect of the Tenth Circuit's case law in the military justice system. Judge Wiss wrote for the Court:

It should be clear . . . that it is our own analysis of the issues that has led us to our decision and that, as the Government retorts, this Court is not bound by the decision in *Dodson*. This appellate court of the United States<sup>[42]</sup> is as capable as is a Court of Appeals of the United States of analyzing and resolving issues of Constitutional and statutory interpretation. In fact, to the extent that an issue involves interpretation and application of the Uniform Code of Military Justice and the Manual for Courts-Martial in the sometimes unique context of the military environment, this Court may be better suited to the task.<sup>43</sup>

A majority of the CAAF granted relief on a slightly different basis than the *Dodson* decision.<sup>44</sup> The majority held that the military judge erred by failing to instruct the members that they must vote on confinement for life and that confinement for life required a three-fourths majority.<sup>45</sup> The CAAF's majority, however, chose not to address the issue of prejudice arising from this error, holding instead that the military judge erred by telling the members that their vote on the punitive discharge, forfeitures and reduction required a two-thirds majority, when it actually required a three-fourths majority.<sup>46</sup> The CAAF held that the members must vote on a sentence in its entirety.<sup>47</sup> Because confinement for life was one component of the sentence, the entire sentence required a three-fourths majority.<sup>48</sup>

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<sup>31</sup> *Id.* at 1261.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *United States v. Dodson*, 16 M.J. 921 (N.M.C.M.R. 1983), *aff'd in part, rev'd in part*, 21 M.J. 237 (C.M.A. 1986), *adhered to on reconsideration*, 22 M.J. 257 (C.M.A. 1986).

<sup>35</sup> *United States v. Dodson*, 21 M.J. 237 (C.M.A. 1986), *adhered to on reconsideration*, 22 M.J. 257 (C.M.A. 1986).

<sup>36</sup> *See Dodson*, 21 M.J. at 238.

<sup>37</sup> 917 F.2d 1250 (10th Cir. 1990).

<sup>38</sup> 10 U.S.C. § 852 (2000).

<sup>39</sup> *Zelez*, 917 F.2d at 1262.

<sup>40</sup> *Garrett v. Lowe*, 39 M.J. 293 (C.M.A. 1994).

<sup>41</sup> *See id.* at 296 n.4.

<sup>42</sup> When the *Garrett* decision was announced on 15 June 1994, the CAAF court was named the United States Court of Military Appeals. On 5 October 1994, legislation renamed the CAAF court the United States Court of Appeals for the Armed Forces. *See* National Defense Authorization for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (codified at 10 U.S.C. § 941 (2000)). *See also* Special Session for Court Name Change, 41 M.J. LIII (1994).

<sup>43</sup> *Garrett*, 39 M.J. at 296.

<sup>44</sup> *Id.* at 297.

<sup>45</sup> *Id.* at 296.

<sup>46</sup> *Id.* at 296-97.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Judge Cox and I dissented.<sup>49</sup> Judge Cox viewed the petition for *writ of coram nobis* as, in essence, an untimely petition for reconsideration. More importantly, he viewed the petition's substance as "patently frivolous."<sup>50</sup> He wrote, "In my view, the chances that three-fourths of the court members then sitting might not have adjudged a dishonorable discharge, reduction to E-1, and total forfeitures are sufficiently infinitesimal as to not warrant the wholesale abrogation of finality of courts-martial."<sup>51</sup>

I agreed with the majority's decision to entertain the petition for extraordinary relief.<sup>52</sup> But like Judge Cox, I also viewed the likelihood that Garrett would not have received the maximum authorized sentence as infinitesimal given the fact that confinement for life was a mandatory sentence for Garrett's offense of felony murder.<sup>53</sup>

An interesting historical footnote to *Garrett* is that he was resentenced on 8 March 1995.<sup>54</sup> Garrett elected to be resentenced by a military judge alone—who predictably sentenced him to confinement for life, total forfeitures, reduction in grade to E-1, and a dishonorable discharge.<sup>55</sup> So the extensive collateral litigation in his case produced no change in Garrett's sentence.

One decision that remains pending before the CAAF from the 2004 term is *United States v. Martinelli*.<sup>56</sup> In that case, the CAAF specified the issue of whether the Child Pornography Protection Act (CPPA) has extraterritorial application.<sup>57</sup> As noted above, case law from Article III courts of appeals is persuasive, but not binding, authority. In the area of extraterritorial application of criminal statutes, the federal circuits have gone in different directions.<sup>58</sup> This provides a good example of why the military justice system should not simply defer to Article III case law to decide the issues that come before it. The CAAF must instead carefully evaluate Article III case law to determine if it is sound. To resolve the extraterritorial application issue that *Martinelli* presents, the CAAF must consider the relevant Article III cases and, to the extent that the CAAF finds any persuasive, use them to craft the resolution of the issue.

Another instance in which Article III courts and military courts construe the same statutes occurs in those rare instances when the Supreme Court grants certiorari to review a decision of the CAAF. The Supreme Court has had certiorari jurisdiction over CAAF cases only since 1984,<sup>59</sup> though before then military justice cases would sometimes make their way to the Supreme Court by way of collateral attacks filed by service members in Article III courts.<sup>60</sup> Since Congress gave the Supreme Court certiorari jurisdiction over the CAAF cases twenty-one years ago, certiorari petitions have been filed in 887 of the CAAF cases, though the actual number of certiorari petitions is somewhat smaller because in some instances, a single petition was filed combining more than one case from the CAAF.<sup>61</sup> The Supreme Court has granted fifteen certiorari petitions seeking review of CAAF decisions. In seven of these cases, the Court vacated the CAAF decision and remanded the case for further consideration in light of a newly-announced Supreme Court case.<sup>62</sup> The remaining eight were orally argued and resolved by authored opinions.

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<sup>49</sup> *Id.* at 297-98.

<sup>50</sup> *Id.* at 297 (Cox, J., dissenting).

<sup>51</sup> *Id.* at 297-98 (Cox, J., dissenting).

<sup>52</sup> *Id.* at 298 (Gierke, J., dissenting).

<sup>53</sup> *Id.* (Gierke, J., dissenting).

<sup>54</sup> See *United States v. Garrett*, No. 82-2670 (N-M. Ct. Crim. App. Nov. 27, 1996), *aff'd*, 48 M.J. 40 (1997).

<sup>55</sup> See *id.*

<sup>56</sup> *United States v. Martinelli*, 59 M.J. 211 (2003) (order granting review).

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

<sup>58</sup> See, e.g., *United States v. Erdos*, 474 F.2d 157, 158 (4th Cir. 1973) (holding that district court had jurisdiction over accused for crimes committed in American embassy located on foreign territory); *United States v. Gatlin*, 216 F.3d 207, 222-23 (2d Cir. 2000) (finding no jurisdiction over criminal acts committed extraterritorially); *United States v. Corey*, 232 F.3d 1166, 1171 (9th Cir. 2000) (finding jurisdiction over criminal acts of sexual assault committed in private apartment building in Japan); *United States v. Vasquez-Velasco*, 15 F.3d 833, 839-41 (9th Cir. 1994) (holding that statute applied extraterritorially to crimes committed by defendant in Mexico); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 9 (1st Cir. 1997) (holding that Sherman Act could apply extraterritorially to prosecute crimes committed in violation of the Act).

<sup>59</sup> Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1394 (1983) (codified as amended at 28 U.S.C. § 1259 (2000)). The effective date of the Military Justice Act of 1983 was 1 August 1984. See Pub. L. No. 98-209, § 12(a)(1), 97 Stat. at 1407.

<sup>60</sup> See, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Noyd v. Bond*, 395 U.S. 683 (1969); *Jackson v. Taylor*, 353 U.S. 569 (1957).

<sup>61</sup> This information is provided by the Court of Appeals for the Armed Forces' invaluable librarian, Agnes Kiang.

<sup>62</sup> *O'Connor v. United States*, 535 U.S. 1014 (2002) (remanding for further consideration in light of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)); *United States v. Mobley*, 523 U.S. 1056 (1998) (remanding for further consideration in light of *United States v. Scheffer*, 523 U.S. 303 (1998));

Some of the eight cases, like *Clinton v. Goldsmith*,<sup>63</sup> have concerned the construction of statutes. Others have dealt with constitutional issues. Here is a brief review of those eight cases.

The first came in 1987, when *Solorio* eliminated the service-connection requirement for subject-matter jurisdiction, at least in non-capital cases.<sup>64</sup> Interestingly, the Supreme Court had granted *Solorio*'s certiorari petition asking whether a child abuse offense that occurred at an off-base home met *O'Callahan*'s<sup>65</sup> service connection requirement.<sup>66</sup> But a majority of the Court *sua sponte* went beyond the granted issue to overturn *O'Callahan*'s service-connection requirement for subject matter jurisdiction.<sup>67</sup>

Seven years passed before the Supreme Court heard its next military justice case—*Weiss v. United States*.<sup>68</sup> That case consolidated argument on two different decisions of the CAAF.<sup>69</sup> The Supreme Court resolved *Weiss* by agreeing with the CAAF that the method by which military trial and appellate judges were generally appointed did not violate the Appointments Clause.<sup>70</sup> The Court also agreed that the Due Process Clause did not prohibit military judges from serving without fixed terms of office.<sup>71</sup>

Also in 1994, the Supreme Court resolved *Davis v. United States*,<sup>72</sup> a split decision<sup>73</sup> that announced the rule that an “ambiguous or equivocal” reference to counsel during a custodial interrogation did not trigger the suspect’s *Miranda* rights—or require any other response from law enforcement agents.<sup>74</sup> Only “an unambiguous or unequivocal request for counsel” has any legal effect.<sup>75</sup> One interesting aspect of the *Davis* case is the decision’s reach. Before *Davis*, the federal appellate courts were split over the question of the effect of an ambiguous request for counsel.<sup>76</sup> Some courts said it had no effect.<sup>77</sup> Some said even an ambiguous reference to counsel required that all questioning cease.<sup>78</sup> In *Davis*, the military judge ruled that the suspect’s statement that “Maybe I should talk to a lawyer” did not invoke his right to counsel.<sup>79</sup> The Naval Investigative Service agents who were interrogating *Davis* followed this ambiguous statement by “properly determin[ing]

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Edmond v. United States, 516 U.S. 802 (1995) (remanding for further consideration in light of *Ryder v. United States*, 515 U.S. 177 (1995)); *Carpenter v. United States*, 515 U.S. 1138 (1995) (remanding for further consideration in light of *Ryder*); *Clark v. United States*, 515 U.S. 1138 (1995) (remanding for further consideration in light of *Ryder*); *Jordan v. United States*, 498 U.S. 1009 (1990) (remanding for further consideration in light of *Minnick v. Mississippi*, 498 U.S. 146 (1990)); *Goodson v. United States*, 471 U.S. 1063 (1985) (remanding for further consideration in light of *Smith v. Illinois*, 469 U.S. 91 (1984)).

<sup>63</sup> 26 U.S. 529 (1999).

<sup>64</sup> *Solorio v. United States*, 483 U.S. 435 (1987).

<sup>65</sup> *O'Callahan v. Parker*, 395 U.S. 258 (1969).

<sup>66</sup> See *Solorio*, 483 U.S. at 436-38.

<sup>67</sup> *Id.* at 450-51.

<sup>68</sup> 510 U.S. 163 (1994).

<sup>69</sup> *Id.* at 165-66.

<sup>70</sup> *Id.* at 169-76.

<sup>71</sup> *Id.* at 176-81.

<sup>72</sup> 512 U.S. 452 (1994).

<sup>73</sup> The Supreme Court unanimously affirmed *Davis*'s conviction. The Court split 5-4 on the issue of whether an ambiguous or equivocal reference to counsel required law enforcement agents to clarify the suspect's intent. Four concurring justices—Justices Souter, Blackmun, Stevens, and Ginsburg—concluded that an ambiguous or equivocal reference to counsel required law enforcement agents to clarify whether the suspect desired counsel, which the interrogating agents had done in the *Davis* case. *Id.* at 466-76 (Souter, J., concurring).

<sup>74</sup> *Id.* at 459, 461.

<sup>75</sup> *Id.* at 462.

<sup>76</sup> See *United States v. Gotay*, 844 F.2d 971, 975 (2nd Cir. 1988) (joining the First, Fourth, Fifth, and Ninth Circuits to hold that ambiguous requests for counsel require officers to cease all questioning except questions clarifying the ambiguity) (citing *United States v. Porter*, 776 F.2d 370 (1st Cir. 1985); *United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976); *United States v. Cherry*, 733 F.2d 1124, 1130-31 (5th Cir. 1984); *United States v. Fouche*, 833 F.2d 1284, 1289 (9th Cir. 1987)); see also *United States v. March*, 999 F.2d 456, 462 (10th Cir. 1993) (holding that equivocal request for counsel required officers to cease substantive questioning and limit further inquiries to clarify the ambiguity); *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1471-72 (11th Cir. 1992) (same).

<sup>77</sup> See, e.g., *United States v. Lame*, 716 F.2d 515, 520-21 (8th Cir. 1983).

<sup>78</sup> See, e.g., *Maglio v. Jago*, 580 F.2d 202, 205 (6th Cir. 1978); *Howard v. Pung*, 862 F.2d 1348, 1351 (8th Cir. 1988).

<sup>79</sup> 512 U.S. at 455.

that [the accused] was not indicating a desire for or invoking his right to counsel.”<sup>80</sup> His subsequent admissions were, therefore, admissible.<sup>81</sup> The CAAF agreed with the military judge’s middle ground approach and held that an ambiguous reference to counsel during an interrogation required the interrogator to clarify whether the suspect was actually requesting counsel.<sup>82</sup>

But a majority of the Supreme Court adopted a rule that was less protective of criminal suspects’ rights than the approach that the military judge, the CAAF, and the other four Supreme Court justices took.<sup>83</sup> So Davis’s certiorari petition, just like Solorio’s, resulted in a net loss for the defense bar.

*Davis* is the only one of the eight military justice cases resolved by the Supreme Court that did not involve a military-specific issue, and therefore had much broader effect across all of the criminal justice systems in America.

Then came *Ryder v. United States*,<sup>84</sup> the first of two Supreme Court cases concerning the method by which civilian Coast Guard Court of Criminal Appeals judges were appointed—and the second of three military justice cases between 1994 and 1997 dealing with the previously-arcaic area of Appointments Clause<sup>85</sup> law.<sup>86</sup>

At the time *Ryder*’s appeal was decided, two of the Coast Guard court’s judges were serving in that role in a civilian capacity.<sup>87</sup> They had been appointed to that position by the General Counsel of the Department of Transportation.<sup>88</sup> In *United States v. Carpenter*,<sup>89</sup> the CAAF had held that the method by which the civilian chief judge of the Coast Guard Court of Criminal Appeals (CGCCA) was appointed violated the Appointments Clause. Relying on *Buckley v. Valeo*,<sup>90</sup> the CAAF held that “the judicial acts of the Chief Judge are entitled to *de facto* validity.”<sup>91</sup> The Supreme Court overturned this result in *Ryder*, issuing a very narrow opinion concluding that the civilian Coast Guard appellate judges’ actions should not be given *de facto* validity.<sup>92</sup> The narrowness of the holding would require the Supreme Court to revisit this area of the law in *Edmond v. United States*.<sup>93</sup>

In 1996, the Supreme Court decided *Loving v. United States*, which unanimously upheld the method by which the CAAF current military death penalty system was created.<sup>94</sup> The following year, the Supreme Court decided *Edmond v. United States*, which held that the Department of Transportation (DOT) had corrected the Appointments Clause problem that *Ryder* had identified.<sup>95</sup> By the time of *Edmond*, the appointing authority for CGCCA judges had gone from the DOT’s general counsel to the Secretary of Transportation.<sup>96</sup> Because the appointing authority was now a department head, the Supreme Court held that the Appointments Clause was satisfied.<sup>97</sup>

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

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

<sup>82</sup> *Id.* at 456.

<sup>83</sup> *Id.* at 462 (Souter, J., joined by Blackmun, Stevens & Ginsburg, JJ., concurring in the judgment).

<sup>84</sup> 515 U.S. 177 (1995).

<sup>85</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>86</sup> See also *Edmond v. United States*, 520 U.S. 651 (1997); *Weiss v. United States*, 510 U.S. 163 (1994).

<sup>87</sup> *Ryder*, 515 U.S. at 179.

<sup>88</sup> *Id.*

<sup>89</sup> 37 M.J. 291 (C.M.A. 1993).

<sup>90</sup> 424 U.S. 1 (1976).

<sup>91</sup> *Buckley*, 37 M.J. at 295.

<sup>92</sup> *Id.* at 187-88.

<sup>93</sup> 520 U.S. 651 (1997).

<sup>94</sup> 517 U.S. 748 (1996).

<sup>95</sup> *Edmond*, 520 U.S. at 666.

<sup>96</sup> *Id.* at 654-55.

<sup>97</sup> *Id.* at 666.

In 1998, the Supreme Court decided *United States v. Scheffer*.<sup>98</sup> *Scheffer* was a fragmented four-four-one decision overturning the CAAF holding that, despite Military Rule of Evidence (MRE) 707, a rule with no Federal Rule of Evidence (FRE) counterpart that bars polygraph evidence from courts-martial, the Sixth Amendment guaranteed an accused the right to at least attempt to lay a foundation to establish the admissibility of an exculpatory polygraph result.<sup>99</sup>

The CAAF court relied on *Daubert*'s<sup>100</sup> language emphasizing that the trial judge is a gatekeeper with a responsibility to determine the reliability of proffered evidence.<sup>101</sup> *Daubert* rejected the *Frye*<sup>102</sup> test, which required general acceptance in the relevant scientific community before novel scientific evidence would be admissible in evidence. The Supreme Court instead expressed confidence that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" would allow juries to separate the scientific wheat from the chaff.<sup>103</sup> Interestingly for purposes of discussing *Daubert*'s interplay with MRE 707, Justice Blackmun's opinion for the Court in *Daubert* noted that the "*Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine."<sup>104</sup>

In *Scheffer*, the CAAF did not hold that polygraph evidence was admissible.<sup>105</sup> Rather, the CAAF simply held that the same process that governs the admissibility of any other scientific evidence should be followed for polygraph evidence as well.<sup>106</sup> But the Supreme Court disagreed, upholding the President's per se rejection of polygraph evidence.<sup>107</sup> Unlike any other area of scientific evidence, the Supreme Court has allowed the President to freeze into place the current state of technology.

