



# THE ARMY LAWYER

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*R. Peter Masterton*

### **The Large Utility of “Little T”: Conducting Interoperability, Safety, and Familiarization Training**

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## Lore of the Corps

### The History of the Paperback Manual for Courts-Martial\*

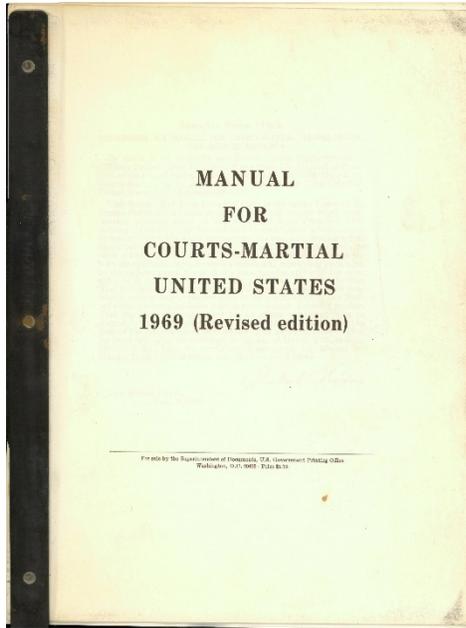
By Fred L. Borch  
Regimental Historian & Archivist

The paperback *Manual for Courts-Martial (MCM)* used by judge advocates, legal administrators, paralegals and civilian practitioners today has been in existence for twenty years. What follows is the story of how that happened—since the *MCM* was in either a hardcover book or hardcover loose-leaf format for the first 100 years of its existence.

For nearly seventy-five years, the *MCM*, first published in 1895, was a hardcover book. Even with the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, the complementary *MCM* was issued as a six inch by nine inch hardcover book when published in 1951.<sup>1</sup>

The first break with this tradition occurred in 1969, when the new *MCM* complementing the Military Justice Act of 1968 was published in a loose-leaf format. While still having a stiff board cover, the pages of the new *MCM* were hole-punched along the left side in three places and housed in a maroon-in-color three-post binder. The center post in this binder could be unscrewed and the book disassembled so that additional pages could be added to the *MCM*. As a result, in the 1970s and early 1980s, when legislative changes to the UCMJ or executive orders amending Rules for Courts-Martial or similar provisions were made, additional pages were printed and distributed to the field. Practitioners then slipped these changes into the *MCM* binder. Some judge advocates attempted to update the 1951 *MCM* by taping or pasting new provisions into their *MCMs*, but this was hardly an ideal situation.<sup>2</sup>

In 1984, when the armed forces published a new *MCM*, the loose-leaf format adopted in 1969 was continued. The only difference was that the 1984 *MCM* was now contained in a two-ring binder type hardcover notebook.<sup>3</sup>



In 1991, Colonel (COL) Francis A. Gilligan, then serving as the Chief, Criminal Law Division, in the Office of The Judge Advocate General (OTJAG), recognized that the *MCM* was not user-friendly. This was chiefly because there had been nineteen changes to the *MCM* since 1984, and it was now difficult to know for certain if all these changes had been posted correctly. Additionally, judge advocates in the field complained that the over-sized *MCM* (it measured ten inches wide by eleven inches tall by six inches in thickness) was too large to carry comfortably under either arm). It definitely would not fit into a standard size brief case. The result was that Army lawyers and other military justice practitioners began dividing the *MCM* in 1984 into two or more parts so that it was easier to carry and use. But this was also an undesirable situation. Finally, the 1984 edition of the *MCM* was expensive to produce: It cost roughly \$100 a copy.<sup>4</sup>

Colonel Gilligan was familiar with West Publishing's softcover *Federal Criminal Rules of Procedure*, which West published on a yearly basis and was used by United States Attorneys and criminal law practitioners. He wondered if it would be possible to transform the *MCM* into a similar paperback format. After consulting with the Army Publications and Printing Command, then located in the Hoffman Building in Alexandria, Virginia, Gilligan learned that not only had electronic publishing advanced to the point where the Army could produce a paperback *MCM*, but it would result in a truly phenomenal cost savings: It cost \$2 for a paperback *MCM* versus \$100 for the loose-leaf hardcover notebook *MCM*.<sup>5</sup>

Another advantage of the new softcover *MCM* would be that it would be more suitable for deployments, and the Army of the mid-1990s was very much aware after the Persian Gulf

\* The author would like to thank retired Colonel Francis A. Gilligan for his help in preparing this *Lore of the Corps*.

<sup>1</sup> See A MANUAL FOR COURTS-MARTIAL, ETC. (1895); A MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW (1898); A MANUAL FOR COURTS-MARTIAL, ETC. (1905); A MANUAL FOR COURTS-MARTIAL, ETC. (1908); A MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1917); A MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1921); A MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1928); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951).

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969).

<sup>3</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984).

<sup>4</sup> Telephone interview with Francis A. Gilligan, Colonel Retired, U.S. Army, June 29, 2016 [hereinafter Telephone Interview].

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

War of 1991 that the future required rapid deployments and that judge advocates deploying with their units would benefit from a smaller softcover book.

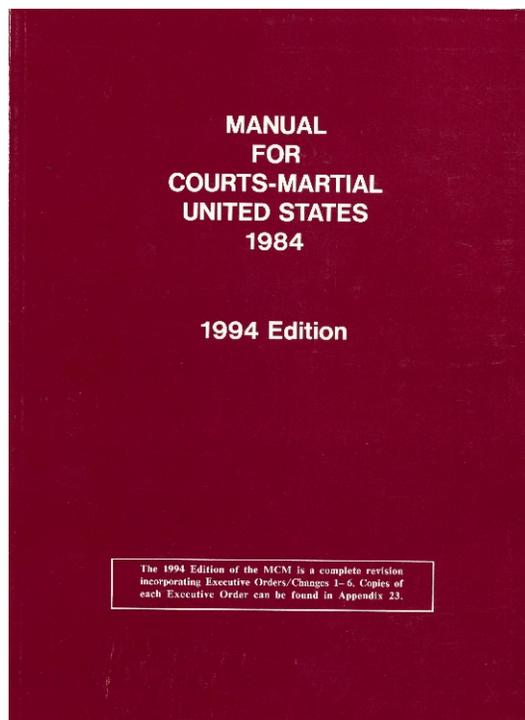
Colonel Gilligan, with the approval of the then Judge Advocate General, Major General John L. Fugh, proposed the metamorphosis of the *MCM* to the Joint Service Committee (JSC) on Military Justice. After obtaining unanimous approval from the five members of the JSC, the next step was the Office of the General Counsel (OGC), Department of Defense (DoD), since the new paperback *MCM* would need DoD GC approval. After Leigh Bradley, the Associate Deputy General Counsel with responsibility for military justice matters at the OGC's office, approved the concept, COL Gilligan began the *MCM* transformation process.<sup>6</sup>

While the Army Publications and Printing Command worked on the project, COL Gilligan left the Pentagon and OTJAG's Criminal Law Division and retired from active duty. His successors at OTJAG's Criminal Law Division, COLs Richard "Dick" Black and COL Charles "Charlie" E. Trant, pushed the project along. The details were worked out by the Joint Service Committee on Military Justice Working Group, which included Army Lieutenant Colonel Fred Borch, Air Force Major Regina Quinn, and Navy Lieutenant Kristen Henriksen.<sup>7</sup> The working group took delivery of the first paperback *MCM*, 1984 (1994 edition) on September 28, 1994.<sup>8</sup>

Two weeks later, on October 11, 1994, Major General Michael J. Nardotti awarded now retired COL Gilligan the Department of the Army Commander's Award for Public Service. The citation for the award lauded Gilligan's great vision in developing a redesigned paperback *MCM*, and noted that the transformation from a hardcover notebook to a smaller softcover book had resulted in a savings of \$5.2 million dollars to the Department of the Army, Department of Defense, and the federal government.<sup>9</sup>

The plan was to annually publish a new *MCM* since it was the practice for the president to sign an executive order amending the *MCM* on a yearly basis and any statutory changes to it likewise occurred. But that has not happened, and the *MCM* was been re-published only every three or four years. As a result, the current in-print version of the *MCM* is often out-of-date. Consequently, practitioners must consult the Internet to ensure that they have the most up-to-date version of a particular *MCM* provision. Despite this inconvenience, the paperback *MCM* has been a success

tremendous and is likely to remain in this all-paper format for the foreseeable future.<sup>10</sup>



*Manual for Courts-Martial, 1994 Edition*

*More historical information can be found at*

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

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

<sup>6</sup> E-mail from Paul S. Koffsky, Deputy General Counsel (Personnel & Health Policy), Dep't of Def., to author (July 15, 2016) (on file with author).