Regardless of the merits of its holding, *Scheffer* was significant procedurally because it was the first case in which the Solicitor General ever asked the Supreme Court to grant certiorari to review one of the CAAF's decisions. But the following year, the Supreme Court heard another case in which the United States was seeking to overturn one of the CAAF's decisions.<sup>108</sup>

*Clinton v. Goldsmith* dealt with the CAAF jurisdiction in extraordinary relief cases.<sup>109</sup> This presented an issue of statutory interpretation—mainly concerning Article 67 and the All Writs Act.<sup>110</sup> In an opinion written by Justice Souter, a unanimous Supreme Court held that a three-judge majority of the CAAF was incorrect when it determined that it had jurisdiction to prevent the Air Force from dropping an officer from the rolls.<sup>111</sup> I had written a dissent, which Judge Crawford joined, arguing that dropping an officer from the rolls is an administrative personnel action over which the CAAF has no jurisdiction—extraordinary or otherwise.<sup>112</sup> The Supreme Court agreed. This created controlling Supreme Court precedent limiting the statutes that provide the CAAF with jurisdiction.

*Clinton v. Goldsmith* was a 1999 decision. In the five years that have passed since, the Supreme Court has not heard oral argument in any cases from the CAAF, though the Supreme Court did grant, vacate, and remand the CAAF decision in *United States v. O'Connor*<sup>113</sup> for further consideration in light of *Ashcroft v. Free Speech Coalition*.<sup>114</sup>

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<sup>98</sup> 523 U.S. 303 (1998).

<sup>99</sup> *Id.* at 317.

<sup>100</sup> *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993).

<sup>101</sup> *United States v. Scheffer*, 44 M.J. 442, 446-47 (1996), *rev'd*, 523 U.S. 303 (1998).

<sup>102</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

<sup>103</sup> *Daubert*, 509 U.S. at 596.

<sup>104</sup> *Id.* at 586.

<sup>105</sup> *See* 44 M.J. 442.

<sup>106</sup> *Id.* at 448.

<sup>107</sup> *Scheffer*, 523 U.S. at 315.

<sup>108</sup> *Clinton v. Goldsmith*, 526 U.S. 529 (1999).

<sup>109</sup> *Id.* at 531.

<sup>110</sup> *Id.* at 533-34.

<sup>111</sup> *Id.* at 540.

<sup>112</sup> *Goldsmith v. Clinton*, 48 M.J. 84, 91-92 (1998) (Gierke, J., dissenting), *rev'd*, 526 U.S. 529 (1999).

<sup>113</sup> 55 M.J. 157 (2001), *vacated*, 535 U.S. 1014 (2002).

<sup>114</sup> 535 U.S. 234 (2002).

## Part II: Applying Article III Case Law When Construing a Similar Statute or Rule

Military courts often construe statutes or rules that are similar, though not identical, to statutes or rules applicable to federal civilian criminal law and procedure. This probably occurs most often in evidence cases, where the MRE generally mirror the FRE.

The *Manual for Courts-Martial's* drafters give us their recommended approach: "While specific decisions of the Article III courts involving rules which are common both to the MRE and the FRE should be considered very persuasive, they are not binding."<sup>115</sup> This approach is consistent with Article 36's preference for court-martial rules that generally follow the rules used for trial of federal civilian criminal cases.<sup>116</sup>

The CAAF has twice quoted the drafters' recommended approach for using Article III precedent to construe the MRE.<sup>117</sup> The most recent occasion was my opinion for a four-judge majority in *United States v. Byrd*.<sup>118</sup>

*Byrd* was, like a depressingly large portion of the CAAF docket, a child abuse case.<sup>119</sup> *Byrd* was an Army sergeant who was charged with forcibly sodomizing his daughter.<sup>120</sup> He was originally confined by civilian authorities.<sup>121</sup> While confined, he wrote two letters to his wife.<sup>122</sup> The government presented those letters as evidence.<sup>123</sup> The government also called his wife to the stand to interpret the letters' meaning for the members.<sup>124</sup> The issue before us was whether Military Rule of Evidence 701 allows a lay witness to offer an opinion about the meaning of someone else's communications.<sup>125</sup>

To assist us in answering that question, the CAAF turned to federal circuit and district court decisions interpreting FRE 701.<sup>126</sup> The majority opinion noted, "Application of the lay witness opinion rule, M.R.E. 701, to interpretations of the meaning of another person's communications is an issue of first impression in military law. Accordingly, the CAAF will seek guidance from judicial interpretations of Federal Rule of Evidence 701, the model for its military counterpart."<sup>127</sup> The CAAF then quoted a Ninth Circuit case for the general proposition that "[l]ay witnesses are normally not permitted to testify about their subjective interpretations or conclusions as to what has been said."<sup>128</sup> The CAAF noted that five other circuits follow the Ninth Circuit's approach.<sup>129</sup> The CAAF also noted that the Sixth Circuit follows a different approach.<sup>130</sup> There a lay witness may generally "testify in the form of an opinion as to his understanding of a defendant's statement."<sup>131</sup>

The CAAF also cited *United States v. Dicker*,<sup>132</sup> which is one of the leading federal civilian cases in this area, where the Third Circuit recognized an exception to the general rule. The Third Circuit observed that it was permissible for a lay

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<sup>115</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) drafter's analysis, at A22-2 [hereinafter MCM].

<sup>116</sup> See UCMJ art. 36 (2002).

<sup>117</sup> See *United States v. Byrd*, 60 M.J. 4 (2004); *United States v. Clemons*, 16 M.J. 44, 46 (C.M.A. 1983).

<sup>118</sup> 60 M.J. 4 (2004).

<sup>119</sup> *Id.* at 5.

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

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 5-6.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 6-7.

<sup>127</sup> *Id.* at 6.

<sup>128</sup> *Id.* at 7 (quoting *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980)).

<sup>129</sup> *Id.* at 7 n.3 (citing *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995); *United States v. Dicker*, 853 F.2d 1103, 1108-09 (3d Cir. 1988); *United States v. White*, 569 F.2d 263, 267 (5th Cir. 1978); *United States v. Marzano*, 537 F.2d 257, 268 (7th Cir. 1976); *DeLoach v. United States*, 307 F.2d 653, 655 (D.C. Cir. 1962)).

<sup>130</sup> *Id.* (citing *United States v. Graham*, 856 F.2d 756 (6th Cir. 1988)).

<sup>131</sup> *Id.* (citing *Graham*, 856 F.2d at 759).

<sup>132</sup> 853 F.2d 1103 (3d Cir. 1988).

witness to interpret another person's communications that use "coded or code-like" language.<sup>133</sup> Then the CAAF recognized the Second Circuit's emphasis on "the foundational requirements that the proponent must satisfy before a witness's interpretation of the meaning of another person's communications becomes admissible."<sup>134</sup>

The CAAF evaluated the general rules laid out in these federal civilian cases and formed three case-specific rules that CAAF would apply to evaluate Mrs. Byrd's testimony: (1) Mrs. Byrd's opinions concerning portions of her husband's letters whose meaning was self-evident were inadmissible; (2) Mrs. Byrd's opinions concerning ambiguous portions of her husband's letters would be admissible only if supported by a foundation establishing that she had a basis for determining the passages' true meaning; and (3) Mrs. Byrd's testimony providing background information concerning references in the letters to other events was admissible.<sup>135</sup>

The CAAF then applied these rules to hold that the military judge had erred in allowing Mrs. Byrd's testimony concerning several of the passages at issue.<sup>136</sup> The CAAF held, however, that in light of the other evidence in the case, that error was harmless.<sup>137</sup>

*Byrd* was an example of examining federal case law interpreting an FRE, discovering the general federal interpretation and exceptions to that interpretation, evaluating the conflicting federal civilian cases, and then crafting the decisional rule. This is probably the manner in which the CAAF most often uses federal civilian precedent.

But there is another approach. On occasion, the CAAF has rejected civilian precedent as inapplicable to the military's unique justice system. Probably the starkest example of that approach since sitting on the bench was *United States v. Rodriguez*,<sup>138</sup> where the CAAF split three-two on the applicability of *Jaffee v. Redmond*,<sup>139</sup> the Supreme Court's 1996 decision recognizing a psychotherapist-patient privilege.

*Rodriguez* involved an Army Specialist who took the rather extreme step of shooting himself in the stomach with an automatic weapon.<sup>140</sup> To literally add insult to injury, he was found guilty of wounding himself without intent to avoid hazardous duty.<sup>141</sup>

At trial, the defense's theory was that while Rodriguez had planned to shoot himself, he changed his mind before doing so and that he then accidentally shot himself while attempting to recover his weapon.<sup>142</sup> Making an already-uphill climb considerably steeper, Rodriguez had admitted to a civilian psychiatrist that he had intentionally discharged the weapon in an attempt to win back his estranged wife.<sup>143</sup> This gives a new twist to the old saying that the way to a man's heart is through his stomach.

The defense challenged the admissibility of the civilian psychiatrist's testimony, arguing that it was protected by the federal psychotherapist-patient privilege that the Supreme Court recognized shortly before Rodriguez's trial.<sup>144</sup> A three-judge majority of the CAAF ruled that the privilege did not apply in courts-martial.<sup>145</sup> Judge Cox and I dissented.<sup>146</sup>

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<sup>133</sup> *Id.* at 1108 (internal quotation omitted).

<sup>134</sup> *Byrd*, 60 M.J. at 7 (citing *United States v. Garcia*, 291 F.3d 127 (2d Cir. 2002)).

<sup>135</sup> *Id.* at 7-8.

<sup>136</sup> *Id.* at 8-10.

<sup>137</sup> *Id.* at 10-11.

<sup>138</sup> 54 M.J. 156 (2000).

<sup>139</sup> 518 U.S. 1 (1996).

<sup>140</sup> *Rodriguez*, 54 M.J. at 156.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 157.

<sup>143</sup> *Id.*

<sup>144</sup> See *Jaffee*, 518 U.S. 1.

<sup>145</sup> *Rodriguez*, 54 M.J. at 161.

<sup>146</sup> *Id.* at 162-63 (Gierke, J., joined by Cox, S.J., dissenting).

There was no opinion for the CAAF. Rather, it was a two-one-two decision.<sup>147</sup> The lead opinion, by then-Chief Judge Crawford, first reviewed the history of privileges under the FRE.<sup>148</sup> While the FREs' initial draft recognized specific privileges, the final version simply stated that privileges are governed by federal common law.<sup>149</sup> The drafters of the MRE quite sensibly recognized that for practical reasons, including many occasions when non-lawyers are required to apply them, the MRE should provide more specific guidance concerning privileges.<sup>150</sup> The result is the series of FRE 501 through 513 with which the CAAF are all familiar. But FRE 501 includes the following catch-all provision: a privilege may arise under "[t]he principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the FRE insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, the rules, or [the] Manual."<sup>151</sup>

The lead opinion concluded that recognizing a psychotherapist-patient privilege would be inconsistent with MRE 501(d),<sup>152</sup> which states, "Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity."<sup>153</sup> The lead opinion concluded that a "psychotherapist-patient privilege would be contrary to and inconsistent with Mil. R. Evid. 501(d). As the CAAF said, the term 'physician' includes a psychiatrist."<sup>154</sup> Judge Sullivan's separate concurring opinion took a similar approach.<sup>155</sup> Interestingly, the MRE's drafters took a different position. In 1999, after Rodriguez was tried but before the CAAF resolved his appeal, the President amended the *Manual* to create MRE 513, recognizing a psychotherapist-patient privilege.<sup>156</sup> The drafters' analysis explained that the new privilege that MRE 513 recognized was "not [a] physician-patient privilege" and it is not affected by MRE 501(d).<sup>157</sup>

Other recent cases where the CAAF distinguished military law from its federal civilian counterpart include *United States v. McElhaney*,<sup>158</sup> holding that the statute of limitations under the Victims of Child Abuse Act had not superseded Article 43, and *United States v. Spann*,<sup>159</sup> holding that the Victims' Rights and Restitution Act's sequestration provisions had not superseded MRE 615. Compare those cases with the CAAF's 1998 decision in *United States v. Dowty*.<sup>160</sup> In *Dowty*, the CAAF held that the Right to Financial Privacy Act's protections and statute of limitations tolling provision did apply to the military justice system.<sup>161</sup> However, the CAAF accompanied the holding with the following disclaimer: "We recognize that the Uniform Code of Military Justice is a special, well-integrated statute, and we exercise great caution in overlaying a generally applicable statute specifically onto the military system."<sup>162</sup>

Another recent example of applying Article III case law is the CAAF's most recent decision in *United States v. Dowty*,<sup>163</sup> a majority decision that I authored. *Dowty* concerned a unique method of finding members for courts-martial: through a solicitation in the "Plan of the Week."<sup>164</sup> In *Dowty*, the CAAF "embraced the approach" of a Fifth Circuit opinion dealing with volunteer jurors.<sup>165</sup> The Fifth Circuit held that volunteer jurors violated the letter and the spirit of the Federal Jury

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<sup>147</sup> *Id.* at 160-63.

<sup>148</sup> *Id.* at 157.

<sup>149</sup> See FED. R. EVID. 501.

<sup>150</sup> See MCM, *supra* note 115, MIL. R. EVID. 501 (Drafter's Analysis), app. 22, at A22-38.

<sup>151</sup> *Id.* MIL. R. EVID. 501(a)(4).

<sup>152</sup> *Rodriguez*, 54 M.J. at 160.

<sup>153</sup> MCM, *supra* note 115, MIL. R. EVID. 501(d).

<sup>154</sup> *Rodriguez*, 54 M.J. at 160.

<sup>155</sup> *Id.* at 161-62.

<sup>156</sup> Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999), reprinted in MCM, *supra* note 115, app. 25, at A25-49, A-25-50.

<sup>157</sup> MCM, *supra* note 115, MIL. R. EVID. 513 (Drafter's Analysis), app. 22, at A22-44.

<sup>158</sup> 54 M.J. 120 (2000).

<sup>159</sup> 51 M.J. 89 (1999).

<sup>160</sup> 48 M.J. 102 (1998).

<sup>161</sup> *Id.* at 111.

<sup>162</sup> *Id.*

<sup>163</sup> 60 M.J. 163 (2004).

<sup>164</sup> *Id.* at 165. "Plan of the Week" is a naval term that appears to denote a document similar to the Army "training schedule."

<sup>165</sup> *Id.* at 173.

Selection and Service Act of 1968.<sup>166</sup> The CAAF found the Fifth Circuit's construction of the federal statute to be persuasive authority in interpreting Article 25's system for obtaining court-martial members.<sup>167</sup>

*Byrd* and *Rodriguez* probably represent the two extremes in how the CAAF applies federal civilian case law to the military justice system. The art of judging, of course, is to determine which of the two methods to use in any given case.

### Part III: Using Article III Case Law When Applying the Constitution to the Military Justice System

Finally, this article examines the application of federal civilian cases construing the United States Constitution. The CAAF's general approach is to apply the Bill of Rights' protections to servicemembers absent a specific exemption for the military justice system or some demonstrated "military necessity that would require a different rule."<sup>168</sup> That standard comes from the 1976 CAAF decision in *Courtney v. Williams*,<sup>169</sup> and was repeated most recently in *United States v. Rendon*.<sup>170</sup>

There are two points about this approach that are particularly interesting. First, the CAAF has been far more willing to expressly recognize constitutional protections for members of the military than has the Supreme Court. Consider two examples.

The CAAF landmark opinion in *United States v. Matthews*,<sup>171</sup> which applied *Furman v. Georgia*<sup>172</sup> to the military justice system, expressly held that a service member is "entitled . . . under the Eighth Amendment to protection against 'cruel and unusual punishments.'"<sup>173</sup> The CAAF therefore applied the Supreme Court's civilian death penalty jurisprudence to the military justice system, while recognizing that "there may be circumstances under which the rules governing capital punishment of service members will differ from those applicable to civilians," particularly "with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war e.g., spying."<sup>174</sup> Contrast that approach with the Supreme Court's decision in *Loving v. United States*.<sup>175</sup> Justice Kennedy's opinion for the Court went no further than to "assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question."<sup>176</sup> Justice Thomas's concurring opinion cast further doubt over the question by observing, "It is not clear to me that the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military, and this Court has never so held."<sup>177</sup> On the other hand, in that same case Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote, "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians."<sup>178</sup> What is a settled point under the CAAF jurisprudence—the general applicability of Supreme Court capital jurisprudence to the military justice system, subject to appropriate exceptions based on military necessity—seems to still be a point in contention at the Supreme Court level.

A second example demonstrating that the CAAF more readily recognizes servicemembers' constitutional rights than does the Supreme Court concerns the Fifth Amendment's protection against self-incrimination. Article 31 of the UCMJ predates *Miranda v. Arizona* by sixteen years.<sup>179</sup> Chief Justice Warren even cited Article 31 in his opinion for the Court in

<sup>166</sup> *United States v. Kennedy*, 548 F.2d 608, 609 (5th Cir. 1977).

<sup>167</sup> *Dowty*, 60 M.J. at 173.

<sup>168</sup> *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976).

<sup>169</sup> *Id.* This approach had previously informed the decision in *United States v. Jacoby*, 29 C.M.R. 244, 346-47 (C.M.A. 1960) ("protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces").

<sup>170</sup> 58 M.J. 221 (2003).

<sup>171</sup> 16 M.J. 354 (C.M.A. 1983).

<sup>172</sup> 408 U.S. 238 (1972).

<sup>173</sup> *Id.* at 368.

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

<sup>175</sup> 517 U.S. 748 (1996).

<sup>176</sup> *Loving*, 517 U.S. at 755.

<sup>177</sup> *Id.* at 777 (internal citations omitted).

<sup>178</sup> *Id.* at 774.

<sup>179</sup> Compare UCMJ art. 31, UCMJ, Pub. L. No. 81-506, 64 Stat. 117, 118 (1950), with *Miranda v. Arizona*, 384 U.S. 436 (1966).

*Miranda*.<sup>180</sup> Article 31 is also broader than *Miranda* in that: (1) it requires warnings even if the suspect is not in custody; and (2) it requires the interrogator to inform the individual being interrogated of the suspected offense.<sup>181</sup> But in one respect, *Miranda* is broader than Article 31: Article 31 has no equivalent to *Miranda*'s requirement to tell suspects that they have the right to consult with counsel before deciding whether to answer any questions.<sup>182</sup> However, in *United States v. Tempia*,<sup>183</sup> the CAAF held that when *Miranda*'s protections exceed those of Article 31, the military is bound by both Article 31 and *Miranda*. Judge Ferguson's opinion of the Court noted, "The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights."<sup>184</sup> Judge Kilday's concurring opinion similarly observed:

The decision of the Supreme Court on this constitutional question is imperatively binding upon us, a subordinate Federal court, and we have no power to revise, amend, or void any of the holdings of *Miranda*, even if we entertained views to the contrary or regarded the requirements thereof as onerous to the military authorities.<sup>185</sup>

Compare that sentiment with *Davis v. United States*,<sup>186</sup> where Justice O'Connor's opinion for the Court noted, "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here."<sup>187</sup>

A second important point about the CAAF's *Courtney* approach is that despite using the Bill of Rights as the starting point and putting the burden on a party urging a military exception, the CAAF has not been reluctant to find that military conditions do require a different rule.

Certainly the CAAF's most prominent recent application of federal constitutional precedent to the military justice system was the decision in *United States v. Marcum*.<sup>188</sup> *Marcum* provides a case study in both using civilian constitutional protections as a starting point and recognizing that military conditions can yield a different result.<sup>189</sup>

As mentioned above, *Marcum* dealt with *Lawrence v. Texas*'s<sup>190</sup> impact on Article 125, the UCMJ's sodomy provision.<sup>191</sup> The CAAF began by again recognizing that "[c]onstitutional rights generally apply to members of the armed forces unless by their express terms, or the express language of the Constitution, they are inapplicable."<sup>192</sup> But the CAAF still held that Technical Sergeant Marcum's act of sodomy could be criminally prosecuted.<sup>193</sup> The CAAF did so by recognizing the disparate power that exists between a senior noncommissioned officer (NCO) and a junior airman in his same chain of command.<sup>194</sup> This placed the junior airman within *Lawrence*'s exception for those "who might be . . . coerced or who are situated in relationships where consent might not easily be refused."<sup>195</sup> Prohibiting such relationships and protecting subordinates are valid military interests that removed Marcum's acts from the "zone of autonomy" for sexual activity that the Supreme Court recognized in *Lawrence v. Texas*.<sup>196</sup>

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<sup>180</sup> *Miranda*, 384 U.S. at 489 ("Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.").

<sup>181</sup> See UCMJ art. 31 (2002).

<sup>182</sup> Compare *Miranda*, 384 U.S. at 444-45, with UCMJ art. 31.

<sup>183</sup> 37 C.M.R. 249 (C.M.A. 1967).

<sup>184</sup> *Id.* at 253.

<sup>185</sup> *Id.* at 261.

<sup>186</sup> 512 U.S. 452 (1994).

<sup>187</sup> *Id.* at 457 n.

<sup>188</sup> 60 M.J. 198 (2004).

<sup>189</sup> See generally *id.* at 202-27.

<sup>190</sup> 539 U.S. 558 (2003).

<sup>191</sup> *Marcum*, 60 M.J. at 199.

<sup>192</sup> *Id.* at 200.

<sup>193</sup> *Id.* at 208.

<sup>194</sup> *Id.* at 207-08.

<sup>195</sup> *Lawrence*, 539 U.S. at 578.

<sup>196</sup> *Marcum*, 60 M.J. at 208.

In one sense, *Marcum* was a direct application of *Lawrence*—*Lawrence* itself recognized that the liberty interest it recognized did not apply to those who might be coerced. But in another sense, it was a uniquely military result. What would happen if a civilian middle manager were criminally prosecuted for engaging in an act of non-forcible sodomy with an employee of the same company? Most likely the courts would rule that *Lawrence* prohibited that prosecution. But in the military, because an NCO exercises a great deal more control than does a civilian middle manager, the CAAF concluded that the military could criminalize an NCO's act of sodomy with a lower-ranking airman in his direct chain of command. Of course, the military could criminalize such a relationship regardless of the NCO's and lower-ranking service member's gender or particular act of sexual intimacy.

Interestingly, in two recent cases, the Army Court of Criminal Appeals applied *Marcum* to invalidate sodomy convictions for consensual heterosexual acts. One of the cases involved soldiers of the same pay grade<sup>197</sup> and the other involved a soldier and a civilian.<sup>198</sup>

Another area where the CAAF has applied Supreme Court precedent to the military justice system concerns child pornography cases—which make up a surprisingly large percentage of the CAAF docket. When the Supreme Court remanded *O'Connor* to the CAAF,<sup>199</sup> the CAAF applied the Supreme Court's holding in *Ashcroft v. Free Speech Coalition*<sup>200</sup> to invalidate a court-martial conviction based on the Child Pornography Prevention Act of 1996 (CPPA)<sup>201</sup> because the providence inquiry did not indicate whether the images were of real children or were, instead, “virtual” computer-generated images.<sup>202</sup>

In *United States v. Mason*<sup>203</sup> and *United States v. Irvin*,<sup>204</sup> the CAAF affirmed two child pornography convictions because the providence inquiries supported the conclusion that the misconduct was prejudicial to good order and discipline or was service discrediting, rather than because the conduct violated the CPPA. *Mason* is particularly interesting. Major Mason was an Air Force major (Maj.) assigned to the Defense Supply Center in Columbus, Ohio.<sup>205</sup> He committed various offenses on his government computer, including accessing child pornography Internet sites and downloading images of child pornography.<sup>206</sup> He was charged with, among other offenses, violating the CPPA.<sup>207</sup> This offense was charged as an Article 134, clause 3 offense, which prohibits “other crimes and offenses not capital.”<sup>208</sup>

During the providence inquiry, the military judge did two things of note. First, he defined child pornography to include images that “appear to be” minors engaged in sexually explicit conduct.<sup>209</sup> In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down the portion of the CPPA that criminalized images appearing to be minors rather than of actual minors.<sup>210</sup> *Ashcroft* informed the CAAF's 2003 holding in *United States v. O'Connor*, which invalidated O'Connor's conviction under the CPPA because the military judge had used the constitutionally-impermissible “appears to be” standard when defining child pornography during the providence inquiry.<sup>211</sup>

The second thing of note that the military judge did in *Mason* was to conduct a providence inquiry into the additional element of whether Mason's conduct was prejudicial to good order and discipline or service discrediting.<sup>212</sup> In fact, the

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<sup>197</sup> *United States v. Barber*, No. 20000413 (Army Ct. Crim. App. Oct. 7, 2004) (unpublished).

<sup>198</sup> *United States v. Bullock*, No. 20030534 (Army Ct. Crim. App. Nov. 30, 2004) (unpublished).

<sup>199</sup> 55 M.J. 157 (2001), *vacated*, 35 U.S. 1014 (2002).

<sup>200</sup> 535 U.S. 234 (2002).

<sup>201</sup> Pub. L. No. 104-208, 121, 110 Stat. 3009, 3009-26 (codified as amended at 18 U.S.C. § 2256 (2000)).

<sup>202</sup> *See* 58 M.J. 450, 453-55 (2003).

<sup>203</sup> 60 M.J. 15 (2004).

<sup>204</sup> 60 M.J. 23 (2004).

<sup>205</sup> *Mason*, 60 M.J. at 16.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 17.

<sup>208</sup> UCMJ art. 134 (2002).

<sup>209</sup> *Mason*, 60 M.J. at 17.

<sup>210</sup> 535 U.S. 234, 249-51 (2002).

<sup>211</sup> *United States v. O'Connor*, 58 M.J. 450, 455 (2003).

<sup>212</sup> *Mason*, 60 M.J. at 17.

military judge in this case was exceptionally prescient. He told Major Mason that he was advising him about this final element in case it is “determine[d] [that] your plea to the . . . [charged offenses] is improvident.”<sup>213</sup>

Judge Erdmann’s opinion for the Court in *Mason* includes a particularly interesting discussion contrasting application of the First Amendment to the CPPA and to the uniquely military offenses embodied in clauses (1) and (2) of Article 134.<sup>214</sup> For CPPA purposes, the First Amendment protects “virtual” as opposed to “actual” images of child pornography.<sup>215</sup> However, the CAAF concluded that the “virtual” versus “actual” distinction did not limit prosecutions under clauses (1) and (2) of Article 134.<sup>216</sup> First, the CAAF noted that “[t]he receipt or possession of ‘virtual’ child pornography can, like ‘actual’ child pornography, be service-discrediting or prejudicial to good order and discipline.”<sup>217</sup> The CAAF then noted that even if the images that Maj. Mason possessed had been “‘virtual’ in nature, this still involves a commissioned officer of the United States Air Force receiving and viewing such images on a government computer in his workplace.”<sup>218</sup> Given those facts, “the distinction between ‘actual’ child pornography and ‘virtual’ child pornography does not alter the character of Mason’s conduct as service-discrediting or prejudicial to good order and discipline.”<sup>219</sup> The CAAF also quoted the Supreme Court’s famous language from *Parker v. Levy*:

While the members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>220</sup>

In other cases, the CAAF have provided greater protections to military accused than civilian defendants would enjoy. For example, in *United States v. Tulloch*,<sup>221</sup> the CAAF parted from the Supreme Court concerning the manner in which a prosecutor could overcome a *Batson* challenge.<sup>222</sup>

In *Purkett v. Elem*,<sup>223</sup> the Supreme Court held that after the defense had made a prima facie showing of racial discrimination in the use of peremptory challenges, the prosecutor was not required to offer “an explanation that is persuasive or even plausible.”<sup>224</sup> The Court held that any race-neutral explanation, such as the prospective juror’s long hair, was permissible and that there is no requirement for the prosecutor to offer “a reason that makes sense.”<sup>225</sup> According to the Court, it is inappropriate to focus on “the reasonableness of the asserted nonracial motive” rather than on “the genuineness of the motive.”<sup>226</sup>

But in *Tulloch*, the CAAF expressly adopted a “different standard for assessing the validity of trial counsel’s proffered race-neutral explanation[s].”<sup>227</sup> The military justice system, with the convening authority’s selection of members and the parties’ single peremptory challenge, differs significantly from civilian systems.<sup>228</sup> In *Tulloch*, the CAAF held that unlike their civilian counterparts, military trial counsel may not offer an explanation that is “unreasonable, implausible, or that

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<sup>213</sup> *Id.* at 17-18.

<sup>214</sup> *Id.* at 19-20.

<sup>215</sup> *Id.* at 19.

<sup>216</sup> *Id.* at 19-20.

<sup>217</sup> *Id.* at 20.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

<sup>221</sup> 47 M.J. 283 (C.A.A.F. 1997).

<sup>222</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>223</sup> 514 U.S. 765 (1995).

<sup>224</sup> *Id.* at 768.

<sup>225</sup> *Id.* at 769.

<sup>226</sup> *Id.*

<sup>227</sup> *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997).

<sup>228</sup> *Id.*

otherwise makes no sense.”<sup>229</sup> In arriving at a different rule, Judge Effron’s opinion for the court emphasized distinctions between the way that juries are selected and seated and the way that court-martial panels are selected and seated.<sup>230</sup> The opinion observed:

*Purkett* reflects the Supreme Court’s sensitivity to the fact that in civilian life – where there are virtually no qualifications for jury service—instinct necessarily plays a significant role in the use of peremptory challenges to ensure that both the Government and the accused are able to present the case to jurors capable of understanding it and rendering a fair verdict.<sup>231</sup>

In court-martial practice, on the other hand, there is a “less compelling need” for instinct-based challenges “because the convening authority already has taken” the members’ qualifications “into account in exercising his responsibilities under Article 25 to select members on the basis of a ‘best-qualified’ standard.”<sup>232</sup> The CAAF also noted “the importance of avoiding the use of stereotypes for any purpose within the court-martial system.”<sup>233</sup>

So adjustments to constitutional rights in the military justice system are not made with a one-way ratchet. In some cases, military accused enjoy greater protections than their civilian counterparts.

### Conclusion

According to the cliché, the law is a seamless web.<sup>234</sup> The cliché, of course, is wrong. If the law is a web, it is incredibly tangled—and sticky. In the common law system, where the law develops through judicial decisions, judges play the role of spiders spinning that web. Article III case law is one thread that is available to appellate judges in the military justice system as the CAAF expands the web through each written opinion. But the CAAF must be particularly careful when weaving with this thread, because its improper use might trap the spider rather than a fly.

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 286 (citation omitted).

<sup>234</sup> That cliché is often attributed to the Nineteenth Century English legal historian Frederic W. Maitland. But Maitland actually used the phrase “seamless web” to describe history: “Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web.” Frederic W. Maitland, *A Prologue to a History of English Law*, 14 *LAW Q. REV.* 13, 13 (1898).

**Azimuth, Distance, and Checkpoints:  
Thoughts on Leadership, Soldiering, and Professionalism for Judge Advocates (JA)**

*Lieutenant Colonel Mike Ryan<sup>1</sup>*

*You must know where you are on the map and on the ground at all times. This includes knowing where you are relative to your directional orientation, the azimuth and distance to your objective, and other landmarks and features.<sup>2</sup>*

**Introduction**

This past 20 May 2005, marks the twentieth anniversary of my commissioning as an officer in the U.S. Army. During my first six years of active duty, I served as an infantry officer, completing command and staff assignments in infantry and special operations units. Since becoming a judge advocate (JA), I have served in a number of different billets, many of them outside the Judge Advocate General's Corps (JAGC) mainstream.<sup>3</sup>

Without question, the most profound and lasting benefit of my time in uniform has been the opportunity to serve alongside a number of stellar role models. No matter where I have been assigned, there have always been officers, noncommissioned officers, and junior enlisted Soldiers who have personified the Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage. The lessons I have learned from these outstanding Soldiers form the basis for this article.

Although this work appears in the pages of the *The Army Lawyer*, it is not devoted to the practice of military law, *per se*. Instead, it offers practical advice to new JAs based on my twenty years of soldiering. If you are a JA with no prior military experience, I hope the ideas presented here will help keep you on track and out of trouble, especially during your first few years as an officer. If you are a more experienced Soldier, this article may provide you with food for thought.

**A Brave New World**

While most JAs are well-qualified to practice military law after completing the Judge Advocate Officer Basic Course (JAOBC), many still need additional mentoring on their duties and responsibilities as officers. This is not to imply that these individuals lack motivation, self-discipline, or a genuine commitment to the Army. Instead, it is a recognition that, for the average law school graduate, military service is a brave new world distinctly different from anything he has ever known.<sup>4</sup>

Their inexperience notwithstanding, virtually all new JAs are eager to learn and grow as officers. They are more than ready to begin their journey, but simply need an azimuth, a distance, and some reliable checkpoints along the way. This article provides some of that direction by highlighting key concepts every officer should know.

It is essential to remember that in the contemporary operational environment, JAs can no longer view themselves as technical experts without leadership or soldiering responsibilities. Given the number of JAs deployed worldwide in support of the Global War on Terror, the transformation of the Army into a more expeditionary force, and the our senior leadership's focus on the warrior ethos, the modern-day JA must stand ready to be a Soldier, a lawyer, and a leader.

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<sup>1</sup> I would like to thank Brigadier General Scott Black, Colonel (COL) Peter Cullen, Major Tom Bryant, Major Brad Sutera, and Captain Mark Matthews for their assistance during the preparation of this article. These officers took time to proof this work and to share their thoughts, experiences, and insights.

<sup>2</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-25.26, MAP READING AND LAND NAVIGATION (20 July 2001).

<sup>3</sup> The author is presently assigned as Director, Future Concepts, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Previous assignments include: Student, Command and General Staff College, Fort Leavenworth, Kansas; Senior Operational Law Observer/Controller, B02 Team, Brigade C2 Division, Joint Readiness Training Center, Fort Polk, Louisiana; Regimental Judge Advocate, 160th Special Operations Aviation Regiment (Airborne), Fort Campbell, Kentucky; Chief, Operational and International Law, U.S. Army Special Forces Command (Airborne), Fort Bragg, North Carolina; Legal Assistance Attorney, Claims Judge Advocate/Chief of Operational Law, Trial Counsel, OSJA, Fort Sam Houston, Texas; Company Executive Officer later G-3 Training and Operations Officer, U.S. Army Special Operations Command (Airborne), Fort Bragg, North Carolina; Rifle Platoon Leader later Company Executive Officer D Company and HHC, 1/17th Infantry (Mechanized), 2nd Infantry Division, Republic of Korea.

<sup>4</sup> This is also not meant to demean the outstanding work done by the dedicated professionals who shepherd our new JAs through their first few months as officers. Indeed, the quality of the JAOBC cadre and the nature of the JAOBC curriculum have improved significantly in recent years. For example, during Phase II of the course, students conduct morning accountability formations and student-led physical training (PT) to Army standards. Those students competing for slots to airborne and Air Assault School do extra physical training, including a weekly road march for the Air Assault candidates. Plans are currently being developed that may call for JAs to attend a rigorous Basic Officer Leadership Course (BOLC) with officers from other branches following JAOBC.

## Ten Basics for Every Officer

### *1: Time, Place, Appearance, and Bearing*

Just as there are cardinal directions on a compass, there are cardinal rules for officers. Among these rules, perhaps the most important involve time, place, personal appearance, and military bearing.

First, if you do absolutely nothing else as an officer, always be on time. Remember, you will never hurt yourself by being early, but you will always hurt yourself by being late. This rule is especially critical when other people depend. If you are supposed to be somewhere at a specified time, never put other people, especially your boss or your Soldiers, in the annoying position of having to wait for you or wonder where you are. Make timeliness an absolute priority, and do not tolerate lateness in your subordinates.

The corollary to being on time is always being in the right place. Know exactly where you are supposed to be well in advance of the time you are due there. Always build enough time into your schedule to find unfamiliar locations, and don't forget to check on the small details: Do you know the building, room, or training area where you are supposed to be? Are roads, gates, or sections of the post along your route closed during certain hours of the day? Do not get caught staring at a closed gate, a blocked road, or a locked door on your way to an important meeting, briefing, or worse, when slated to join a departing convoy or board an outbound aircraft.

Regarding personal appearance, it is hard to conceive of an area that is more important to an officer's credibility. For the rest of your career, Soldiers, peers, superiors, and promotion boards alike will judge you by the way you look in uniform. For an officer, a crisp, professional military appearance should be nonnegotiable. Just as importantly, as an officer, you will be expected to set the example for your Soldiers when it comes to uniform and appearance standards. You must also be ready to correct Soldiers on a uniform or appearance issue when necessary.<sup>5</sup> To fulfill these responsibilities, you must become intimately familiar with the relevant uniform and appearance regulations and stay abreast of the latest changes in these regulations.<sup>6</sup>

Setting the example in your military appearance embodies more than simply meeting the standard. It also involves paying attention to detail and taking the extra steps necessary to make sure you look sharp and professional at all times. In the garrison environment, keep your uniform pressed, maintain shined boots, ensure your hair conforms to Army standards, and wear and shape your beret correctly. In the field, maintaining your military appearance entails conducting personal hygiene every day, to include shaving for males, as well as keeping your individual equipment clean, wearing your equipment properly, and doing your best to keep yourself as presentable as possible. Remember, your responsibility to look and act like a professional does not end when you leave the garrison area.

Coupled with your responsibility to maintain high standards for personal appearance is the importance of maintaining a superior level of physical fitness. Make no mistake—your ability to perform physical training alongside your Soldiers is absolutely critical to your credibility. Your goal should not simply be to pass the Army Physical Fitness Test (APFT). As a leader, you should strive to exceed Army standards. When it comes to organized physical training (PT), your role is to lead and motivate your soldiers by your personal example. Officers should never whine, complain, or give a half-hearted performance during PT. Organized PT is a golden opportunity for you to show Soldiers what you are made of; give them 110%, and they will be proud to call you their leader.