<sup>7</sup> The Joint Service Committee on Military Justice, established by Department of Defense Directive 5500.17, is responsible for conducting an annual review of the Manual for Courts-Martial in light of judicial and legislative developments in civilian and military practice. See *The Joint Service Committee on Military Justice*, U.S. DEP'T OF DEF.,

[http://www.dod.gov/dodgc/images/jsc\\_mission.pdf](http://www.dod.gov/dodgc/images/jsc_mission.pdf) (last visited July 25, 2016).

<sup>8</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1994).

<sup>9</sup> U.S. Dep't of Army, DA Form 5231, Commander's Award for Public Service, Colonel Francis A. Gilligan (Retired) (Oct. 11, 1994).

<sup>10</sup> Telephone Interview, *supra* note 4.

# Doctor-Patient Privilege Rules Overseas

R. Peter Masterton\*

## I. Introduction

Trying courts-martial overseas can be a challenge. Foreign laws often differ from American law and can affect the ability to obtain witnesses and evidence. One area where this can occur is when foreign doctors are needed as witnesses. This note will discuss the special challenges in this area and suggest methods to address these challenges.

Under the Military Rules of Evidence (MRE), there is no general doctor-patient privilege.<sup>1</sup> While there are limited exceptions for communications between psychotherapists and patients<sup>2</sup> and statements made by the accused during a mental examination ordered under Rule for Courts-Martial 706,<sup>3</sup> medical doctors do not have any general privilege to refuse to disclose matters relating to their treatment of servicemembers. The analysis to the MRE explains that a doctor-patient privilege

[W]as considered to be totally incompatible with the clear interest of the armed forces in ensuring the health and fitness for duty of personnel. . . . [T]he law of the forum determines the application of privilege. Even if a servicemember should consult with a doctor in a jurisdiction with a doctor-patient privilege for example, such a privilege is inapplicable should the doctor be called as a witness before the court-martial.<sup>4</sup>

Outside of the United States, a number of countries recognize a general doctor-patient privilege.<sup>5</sup> Because the only way to compel foreign witnesses to attend U.S. courts-martial rests on agreements with foreign nations where they

reside; these foreign laws may interfere with a court-martial's ability to obtain relevant evidence from doctors.

## II. Status of Forces Agreements

Most countries where American troops are stationed have some form of agreement defining the status of U.S. forces and their ability to obtain foreign witnesses, including doctors, to testify at U. S. courts-martial.<sup>6</sup> The detail and extent of these agreements vary from country to country.

The status of forces agreement applicable in Germany is one of the most detailed. Germany is bound by the North Atlantic Treaty Organization (NATO) Status of Forces Agreement that requires the parties to "assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence . . ."<sup>7</sup> Germany also entered into a supplemental agreement implementing the NATO Status of Forces Agreement,<sup>8</sup> which, among other things, requires the German government to assist in securing attendance of civilian witnesses at U.S. courts-martial. The supplemental agreement states:

Where persons whose attendance cannot be secured by the military authorities are required as witnesses or experts by a court or a military authority of a sending State, the German courts and authorities shall, in accordance with German law, secure the attendance of such persons before the court or military authority of that State.<sup>9</sup>

\* The author is currently a civilian attorney working as the Chief of International Law, Office of the Staff Judge Advocate, 21st Theater Sustainment Command in Kaiserslautern, Germany. He is a retired U.S. Army judge advocate and formerly served as the Chief Circuit Judge in Germany. The author would like to thank Mr. Holger Blug, a German legal assistance attorney at the Kaiserslautern Law Center, for his invaluable assistance in researching German doctor-patient privilege law.

<sup>1</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 501(d) (2012) [hereinafter MCM]. This rule provides that "Notwithstanding any other provision of the 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." *Id.*

<sup>2</sup> *Id.* MIL. R. EVID. 513. This privilege was adopted in 1999 in response to *Jaffee v. Redmond*, 518 U.S. 1 (1996). MCM, *supra*, at A22-45 (analysis).

<sup>3</sup> *Id.* R.C.M. 706 (2012). *See id.* MIL. R. EVID. 302.

<sup>4</sup> *Id.* MIL. R. EVID. 501 at A22-39 (analysis).

<sup>5</sup> For example, in Germany doctors have a privilege to refuse to provide information related to a patient. §53 StPO, [CODE OF CRIMINAL PROCEDURE], [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0199](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0199); §383 ZPO [CODE OF CIVIL PROCEDURE], [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p1455](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p1455).

<sup>6</sup> A complete list of all status of forces agreements can be found in U.S. DEP'T OF STATE, TREATIES IN FORCE (Jan. 1, 2013), <http://www.state.gov/documents/organization/218912.pdf>; U.S. DEP'T OF STATE, TREATIES IN FORCE 2014-SUPPLEMENT (Dec. 31, 2013), <http://www.state.gov/documents/organization/235185.pdf>.

<sup>7</sup> Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, Jun. 19, 1951, art. VII, para. 6(a), 4 U.S.T. 1792, T.I.A.S. 2846, [http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm) [hereinafter NATO SOFA].

<sup>8</sup> Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces with respect to Foreign Forces stationed in the Federal Republic of Germany (Revised Supplementary Agreement), 3 Aug. 1959, *amended* 21 Oct. 1971, *amended* 18 May 1981, *amended* 18 Mar. 1993, 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30, [http://www.europe.forces.gc.ca/Resources/log\\_unit\\_heb/AJAG/\\_doc/nato-sofa-revised-supplementary-agreement.pdf](http://www.europe.forces.gc.ca/Resources/log_unit_heb/AJAG/_doc/nato-sofa-revised-supplementary-agreement.pdf) [hereinafter German Supplement to NATO SOFA]. For a general discussion of the supplemental agreement and its amendments, see Major Wes Erickson, *Highlights of the Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 14.

<sup>9</sup> German Supplement to NATO SOFA, *supra* note 8, art. 37, para. 2.

The supplemental agreement specifically discusses privilege rules. It states that:

Privileges and immunities of witnesses . . . and experts shall be those accorded by the law of the court or authority before which they appear. The court or authority shall, however, give appropriate consideration to the privileges and immunities which witnesses . . . and experts . . . would have before a German court.<sup>10</sup>

The status of forces agreement applicable in Korea is also relatively robust. It contains language on assistance in investigating offenses and obtaining evidence that is identical to the NATO Status of Forces Agreement.<sup>11</sup> The agreed upon minutes to the Korean Status of Forces Agreement contains more detail on the obligation to assist in securing attendance of civilian witnesses:

The military authorities of the United States and the Authorities of the Republic of Korea shall assist each other in obtaining the appearance of witnesses necessary for the proceedings conducted by such authorities within the Republic of Korea. . . . When citizens or residents of the Republic of Korea are required as witnesses or experts by the military authorities of the United States, the courts and authorities of the Republic of Korea shall, in accordance with the law of the Republic of Korea, secure the attendance of such persons. In these cases the military authorities of the United States shall act through the Attorney General of the Republic of Korea, or such other agency as is designated by the authorities of the Republic of Korea.<sup>12</sup>

Unlike the German supplemental agreement, the Korean Status of Forces Agreement does not discuss any privilege rules for witnesses.