Like many of an officer's key responsibilities, staying in shape is not always easy. You may work in an office where there is no organized PT program or you may find yourself falling back on an excuse—too busy to do PT. Beware of these pitfalls. When there is no organized office PT program or when you are extremely busy, you must be self-disciplined enough to make time for PT. Also, do not make the mistake of avoiding PT because you are waiting for enough free time to execute a complex exercise program. Instead, do whatever you can whenever you can. When it comes to PT, a little bit of something is always better than a whole lot of nothing. The profession of arms is mentally and physically taxing, and a regular, rigorous exercise program will benefit both your body and your mind. You will be healthier, think clearer, live longer, and set a good example for your Soldiers if you exercise regularly.

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<sup>5</sup> Do not forget, if you are a male officer you must also take the time to learn the uniform and appearance rules that apply specifically to females. If you are a female officer, the converse is true.

<sup>6</sup> U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF THE ARMY UNIFORM (3 Feb. 2005), is not always the last word. Very often, commanders will issue local uniform policies that apply to units or your installation. Local uniform policies are usually published in some form of handbook issued to Soldiers.

Finally, consider a few words of advice on military bearing and military courtesies. Just as you will never hurt yourself by being early, you will also never hurt yourself by erring on the side of formality. Learning and practicing proper military courtesies is essential for officers, and is a key component of being a military professional. This area is sometimes, however, overlooked by JAs. Never follow the lead of a peer or even a superior who is lax in their approach to the customs and courtesies of the service. Maintain your professional bearing at all times, and you will never be sorry you did so.

Superior officers are addressed as “Sir” or “Ma’am.” They are never answered with “Yeah,” “Yep,” “Nah,” or “Nope.” A group of male officers is addressed as “Gentlemen,” not “Sirs,” and a group of female officers is addressed as “Ladies,” not “Ma’am’s.” Stand when a superior officer enters your office and do not sit in a superior’s office until told to do so. When walking beside a superior officer outdoors, walk to his left. When you encounter a superior officer outside, salute smartly and render the proper greeting. Remember, a salute is an exchange of courtesy and respect between warriors. Salute proudly, and expect others to do the same.

Likewise, never forget that you are a commissioned officer deserving of proper military courtesy from your subordinates. Never tolerate insolence, disrespect, a failure to salute, or any other breach of proper military courtesy. If you ever feel uncertain about making an on the spot correction, remember what a senior noncommissioned officer (NCO) once told me: “Everyone in uniform knows the rules. Soldiers learn them in basic training; officers learn them in OBC. The maximum effective range of an excuse in this area is exactly zero meters.”

A team sergeant at the Joint Readiness Training Center (JRTC), probably said it best: “When an officer looks or acts unprofessional, his subordinates will do one of two things: they will either emulate him or lose respect for him. There is no third alternative.” As you progress through your career, keep these two choices in mind. Be an officer your Soldiers are proud to emulate and you will always stay on course.

## *2: Patience, Perspective, and a Positive Attitude*

Life as an officer has never been easy, however, to whom much is given, much is expected. With the Army’s high operational tempo, everyone, to include newly commissioned officers, is expected to do more with less, and to get it done yesterday. Just as you would not run full speed through the woods while trying to stay on azimuth, however, you should not expect to go 100 miles an hour every day, giving every problem the same priority. In trying to find the right approach to life as an officer, try to remember the three Ps: patience, perspective, and a positive attitude.

First, when the pressure is on, remain patient, and try not to run in several directions at once. You will be more effective when you take a few extra moments to think things through before acting. Patience under pressure is a learned art, so practice patience, especially if you are impatient by nature. You may be surprised at how you can improve your ability to deal calmly with high-pressure situations with a little practice.

Second, remember that as a leader, your attitude, demeanor, and personal style will set the tone for your organization. A former regimental commander used to say: “If the Boss gets excited, he’ll spook the herd.” Excitable types rarely make good bosses. Instead, emulate leaders who are calm, steady, and resolute in the face of pressure, deadlines, and even danger. When things get stressful, keep an even keel and don’t contribute to a stampede.

Perspective is another key component of good leadership. Everything cannot be a priority, so work on your ability to determine what is critical and what is not. Start by determining what your boss’s priorities are. As a general rule, your priorities should be “nested” within those items your boss thinks are important. “If nobody’s bleeding and nobody’s dying, then it’s probably not the time to get excited.” These are good words to live by, especially with regard to daily issues. If you feel yourself becoming emotionally involved in an issue, make it a practice to take a step back and reassess the issue’s importance. Set priorities for yourself and your subordinates. People work better and are much more motivated when they understand the mission and work toward a common goal.

Finally, remember that optimism is infectious. As a commissioned officer you owe it to your subordinates, your peers, and your superiors to bring a positive, can-do attitude to your job. No one will follow a whiner or a naysayer for long so work to motivate your subordinates daily through your own personal, positive example.<sup>7</sup>

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<sup>7</sup> Historian Stephen Ambrose quotes General Dwight Eisenhower as stating: “Optimism and pessimism are infectious and they spread more rapidly from the head down than in any other direction.” STEPHEN E. AMBROSE, D-DAY, JUNE 6, 1944: THE CLIMACTIC BATTLE OF WORLD WAR II 61 (1994).

### 3: Anger Never Wins

Anger never wins. According to historian Stephen Ambrose, General Dwight D. Eisenhower relied on these three simple words when facing complex and frustrating situations as Supreme Allied Commander during World War II.<sup>8</sup> While few of us will ever have to shoulder a burden akin to Eisenhower's, if you spend any length of time in the Army, you will inevitably encounter trying situations. When you feel yourself responding negatively to a frustrating situation, take a deep breath and remember Eisenhower's mantra. You will rarely, if ever, go wrong by keeping a cool head, but you will almost always regret things said and done in anger.<sup>9</sup>

Admittedly, ire can sometimes be the right answer, but the situations that call for it are few and far between.<sup>10</sup> When you do have to assert your authority or take a subordinate to task, remember the old Army maxim: praise in public, punish in private. Unless a Soldier's behavior is blatantly insubordinate, always take the Soldier aside or go behind closed doors before you dress them down. This rule is especially critical when dealing with officers or noncommissioned officers. Absent flagrant disrespect, never undercut the authority of an officer or an NCO by scolding them in front of their peers or subordinates.

Be aware that this sanguine attitude is contrary to the way some officers, many of them very senior in rank, feel is the best way to accomplish things in the Army. While these types of individuals are few and far between in today's Army, during your military career you may encounter a boss who is what soldiers refer to as "a screamer." When you do, remember a few simple survival tips.

First, never take that person's anger personally. If you are the unfortunate target of your boss's anger, salute, move out, and do what needs to be done. If you made a mistake, do not let it happen again. If you did not make a mistake, but were nonetheless chastised, put the episode down in the "life isn't fair" column and move on.

Second, when you are the target of your boss's wrath, do not argue, explain, make excuses, or try to mitigate. This is often a very hard concept for JAs to master. As attorneys, the natural reaction under pressure is to plead your case. Just don't do it. No one cares why you dropped the ball or why you cannot get something done.<sup>11</sup> If your boss is on the warpath, the only three phrases that should ever escape your lips are: "Yes, Sir," "No, Sir," or "I will find out, Sir." Any other response will generally only create more problems.

Finally, remember that a boss who erupts over every little issue quickly loses effectiveness. If you supervise Soldiers for any length of time, you will quickly learn that they will make mistakes. Carefully debate your response to those mistakes before you react out of anger. My first company commander provided great advice on this topic: "When good people screw up, they will feel worse about their mistake than you can ever make them feel." Remember this statement, and remember the higher your rank, the less you should have to raise your voice. If a subordinate makes a mistake, before getting angry, consider the most constructive way to handle the situation. Aim for a response that helps the Soldier learn and grow versus a response that simply makes you feel good.<sup>12</sup>

### 4: Ask Questions, Admit Mistakes, and Share Credit

Many JAs come to the profession of arms with little or no knowledge of what Soldiers actually do for a living. This is understandable, especially for the direct commissionee. If you are new to the Army, there is certainly no shame in being

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

<sup>9</sup> One of the many valuable lessons I learned from my first staff judge advocate was the value of staying calm and treating everyone, even obstinate people, with courtesy and kindness. This leader believed that whether it's a recalcitrant pay clerk or a mendacious witness on the stand in the courtroom, the best way to get people to do something is to make them *want* to do it.

<sup>10</sup> By all means, before directing your anger at anyone, be 100% certain your facts are correct. You are guaranteed to look foolish if you fly off the handle based on incorrect information.

<sup>11</sup> The author learned this lesson the hard way when, as a second year ROTC cadet attending the U.S. Army Airborne course in May of 1983, he attempted to explain to a visibly impatient NCO from the Airborne School cadre why his PT shirt was not clean and ready for inspection. The Airborne instructor, much less constrained by the rules that affect the behavior of modern-day NCOs, repeatedly slapped the author's helmet, called him obscene names, and then made the author low crawl around the platoon formation.

<sup>12</sup> The same holds true for dealing with people via e-mail. It is very easy to get upset over an issue and send a scathing reply. Think very hard before you do so. When responding to a contentious issue, type your response then take a walk around the building and cool off. Read your e-mail again then ask yourself, is this *really* what I want to say?

initially ignorant, however, that excuse has a limited shelf life. As a professional, you have an obligation to learn the intimate details of your profession, and as a leader, you have an obligation to learn the basic skills every Soldier should know.

Just as you could not properly advise a corporate client without a working knowledge of the corporation's business, you cannot expect to be credible when advising a Soldier or a commander if you have no understanding about their unit, their mission, and the equipment they use to do their job. The easiest way to learn what Soldiers do is to ask them. Everyone enjoys talking about what he or she does for a living. If you ask a Soldier to explain his unit's mission or show a genuine interest in how a particular weapon or a piece of equipment works, you will receive a lengthy and enthusiastic block of instruction from that Soldier, one that will likely rival any presentation on the same topic that you might receive at a proponent school. Never be afraid to ask questions. Your fellow Soldiers will be your best teachers, and you will be amazed at how much you can learn when you take the time to talk to them.<sup>13</sup>

Inevitably, you will learn some lessons the old fashioned way. The first rule of dealing with mistakes is own up to them as soon as possible. Unlike wine, the results of mistakes do not get better with age. The sooner you admit your error, the sooner you can go to work repairing the damage. Secondly, never try to excuse a mistake. Professor Dale Carnegie once wrote, "Any fool can defend his or her mistakes and most fools do."<sup>14</sup> Fight the urge to make excuses when you or your people have dropped the ball. Most importantly, never blame subordinates for mistakes. Per tradition of the officer corps, an officer is responsible for everything his personnel do or fail to do. Blaming a subordinate is absolutely unseemly for an officer. At the end of the day, the most constructive approach you can take to mistakes is to learn from them and move on.

Just as you will make some mistakes as a new officer, you will also have your share of successes. Success in the Army is very rarely an individual effort, so when things go well for you, remember to share credit with the people who helped you get there. Make it a practice to take every opportunity, no matter how small, to recognize your subordinates publicly for their hard work. That recognition may be as simple as a pat on the back and kudos at a morning formation or as formal as an impact award. The form your recognition takes is not as important as you, a leader, taking the time to offer your genuine, sincere appreciation for a job well done. Soldiers work hard and make substantial sacrifices so make sure you always give credit where credit is due.

#### *5: Never Question Motives*

There is an old joke among Soldiers that no matter what echelon you are assigned to, everyone above you is an idiot and everyone below you is incompetent. When you are a platoon leader, the company leadership is clueless. When you are on battalion staff, you lament the idiots at brigade. As a part of the brigade staff, you routinely wonder what division is thinking.

Every Soldier is guilty of parochialism to a certain extent. In the words of one of my former commanders, "Where you stand is where you sit." While there may be a rare occasions where a more narrow-minded attitude is justified, most of the time it is not. Likewise, it is unfair and unprofessional to assume that a tasking, order, or policy you do not agree with is based on merely on someone's stupidity.

I learned a valuable lesson about this type of attitude while assigned to the JRTC Operations Group. While discussing a seemingly arbitrary request from higher headquarters, a fellow senior observer/controller explained his philosophy for dealing with his fellow soldiers: "I try never to question anyone's motives," he told me, "it makes life a whole lot easier." As I reflected on these comments, I realized his attitude was correct. Soldiers and units all have their own unique sets of pressures and priorities and it makes little sense to immediately assign bad motives to a fellow Soldier.

As you progress through your military career, you will proceed upward through the ranks and serve at a variety of different echelons. As you make this journey, you will see that there are in fact smart, dedicated, hard-working Soldiers at every level of command. Seldom if ever will any of these individuals do anything with the express purpose of making your life more difficult, so set a good example for your Soldiers by eschewing baseless, negative characterizations. Start from the premise that most people in the Army are working toward the common good and you will get more done and expend significantly less stomach acid throughout your military career.

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<sup>13</sup> On an individual level, everyone—officers, NCOs, and junior enlisted soldiers alike—should be able to perform basic Soldier skills. Irrespective of branch or military occupational specialty, every Soldier should all be able to shoot, move, communicate, and apply basic first aid.

<sup>14</sup> DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* 131 (1936).

## *6: Do Not Just Complain; Offer Solutions*

A few years ago during the course of a Mission Rehearsal Exercise (MRE) at Fort Polk, Louisiana, I was fully engaged in a wholesale violation of rule 5 above. Frustrated with a situation, I spent several minutes painstakingly lamenting the shortcomings of a particular higher headquarters element to a senior JA. The senior JA listened patiently to my petulant rant, then calmly retorted: “OK, that’s all well and good, now what are *you* doing to change things?” As I slithered from my soapbox, embarrassed by my unprofessionalism, I knew immediately that he was right, and I was wrong.

As leaders and professionals, it is incumbent on us to leave our units better than we found them. When in your daily duties you notice an inefficient practice or nonsensical rule, do not just complain. Be a positive force. Analyze the problem, craft a practical solution, and present your recommendations to the responsible person. You might not succeed every time, but at least you will have the satisfaction of knowing that you did your best to be part of the solution and not part of the problem.

## *7: Untie the Knot*

As an officer, you will routinely be confronted with what seem to be unsolvable problems. When you find yourself staring at the proverbial Gordian knot,<sup>15</sup> do not panic or lose heart. Remember, there are very few situations that are genuinely hopeless. The difference between success and failure is usually a combination of patience and hard work.

Many years ago while serving as an infantry officer in Korea, I was selected to fill the billet of executive officer (XO) for my battalion’s headquarters and headquarters company (HHC). As HHC XO for a J-series mechanized infantry battalion, I was responsible for the maintenance and readiness of sixty-four wheeled-vehicles and twenty-four armored personnel carriers, among other things. My first priority was to organize the motor pool.

Having spent my entire time as an officer leading a rifle platoon, I was exceedingly ignorant about how to tackle the monumental task of efficiently organizing a motor pool, ensuring maintenance was done on time, supervising technically-competent mechanics, and overseeing the mountains of paperwork and the litany of administrative responsibilities attendant to vehicle maintenance in the Army.

As lieutenants (LTs) are wont to do, I sought the counsel of a fellow LT—an officer for whom I had great respect. After confessing, somewhat sheepishly, that I had no idea where to start with my motor pool and maintenance nightmare, he smiled, and said four simple words that I have never forgotten, “Start at the beginning.”

Always start at the beginning. Take a step back, assess the situation, make a plan, and untie the knot. If you begin with the notion that no problem will ever get the best of you, you will be much more inclined to succeed. Someone once said that motivation arises from the desire to overcome. Cultivate that desire in yourself, and your Soldiers will follow you.

## *8: Never Shy Away from Difficult Missions, Tough Jobs, or Hard Schools*

The only thing permanent in the Army is change. Unlike our civilian counterparts, service members routinely change jobs, assignments, bosses, and duty stations. You will have to face the prospect of being the new guy or gal on the team and eventually the new boss more than a few times during your military career. No matter how experienced you are, the prospect of a new job always comes with a certain amount of anxiety. To help assuage some of your trepidation, remember that you will never have a job in the Army that you feel completely ready for.

When you assume a new position, be patient. Do not expect to be an instant expert or an overnight success. Instead, commit yourself to learning daily about your new billet and constantly remind yourself that you can do the job just as well or better than anyone else. It is much easier to be an effective leader when you are comfortable with the details of your job, so never stop learning.

In this same vein, never let anxiety or uncertainties about your abilities dissuade you from taking on a tough mission or volunteering for a hard school. Remember, nothing worth having is easy to obtain, and you will never know the incredible

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<sup>15</sup> The term “Gordian knot” refers to an exceedingly complicated problem or deadlock. The term originated with the story of an intricate knot tied by King Gordius of Phrygia and cut by Alexander the Great with his sword after hearing an oracle promise that whoever could undo it would be the next ruler of Asia. See Northland Pioneer College, Glossary, <http://www.northland.cc.az.us/pos221/resource/definiti.htm> (last visited Aug. 15, 2005).

satisfaction of successfully completing a difficult challenge if you never try. When a seemingly intimidating opportunity presents itself, marshal your courage and step up to the plate. Whether it is a difficult job that others are reluctant to undertake or a demanding school such as Airborne, Air Assault, or Jumpmaster, always steel yourself with the notion that you are just as capable as anyone else. From a career perspective, the specialized qualifications these types of schools provide will make you eligible for a wider variety of assignments. From a leadership standpoint, you will enjoy a significant advantage in terms of credibility when your Soldiers and the commanders you advise see you wearing the same special skill badges they worked hard to earn.

While there are certainly no guarantees in the Army, you will generally find that every time you raise your hand and volunteer to take a job or attend a school, you will eventually be rewarded, both personally and professionally. If you are ever uncertain about whether to take advantage of the type of opportunity discussed in this section, remember the motto of the British Army Special Air Service: “Who Dares Wins.”<sup>16</sup>

#### *9: Your Contribution to Mission Success Is Not Measured by Your Proximity to the Objective*

As members of a combat service support branch, it is sometimes difficult for JAs to understand how they further the Army’s mission of fighting and winning the nation’s wars. There are a number of valid answers to this question, however, consider the thoughts of retired COL Keith Nightingale, a veteran of numerous special operations assignments. In a speech to the 2000 Special Operations Legal Conference, COL Nightingale gave an excellent presentation on the importance of a commander’s legal advisor. Of the many astute points that COL Nightingale made that morning, the one that has always stayed with me was his maxim: “Your contribution to mission success is not necessarily measured by your proximity to the objective.”<sup>17</sup>

The point of the spear is extremely small, and there are very few Soldiers who will ever actually fire a weapon downrange. For the rest of us, our job is to do our duty to the utmost of our ability and be secure in the notion that our work contributes in its own way to mission success. Never discount the work you do for Soldiers, commanders, the Army, and the nation. As a member of the JAGC, you represent everything that makes the American Army what it is. You symbolize order, discipline, honesty, fairness, and an Army that has enforced and adhered to the rule of law for over 200 years, no matter how tough the circumstances or how despicable the enemy’s conduct. Your efforts and the efforts of every other Soldier in our branch ultimately set the conditions for success on the battlefield, so take pride in what you do. Approach every task with the conviction that you are part of a world-class team and remember that Soldiers and commanders everywhere need your commitment and special expertise.