The status of forces agreement between the United States and Japan contains language similar to the NATO and Korean status of forces agreements.<sup>13</sup> Although the agreement itself does not contain any specific provisions requiring Japan to assist in obtaining witnesses, an “agreed view” between the parties provides that the United States may submit requests for witnesses to “the nearest Procurator’s office or judicial police official or Judge, so that summons may be issued.”<sup>14</sup> The agreed view contains no details on witness privilege rules.<sup>15</sup>

The Bilateral Security Agreement between the United States and Afghanistan, concluded in 2014, states that Afghanistan “authorizes the United States to hold trial[s] . . . in the territory of Afghanistan” in criminal cases involving U.S. forces and its civilian component.<sup>16</sup> It also states that Afghanistan and the United States shall “assist each other in investigation of incidents, to include the collection of evidence.”<sup>17</sup> However, it does not contain any specific provisions requiring Afghanistan to provide witnesses at U.S. courts-martial, nor does it address privilege rules.<sup>18</sup>

### III. Effect of Foreign Doctor-Patient Privilege Rules

As discussed above, in many countries where U.S. troops are stationed, civilian host-nation doctors can be required to appear as witnesses at U.S. courts-martial with the assistance of host-nation officials. While such doctors do not enjoy a general doctor-patient privilege,<sup>19</sup> the applicable status of forces agreement may require the U.S. military judge to “give appropriate consideration” to host-nation doctor-patient

<sup>10</sup> *Id.* art. 39.

<sup>11</sup> Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Area and the Status of United States Armed Forces in the Republic of Korea, Jul. 9, 1966, U.S.-S. Korea, art. XXII, para. 6(a), 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163, [http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966\\_1991.html](http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966_1991.html). This paragraph provides that “[t]he military authorities of the United States and the authorities of the Republic of Korea shall assist each other in the carrying out of all necessary investigation into offenses, and in the collection and production of evidence . . .” *Id.*

<sup>12</sup> *Id.*; Agreed Minutes to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Area and the Status of United States Armed Forces in the Republic of Korea, Jul. 9, 1966, U.S.-S. Korea, 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163, [http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966\\_1991.html](http://web.archive.org/web/20050607080358/http://www.shaps.hawaii.edu/security/us/sofa1966_1991.html).

<sup>13</sup> Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652; T.I.A.S. 4510; 373 U.N.T.S. 248, <http://www.mofa.go.jp/mofaj/area/usa/sfa/pdfs/fulltext.pdf>. Article XVII, paragraph 6(a) of the agreement provides that, “The military

authorities of the United States and authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense.” *Id.*

<sup>14</sup> Agreed View 26 of the Joint Committee Regarding the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 22 Oct. 1953, (on file with author) [hereinafter Agreed View 26]. Although a number of these agreed views predate the current status of forces agreement between the United States and Japan, they have all been incorporated into the current agreement. See Lieutenant Commander Timothy D. Stone, *U.S.-Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 234 (2006).

<sup>15</sup> *Id.*

<sup>16</sup> Security and Defense Cooperation Agreement Between the United States and the Islamic Republic of Afghanistan, Sept. 30, 2014, U.S.-Afg., art. 13, para. 1, <http://photos.state.gov/libraries/afghanistan/231771/PDFs/BSA%20English.pdf>.

<sup>17</sup> *Id.* art. 13, para. 3.

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

<sup>19</sup> MCM, *supra* note 1, MIL. R. EVID. 501(d).

privilege rules.<sup>20</sup> What this means in an individual court-martial is unclear.

In addition, many host-nation doctors may be unfamiliar with U.S. law and, as a result, refuse to testify if they believe a local doctor-patient privilege applies. To obtain the presence of these witnesses at U.S. courts-martial, the trial counsel must rely on foreign prosecutors or officials, who also may not be familiar with U.S. privilege rules. As a result, enforcing the U.S. military rules requiring such doctors to testify may be difficult. Using American contempt proceedings<sup>21</sup> to force the doctors to testify may not be permitted by the applicable status of forces agreement.<sup>22</sup> Host-nation prosecutors may refuse to enforce U.S. evidentiary rules requiring doctors to testify, if those rules contradict host-nation privilege rules.<sup>23</sup> Even if the military rules requiring doctors to testify can be successfully enforced, such enforcement may lead to lack of cooperation in obtaining host-nation witnesses in the future.

#### IV. Solutions

Prosecutors and defense counsel seeking to get the testimony of a host-nation doctor in an overseas court-martial should initially attempt to obtain written consent from the patient involved. This will usually serve as a proper waiver for a host-nation doctor-patient privilege rule.<sup>24</sup>

If it is impossible to obtain consent from the patient, counsel should carefully research host-nation law. Most overseas U.S. military legal offices have an international law section with local attorneys that can determine the existence and extent of a host-nation doctor-patient privilege.<sup>25</sup> If such a privilege exists, the parties should educate both the doctor (potential witness) and the local prosecutor on the lack of such a privilege at a U.S. military court-martial. Such education may be sufficient to allay the doctor's fears and obtain his or her cooperation.

If this education is insufficient to obtain the host-nation doctor's cooperation, the parties should raise the problem to

the military judge in a pretrial motion.<sup>26</sup> It may be helpful to have an expert on host-nation law and the local status of forces agreement available to testify at the motion hearing to educate the judge on the legal status of the privilege being asserted by the doctor. At this point an appropriate order to testify by the military judge<sup>27</sup> may be sufficient to convince the doctor to testify.

If an order by the judge is still insufficient, the parties and the military judge should examine enforcement options. Usually, a military judge's order to testify can only be enforced against a foreign doctor by a host-nation prosecutor.<sup>28</sup>

If it proves impossible to obtain the doctor's testimony, counsel should examine alternatives to his or her testimony. Foreign medical records may qualify for an exception to the hearsay rule, if they qualify as statements for the purpose of medical treatment or records of regularly conducted activities.<sup>29</sup> Lay witnesses who witnessed medical examinations may also be able to testify as to their observations, although they may not be as helpful as a medical professional.<sup>30</sup> Since it may take significant preparation to present such alternatives, it is important to resolve all issues surrounding testimony by foreign doctors at a motion hearing well before trial on the merits.

#### V. Conclusion

Foreign doctor-patient privilege rules can create serious difficulty in obtaining necessary testimony at courts-martial overseas. If a foreign doctor refuses to testify based on such a doctor-patient privilege, it is critical for the parties to identify and raise this issue early. Educating foreign doctors on the lack of a doctor-patient privilege at a court-martial may allay their fears and obtain their testimony. However, if this does not work, the parties should seek appropriate pretrial orders from the military judge and approach the host-nation prosecutors to enforce those orders. If all else fails, the parties should consider alternatives to the doctor's testimony.

<sup>20</sup> See *supra* note 10 and accompanying text.

<sup>21</sup> UCMJ art. 48(a) (2012). Military judges detailed to courts-martial have the authority to punish "any person" for contempt who willfully disobeys a lawful order of the court-martial. *Id.*

<sup>22</sup> For example, the North Atlantic Treaty Organization (NATO) Status of Forces agreement provides that its jurisdictional provisions "shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State." NATO SOFA, *supra* note 7, art. VII, para. 4.

<sup>23</sup> While status of forces agreements can be useful tools, it may be difficult to find remedies for violations by the host-nation. See, e.g., Captain Benjamin P. Dean, *An International Human Rights Approach to Violations of the NATO SOFA Minimum Fair Trial Standards*, 106 MIL. L. REV. 219 (1984).

<sup>24</sup> For example, in Germany doctors can be "released" from the obligation to refuse to provide information related to a patient. §53 StPO [CODE OF CRIMINAL PROCEDURE], [http://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0199](http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0199).