#### *10: Be Bigger Than Yourself*

As you proceed through your military career, you will encounter ups and downs, fairness and unfairness, efficiency and inefficiency. You will serve in assignments where you feel a genuine sense of satisfaction and others where you may feel you take two steps back for every one step forward. If you stay in uniform long enough, you will undoubtedly experience periods of physical hardship, family separation, and personal sacrifice. Never forget that as an officer, you will be expected to endure the unpleasant aspects of military life without complaint. The best way to deal with hardship as a leader is to constantly strive to be bigger than yourself.

Realize that as an officer and a leader, it is never about you; your wants, needs, and comfort are always secondary. Your Soldiers should always eat first, sleep first, wash first, go home first, and get paid first. Whenever there is a job to be done, no matter how tough or unpleasant it may be, you should be the first to raise your hand and volunteer, and you should, to the extent humanly possible, stay positive during the completion of that job. Being an officer means subordinating yourself to the unit, the mission, the Army, and the nation. At times, this may even mean paying the ultimate price.

One of the most moving and eloquent summations of an officer’s duty is found at the United States Naval Academy chapel at Annapolis, Maryland. Carved over the doors of the chapel is the Latin phrase, *Non Sibi Sed Patria*—Not Self, But Country.<sup>18</sup> Your military rank is a reflection of the trust your country has placed in you. Your fellow citizens and the families of your Soldiers expect you to put personal desires aside and perform your duties in the best interest of the nation.

<sup>16</sup> See United Kingdom, Special Air Service, <http://www.specwar.net/europe/sas.htm> (last visited Aug. 8, 2005).

<sup>17</sup> Colonel (Retired) Keith Nightingale, Address at the 2000th Special Operations Legal Conference (Mar. 20-24, 2000).

<sup>18</sup> See United States Naval Academy, A Brief History of the United States Naval Academy 1950s, <http://www.usna.edu/VirtualTour/150years/1950.htm> (last visited Aug. 15, 2005).

## **Conclusion**

When Soldiers initially try their hand at navigating through the woods, they make short trips and look for obvious checkpoints. As they evolve into more seasoned navigators, they become comfortable under more challenging circumstances- navigating at night, reading the subtleties of the map, and developing a feel for distance. An officer's growth as a leader and a professional evolves in much the same way. Contrary to popular belief, there are few, if any, born leaders. An officer becomes a better leader and a more professional Soldier through hard work, practice, experience, and a genuine desire to learn. In your journey toward success as an officer, keep in mind the ideas and examples set forth in this article. Remember, with the right azimuth, a well-measured distance, and some reliable checkpoints, you can go anywhere.

## **National Training Center Transformation and Change—A Primer for Brigade Operational Law Teams<sup>1</sup>**

### **Introduction**

The National Training Center (NTC) has transformed from a barren desert used by heavy brigades for high intensity combat maneuvers into a landscape dotted with villages, crossed by roads, and occupied by civilians. The NTC “box” is a 1000 square mile maneuver area located in the California Mojave Desert.<sup>2</sup> Heavy brigade combat teams (BCTs) traditionally deployed to the NTC to test, train, and validate their Mission Essential Task List (METL) for high intensity conflict (HIC). A BCT deploying to the NTC before the summer of 2003 could expect a very structured rotation including a week of reception, staging, onward movement, and integration (RSOI), nine days of force on force battles against the NTC’s world class opposing force (OPFOR), and five days of brigade-level live fire conducted in the northern portion of the training center.

Since the summer of 2003, the NTC dramatically adjusted its training scenario, focusing solely on preparing units to deploy in support of either Operation Enduring Freedom (OEF) or Operation Iraqi Freedom (OIF). This article is intended to familiarize deploying Brigade Operational Law Teams (BOLTs) with the changes in the overall NTC training scenario and highlight issues which BOLTs should address before and during an NTC rotation.<sup>3</sup>

### **In the “Box”—It is Not What You Remember**

Gone are the days when units could mark the passing of their time at the NTC with battle periods, suspension of battlefield effects, and live fire. Units now face up to twenty days of continuous operations with no suspension of battlefield effects. Where BCTs once battled the OPFOR infantry, tanks, artillery, and aircraft, BCTs now fight smaller enemy forces entrenched in towns and caves, which use insurgent and guerrilla tactics to disrupt the BCT’s advance. The NTC spent millions of dollars to construct ten villages in the training area, the largest of which houses a population of up to 500 personnel, has three-story buildings and an underground network of caves and tunnels connecting buildings throughout the town. The NTC also constructed several underground cave complexes, which are used by enemy insurgent role players to harass and interdict supply lines and resupply insurgents in nearby towns.<sup>4</sup> Units conducting Mission Rehearsal Exercises (MREs) now occupy pre-constructed Forward Operating Bases (FOBs). The FOBs have berms and tents constructed for rotational units to occupy during their time in the “box.”

The OPFOR has significantly modified its tactics as well. Most members of the OPFOR—the 11th Armored Cavalry Regiment (11th ACR)—traded desert camouflage uniforms for civilian clothes and occupy one of the ten towns during the rotation. The 11th ACR also fields small cells of insurgents who mingle with the local population during the day and attack the BCT’s critical nodes and supply lines at night. The NTC hired approximately 250 Arab role-players and linguists to serve as religious, business, and local leaders and citizens in each town. They are under the control of the 11th ACR during the rotation.

The OPFOR composition varies based on what training requirements have been set by the senior trainer for each unit. For example, some rotations have six days of force on force, followed by eight days of stability operations and support operations (SOSO). In this case, OPFOR personnel first maneuver tanks and infantry to combat the BCT in an HIC-like environment. Once the MRE portion of the rotation starts, OPFOR personnel transition to role-play the local population.

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<sup>1</sup> The author, Major (MAJ) Toby Harryman, was formerly assigned as a legal Observer / Controller (O/C) at the National Training Center. Much of the information and recommendations contained herein were collected during his time at the NTC. Currently, MAJ Sean McGarry, Captain (CPT) Theo Voudouris, and Sergeant First Class (SFC) Stephen Pickerin are legal Observer / Controllers (O/Cs) at the NTC. For additional information or questions concerning the materials referenced in this article, the O/Cs can be contacted at the following e-mail addresses: bronco70@irwin.army.mil, bronco70B@irwin.army.mil, or bronco70A@irwin.army.mil.

<sup>2</sup> See generally National Training Center, [www.irwin.army.mil](http://www.irwin.army.mil) (last visited Apr. 7, 2005).

<sup>3</sup> See generally The Judge Advocate General’s Corps, U.S. Army, Center for Law and Military Operations, [http://www.jagcnet.army.mil/laawsxxi/jagcprofile.nsf/\(JAGCNetDocID\)/CLAMOWebSite](http://www.jagcnet.army.mil/laawsxxi/jagcprofile.nsf/(JAGCNetDocID)/CLAMOWebSite) [hereinafter CLAMO website]. The Center for Law and Military Operations is a resource organization for operational lawyers. Many articles and more detailed information regarding how to prepare a BOLT for an NTC rotation can be found on the CLAMO website within the folder, Combat Training Centers, subfolder, National Training Center. Much of this information, however, is unavailable to the general public.

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

## NTC Transformation—What It Means to a Deploying BOLT

As the NTC landscape and scenario transformed from a purely HIC to a HIC/SOSO model, demands on judge advocate's (JAs) time and participation significantly increased. The impact of this change is further amplified as the Army transforms from legacy to modular BCTs. Modular BCTs are designed to conduct operations more independently from their headquarters than legacy BCTs. This means legal support once provided by division-level JAs is now provided at the BCT-level. The following highlights the most significant scenario changes and their impact on BOLT operations.<sup>5</sup>

### Rules of Engagement (ROE) Issues

Two years ago, the NTC fielded roughly fifteen contractors and a handful of military intelligence personnel to replicate civilians on the battlefield (COBs) each rotation. Currently, the 11th ACR and Titan Corporation contractors field up to 2000 personnel to replicate COBs throughout the BCT's area of operations (AO). This increase in COBs translates into an increased number of ROE issues that JAs must address. From publishing Annex E (including an ROE card)<sup>6</sup> in the BCT operations order (OPORD) to conducting ROE training for all BCT soldiers, ROE remains a pivotal practice of BOLTs at the NTC.

Judge advocates can ensure the BCT is prepared for an NTC rotation by dealing with ROE issues before they arrive. At a minimum, BOLT JAs should complete the following:

1. Publish Annex E. The 52d Infantry Division (52ID)<sup>7</sup> publishes a deployment order (DEPOD) to incoming BCTs approximately two to three months prior to the start of each rotation. This order almost always includes an ROE annex along with an ROE card. Judge advocates may simply publish the 52ID Annex E and ROE card, or send requests for changes to 52ID. Common requests for changes concern the following issues: warning shots, levels at which various fires can be approved, and varying the ROE based on the ROE used in the unit's projected AO in theater. The NTC currently uses an ROE developed by the Center for Law and Military Operations (CLAMO) in coordination with the combat training centers (CTCs) and based on the current ROE in theater which addresses most of the BCT-level ROE issues units will encounter when they deploy. Because the NTC rarely conducts classified rotations, it is not yet possible to use the exact, classified ROE units will encounter in theater. However, this should not lessen the ROE training of the unit, because at the Soldier level, where the most difficult ROE issues are addressed, the ROE principles developed by CLAMO are the same as in theater.<sup>8</sup> Rules of Engagement cards should also be printed and distributed to each Soldier in the BCT.<sup>9</sup>

2. Train ROE. Publishing Annex E and an ROE card will not help the BCT unless it is trained properly. Emphasis on ROE training must come from the BCT and Battalion (BN) commanders and work its way down to the BCT and BN S3s.<sup>10</sup> Only commanders and S3s can direct that time on unit training schedules be dedicated to ROE training. The training should also include the most recent vignettes from the theater where a unit will be deploying. The CLAMO maintains recent ROE vignettes (classified and unclassified) on its non-secure internet protocol router network (NIPR) and secure internet protocol router network (SIPR) websites.<sup>11</sup> Accessing a deployed unit's SIPR site can also reveal important vignette examples.

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<sup>5</sup> See *id.*

<sup>6</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION app. G-15 (Jan. 2005) [hereinafter FM 5-0].

<sup>7</sup> The 52d Infantry Division (52ID) is the notional division headquarters for the rotating unit. The NTC provides full-time personnel to staff the 52ID Tactical Operations Center (TOC) during each NTC rotation. For example, the senior legal O/C serves as the 52ID SJA. All orders, guidance, procedures, etc., originate from 52ID.

<sup>8</sup> See, e.g., CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR US FORCES encl. A, para. 5.g-h (15 Jan. 2000) (defining hostile act and hostile intent). Both ROEs are trained extensively at the NTC. Various other classified elements (such as the CENTCOM collateral damage assessments), however, cannot be used because of their classified nature. Even so, BOLTs are encouraged to practice these principles in the BCT tactical operations center (TOC).

<sup>9</sup> The current 52ID ROE Card is identical to that used in OIF. Units can reproduce and distribute this ROE card for an NTC rotation knowing it will be the same used in theater.

<sup>10</sup> All Army staff organizations at corps through battalion levels use a basic model to begin the organization of their staffs. A unit commanded by a general officer has a G staff. A unit commanded by a colonel or below has an S staff. The different sections are identified by a number: personnel (1); intelligence (2); operations and training (3); supply or logistics (4); civil-military operations (5); information management (6); information operations (7); and comptroller or resource management (8). See News release, U.S. Army Europe Public Affairs, USAREUR Headquarters Staff to Transition to "G" Designations (Jan. 15, 2003), [http://www.hqusareur.army.mil/htmlinks/Press\\_Releases/2003/Jan2003/15Jan2003-03.htm](http://www.hqusareur.army.mil/htmlinks/Press_Releases/2003/Jan2003/15Jan2003-03.htm). For example, the brigade operations and training section is S3.

<sup>11</sup> See CLAMO website, *supra* note 3. The SIPR database can only be accessed by persons with a secret security clearance.

Finally, Soldiers arriving already trained on the ROE can then repetitively exercise their knowledge and adherence to the rules, which will increase their confidence that the ROE will work for them in theater.

### **Detention Operations and Evidence Collection**

Two years ago, BCT training objectives for NTC rotations focused on engaging with and destroying enemy infantry, armor, artillery, and air forces. Current scenarios continue to focus on BCT's individual and collective warfighting skills. Senior trainers, however, are placing greater emphasis on replicating the current operating environment where U.S. forces face insurgent and terrorist threats while supporting a sovereign government. This requires BCTs to cooperate with local police and defense forces as they attempt to capture and detain enemy forces which are attacking coalition forces and undermining the legitimate government. National Training Center scenarios are designed to test a BCT's ability to gather information from local sources, conduct operations based on the analysis of that information, detain wanted persons, and then process them along with the evidence collected at the scene, all with an eye towards prosecution at the local or national level. The entire process requires extensive BOLT involvement.

1. Training Detention Operations. Detention operations in current major theaters of operations are complex. They require specific forms, adherence to specific guidelines, and require BCTs to meet a certain legal burden before continued detention is permitted.<sup>12</sup> If these burdens are not met, detainees (often captured after great effort and sometimes casualties) are released back to the unit's AO. The NTC reflects this reality by requiring units to operate detention facilities and process detainees in accordance with current theater guidelines. Because the process is complicated, it must be trained before deployment to the NTC. Every Soldier in a BCT must understand the process including how to fill out the capture forms and process evidence. The CLAMO maintains multiple training packets developed by units in theater, which can be easily downloaded and used to train BCT Soldiers.<sup>13</sup>

2. Training Evidence Collection Procedures. At the NTC, Observer/Controllers (O/Cs) stress that each detainee should be detained for a valid reason. This typically means a detainee was involved in some sort of attack or unlawful activity directed against BCT forces. Detaining personnel should gather evidence at the point of detention which connects the detainee to the specific act. This evidence, along with the detainee, may ultimately be presented to a mock national-level court that determines what punishment (if any) the detainee should receive for his actions. The NTC scenario requires units to plan for and execute the evidence collection procedures they will use in theater. Judge advocates must train BCT Soldiers to properly document, collect, and store evidence to ensure it remains in custody throughout the process. The CLAMO website contains evidence collection training slides developed in theater that BOLT personnel can use to train BCT Soldiers before an NTC deployment.<sup>14</sup> Finally, BOLT personnel should contact the NTC legal O/Cs for more details on detention operations planned for their rotation.

### **Money as Weapon—Fiscal Operations**

Two years ago, a BCT might hand-receipt for \$10,000 in claim funds to cover an entire rotation. Currently, BCTs hand-receipt for over \$300,000 (in local currency) at the beginning of a rotation and are encouraged to spend every penny. The NTC scenario increasingly tests a BCT's ability to receive, target, spend, and account for large sums of money during its rotation.<sup>15</sup> Current legal doctrine states fiscal law support is mainly provided at the Division level and higher<sup>16</sup> and seemingly does not contemplate JAs at the BCT level providing anything other than legal reviews of most fiscal actions.<sup>17</sup> Modular BCTs, however, are being designed to provide this advice at the BCT level, and at the NTC, BOLTs find themselves active participants in the entire fiscal process, not just the traditional legal review.

The majority of the money spent by units at the NTC comes from the BCT's Commander's Emergency Response Program (CERP) funds, but also includes Operation and Maintenance (O&M) funds, intelligence contingency funds, de

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<sup>12</sup> See *id.* (providing the 3rd Infantry Division Apprehension and Detention standard operating procedures in the OIF folder).

<sup>13</sup> See *id.* (providing example detainees operations training slides in the OEF and OIF folders).

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

<sup>15</sup> There is no comptroller or resource management (S8) O/C at the NTC, so the JA legal team is responsible for handling this facet of the BCT's operations and serves as the division G8. Inbound JAs should contact the legal O/Cs for additional fiscal information before arriving at the NTC.

<sup>16</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 4-0, COMBAT SERVICE SUPPORT para. 12-26 (Aug. 2003) [hereinafter FM 4-0].

<sup>17</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 6.6.6 (Mar. 2001) [hereinafter FM 27-100].

minimis humanitarian assistance funds, claims funds, and various other theater-specific funds. While the JAs are typically not the proponent for all fiscal matters, commanders will look to their JA section in the absence of a strong S4/S8. Further, JAs should have visibility of all major fiscal operations within the BCT to ensure they comply with applicable laws and regulations.<sup>18</sup>

1. Training and Preparing for Fiscal Operations. Army Finance is doctrinally responsible for all aspects of deployed fiscal operations.<sup>19</sup> However, modular BCTs observed at the NTC, operating more independently from division-level support, are increasingly tasked to conduct complicated fiscal operations without the standard finance support. Judge advocates should anticipate the actual “nuts and bolts” of a BCT’s fiscal operations and discuss and coordinate these issues with finance or the BCT S4/S8. Brigade combat teams that have been proactive in this area have reaped significant dividends during their rotation. At the NTC, 52ID will not distribute money to a BCT until the BCT displays the requisite process for conducting fiscal operations. The first step is training and appointing pay agents. Pay agents are the only persons who can sign for, receive, and physically disperse funds.<sup>20</sup> The second step is training and appointing field ordering officers (FOOs). Pay agents cannot disperse funds unless they have been legally obligated by a correctly appointed FOO.<sup>21</sup> Third (if your unit is conducting an Iraq-specific MRE), the BCT must have Project Purchase Officers (PPOs) on orders and trained to handle CERP expenditures.<sup>22</sup> Finally, BCTs should have a safe where hand-receipted cash is properly stored. Enterprising JAs should address all of these issues with the BCT S4/S8 who, at the BCT level, may not anticipate or understand how a BCT conducts fiscal operations.

2. Conducting Fiscal Operations. During HIC rotations, BOLTs typically learn of fiscal issues during the Military Decision Making Process (MDMP). During SOSO/MRE rotations, JAs typically learn of fiscal issues at various working groups and meetings during the BCT effects-oriented battle rhythm. Judge advocates should attend information operations working groups or non-lethal fires working groups, because these groups will address most of the significant issues. If the BCT conducts a single fires and effects coordination cell (FECC) meeting, fiscal issues are also usually addressed during this meeting. At either working group, the BCT effects players (lethal and non-lethal) discuss and plan the BCT targeting agenda, which should include targeting money to certain projects, individuals, areas, or organizations in the BCT AO. As targets are recommended, JAs must ensure planned expenditures are in compliance with applicable laws, regulations, and current division spending guidance. In many BCTs, JAs might also conduct fiscal operations with other BCT elements by paying claims, solatia, or negotiating contracts with the locals. All these events are replicated at the NTC.