<sup>25</sup> See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES, 30 Sept. 1989, paras. 2-1g, 5-2a(7), 9-3(f). The U.S. Army is required to create studies of the criminal law of each foreign country where its forces are located. U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURE AND INFORMATION, 15 Dec. 1989, para. 1-6.

<sup>26</sup> MCM *supra* note 1, R.C.M. 906(a).

<sup>27</sup> *Id.* R.C.M. 906(b)(13).

<sup>28</sup> See *supra* notes 21-23 and accompanying text.

<sup>29</sup> MCM, *supra* note 1, MIL. R. EVID. 803(3), (4). Unfortunately, the foreign doctor who has refused to testify may be the only person who can establish the requisite foundation for these exceptions.

<sup>30</sup> Lay persons generally may not provide testimony in the form of opinions unless they are rationally based on their perceptions, helpful to a clear understanding of their testimony or a fact in issue, and are not based on specialized knowledge generally provided by experts. See *id.* MIL. R. EVID. 701.

# The Large Utility of “Little T”: Conducting Interoperability, Safety, and Familiarization Training

Major Matthew T. Miller\*

## I. Introduction

You are the brigade judge advocate (BJA) for a brigade combat team that is scheduled to take part in a large multinational training exercise consisting of thousands of Soldiers from your brigade and three other allied nations in Africa. U.S. Army Africa recently issued your brigade a warning order<sup>1</sup> (WARNORD) stating that this exercise is part of a three-month deployment to Senegal.<sup>2</sup> The WARNORD describes a number of situational training exercises<sup>3</sup> and live-fire ranges focusing on combat operations in an urban environment.

The brigade staff is all-hands-on-deck as they begin analyzing the WARNORD and working through the military decision-making process.<sup>4</sup> Since you took the military operations elective at the graduate course,<sup>5</sup> you know the Army’s planning process emphasizes collaboration within the whole staff to analyze the operational environment and plan for mission success.<sup>6</sup> Therefore, you take the initiative and stay late to work with the rest of the staff.

You first go to the S-3 shop<sup>7</sup> and find the team

brainstorming. There are sticky notes covering the walls with ideas about what may be necessary to carry out the combined exercises. Among the notes, you see references to training African soldiers in battle-drill six,<sup>8</sup> detainee operations, and combat lifesaver skills.<sup>9</sup> Your mind flashes back to your fiscal law classes and you remember that training foreign soldiers is considered foreign security assistance, which normally requires special funding.<sup>10</sup>

You re-read the WARNORD and notice that it does not discuss any separate funding sources for this mission. You tell the S-3 that training foreign soldiers may create fiscal law problems and that there will be a lot of uncertainty until we receive more funding information from higher headquarters. The S-3 turns to you and asks, “What options can you give me for reducing that uncertainty, lawyer?”<sup>11</sup>

This scenario is not relatively common. For years, the United States has increased its focus on strengthening ties with regional allies across the globe.<sup>12</sup> Regionally-aligned brigades are being tasked with maintaining their standard mission skill-sets, while also rotating through their assigned regions to increase the capacity of ally forces and ensure they

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<sup>1</sup> The commander and staff issue a warning order to subordinate units in order to provide them with information necessary to begin preparations while the higher headquarters finishes the planning process. U.S. DEP’T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 9-81 (5 May 2014) [hereinafter FM 6-0].

<sup>2</sup> Foreign assistance operations are normally planned at the combatant command level, which then sends orders down the chain of command to regionally-aligned brigades. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-568, REGIONALLY ALIGNED FORCES: DoD COULD ENHANCE ARMY BRIGADES’ EFFORTS IN AFRICA BY IMPROVING ACTIVITY COORDINATION AND MISSION-SPECIFIC PREPARATION (2015) [hereinafter GAO-15-568] (discussing the Government Accountability Office’s (GAO) review of planning procedures for foreign assistance operations in Africa).

<sup>3</sup> Situational training exercises are short, scenario-driven, mission-oriented, limited exercises designed to train one collective task, or a group of related tasks or battle drills, through practice. U.S. DEP’T OF ARMY, TRAINING CIRCULAR 25-10, A LEADER’S GUIDE TO LANE TRAINING para. 1-3b (Aug. 1996) [hereinafter TC 25-10].

<sup>4</sup> The military decision-making process is an iterative planning methodology used by Army staffs to understand the situation and mission, develop a course of action, and produce an operation plan or order. U.S. DEP’T OF ARMY, ARMY DOCTRINE PUBLICATION 5-0, THE OPERATIONS PROCESS para. 32 (17 May 2012) [hereinafter ADP 5-0].

<sup>5</sup> The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, 64th Graduate Course Elective Descriptions 17 (Aug. 2015).

<sup>6</sup> See ADP 5-0, *supra* note 4, para. 7.

<sup>7</sup> The S-3, or operations officer, is the principal staff officer responsible for all matters concerning training, operations and plans, and force development and modernization. FM 6-0, *supra* note 1, para. 2-46.

<sup>8</sup> A battle-drill is a collective action that a unit practices regularly in order to rapidly execute it without applying a deliberate decision-making process. U.S. DEP’T OF ARMY, FIELD MANUAL 7-8, INFANTRY RIFLE PLATOON AND SQUAD para. 4-1 (22 Apr. 1992). Battle-drill six is the common name for the collective action of entering and clearing a room and building. *Id.* para. 4-2.

<sup>9</sup> Combat life-saver training is a bridge between the first aid training given to all Soldiers during basic training and the medical training given to combat medics. *Medical Simulation Training Center*, FORT CARSON, <http://www.carson.army.mil/mstc/cls.html> (last visited Aug. 15, 2016) [hereinafter *Medical Simulation Training Center*].

<sup>10</sup> The Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C.S. § 2151(2015)).

<sup>11</sup> Uncertainty is always present during military operations and the staff must continually reassess the environment to plan for and reduce that uncertainty. See ADP 5-0, *supra* note 4, para. 1-1.

<sup>12</sup> See Gen. Raymond T. Odierno, *CSA Lays Out Strategic Priorities for Uncertain Future*, U.S. ARMY (Oct. 16, 2013), [http://www.army.mil/article/113256/CSA\\_lays\\_out\\_strategic\\_priorities\\_for\\_uncertain\\_future/](http://www.army.mil/article/113256/CSA_lays_out_strategic_priorities_for_uncertain_future/).

can conduct combined operations.<sup>13</sup> This dual focus creates fiscal concerns related to when a command can use its operation & maintenance (O&M) funds and when an event requires the use of funds specifically designated for foreign assistance.

Although Congress has increased statutory authority and funding for military foreign assistance,<sup>14</sup> it is imperative that judge advocates be able to distinguish between foreign assistance and training that is specifically designed to ensure our own safety and interoperability with foreign forces. This type of interoperability training, commonly called “little t” training, may utilize O&M funds.<sup>15</sup> Understanding the little t paradigm is crucial for providing your commander and staff flexibility to plan and fund necessary training at the local level.

This article will briefly discuss the general fiscal issues related to the Department of Defense (DoD) conducting foreign assistance. It will then provide a detailed analysis of the U.S. Government Accountability Office (GAO) opinion that created the little t framework<sup>16</sup> and apply that framework to common scenarios faced by U.S. forces across the globe.

## II. Background

On August 1, 1961, President John F. Kennedy signed into law the Foreign Assistance Act, which unified foreign assistance efforts under the Department of State (DoS).<sup>17</sup> President Kennedy further affirmed the DoS’s lead role in Executive Order Number 10973, which delegated foreign assistance authorities to the DoS and specifically withheld them from the DoD.<sup>18</sup> Foreign assistance includes financial support, logistics support, security assistance, and

humanitarian assistance that is provided to foreign governments, forces, and populations.<sup>19</sup> As a baseline rule, the DoD does not have authority to conduct these types of missions.<sup>20</sup>

Despite this baseline rule, the DoD has unique capabilities and skills that make it the rational choice for conducting many types of foreign assistance.<sup>21</sup> Congress has acknowledged this reality by granting statutory exceptions for certain types of DoD foreign assistance.<sup>22</sup> The most prominent statutory exceptions include authorizations for building the capacity of allied military forces,<sup>23</sup> conducting humanitarian assistance missions,<sup>24</sup> and conducting foreign assistance related to counterterrorism.<sup>25</sup> In recent years, Congress has expanded some of these authorizations to provide the DoD with increased authority and funding to support our allies and combat terrorism in today’s dynamic strategic environment.<sup>26</sup>

Despite the increase in authorizations, these foreign assistance funding sources have limitations. The expanded authorities still require coordination with the DoS<sup>27</sup> and considerable congressional oversight.<sup>28</sup> Another potential limitation is that today’s austere fiscal environment could always reduce or remove these additional funding sources.<sup>29</sup>

## III. The Birth of Little T Training

On April 7, 1954, President Dwight D. Eisenhower coined the term “domino theory” to convey the concern that, unless stopped, communist countries would spread communism to neighboring states.<sup>30</sup> This fear of communist expansion shaped U.S. foreign policy for decades after

<sup>13</sup> GAO-15-568, *supra* note 2.

<sup>14</sup> See, e.g., Major Ryan W. Leary, *A Big Change to Limitations on “Big T” Training: The New Authority to Conduct Security Assistance Training with Allied Forces*, ARMY LAW., Feb. 2014, at 23 (discussing the recent expansion of “big t” training authority under § 1203 of the 2014 National Defense Authorization Act (NDAA)).

<sup>15</sup> CONT. & FISCAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, THE FISCAL LAW DESKBOOK 10-6 (2015) [hereinafter THE FISCAL LAW DESKBOOK].

<sup>16</sup> Hon. Bill Alexander, 63 Comp. Gen. 422 (1984).

<sup>17</sup> The Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C.S. § 2151(2015)).

<sup>18</sup> Exec. Order No. 10,973, 26 C.F.R. § 639 (1961) [hereinafter Exec. Order No. 10,973].

<sup>19</sup> Foreign Assistance Act.

<sup>20</sup> *Id.* See also Exec. Order No. 10,973, *supra* note 18.

<sup>21</sup> See generally U.S. DEP’T OF ST., FOREIGN MILITARY TRAINING REPORT FISCAL YEARS 2014 AND 2015 (2015), <http://www.state.gov/t/pm/rls/rpt/fmtrpt/2015/index.htm> [hereinafter FOREIGN MILITARY TRAINING REPORT].

<sup>22</sup> See, e.g., 10 U.S.C. § 1050 (2012) (authorizing the Secretary of Defense to pay the travel, subsistence, and other special compensations to members

of Latin American militaries in order to support Latin American cooperation). See also National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1206, 128 Stat. 3292, 3536-3537 (2014) (authorizing the military to spend its own appropriations to train and equip foreign militaries to conduct counterterrorism or stability operations).

<sup>23</sup> See, e.g., 10 U.S.C. § 2282 (2016).

<sup>24</sup> See, e.g., 10 U.S.C. § 2561 (2016).

<sup>25</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-219, § 1236, 128 Stat. 3292, 3558 (2014).

<sup>26</sup> Leary, *supra* note 14, at 23.

<sup>27</sup> See, e.g., National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1203(a)(2), 127 Stat. 894 (2013).

<sup>28</sup> *Id.* § 1203(d).

<sup>29</sup> Jeremy Herb, *Defense Budget Fight Hits House Floor*, POLITICO (May 14, 2015, 5:08 AM), <http://www.politico.com/story/2015/05/defense-budget-fight-hits-house-floor-thornberry-117931> (discussing the powerful factions within the federal government that wish to decrease DoD funding).

<sup>30</sup> Eisenhower Gives Famous “Domino Theory” Speech, HISTORY, <http://www.history.com/this-day-in-history/eisenhower-gives-famous-domino-theory-speech> (last visited Aug. 15, 2015).

President Eisenhower's speech.<sup>31</sup>

In 1979, a communist guerilla movement overthrew the Nicaraguan dictator, General Anastasio Somoza De Bayle.<sup>32</sup> To prevent communist expansion into neighboring Honduras, the U.S. military conducted a series of operations in Honduras beginning in February 1983.<sup>33</sup> These operations included: 1) joint training and maneuvers with the Honduran military; 2) military and civilian construction projects; 3) deployment of key military equipment; and 4) medical and veterinary care for thousands of civilians and animals.<sup>34</sup> The U.S. Army used O&M funds for all of the operations.<sup>35</sup>

In response to congressional concerns about the military build-up along the Nicaragua-Honduras border, the comptroller general investigated the military's fiscal authority to conduct these foreign operations.<sup>36</sup> The investigation determined that many of the activities, including the training of Honduran soldiers, violated fiscal law principles and amounted to unauthorized foreign assistance.<sup>37</sup> However, the GAO opinion did acknowledge that certain types of small scale interoperability, safety, and familiarization activities that are required for combined operations do not constitute foreign assistance.<sup>38</sup>

The military calls these small scale activities little t training.<sup>39</sup> Little t training is often described as an exception to the general prohibition against DoD foreign assistance.<sup>40</sup> However, a review of the original GAO language shows that this description is somewhat misleading:

Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e. to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department,

some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure "interoperability" of the two forces. At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by Congress. Where such extensive "interoperability" training is in fact necessary, combined exercises should not be conducted without the formal training needed to equalize the participating forces.<sup>41</sup>

As the language demonstrates, little t training is not an exception to the rule. Instead, it is a type of limited interoperability and safety instruction that does not rise to the level of formal training defined in the Foreign Assistance Act.<sup>42</sup> Therefore, the only exception to the general prohibition against foreign assistance remains express statutory authorization. Judge advocates must understand this distinction and ensure little t events remain narrow in scope.

Little t training may be funded with O&M appropriations because it satisfies the three basic tenants of selecting a proper funding source: 1) it is reasonably related to the purpose of the appropriation;<sup>43</sup> 2) it is not prohibited by law;<sup>44</sup> and 3) it does not fall within the scope of some other category of appropriation.<sup>45</sup>

The interoperability and safety instruction described by the GAO is reasonably related to the purpose of O&M funds, because it is necessary for the safe operation of the military during a combined exercise.<sup>46</sup> By not rising to the level of formal training, little t training is neither prohibited by the Foreign Assistance Act nor properly within the scope of one

<sup>31</sup> See generally FRANK NINKOVICH, MODERNITY AND POWER: A HISTORY OF THE DOMINO THEORY IN THE TWENTIETH CENTURY 203-40 (1994).

<sup>32</sup> HOOVER PRESS, COMMUNISM IN CENTRAL AMERICA AND THE CARIBBEAN 53 (Robert Wesson ed. 1982).

<sup>33</sup> *Id.* See also THOMAS M. LEONARD, THE HISTORY OF HONDURAS 156 (2011).

<sup>34</sup> Hon. Bill Alexander, *supra* note 16, at 8.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.* at 42.

<sup>38</sup> *Id.* at 44-45.

<sup>39</sup> THE FISCAL LAW DESKBOOK, *supra* note 15.

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

<sup>41</sup> Hon. Bill Alexander, *supra* note 16, at 44-45.

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

<sup>43</sup> 65 Comp. Gen. 738, 740 (1986).

<sup>44</sup> 38 Comp. Gen. 758 (1959) (discussing how the necessary expense test cannot overcome a statutory prohibition).

<sup>45</sup> *Id.* (discussing how the necessary expense test cannot overcome a legislative mandate to use a specific fund).