### **Do Not Forget About Claims**

In the past, BOLTs conducting an NTC rotation might have encountered a few claims here and there at one village during a rotation. The current scenario includes an unlimited number of claims arising at any of the villages in the BCT AO.<sup>23</sup> While claims are a doctrinally contemplated core JA discipline,<sup>24</sup> CERP has added a new complexity to claims in the

<sup>18</sup> See FM 4-0, *supra* note 16, paras. 12-22 through 12-26; see also FM 27-100, *supra* note 17, para. 3.6.

<sup>19</sup> FM 4-0, *supra* note 16, para. 11-1, states,

[d]uring operations, Army finance units provide real-time, split-based support to individuals and organizations. . . Organizational funding support goes to local procurement of supplies and services, enemy prisoners of war (EPW) pay, legal claims, and the cost of local national employees supporting intelligence elements, CSS unit, military police, the staff judge advocate, civil affairs, unit tactical field exchanges, and other unit commanders.

<sup>20</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 14-100, FINANCIAL MANAGEMENT OPERATIONS app. C (July 1997) [hereinafter FM 14-100] (providing a detailed process by which to appoint pay agents, including sample appointment memos). Judge Advocates should reference this manual if tasked to support these BCT operations.

<sup>21</sup> U.S. DEP’T OF ARMY, FEDERAL ACQUISITION, REG. MANUAL NO. 2, CONTINGENCY CONTRACTING (Nov. 1997) (containing specific guidance on how field ordering officers (FOOs) are appointed and placed on orders and delineates specific duties and responsibilities for FOOs). This manual also describes in detail the forms, processes and procedures a FOO (and BCT) must follow when obligating funds. Judge advocates should reference this manual for questions regarding FOOs.

<sup>22</sup> The NTC scenario uses the most recent fiscal information from theater, but as this quickly changes in each area of operation (AO), units are encouraged to focus on developing and executing fiscal processes that can be adapted quickly in theater. See, e.g., HEADQUARTERS, MULTI-NATIONAL CORPS-IRAQ, FRAGMENTARY ORDER 092 to OPOD 05-02 (1 June 2005) (listing the requirement for each BCT to have a PPO for CERP projects). This document and other related FRAGOs concerning CERP expenditures and PPOs can be found on the CLAMO website, *supra* note 3.

<sup>23</sup> Over the past twenty months, the number of claims handled by BCT JAs in MRE scenarios varied greatly. Some have paid over fifty, others processed significantly less. A number of factors seem to impact claim operations. First is security. If the BCT cannot secure a village from the insurgents, claim missions cannot be conducted. Second, if JAs do not coordinate with the BCT S3 for requisite security at the BCT and battalion level, claim missions cannot depart the FOB. Third, JAs arriving at villages are often not familiar with the paperwork, and are not prepared to pay claims on the spot, thus losing the training value of paying multiple claims in one day. Finally, JAs fail to get claim missions on the target synchronization matrix (targeting a certain town for a claim mission) and therefore claims are never properly planned or resourced.

form of solatia-like payments. The NTC scenario exercises a BOLT's understanding of the traditional claims practice involving the Foreign Claims Act<sup>25</sup> and battle-damage claims now associated with CERP solatia payments. Further, BOLTs may encounter other types of claims when personnel property is damaged coming to and from the NTC.

To be successful at the NTC, BOLTs first need to consider how to execute the BCT claim mission. This may be driven by how claims operations will be conducted in the BCT's projected AO for a deployment. Two processes have been observed at the NTC. Some BCTs establish and operate a claim intake point in conjunction with the BCT's Civil-Military Operations Center (CMOC) (or some type of intake point where civilians can contact the BCT with questions, grievances, etc.). There, BOLT personnel intake claims, determine whether they should be paid, and either pay on the spot or have the claimants return later after the claim is reviewed. Other BCTs conduct "roving CMOCs"<sup>26</sup> in different villages where Civil Affairs (CA) personnel advertise the mission in advance and rent space, and battalion elements are tasked to provide security for the operation. Brigade operational law team personnel pay claims during these missions. Doctors, dentists, Psychological Operations (PSYOP) personnel, preventative medicine personnel, and others also participate in roving CMOCs as part of the larger mission operation.

Due to the large size of the training area, and because very few of the COBs have vehicles, claim intake points operated at FOBs have traditionally not been successful. Further, convoying to different villages permits BOLTs to practice convoy operations, which they may not have done otherwise.<sup>27</sup>

Second, JAs should have the commander appoint unit claims officers (UCOs). Unit claims officers can identify and investigate claims at the company level and forward information to the BCT single-person Foreign Claims Commission (FCC). The UCOs investigation assists the FCC in identifying potential claimants without having to personally investigate every claim.

Brigade operational law teams should also prepare claim packets with the necessary forms before they arrive at the NTC. The CLAMO has examples of claims packets specific to the Iraq theater of operation—many of them already translated into the local language.<sup>28</sup> Finally, JAs must determine which JA will serve as the FCC, and which paralegal will serve as the pay agent, for purposes of making claim or solatia payments.

## Investigations

In the past, rotational BOLTs tracked mainly blue on blue fratricide incidents as mandated by the NTC exercise operating procedures (EXOP).<sup>29</sup> The current NTC EXOP does not contain this requirement. Mandatory investigation requirements are outlined in the 52ID operations order. The 52ID generally requires investigations for the following incidents: class A accidents, friendly fire incidents (blue on blue), blue on green incidents, green on blue<sup>30</sup> incidents, non-combat deaths or serious injuries of foreign nationals, potential law of war violations (in particular civilian or detainees), losses of sensitive items, negligent discharges (other than in clearing barrels), and ROE violations (known or suspected).<sup>31</sup> The BOLT JAs may encounter commanders who balk at these requirements. The requirements mirror investigation requirements in theater. In fact, there are actually fewer requirements at the NTC than, for example, a BCT deployed to

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<sup>24</sup> FM 4-0, *supra* note 16, para. 12-30; FM 27-100, *supra* note 17, at viii.

<sup>25</sup> See generally U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS paras. 10-1 through 10-10 (July 2003).

<sup>26</sup> "Roving CMOC" is not a doctrinal term. Brigade combat teams have also referred to this collection of mobile humanitarian assistance assets as a "consequence management team," "mitigation effects cell," "host nation support team," and "non-lethal support team."

<sup>27</sup> Many BOLTs initially are inclined to set up NTC claim operations based on current in-theater operations. This makes sense from a theoretical perspective. National Training Center O/Cs, however, encourage BOLT leaders to consider all BOLT training objectives to determine if modifying their NTC claim mission to facilitate other training objectives (convoy operations, weapons handling, and other soldier skills) might be a good use of limited training opportunities.

<sup>28</sup> See CLAMO website, *supra* note 3 (providing examples of claim packets in the OEF and OIF folder).

<sup>29</sup> NAT'L TRAINING CENTER EXERCISE, OPERATING PROCEDURES para. 11-4 (2004) [hereinafter NTC SOP] (requiring AR 15-6 investigations only for "blue on blue" fratricide incidents). The 2004 exercise SOP required the unit to initiate, complete, and submit the final, approved investigation within forty-eight hours to the 52ID Division TOC. This document can be requested from the NTC legal O/C team. It has been replaced by the 2005 EXOP which units will receive several months before their rotation.

<sup>30</sup> "Blue on green" and "green on blue" incidents refer to incidents between coalition and Iraqi forces. The NTC scenario requires units to train and conduct operations with local Iraqi police and military forces. Fratricides and other incidents often occur on these operations, requiring investigation.

<sup>31</sup> See NTC SOP *supra* note 29, at annex I(5) (Legal) (providing investigation requirements for NTC rotations). Although this is doctrinally not the best location, due to NTC manning constraints, however, the legal O/Cs provide oversight of this process, and therefore include it in the legal appendix.

Iraq.<sup>32</sup> Judge advocates must brief commanders on these requirements early on and establish a system to efficiently handle investigations as they arise.

The BOLTs should take several steps before an NTC rotation to ensure rotational investigations are completed timely and to standard. First, BOLT personnel should coordinate with the S-1 to complete a Department of the Army (DA) Form 6 specifically for AR 15-6 investigations.<sup>33</sup> This provides an immediate list of names from which commanders can appoint investigating officers when required. Second, BOLTs should pre-position investigation packets with officers on the DA 6 in each battalion (or at a minimum with battalion S-1s). Officers should be briefed in advance on how to complete an investigation because conducting a legal brief to the investigating officer (IO) is sometimes impossible depending on the status of BCT communications. Third, JAs should encourage commanders to clearly delineate what level of command has the authority to initiate investigations for different incidents. Judge advocates often discover serious investigations have been initiated by battalion or even company commanders—after they are completed. Fourth, JAs must carefully explain to BCT commanders that for serious incidents, JAs should draft the appointment memo to ensure clear, concise, and legally sound directives are issued to the IO. This will speed up the entire process by directing IOs to focus on the most important issues from the beginning of each investigation. Finally, BOLT paralegals (after legal review) must have a plan to store and index investigations for reference at a later time. Even at the NTC, investigations often draw general officer attention, and may be requested weeks after the incident occurred.

After investigations are completed, BOLT JAs at the NTC are encouraged to identify trends and corrective measures based on the findings and recommendations of the IO. Most BCTs have multiple incidents of fratricide, civilian deaths, and negligent discharges. After the fourth or fifth incident, clear trends start to emerge. Judge advocates should identify these trends and (after conferring with safety, or operational subject matter experts) coordinate with the S3 to publish these trends via fragmentary order (FRAGO)<sup>34</sup> to BCT elements to mitigate potential similar incidents in the future.<sup>35</sup>

### **Targeting / Fires and Effects / Information Operations / Effect Based Operations<sup>36</sup>**

In the past, BCTs at the NTC planned using mainly the MDMP. One pre-battle MDMP cycle traditionally took up to three days with a battle period following. Current NTC scenarios are more fluid and BCTs conducting MREs generally conduct daily targeting meetings resulting in a FRAGO being issued every twenty-four hours which drives missions up to seventy-two hours out. Unless a JA has Stryker brigade combat team (SBCT) or recently deployment experience, most are not familiar with the FECC, information operations, or other aspects of effects based operations.<sup>37</sup> The BOLTs should familiarize themselves with current doctrine on information operations, fires and effects, and targeting.<sup>38</sup> Savvy JAs could

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<sup>32</sup> Judge Advocates looking to encourage commanders to plan for conducting investigations should provide them with the pertinent portions of U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 6 (9 Dec. 1998) and U.S. DEP'T OF ARMY, PAM. 385-40, ARMY ACCIDENT INVESTIGATION AND REPORTING (Nov. 1994). *See also* Information Paper, Headquarters, Multinational Force Iraq, subject: Friendly Fire Incident Investigations (7 Sept. 2003); Information Paper, Multinational Force Iraq, subject: Investigations of Non-combat Related Deaths and Serious Injuries (27 Oct. 2004); Information Paper, Multinational Force Iraq, subject: Overview of Command Investigations in the Iraq Theater (21 Sept. 2004). These documents set out mandatory investigation requirements. The information papers are located on the CLAMO website under OIF and provide information detailing investigations required in Iraq. They could be used to impress on commanders the importance of having a plan for conducting investigations, and giving it a test run at the NTC.

<sup>33</sup> U.S. Dep't of Army, DA Form 6, Duty Roster (July 1974). Department of Army Form 6 is the standard form Army units use to maintain a list of names of personnel available for a specific duty. The form lists personnel grades, names, and nature of duty. The S1 should have a separate list of officers who are available to conduct AR 15-6 investigations. Many units already have DA Form 6s completed for reports of survey, and can use the same for other investigations. However, JAs should carefully scrub the list with the XO to ensure listed officers are capable of conducting a proper investigation as many incidents are high-profile and may result in UCMJ actions, media interest, or even congressional scrutiny.

<sup>34</sup> A FRAGO is a supplement or change to an original OPORD.

<sup>35</sup> This is another non-doctrinal task. Because BCT JAs see every AR 15-6 investigation, they are in the best position to identify trends for the commander. Judge advocates, however, should always coordinate the FRAGO with the subject matter expert (often safety).

<sup>36</sup> "Effects Based Operations" is a non-doctrinal term developed at the Joint Readiness Training Center. Information Operations is a doctrinal Army term and practice. *See generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES (Nov. 2003) [hereinafter FM 3-13]. Information operations are based largely on the Army targeting process of decide, detect, deliver, and assess (D3A). *See generally* FM 5-0, *supra* note 6, app. H. Because "Effects Based Operations" is not a doctrinal term, the NTC uses the terms "targeting" and "information operations" to describe the "effects based" planning process and mission execution. All three, however, follow the same process.

<sup>37</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-21.31, THE STRYKER BRIGADE COMBAT TEAM (Mar. 2003) [hereinafter FM 3-21.31], provides the most doctrinal example of "fires and effects" and how information operations fit into this process. In an SBCT, the JA is located in the FECC. New modular BCTs are not staffed exactly like SBCTs—but some have formed a FECC (or FECC-like) group by the end of an NTC rotation to plan and synchronize BCT "effects."

<sup>38</sup> *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS ch. 11 (Mar. 2003) [hereinafter FM 3-0]; FM 5-0, *supra* note 6, app. H; FM 3-13, *supra* note 36; FM 3-21.31, *supra* note 37; and, U.S. DEP'T OF ARMY, FIELD MANUAL 6-20-10, TACTICS, TECHNIQUES, AND PROCEDURES FOR THE TARGETING PROCESS paras. 2-1 to 2-14. (May 1996) [hereinafter FM 6-20-10].

phrase almost all of their doctrinal operational law tasks in terms of “effects” and “targeting.”<sup>39</sup> This is a language commanders understand. Therefore, they will be more likely to support requested BOLT missions if expressed in this familiar language.<sup>40</sup> For example, claims missions can almost always be tied to the doctrinal information operations effect of “influence” as they influence the local populace to support the BCT mission.<sup>41</sup> Judge advocates requesting claims missions could discuss the requirement during the FECC, get the intended “target” placed on the target synchronization matrix under the category of “influence,” and have the mission published in the daily FRAGO with requisite support directed of subordinate units.

At the NTC, JAs are encouraged to attend all the FECC working groups and actively participate in the targeting process. Modular BCTs should be staffed with an S7 (information operations officer) who more often than not will coordinate all non-lethal effects. Modular BCTs also have organic CA and PSYOP detachments. These elements are often self-supported and sometimes willing to assist JAs with their missions, as many BOLT missions further CA or PSYOP objectives as well. Therefore, JAs should coordinate closely with both elements as they can greatly assist the BOLTs when convoys, personnel, and equipment are needed.

### Soldier Skills

Much has already been written about the need for basic Soldier preparation before a CTC rotation, but this is not the focus of this article.<sup>42</sup> Planning for and arriving with HMMWV driver’s licenses, radios, night vision goggles, weapons, field equipment, etc., all remain important tasks—primarily for the BOLT Non-Commissioned Officer in Charge (NCOIC).

One change at the NTC, which affects basic Soldier preparation, is worth mentioning. Conducting convoy operations is now a primary training objective for most units at the NTC. The NTC constructed and operates two to three (depending on the rotation requirements) convoy force on force, and live fire lanes. One lane includes a mock-up village with buildings as high as three stories. Other lanes include reacting to an ambush, an improvised explosive device, a vehicle born improvised explosive device, and a mortar attack. This new focus on convoy operations directly impacts BOLTs, who once relaxed during the BCT live-fire, because each member of the BCT must spend one day participating in the convoy live fire. This means BOLT members must qualify on an M-16, squad automatic weapon, or other weapon system within six months of their rotation.<sup>43</sup>

### Conclusion

The NTC transformation has been rapid, and is continuing to change the face of the desert training area. Brigade operational law teams should learn about and prepare for the impact these changes have on legal operations. At the same time, while the NTC may appear facially different, many of the old BOLT tactics, techniques and procedures (TTPs) remain relevant and should not be cast aside. Before an NTC rotation, BOLTs should focus on the new developing areas, including detention and evidence collection operations, fiscal operations, effects-based planning (or planning in general), and other new nuances to the time-tested tenets of ROE, claims, investigations, and basic Soldier skills. Preparing for the issues addressed above will significantly increase the chances of a successful BOLT deployment to the NTC.

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<sup>39</sup> FM 27-100, *supra* note 17, ch. 3 (listing OPLAW, military justice, international law, administrative law, civil law (contract, fiscal, and environmental), claims, and legal assistance as the “core legal disciplines”).

<sup>40</sup> Rotational unit battle staffs all attend a week-long “Leader Training Program” at the NTC several months before the rotation. This program is designed to introduce BCTs to the NTC, including an orientation to the maneuver area. It also requires the BCT to conduct several MDMP or target planning sessions. This is generally the first opportunity a JA has to integrate with the staff and BN commanders, and an is excellent time to stress training requirements while the staff is focused on preparing for the rotation. Judge advocates will also spend time with the legal O/C team where they receive critical data for their rotation. The Leader Training Program is a must attend event for JAs.

<sup>41</sup> FM 3-0, *supra* note 38, paras. 11-49 through 11-69 (detailing the IO elements and their related activities). “Influence” is the doctrinal term to which most JA activities can be associated.

<sup>42</sup> Center for Law & Military Operations Report, *Legal Team Trends at Combat Training Centers*, ARMY LAW., Feb. 2005, at 14.

<sup>43</sup> See NTC 2005 EXERCISE OPERATING PROCEDURES ch. 13 (2005). National Training Center planners publish the *NTC EXOP* to rotational units at least three months in advance of each rotation. The *NTC EXOP* covers all aspects of the upcoming rotation. For example, the EXOP details requirements for personnel participating in live-fire, the rules for outfitting, wearing, and adjudicating the Multiple Integrated Laser Engagement System (MILES), enemy prisoner of war events and handling, fratricide investigations, close air support, minefields, civil military operations, interactions with local civilians, media on the battlefield, and emergency procedures (among others). Judge advocates, however, should not mistake this document for the actual exercise ROE, which is covered separately in Annex E of the DEPORD.

## Book Review

### WASHINGTON'S CROSSING<sup>1</sup>

REVIEWED BY MAJOR DEVIN A. WINKLOSKY<sup>2</sup>

*There is an old American folk tale about George Washington and the Crossing of the Delaware. It tells us that the new American republics nearly failed in the winter of 1776, that George Washington crossed the Delaware on Christmas night, and that his victory at Trenton revived the Revolution. All of this story is true, but it is not the whole truth.*<sup>3</sup>

*Washington's Crossing* is a superbly written narrative that provides a rich historical account of the Revolutionary War battles of Trenton and Princeton. David Hackett Fischer chronicles the events surrounding a defining moment in America's formative years and one of the country's first successful military campaigns.<sup>4</sup> Despite its historical focus, *Washington's Crossing* provides more than a strict historical account of a military operation. Fischer does not simply regurgitate historical facts, but relates a story focused on the decisions of real people in the midst of actual events of consequence.

Choice is a dominant theme in the book. According to Fischer, "This book is mainly about contingency, in the sense of people making choices, and choices making a difference in the world."<sup>5</sup> In *Washington's Crossing*, Fischer dissects the choices made by individuals on both sides of the conflict and examines their resulting impact on history and America today. What makes *Washington's Crossing* impressive is that Fischer presents his thesis in a way that is easily digestible. He artfully integrates historical accuracy with literary prose. Fischer does not dilute the complex history;<sup>6</sup> rather, he cites to hundreds of primary and secondary sources, uses over 1100 footnotes, displays at least eighteen maps, and provides twenty-four appendices.<sup>7</sup> The extensive research certifies the book's validity without encumbering the narrative. As one commentator aptly notes, "the book clips along like an adventure story . . . . It is a nonfiction book that reads like fiction."<sup>8</sup>

The turbulent events of late 1776 and early 1777 provide an exceptional set of circumstances for Fischer's premise. Fischer explains that America was quickly becoming another failed attempt at defeating colonial rule.<sup>9</sup> In the winter of 1776, the new American republic was on the verge of destruction and resubmission to the British Empire.<sup>10</sup> The Continental Army was weak and shriveled. The continental militia was undisciplined and marginally reliable.<sup>11</sup> In contrast, the British army and its hired Hessian allies were disciplined, well equipped, and strong.<sup>12</sup> In the fall of 1776, the British forces had quickly ripped control of New York, New Jersey, and Rhode Island from the continental forces.<sup>13</sup> In the winter, the British were

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<sup>1</sup> DAVID HACKETT FISCHER, WASHINGTON'S CROSSING (2004).

<sup>2</sup> U.S. Marine Corps. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

<sup>3</sup> FISCHER, *supra* note 1, at 142-43.

<sup>4</sup> *Washington's Crossing* is part of a series of books designed to explore "Pivotal Moments in American History." *Id.* at ix. Not surprisingly, Fischer is the co-editor of the series. *Id.* at ii. He is a widely recognized historical scholar and well qualified to contribute to this area of historical writing. Fisher earned an A.B. from Princeton in 1958 and a Ph.D. from Johns Hopkins in 1962. See David Hackett Fischer, University Professor and Warren Professor of History, Brandeis University Department of History Faculty Website, <http://www.brandeis.edu/departments/history/faculty/fischer.html> (last visited May 24, 2005). Over the past fifteen years he has written several books focused on American history, and he currently serves as a Warren Professor of History at Brandeis University in Wayland, Massachusetts, where he teaches primarily American history. See *id.*

<sup>5</sup> FISCHER, *supra* note 1, at 364.

<sup>6</sup> Professor Fischer notes in one interview: "It's a complicated tale and I didn't try to simplify it." Elise Soukup, *The First George W.*, NEWSWEEK, Mar. 15, 2004, at 12.

<sup>7</sup> See FISCHER, *supra* note 1, at 380 (listing the various appendices), 459-86 (providing the bibliography of sources), 545-46 (providing a comprehensive listing of maps).

<sup>8</sup> Alexander Rose, *History in the Making: An Interview with David Hackett Fischer*, NAT'L REV. ONLINE (July 1, 2004), <http://www.nationalreview.com/rose/rose200407011011.asp>.

<sup>9</sup> See FISCHER, *supra* note 1, at 136-37 ("Many on both sides thought that the rebellion was broken and that the American war was over.").

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 19-30, 85-88.

<sup>12</sup> See *id.* at 31-65.

<sup>13</sup> See *id.* at 84-98 (detailing the fall of New York), 121-28 (detailing the fall of New Jersey), 137 (discussing the fall of Rhode Island).

poised to continue their march inland, take control of Philadelphia, and arrest the members of the Continental Congress.<sup>14</sup> The British expected to end the rebel insurrection promptly and definitively.<sup>15</sup>

However, to read *Washington's Crossing* solely as history undervalues the writing. Fischer provides historical detail to support his broader premise "that particular individuals at particular times have an indelible effect on events."<sup>16</sup> He discusses the myriad factors that influenced personal choices, shifted momentum in favor of the Americans, and resulted in the ultimate defeat of the British forces.<sup>17</sup> In just under 400 pages, Fischer instills a genuine appreciation of the monumental importance of the events and people he discusses.<sup>18</sup> He provides a true and accurate account of American history, as well as lessons in military and civic leadership, honor, and humanity. Fischer also provides insight into the formation of the unique American spirit that remains as important today as it was in the winter of 1776. In that respect, *Washington's Crossing* is not only a valuable history lesson, it is an inspiration.

### *The Painting*

Fischer introduces his book with a discussion of Emanuel Leutze's painting *Washington Crossing the Delaware*.<sup>19</sup> This is an appropriate introduction because, as Fischer acknowledges, most modern Americans think of the famous painting when they imagine General George Washington crossing the Delaware River on Christmas 1776.<sup>20</sup> Fischer spends six pages discussing the painting and utilizes Leutze's work to express some of the book's major themes.

Fischer notes that Leutze "invites us to see each of these soldiers [in the painting] as an individual, but he also reminds us that they are all in the same boat, working desperately together against the wind and current."<sup>21</sup> Fischer repeatedly presents this theme of Americans placing differences aside and uniting in times of crisis to pursue a common cause.<sup>22</sup> He contends, however, that this is not an unguided pursuit. Just as Washington is at the center of Leutze's painting, Fischer highlights the central role of Washington as the man who provides the unifying and determined leadership for the American cause. Caspar Weinberger, a former U.S. Secretary of Defense, suggest that "this book makes clear that it was the military genius and leadership of Washington that turned almost certain defeat into victory."<sup>23</sup> Indeed, the book is titled *Washington's Crossing*, and throughout the book Fischer reveals why George Washington deserves this recognition.

Moreover, Fischer notes that most Americans are surprised by the enormous size of Leutze's painting when they see it in New York's Metropolitan Museum of Art.<sup>24</sup> Similarly, *Washington's Crossing* surprises readers with the extent of the history behind the actual event; Fischer reveals that there is far more to the story than Leutze's painting depicts. His writing enhances the reader's knowledge through well-integrated historical anecdotes about the countless choices that occurred at many levels.<sup>25</sup> The book consistently elicits moments of genuine discovery.

<sup>14</sup> See *id.* at 136-37.

<sup>15</sup> See *id.* at 73-75, 160-61.

<sup>16</sup> Woody West, *Washington Command: Leading America's Spirited Response to a Military Nightmare*, WASH. TIMES, Feb. 15, 2004, at B8.

<sup>17</sup> Fischer provides so many examples that a comprehensive listing of these factors is impractical. See, e.g., FISCHER, *supra* note 1, at 7-18 (discussing General Washington's background and education), 19-30 (discussing the different colonial regions and their varying ideas of liberty), 138-43 (discussing the influence of Thomas Paine's writings), 143-45 (discussing the Continental Congress's changing approach to military and economic affairs), 151-54 (discussing the formation of new military units and the appointment of new military leaders), 153 (discussing the "new breed of combat leader in the American army" represented by the appointment of Colonel Charles Scott to lead the Fifth Virginia Regiment), 180 (highlighting the American belief that even men without military uniforms have "a natural right to take up arms in defense of their laws and liberties"), 193-201 (discussing spontaneous uprisings in response to the British occupation and pillaging of New Jersey), 208 (discussing the philosophy of American officers leading from the front), 296 (discussing Colonel Edward Hand's leadership in the midst of sudden crisis), 301 (highlighting the effect of General Washington's leadership), 305 (discussing the leadership of Colonel Charles Scott).

<sup>18</sup> The book's editor, James M. McPherson, posits that "[n]o single day in history was more decisive for the creation of the United States than Christmas 1776." *Id.* at ix.

<sup>19</sup> See *id.* at 1.

<sup>20</sup> See *id.*

<sup>21</sup> *Id.* at 2.

<sup>22</sup> For instance, Fischer notes that General Washington's leadership "unit[ed] cantankerous Yankees, stubborn Pennsylvanians, autonomous Jersey men, honor-bound Virginians, and independent backcountrymen in a common cause." *Id.* at 266.

<sup>23</sup> Caspar Weinberger, *Books of Summer XII*, FORBES, Oct. 4, 2004, at 43.

<sup>24</sup> See FISCHER, *supra* note 1, at 2 (noting that the painting is over twelve feet high and over twenty-one feet long).

<sup>25</sup> Although Fischer details numerous individual and collective decisions throughout the book, his *Reprise: A Web of Contingency in History* provides a superb summary of these choices, their interrelation, and their impact on history. See *id.* at 364-67.

Fischer cautions that “size is not a measure of significance.”<sup>26</sup> The Delaware crossing was a single event; however, its historical significance is far larger. In this respect, the painting provides a good analogy of perspective. Leutze portrays a small group of Americans in a small boat on a giant canvas. Likewise, Fischer repeatedly expresses that seemingly insignificant individual choices produced major impacts when magnified upon the giant canvas of history.<sup>27</sup>

Fischer is keenly aware that history is not only a matter of facts, but of perspective. Indeed, he dedicates an appendix and a historiography to the subject of historical perspective and accuracy.<sup>28</sup> Like a good painting, “[g]ood history . . . depends on combining delicate detail with broad strokes, and balancing color with depth.”<sup>29</sup> Fischer understands that history can be told by many sources and that each deserves appropriate consideration. He evaluates the relative value of various sources and synthesizes them into coherent accounts of the same events.

### *The Book*

Fischer establishes the quintessential importance of individual choice through the organization of his book. First, he contrasts the relative quality of the opposing armies. In these chapters, Fischer indicates that the British and Hessian troops are far superior to the American army. In the next few chapters, Fischer relays the plight of the American army and its desperate and failed attempts to thwart the determined British and Hessian assaults. However, in the final chapters, which constitute the bulk of the book, Fischer’s analysis focuses on how individual choices at many levels changed the course of the war and transformed a losing American army into victors. As one commentator observed, “[c]ontemporary observers assumed that the little American rebellion must inevitably be crushed by the greatest empire on earth, yet, somehow, individual Americans made a series of better decisions than did their British and Hessian foes.”<sup>30</sup>

### *The Armies*

Fischer dedicates three chapters to an in-depth review of the principal armies involved in the engagements. These chapters orient the reader by providing significant details and background concerning the history, composition, organization, leadership, and cultural nuances of each army. Here, the value of Fischer’s reliance on a plethora of primary sources is obvious. Eighteen of the book’s twenty-four appendices relay extensive information about the armies.<sup>31</sup> Such exhaustive analysis helps explain the striking peculiarities and cultural differences of the armies that surface throughout the book.<sup>32</sup> Fischer weaves these characteristics into his narrative to help explain how the choices on each side contributed to the final outcome.

Fischer begins with a discussion of the American army, referring to the Continental Army as “An Army of Liberty.”<sup>33</sup> He shows the reader an American army that was a piecemeal configuration of diverse groups from various parts of the country. Despite sharing a common mission, the men did not hold a common definition of liberty. Fisher elaborates on some of the difficulties these differing views created when integrating the units into the army.<sup>34</sup> Additionally, forging a new army required the instillation and enforcement of discipline. This also proved problematic, however, since liberty and military

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<sup>26</sup> *Id.* at 5.

<sup>27</sup> One example is Hessian General Rall’s choice to “fight the Americans by attacking directly against their main strength [inside] the town of Trenton.” *Id.* at 243. Fischer characterizes this decision as a “mistake of historic consequence.” *Id.* Another example is American Sergeant Joseph White’s leadership of a heroic charge to capture Hessian cannons during the battle of Trenton which helped achieve American victory. *See id.* at 247-48. A further example is Colonel Edward Hand’s decision to take charge of the Pennsylvania Rifle Regiment when its original leader, French General Matthias de Roche-Fermoy, abandoned his command in the face of British and German troops. *See id.* at 296. Colonel Hand’s choice proved critical to American success at Trenton. *See id.* at 296-301.

<sup>28</sup> *See id.* at 421-57.

<sup>29</sup> Rose, *supra* note 8.

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

<sup>31</sup> Only appendices I through K and W and X provide no information about the armies.

<sup>32</sup> *See FISCHER, supra* note 1, at 7-30 (discussing the characteristics of the American army), 31-50 (discussing the characteristics of the British army), 51-64 (discussing the characteristics of the German army).

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *See id.* at 25.

discipline were conflicting concepts for free Americans.<sup>35</sup> According to Fischer, successful integration resulted primarily from the choice of action of their leader, General George Washington.

Throughout, Fischer explains Washington's role as the military leader charged with the daunting task of unifying the army into a cohesive and effective fighting force. Washington faced difficult choices concerning "how he could lead an amateur American army against highly skilled Regular troops."<sup>36</sup> Washington was a strong advocate of strict discipline;<sup>37</sup> yet, Washington "learned that the discipline of a European regular army became the enemy of order in an open society."<sup>38</sup> Fischer portrays Washington as a sensitive leader who chose to strike a delicate balance between enforcing discipline and respecting liberty. As a result of Washington's individual efforts, the "army of free men [learned] to work together."<sup>39</sup> Fischer elaborated on Washington's importance in an interview discussing the book:

Gradually, Washington found a way to work with these men. He was always listening, always consulting. His greatest success was to tap the skills, knowledge and experience of these men. This kind of leadership was one of Washington's great feats, and it became the very model for an open society and for the kind of leadership Americans now expect.<sup>40</sup>

Fischer next contrasts the American army with the British and Hessian armies. He suggests that the revolution was not just a contest between armies on the battlefield, but that the events also reflected a larger battle over ideology.<sup>41</sup> In 1776, the Americans faced a British army that was a professional and highly skilled veteran force that enjoyed "an experience of victory without equal in the world."<sup>42</sup> Unlike the American army, British military training was "a search for order and regularity through discipline."<sup>43</sup> British soldiers held the "ideals of loyalty, fidelity, honor, duty, discipline, and service . . . as sacred."<sup>44</sup> Likewise, the hired Hessian force "was a highly disciplined professional force, with strong values of obedience and service."<sup>45</sup> Even when officers had differing backgrounds, they nonetheless "all believed deeply in hierarchy, order, and discipline."<sup>46</sup> The Hessian leadership "despised the American language of liberty and freedom as the cant of cowards, traitors, and poltroons."<sup>47</sup>

Fischer's contrast of the relative quality of the armies heightens the reader's sensitivity to the importance of individual choice. The American army was not equal to its more experienced, better disciplined, and larger foes. Fischer argues that this disparity influenced important decisions within each army.<sup>48</sup>

### *Desperation*

After presenting a static comparison of the armies, Fischer examines the armies under dynamic circumstances. Fischer places the reader directly into a gripping story told from both sides of the battle lines. Readers will likely agree that

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<sup>35</sup> See *id.* at 30.

<sup>36</sup> *Id.* at 11.

<sup>37</sup> See *id.* at 15. Fischer notes that General Washington maintained "a deep concern for order and discipline." *Id.* Fischer states that Washington "raged against the undisciplined militia [and] demanded more rigorous military laws . . ." *Id.* Fischer also quotes a letter that Washington wrote to his captains stating, "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." *Id.*

<sup>38</sup> *Id.* at 30.

<sup>39</sup> *Id.*

<sup>40</sup> Andrew Richard Albanese, *Crossings Then and Now*, PUBLISHERS WKLY., Apr. 5, 2004, at 33.

<sup>41</sup> See FISCHER, *supra* note 1, at 50 ("For men on both sides who actually did the fighting, the war was not primarily a conflict of power or interest. It was a clash of principles in which they deeply believed.").

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Id.* at 40.

<sup>44</sup> *Id.* at 50.

<sup>45</sup> *Id.* at 65.

<sup>46</sup> *Id.* at 58-59.

<sup>47</sup> *Id.* at 59.

<sup>48</sup> See *id.* at 364 ("Many of them, from generals to privates, made choices that had an impact on events. But what they chose differed very much from one army to another, and so also did their ways of choosing.").

“Professor Fischer conveys in a remarkably realistic way what combat and the fog of war are actually like.”<sup>49</sup> Fischer elaborates upon the miserable failures and dire circumstances faced by the Continental Army and the new American Republic. He further details the confidence, professionalism, and successes of the British and Hessian forces sent to quash the rebellion. Fischer expertly builds suspense through the precarious predicament facing the Americans.

First, Fischer explains the British and American campaign plans. The British leaders, Admiral Lord Richard Howe and General William Howe, contemplated at least six different strategies.<sup>50</sup> They ultimately chose a strategy designed to take control of New York and the Hudson Valley and then seize New Jersey and Rhode Island.<sup>51</sup> Meanwhile, the Americans contemplated at least five strategies to meet the British offensive.<sup>52</sup> The American leadership chose to defend strategically important New York.<sup>53</sup>

Fischer then spends the next fifty-six pages discussing the result of these choices: a tragic American loss in New York. He succinctly states, “[t]he American army had been routed. Its commanders had made many grievous errors, and even its best infantry could not win a pitched battle against a seasoned regular army. In an ordeal by combat on Long Island, the forces of order made short work of an army of liberty.”<sup>54</sup>

Fischer heightens the desperation of the American condition by detailing the subsequent American losses of New Jersey and Rhode Island.<sup>55</sup> The British strategy succeeded as planned. The chosen American strategy had failed, and the Americans retreated across the Delaware to Pennsylvania. Here, Fischer purposely injects a dark note, “[m]any on both sides thought that the rebellion was broken and that the American war was over.”<sup>56</sup>

### *Defiance and the American Spirit*

Fischer deliberately portrays the American army as an inferior force and recounts the details of the miserable losses and rout of the American army. Why? Fisher hopes to prepare the reader for the epic transformation that takes place in the remaining chapters: “The Americans began to develop fresh confidence in Gen[eral] Washington and to believe that they could match and defeat the British army, and the British were losing confidence that they could win this war against upstart rebels . . . .”<sup>57</sup>

After building upon the near hopelessness of the American predicament, Fischer masterfully expresses the defiance of the American forces and their unwillingness to capitulate despite the overwhelming odds of defeat. Fischer demonstrates how the Americans and their leaders made decisions that profoundly impacted history forever. He notes that “[t]his great revival grew from defeat, not from victory. The awakening was a response to a disaster.”<sup>58</sup> Moreover, Fischer seems to agree with Doctor Benjamin Rush, a leading actor in the events at Trenton and Princeton,<sup>59</sup> that Americans choose not to act decisively during crisis until circumstances are dire:

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<sup>49</sup> Weinberger, *supra* note 23, at 43.