<sup>46</sup> The use of operation and maintenance funds is authorized for "expenses, not otherwise provided for, necessary for the operation and maintenance of the Army." See generally Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 28 Stat. 2130 (2014).

of the other statutory authorizations.<sup>47</sup>

## A. Analysis Factors

The GAO identified three types of training being conducted by U.S. forces in Honduras: 1) artillery training provided by the 3-319th Field Artillery Battalion; 2) medical training provided by the 41st Combat Support Hospital; and 3) field training being conducted by U.S. Special Forces.<sup>48</sup> For purposes of little t analysis, this article will only discuss the first two events.<sup>49</sup>

When reviewing the artillery and medical training, the GAO focused on five factors: 1) whether the event supported a combined exercise; 2) whether the event gave the foreign forces a skill set they did not previously possess; 3) the number of U.S. service members involved in the training; 4) the cost of the training; and 5) the duration of the training.<sup>50</sup>

### 1. Application to Artillery Training

The artillery training was conducted to prepare the Honduran forces for combined exercises with 105mm artillery guns. The training lasted 22 days and consisted of teams of two to three U.S. Soldiers working with crews of eight to twelve Honduran soldiers.<sup>51</sup> Half of each U.S. team spoke Spanish.<sup>52</sup> The Honduran military had recently received 105mm artillery through the U.S. Foreign Military Sales (FMS) Program<sup>53</sup> and had no previous experience with this weapon.<sup>54</sup> The GAO found that if the Honduran government had purchased comparable training through the FMS program, the cost would have been \$250,000 to \$500,000.<sup>55</sup>

When reviewing the five analysis factors, the GAO determined that the nature of this event was not interoperability but rather a formal training period necessary to teach Honduran soldiers how to use a new piece of

equipment. The GAO agreed with the Army's assertion that this training was necessary to prepare the Honduran forces for the combined exercise.<sup>56</sup> The GAO emphasized, however, that interoperability instruction cannot be used as a replacement for the formal training that is necessary to give foreign forces the minimum skills necessary to operate with the U.S. military.<sup>57</sup> If a foreign partner requires a new skill set to participate in combined operations, it is the responsibility of the U.S. military to plan for formal training sessions.<sup>58</sup>

The rest of the analysis factors corroborated the GAO's concerns about providing the Honduran forces a new skill set. The training was organized in a formal manner, with small U.S. teams training larger Honduran groups.<sup>59</sup> The high price and long duration of the event also substantiated the formal nature of the training and the GAO's ultimate conclusion that this instruction constituted foreign security assistance.<sup>60</sup>

### 2. Application to Medical Training

The 41st Combat Support Hospital conducted a five-week combat medical training course for approximately 100 Hondurans.<sup>61</sup> Unlike the artillery training, the DoD did not specifically argue that the training was necessary for interoperability in a combined exercise.<sup>62</sup> Instead, the DoD classified the training as humanitarian-based instruction provided by off-duty Soldiers.<sup>63</sup> The DoD justified its use of O&M funds with the idea that the event increased the readiness of the U.S. forces by exposing them to indigenous methods of operation and culture.<sup>64</sup>

The GAO dismissed the DoD's arguments related to off-duty Soldiers because service members are considered on-duty, unless on leave.<sup>65</sup> The DoD cannot circumvent the prohibition on foreign assistance simply by having the instructors volunteer for the task.<sup>66</sup> The GAO also stressed that formal training provided to foreign personnel is foreign assistance, regardless of whether the DoD classifies it as

<sup>47</sup> Hon. Bill Alexander, *supra* note 16, at 44.

<sup>48</sup> *Id.* at 42-43.

<sup>49</sup> One of the United States Special Forces' critical tasks is to train foreign forces and build their warfighting capabilities. U.S. DEP'T OF ARMY, ARMY DOCTRINE PUBLICATION 3-05, SPECIAL OPERATIONS para. 32 (31 Aug. 2012). The GAO issued a follow-up opinion specifically concerning special forces security assistance in Honduras and found no violation of fiscal principals due to their unique mission. See Hon. Bill Alexander, 63 Comp. Gen. 422 (1986).

<sup>50</sup> Hon. Bill Alexander, *supra* note 16, at 42-49.

<sup>51</sup> *Id.* at 43.

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

<sup>53</sup> The Foreign Military Sales program is the responsibility of the Department of State and facilitates the sale of military equipment to a foreign government when it is in the best interest of U.S. security. Exec. Order No. 11,958, 3 C.F.R. § 79 (1977). See also *Foreign Military Sales*, DEF. SEC. COOPERATION AGENCY, <http://dscs.mil/programs/foreign-military-sales-fms> (last visited Aug. 15, 2016).

<sup>54</sup> Hon. Bill Alexander, *supra* note 16, at 43.

<sup>55</sup> *Id.* at 42-44.

<sup>56</sup> *Id.* at 48.

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

<sup>58</sup> *Id.* at 49.

<sup>59</sup> *Id.* at 43.

<sup>60</sup> *Id.* at 48.

<sup>61</sup> *Id.* at 43.

<sup>62</sup> *Id.* at 48.

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

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

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

<sup>66</sup> *Id.*

security-based or humanitarian in nature.<sup>67</sup>

The GAO also disagreed with the DoD's justification that the event contributed to the U.S. forces' readiness. The "mere fact that an activity carried out by [DoD] has a readiness or operational benefit does not mean that it may automatically be financed with O&M appropriations."<sup>68</sup> The true test is whether the analysis factors indicate the training event is "comparable to that normally provided by security assistance projects."<sup>69</sup> In this case, the GAO classified this long-duration, formal medical training as foreign assistance and concluded that O&M funds were improper.<sup>70</sup>

#### B. The Sliding Scale of Analysis Factors

The GAO's analysis of the Honduran training events and dismissal of the Army's counterarguments make it clear that the pre-requisite factor for little t training is whether the training supports a combined exercise. If the DoD does not present evidence that the training supported a combined exercise, as was the case for the Honduran medical training, it will be impossible to classify the event as little t.<sup>71</sup>

Once the military establishes that an event supports a combined exercise, the next key factor is whether the training provides the foreign force with a new skill necessary for the ally to participate in the exercise.<sup>72</sup> When the GAO found that the Honduran artillery would have been unable to operate their own weapons without the training event, it used the remaining analysis factors to confirm the formality of the training.<sup>73</sup> Therefore, the fact that the Honduran Army required a new skill set raised the level of scrutiny and required a more thorough analysis of the cost, duration, and personnel factors.

The GAO's treatment of the Honduran events demonstrates that little t analysis can be viewed as a sliding scale based on the foreign force's level of sophistication. Combined exercises inherently involve a sharing of information between forces.<sup>74</sup> The more sophisticated a

foreign force, the more likely that sharing of information will be mutual and focused exclusively on interoperability and safety. In this scenario, the remaining factors become less decisive.

The less sophisticated a foreign force, the more likely the sharing of information will be one-directional and involve the transfer of new skill sets to the foreign force.<sup>75</sup> In this situation, the remaining analysis factors become crucial in determining whether the training rises to the level of formality requiring specific statutory authority.

#### IV. Traditional Example Application

Since the creation of the little t paradigm, the classic scenario used to explain its application is safety and interoperability training conducted as part of a combined airborne operation.<sup>76</sup> Before any airborne operation, units conduct pre-jump training to remind paratroopers of proper procedures and safety techniques.<sup>77</sup> Before conducting a combined airborne operation with foreign paratroopers, U.S. commanders will likely want the foreign paratroopers to participate in the U.S. pre-jump training. This pre-jump training satisfies the pre-requisite factor for little t, because it is necessary to support a combined airborne operation.