<sup>50</sup> The British strategies included: (1) a blockade, (2) “the deliberate use of extreme violence and terror to break the American will to resist,” also called “*Shrecklichkeit*,” (3) a relentless search and destroy approach, (4) a “spreading ink-stain strategy,” (5) a “divide and conquer” approach through seizure of key territory, and (6) the use of “Loyalist Americans against the rebels.” FISCHER, *supra* note 1, at 75-77.

<sup>51</sup> *Id.* at 77-78.

<sup>52</sup> Although Fischer enumerates five formal strategies, he actually discusses six. The American strategies included: (1) the use of privateers, (2) attrition through retreat and delay tactics, (3) resistance through an “irregular war” and guerilla tactics, (4) the use of defensive tactics to invite the enemy to attack only strong positions (called a “war of posts” by General Washington), (5) an “offensive-defensive” approach where American forces attacked “whenever an opportunity presented itself, while offering no opening to an enemy,” and (6) a full “perimeter defense” of all American colonies and towns. *Id.* at 79-80.

<sup>53</sup> *See id.* at 80.

<sup>54</sup> *Id.* at 98.

<sup>55</sup> *See id.* at 121-37.

<sup>56</sup> *Id.* at 137.

<sup>57</sup> West, *supra* note 16, at B8.

<sup>58</sup> FISCHER, *supra* note 1, at 143.

<sup>59</sup> *See id.*

[Rush] thought it was a national habit of the American people (maybe all free people) not to deal with a difficult problem until it was nearly impossible. “Our republics cannot exist long in prosperity,” Rush wrote[,] “We require adversity and appear to possess most of the republican spirit when most depressed.”<sup>60</sup>

Nothing in *Washington’s Crossing* more appropriately captures Fisher’s fundamental thesis than the book’s emphasis on the critical role of writer and soldier Thomas Paine and his *American Crisis*. Fischer credits Paine with reenergizing Americans to pursue their fight for liberty. He contends that *American Crisis* was a catalyst for this American revival,<sup>61</sup> and highlights its profound effect, suggesting that the revival “rose from the acts and choices of ordinary people in the valley of the Delaware, as Thomas Paine’s *American Crisis* began to circulate among them.”<sup>62</sup> Reflecting on Paine’s writing and the tragedy of December 1776, Fischer provides meaningful insight into his themes of individual choice and the American spirit that remain relevant today:

Everyone agreed that it was a perilous moment when things had gone deeply wrong for the American War of Independence. It was also a pivotal moment when great issues of the Revolution were hanging in the balance. Most of all it was a moment of decision, when hard choices had to be made. Thanks in part to Thomas Paine, it became a time when many Americans resolved to act, in ways that made a difference in the world.<sup>63</sup>

Ultimately, Fisher proves his fundamental thesis—that people’s choices have lasting import. Fischer’s chronicle of the recapture of Trenton and conquest of Princeton spans nine days. In those nine days Americans made innumerable individual choices at every level. They made these decisions under harsh conditions and in circumstances of uncertainty and fear. Yet, these choices were inspired by a common goal: the undaunted pursuit of liberty. In *Washington’s Crossing* Fisher succeeds at providing a vibrant history, but he provides a history that is an inspiration today. The truth of Fisher’s superb work is that our choices matter.

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<sup>60</sup> *Id.*

<sup>61</sup> *See id.* at 138-43. *The American Crisis* remains an inspirational writing, particularly when read in light of the events of 11 September 2001.

<sup>62</sup> *Id.* at 143.

<sup>63</sup> *Id.* at 142.

## CLE News

### 1. Resident Course Quotas

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

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—155th Contract Attorneys Course 5F-F10

Course Number—155th Contract Attorneys Course 5F-F10

Class Number—155th Contract Attorneys Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

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

### 2. TJAGSA CLE Course Schedule (June 2005 - September 2007) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C22	54th Graduate Course	15 Aug 05 – thru 25 May 06
5-27-C22	55th Graduate Course	14 Aug 06 – thru 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – thru 23 May 08
5-27-C20	167th Basic Course	24 Jun – 1 Sep 05 (Phase II – TJAGSA)
5-27-C20	168th Basic Course	13 Sep – 7 Oct 05 (Phase I – Ft. Lee)
		7 Oct – 15 Dec 05 (Phase II – TJAGSA)
5-27-C20	169th Basic Course	3 Jan – 27 Jan 06 (Phase I – Ft. Lee)
		27 Jan – 7 Apr 06 (Phase II – TJAGSA)
5-27-C20	170th Basic Course	30 May – 23 Jun 06 (Phase I – Ft. Lee)
		23 Jun – 31 Aug 06 (Phase II – TJAGSA)
5-27-C20	171st Basic Course	12 Sep – 6 Oct 06 (Phase I – Ft. Lee)
		6 Oct – 14 Dec 06 (Phase II – TJAGSA)
5-27-C20	172d Basic Course	2 Jan – 2 Feb 07 (Phase I – Ft. Lee)
		2 Feb – 6 Apr 07 (Phase II – TJAGSA)
5-27-C20	173d Basic Course	29 May – 22 Jun 07 (Phase I – Ft. Lee)

		22 Jun – 30 Aug 07 (Phase II – TJAGSA)
5-27-C20	174th Basic Course	11 Sep – 5 Oct 07 (Phase I – Ft. Lee)
		5 Oct – 14 Dec 07 (Phase II – TJAGSA)
5F-F70	37th Methods of Instruction Course	30 May – 2 Jun 06
5F-F70	38th Methods of Instruction Course	29 May – 1 Jun 07
5F-F1	188th Senior Officers Legal Orientation Course	12 – 16 Sep 05
5F-F1	189th Senior Officers Legal Orientation Course	14 – 18 Nov 05
5F-F1	190th Senior Officers Legal Orientation Course	30 Jan – 3 Feb 06
5F-F1	191st Senior Officers Legal Orientation Course	27 – 31 Mar 06
5F-F1	192d Senior Officers Legal Orientation Course	12 – 16 Jun 06
5F-F1	193d Senior Officers Legal Orientation Course	11 – 15 Sep 06
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	5 – 9 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07
5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	12th RC General Officers Legal Orientation Course	25 – 27 Jan 06
5F-F3	13th RC General Officers Legal Orientation Course	24 – 26 Jan 07
5F-F52	36th Staff Judge Advocate Course	5 – 9 Jun 06
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	9th Staff Judge Advocate Team Leadership Course	5 – 7 Jun 06
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2006 JAOAC (Phase II)	8 – 20 Jan 06
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2005 JAG Annual CLE Workshop	3 – 7 Oct 05
5F-JAG	2006 JAG Annual CLE Workshop	10 – 13 Oct 06
JARC-181	2006 JA Professional Recruiting Seminar	11 – 14 Jul 06
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F21	4th Advanced Law of Federal Employment Course	19 – 21 Oct 05
5F-F21	5th Advanced Law of Federal Employment Course	25 – 27 Oct 06
5F-F22	59th Law of Federal Employment Course	17 – 21 Oct 05
5F-F22	60th Law of Federal Employment Course	23 – 27 Oct 06
5F-F23	57th Legal Assistance Course	31 Oct – 4 Nov 05
5F-F23	58th Legal Assistance Course	15 – 19 May 06
5F-F23	59th Legal Assistance Course	30 Oct – 3 Nov 06
5F-F23	60th Legal Assistance Course	14 – 18 May 07
5F-F24	30th Admin Law for Military Installations Course	13 – 17 Mar 06
5F-F24	31st Admin Law for Military Installations Course	26 Feb – 2 Mar 07
5F-F28	2005 Income Tax Course	12 – 16 Dec 05
5F-F28	2006 Income Tax Course	11 – 15 Dec 06
5F-F29	23d Federal Litigation Course	1 – 5 Aug 05
5F-F29	24th Federal Litigation Course	31 Jul – 4 Aug 06

5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	4th Ethics Counselors Course	17 – 21 Apr 06
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2005 USAREUR Legal Assistance CLE	17 – 21 Oct 05
5F-F23E	2006 USAREUR Legal Assistance CLE	23 – 27 Oct 06
5F-F24E	2005 USAREUR Administrative Law CLE	12 – 15 Sep 05
5F-F24E	2006 USAREUR Administrative Law CLE	11 – 14 Sep 06
5F-F24E	2007 USAREUR Administrative Law CLE	10 – 13 Sep 07
5F-F26E	2005 USAREUR Claims Course	28 Nov – 2 Dec 05
5F-F26E	2006 USAREUR Claims Course	27 Nov – 1 Dec 06
5F-F28E	2005 USAREUR Income Tax CLE	5 – 9 Dec 05
5F-F28E	2006 USAREUR Income Tax CLE	4 – 8 Dec 06
5F-F28P	2006 PACOM Income Tax CLE	9 – 13 Jan 06
5F-F28P	2007 PACOM Income Tax CLE	8 – 12 Jan 07
<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	155th Contract Attorneys Course	25 Jul – 5 Aug 05
5F-F10	156th Contract Attorneys Course	17 – 28 Jul 06
5F-F10	157th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2005 Government Contract Law Symposium	6 – 9 Dec 05
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	73d Fiscal Law Course	24 – 28 Oct 05
5F-F12	74th Fiscal Law Course	1 – 5 May 06
5F-F12	75th Fiscal Law Course	30 Oct – 3 Nov 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	2d Operational Contracting Course	10 – 14 Apr 06
5F-F13	3d Operational Contracting Course	12 – 16 Mar 07
5F-F14	18th Comptrollers Accreditation Course (Ft. Bragg)	21 – 24 Feb 06
5F-F101	7th Procurement Fraud Course	31 May – 2 Jun 06
5F-F102	6th Contract Litigation Course	16 – 20 Apr 07
5F-F103	7th Advanced Contract Law	12 – 14 Apr 06
5F-F15E	2006 USAREUR Contract & Fiscal Law CLE	28 – 31 Mar 06
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	27 – 30 Mar 07
N/A	2006 Maxwell AFB Fiscal Law Course	6 – 9 Feb 06
N/A	2007 Maxwell AFB Fiscal Law Course	5 – 8 Feb 07
<b>CRIMINAL LAW</b>		
5F-F31	11th Military Justice Managers Course	22 – 26 Aug 05
5F-F31	12th Military Justice Managers Course	21 – 25 Aug 06

5F-F31	13th Military Justice Managers Course	20 – 24 Aug 07
5F-F33	49th Military Judge Course	24 Apr – 12 May 06
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	24th Criminal Law Advocacy Course	12 – 23 Sep 05
5F-F34	25th Criminal Law Advocacy Course	13 – 24 Mar 06
5F-F34	26th Criminal Law Advocacy Course	11 – 22 Sep 06
5F-F34	27th Criminal Law Advocacy Course	12 – 23 Mar 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-F35	29th Criminal Law New Developments Course	29 Nov – 2 Dec 05
5F-F35	30th Criminal Law New Developments Course	14 – 17 Nov 06
5F-301	9th Advanced Advocacy Training	16 – 19 May 06
5F-301	10th Advanced Advocacy Training	15 – 18 May 07
<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F42	85th Law of War Course	30 Jan – 3 Feb 06
5F-F42	86th Law of War Course	10 Jul – 14 Jul 06
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	16 – 20 Jul 07
5F-F44	1st Legal Aspects of Information Operations Course	26 – 30 Jun 06
5F-F44	2d Legal Aspects of Information Operations Course	25 – 29 Jun 07
5F-F45	5th Domestic Operational Law Course	24 – 28 Oct 05
5F-F45	6th Domestic Operational Law Course	30 Oct – 3 Nov 06
5F-F47	44th Operational Law Course	8 – 19 Aug 05
5F-F47	45th Operational Law Course	27 Feb – 10 Mar 06
5F-F47	46th Operational Law Course	31 Jul – 11 Aug 06
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07
<b>LEGAL ADMINISTRATORS COURSES</b>		
7A-270A1	17th Legal Administrators Course	19 – 23 Jun 06
7A-270A1	18th Legal Administrators Course	18 – 22 Jun 07
7A-270A2	7th JA Warrant Officer Advanced Course	10 Jul – 4 Aug 06
7A-270A2	8th JA Warrant Officer Advanced Course	9 Jul – 3 Aug 07
7A-270A0	13th JA Warrant Officer Basic Course	30 May – 23 Jun 06
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
<b>PARALEGAL AND COURT REPORTING COURSES</b>		
512-27DC4	10th Speech Recognition Training	17 – 28 Oct 05
512-27DC4	11th Speech Recognition Training	23 Oct – 3 Nov 06
512-27DC5	18th Court Reporter Course	1 Aug – 30 Sep 05
512-27DC5	19th Court Reporter Course	30 Jan – 31 Mar 06
512-27DC5	20th Court Reporter Course	24 Apr – 23 Jun 06
512-27DC5	21st Court Reporter Course	31 Jul – 29 Sep 06
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07

512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	6th Court Reporting Symposium	31 Oct – 4 Nov 05
512-27DC6	7th Court Reporting Symposium	30 Oct – 3 Nov 06
512-27D/20/30	17th Law for Paralegal NCOs Course	27 Mar – 7 Apr 06
512-27D/20/30	18th Law for Paralegal NCOs Course	26 Mar – 6 Apr 07
512-27DCSP	2d Combined Sr. Paralegal NCO Course	12 – 16 Jun 06
512-27DCSP	3d Combined Sr. Paralegal NCO Course	11 – 15 Jun 07

### 3. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2005 issue of *The Army Lawyer*.

### 4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2005**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2006 (“2006 JAOAC”). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2006 JAOAC will be held in January 2006, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or “re-do” any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2005). If the student receives notice of the need to re-do any examination or exercise after 1 October 2005, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2005 will not be cleared to attend the 2006 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact Lieutenant Colonel Jeffrey Sexton, telephone (434) 971-3357, or e-mail [Jeffrey.Sexton@hqda.army.mil](mailto:Jeffrey.Sexton@hqda.army.mil).

### 5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<b><u>Jurisdiction</u></b>	<b><u>Reporting Month</u></b>
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.

Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August

Rhode Island	Group 3: 31 December 30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October completion deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

\* Military exempt (exemption must be declared with state).

\*\*Must declare exemption.

## Current Materials of Interest

### 1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2004-2005).

5-6 Nov 05	Topeka, KS Washburn School of Law	Civil Law, Legal Assistance, Operational Law, Criminal Law	MAJ Fran Brunner (785) 274-1027 Fran.brunner@ks.ngb.army.mil
19-20 Nov 05	New York, NY 77th RRC	ADA/ADI	MAJ John Dupon (718) 352-5654 john.dupon@us.army.mil
13-15 Jan 06	New Orleans, LA 2d LSO	ADI/ADC	MAJ Nick Lorusso (504) 282-6439 (504) 593-6529 nlorusso@cox.net
28-29 Jan 06	Seattle, WA 70th RRC	ADA/ADK	LTC Lloyd Oaks (253) 301-2392 lloyd.d.oaks@us.army.mil
11-12 Feb 06	Orlando, FL 174th LSO/12th LSO	ADA/ADC	MSG Timothy Stewart (305) 779-4022 tim.stewart@usar.army.mil
25-26 Feb 06	Draper, UT 115th En Grp UTARNG/ 87th LSO	ADA/ADC	CPT Daniel K. Dygert (115th En Grp) (435) 787-9700 (435) 787-2455 (fax) daniel.k.dygert@us.army.mil  SFC Matthew Neumann (87th LSO) (801) 656-3600 (801) 656-3603 (fax) matthew.neumann@us.army.mil
4-5 Mar 06	Fort Belvoir, VA 10th LSO	ADC/ADA	CPT Eric Gallun (202) 514-7566 frederic.gallun@usdog.gov
11-12 Mar 06	Ft Hunter-Liggett, CA 75th LSO	ADK/ADA	LTC Burke Large (213) 452-3954 burke.s.large@us.army.mil
18-19 Mar 06	Cincinnati, OH 9th LSO	ADA/ADK	MAJ Charles Ellis (973) 865-6800 charles.ellis@us.army.mil
18-19 Mar 06	Fort McCoy, WI WIARNG	ADI/ADK	SPC Nicole Kimpfbeck (608) 242-3071 (608) 242-3082 (fax) nicole.kimpfbeck@wi.ngb.army.mil
22-23 Apr 06	Indianapolis, IN INARNG	ADI/ADK	COL George Thompson (DSN) 369-2491 george.thompson@in.ngb.army.mil
22-23 Apr 06	Boston, MA 94th RRC	ADI/ADK	MAJ Angela Horne (978) 784-3940 angela.horne@usar.army.mil
29-30 Apr 06	Oakbrook, IL 91st LSO	ADA/ADI	COL John Matthews (847) 402-2627 john.matthews@usar.army.mil
6-7 May 06	Fort Walton, FL 81st RRC	ADK/ADI	MAJ Timothy Harner (205) 795-1575 timothy.harner@usar.army.mil

19-21 May 06	Kansas City, MO 8th LSO/89th RRC	ADC/ADK	COL Meg McDevitt SFC Larry Barker (402) 554-4400, ext. 227 mmcdevitt@bqlaw.com larry.r.barker@us.army.mil
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## 2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at [www.dtic.mil/dtic/current.html](http://www.dtic.mil/dtic/current.html).

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to [bcorders@dtic.mil](mailto:bcorders@dtic.mil).

### Contract Law

- AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.
- AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95.
- AD A265777 Fiscal Law Course Deskbook, JA-506-93.

### Legal Assistance

- AD A384333 Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000).
- AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).
- AD A326002 Wills Guide, JA-262 (1997).
- AD A346757 Family Law Guide, JA 263 (1998).
- AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998).

AD A350514 The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Deployment Guide, JA-272 (1994).

AD A360704 Uniformed Services Former Spouses' Protection Act, JA 274 (2002).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

#### Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231 (2002).

AD A347157 Environmental Law Deskbook, JA-234 (2002).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

#### Labor Law

AD A360707 The Law of Federal Employment, JA-210 (1998).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (1999).

#### Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A303842 Trial Counsel and Defense Counsel Handbook, JA-310 (1995).

AD A302445 Nonjudicial Punishment, JA-330 (1995).

AD A302674 Crimes and Defenses Deskbook, JA-337 (1994).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

#### International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2003).

\* Indicates new publication or revised edition.

### 3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

#### b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: <http://jagcnet.army.mil>.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

#### **4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

For detailed information of TJAGSA Publications Available Through the LAAWS XXI JAGCNet, see the March 2005 issue of *The Army Lawyer*.

#### **5. TJAGLCS Legal Technology Management Office (LTMO)**

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at

<http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

#### **6. The Army Law Library Service**

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mrs. Dottie Evans, The Judge Advocate General's School, U.S. Army, ATTN: CTR-MO, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3278, commercial: (434) 971-3278, or e-mail at [Dottie.Evans@hqda.army.mil](mailto:Dottie.Evans@hqda.army.mil).



By Order of the Secretary of the Army:

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