Pre-jump training serves as an easy example of little t training, because a foreign military conducting a combined airborne operation will normally be sophisticated enough to have paratroopers who are fully trained to jump out of an aircraft.<sup>78</sup> Unlike the Honduran artillery soldiers, the purpose of including foreign paratroopers in pre-jump training is not to give them the basic skills necessary for the combined exercise. Instead, it is necessary to ensure that U.S. and foreign paratroopers understand each other's procedures and safety practices.<sup>79</sup> If paratroopers do not understand these procedures, it greatly increases the risk of an accident during the jump.<sup>80</sup> Therefore, pre-jump training is critical for the mutual sharing of information necessary to safely and

<sup>67</sup> *Id.* at 47.

<sup>68</sup> *Id.* at 46-47.

<sup>69</sup> *Id.* at 44.

<sup>70</sup> *Id.* at 49.

<sup>71</sup> *Id.* at 47.

<sup>72</sup> *Id.* at 44.

<sup>73</sup> *Id.* at 47.

<sup>74</sup> *Id.* at 44.

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

<sup>76</sup> THE FISCAL LAW DESKBOOK, *supra* note 15, at 10-17.

<sup>77</sup> See U.S. ARMY AIRBORNE SCH., PRE-JUMP TRAINING (MC-7) (Apr. 2011) [hereinafter PRE-JUMP TRAINING] (providing an example pre-jump training description for the MC-7 parachute).

<sup>78</sup> SGT Brandon Anderson, *Task Force Brawler and Dutch Soldiers Participate in Noble Jump*, DEF. MEDIA ACTIVITY (June 18, 2015), [https://www.dvidshub.net/news/167112/task-force-brawler-and-dutch-soldiers-participate-noble-jump#.VgVmc\\_4w\\_4g](https://www.dvidshub.net/news/167112/task-force-brawler-and-dutch-soldiers-participate-noble-jump#.VgVmc_4w_4g) (discussing joint airborne operations with Dutch Soldiers).

<sup>79</sup> Michelle Tan, *British Invasion: Huge Paratrooper Jump Today Over Bragg*, ARMY TIMES (Apr. 13, 2015), [http://www.lexis.com/research/retrieve?\\_m=09ceef89b3d3f7bb88419bc935e6b678&csvc=fr&cform=searchForm&\\_fmtstr=FULL&docnum=1&\\_startdoc=1&wchp=dGLbVzkzSkAW&\\_md5=294656573e1d88429178930c3e559142](http://www.lexis.com/research/retrieve?_m=09ceef89b3d3f7bb88419bc935e6b678&csvc=fr&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzkzSkAW&_md5=294656573e1d88429178930c3e559142) (discussing the unique challenges created by the fact that the British and U.S. paratroopers use different equipment).

<sup>80</sup> Adam Ashton, *Army "VIP Culture" Led to Parachute Accident that Killed Former JBLM Officer*, THE NEWS TRIBUNE (Jul. 31, 2014), <http://www.thenewstribune.com/news/local/military/article25874407.html> (discussing how the failure to conduct pre-jump safety training contributed to an accident).

effectively operate together.

The other analysis factors support the small-scale nature of pre-jump training. Normal pre-jump training is relatively short in duration, low cost, and is traditionally conducted on the same day as the airborne operation.<sup>81</sup> The number of U.S. personnel is also not a problem because all paratroopers, regardless of nationality, participate in the training.<sup>82</sup>

However, the analysis becomes more problematic when the foreign forces are less sophisticated and require more than basic familiarity and safety training. The more the event resembles the cost, duration, and organization of basic airborne school,<sup>83</sup> the more likely it is to be classified as foreign assistance.

## V. Application to a Near-Peer Ally<sup>84</sup>

As shown in the airborne example, it is easier to apply the little t paradigm to combined operations with relatively advanced foreign militaries. The more capable the allied military, the less likely interoperability training will be perceived as a subterfuge for formal training.<sup>85</sup> An excellent example of this dynamic is combined operations with the United Kingdom (U.K.).

For this example, a U.K. infantry brigade travels to Fort Bragg to conduct a series of combined operations focusing on airborne insertion, urban warfare, and evacuation of civilians from a warzone or natural disaster.<sup>86</sup> The ultimate goal of the exercises is to ensure the U.K. brigade can seamlessly integrate into the command and control structure of the 82d Airborne Division.<sup>87</sup>

To prepare for the combined exercises, the U.S. and U.K. brigades conduct interoperability training focused on a wide range of issues, including: 1) proper rigging of U.K. and U.S. heavy equipment for airborne insertion from each other's aircraft;<sup>88</sup> 2) integration of U.S. and U.K. communication systems; and 3) familiarization with the other force's weapons. The U.S. brigade uses O&M funds for all of the

fuel, food, water, ammunition, and other supplies needed for these events.

### A. Little T Analysis

The U.K. military is one of the most technically and tactically capable forces in the world.<sup>89</sup> These combined exercises would naturally be less about enhancing one side's capabilities and more about ensuring both armies could effectively operate together. As a result, the GAO's concerns about using little t as a replacement for formal training are less likely to apply to a scenario with the United Kingdom because very little training is necessary to equalize our forces. However, the level of formality remains fact-dependent and full analysis is always required.

#### 1. *The Foundational Factors: Combined Exercise and Skill Set*

In this hypothetical, the interoperability training satisfies the two foundational little t factors: 1) support of a combined exercise and 2) no transfer of a new skill set. The British Parachute Regiment possesses all the basic airborne and infantry skill sets of the 82d Airborne Division.<sup>90</sup> Unlike the far less sophisticated Honduran military, the U.K. military does not need to substantially improve its capabilities in order to conduct combined operations with the United States.

The intent of the heavy-rigging training would not be to teach U.K. forces the skill of dropping heavy equipment during an airborne operation. Instead, this interoperability training is an extension of the classic airborne little t example. This training is necessary to ensure the two fully-trained forces understand each other's rigging and safety practices.<sup>91</sup>

The same initial analysis is true for the communications and weapons familiarity. Unlike the Honduran soldiers, who needed extra training just to operate their own artillery pieces, the U.K. soldiers would already be fully proficient with their own equipment.<sup>92</sup> The communication training would be

(demonstrating the complicated and technically demanding task for preparing heavy equipment for airborne insertion).

<sup>89</sup> *United Kingdom*, GLOBAL FIREPOWER, [http://www.globalfirepower.com/country-military-strength-detail.asp?country\\_id=United-Kingdom](http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=United-Kingdom) (last visited Aug. 15 2016) (detailing the wide range of factors that make the British military one of the world's most capable forces).

<sup>90</sup> The official website of the British Army describes the battle-tested capabilities and modern equipment of the British Parachute Regiment. *The Parachute Regiment*, U.K. ARMY, <http://www.army.mod.uk/infantry/regiments/23304.aspx> (last visited Aug. 16, 2016); *see also 82d Airborne Division History*, FT. BRAGG, <http://www.bragg.army.mil/82nd/Pages/History.aspx> (last visited Aug. 16, 2016).

<sup>91</sup> Tan, *supra* note 79.

<sup>92</sup> *Id.*

<sup>81</sup> PRE-JUMP TRAINING, *supra* note 77.

<sup>82</sup> U.S. ARMY JUMPMASER SCH., STUDENT STUDY GUIDE 6 (Oct. 2014).

<sup>83</sup> *Basic Airborne Course*, FT. BENNING, <http://www.benning.army.mil/infantry/rbt/1-507th/airborne/> (last visited Aug. 16, 2016) (providing an overview of the three-week training plan and graduation requirement for the U.S. Army Airborne School).

<sup>84</sup> The term "near-peer" is used to describe a force with similar weapons and capabilities as the U.S. military. *See Support: Getting Ready to Fight the Near-Peers*, STRATEGY PAGE (Feb. 24, 2014), <http://www.strategypage.com/htm/w/htcbtsp/articles/20140224.aspx>.

<sup>85</sup> Hon. Bill Alexander, *supra* note 16, at 46-47.

<sup>86</sup> Tan, *supra* note 79.

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

<sup>88</sup> *See, e.g.*, U.S. DEP'T OF ARMY, TRAINING MANUAL 4-48.23, AIRDROP OF SUPPLIES AND EQUIPMENT: RIGGING THE FAMILY OF MEDIUM TACTICAL VEHICLES (FMTV) TRUCKS (July 2013) [hereinafter TM 4-48.23]

limited to ensuring that the U.S. and U.K. forces can talk to each other during maneuvers and live-fire exercises.<sup>93</sup> Similarly, the weapons training would focus on ensuring the allied forces understand the capabilities of each other's primary weapons. Common sense dictates that both of these events are essential for ensuring that two militaries can safely and effectively operate together on the battlefield.

## 2. Supporting Factors

Although the rest of the factors are usually less decisive with a near-peer ally, they still need to be fully analyzed to ensure there is nothing that will counter the presumption against providing a new skill set.

For the communications training, let us assume that the cost and duration of training is relatively low, because it would basically entail trouble shooting the radio systems. The communications training would likely involve a small number of U.S. Soldiers from the S-6<sup>94</sup> teaching U.K. soldiers how to connect their radios to the U.S. network. When analyzing the Honduran artillery training, the GAO pointed at this kind of personnel ration as evidence of formal training.<sup>95</sup> However, unlike in Honduras, this impression is offset by the clear interoperability nature of this event and the sophistication and capabilities of the U.K. forces.

For the heavy-rigging training, the supporting factors may also establish that it is a more formal type of event. The technical and complicated nature of preparing heavy equipment for airborne insertion demands that interoperability training involve considerably more time and resources than the communications training.<sup>96</sup>

The heavy-rigging training is also similar to the Honduran artillery event, because the United Kingdom acquired its aircraft in a foreign military sale (FMS).<sup>97</sup> However, unlike the Honduran military, this interoperability training would not appear to replace formal FMS training because the U.K. is already capable of conducting heavy-drop operations.<sup>98</sup> Despite the evidence of formality, the purpose of the training and the U.K. force's sophistication would corroborate the limited nature of these events.

As a counterpoint, the weapons familiarization training

demonstrates how the supporting factors could overcome the presumptions created by the U.K. forces' sophistication. At first glance, there appear to be no problems because the U.K. forces are fully proficient with their own weapons and do not require a new skill set to participate in the exercises.<sup>99</sup> However, the supporting factors could demonstrate that the weapons training has gone beyond familiarization and created a skill set unrelated to the combined exercise.

If the weapons familiarization training involves more formal U.S. training teams, high expenditures of ammunition, and significant time on the range, then the transfer of knowledge likely goes beyond what is necessary for combined operations. Arguably, U.K. forces need to know the basic capabilities of U.S. weapons in order to operate in a joint environment. However, it is more difficult to argue that U.K. forces need to be able to operate U.S. weapons.

Unlike communications training, U.K. forces do not need to have hands-on experience with U.S. weapons in order to connect to a central system. Unlike the heavy-rigging training, U.K. forces do not need hands-on training with U.S. weapons to avoid accidents during the follow-on exercise. Without these safety and interoperability requirements, the GAO will likely determine that hands-on training with U.S. weapons serves no purpose other than to give the U.K. forces a new skill set. Therefore, hands-on weapons training is difficult to justify, even when operating with a near-peer ally.

As discussed, commanders have flexibility in applying the little t paradigm to training with sophisticated foreign militaries. However, this flexibility has its limits. Little t training with sophisticated allies can involve higher cost and duration, but these supporting factors must still align with the limited need for interoperability, familiarization, and safety training.

## VI. Application to a Developing Ally

The United States' strategic focus on increasing ties with global partners does not just include countries with advanced militaries. The United States has also worked diligently to build ties with less-developed militaries in Africa,<sup>100</sup> Eastern Europe,<sup>101</sup> and Asia.<sup>102</sup> As shown in the GAO's analysis of

<sup>93</sup> *Id.*

<sup>94</sup> FM 6-0, *supra* note 1, para. 2-66.

<sup>95</sup> Hon. Bill Alexander, *supra* note 16, at 43.

<sup>96</sup> TM 4-48.23, *supra* note 88.

<sup>97</sup> *United Kingdom—Globemaster III Sustainment Partnership*, U.S. DEP'T OF DEF. SEC. COOPERATION AGENCY (July 2, 2010), [http://dscamilitary.com/sites/default/files/mas/uk\\_10-29\\_0\\_0.pdf](http://dscamilitary.com/sites/default/files/mas/uk_10-29_0_0.pdf) (discussing the renewal of the foreign military sale of C-17 cargo aircraft, spare parts, and maintenance).

<sup>98</sup> Tan, *supra* note 79.

<sup>99</sup> *Small Arms*, U.K. ARMY, <http://www.army.mod.uk/equipment/23218.aspx> (last visited Aug. 16, 2016) (describing the various small arms weapons used by the British army).

<sup>100</sup> GAO-15-568, *supra* note 2.

<sup>101</sup> Joseph Trevithick, *A Great Green Fleet is Rolling Through Eastern Europe*, MEDIUM (25 Mar. 2015), <https://medium.com/war-is-boring/a-great-green-fleet-is-rolling-through-eastern-europe-1ac1f47a14ca>; *see also Operation Atlantic Resolve*, U.S. DEP'T OF DEF., [http://www.defense.gov/News/Special-Reports/0514\\_Atlantic-Resolve](http://www.defense.gov/News/Special-Reports/0514_Atlantic-Resolve) (last visited Aug. 16, 2016) [hereinafter *Operation Atlantic Resolve*] (describing the wide range of operations intended to increase European security).

<sup>102</sup> *See Special Report: DoD Focus on Asia-Pacific Rebalance*, U.S. DEP'T OF DEF., <http://www.defense.gov/News-Article->

Honduras, combined operations with less sophisticated militaries raise the likelihood of a unilateral transfer of skill and increase scrutiny in the little t analysis.<sup>103</sup> Therefore, commanders must provide weight to all the analysis factors to ensure that interoperability training does not rise to the level of formal foreign assistance.

For example, take a scenario where 3rd Stryker Brigade Combat Team (SBCT), 7th Infantry Division, travels to Malaysia to conduct a series of combined exercises in both jungle and urban environments. To prepare for these combined exercises, the United States and Malaysia conduct (1) familiarization training for the Stryker Combat Vehicle,<sup>104</sup> (2) combat medic training, and (3) jungle survival training.<sup>105</sup> The 3rd SBCT command and staff wish to use O&M funds for all of the preparatory training events.

#### A. Little T Analysis

Malaysia is an important ally in the Pacific region and it has taken a central role in the United States' refocus on building partnerships in Asia,<sup>106</sup> which has been coined the Asia-Pacific Rebalance.<sup>107</sup> However, the Malaysian military is not a military peer of the United States and its military expenditures rank only 58th in the world.<sup>108</sup>

As always, the analysis must begin with the prerequisite support for a combined operation. This factor appears to be met, because in order to operate together, both forces will have to be familiar with each other's equipment, medical procedures, and jungle survival techniques. Since the Malaysian military is, in general, less sophisticated than the U.S. military, there will be an initial appearance of a unilateral skill transfer. To counter this initial impression, the brigade staff must fully analyze the Malaysian forces' specific capabilities in the various events.

##### 1. Stryker Training

At first glance, training Malaysian soldiers on the Stryker

Combat Vehicle appears to parallel the problematic artillery training in Honduras. Like the Honduran military's lack of basic competence with 105mm artillery, the Malaysian military does not have experience with Stryker vehicles.<sup>109</sup> Training them on the use and capabilities of the vehicle appears to inherently create a new skill set. However, unlike Honduras, Malaysia has not purchased the Stryker Combat Vehicle in an FMS and will not be expected to operate them during the combined exercise.

The fact that Malaysia does not own Stryker vehicles may appear to alleviate some of the GAO's concerns that little t training will be used as a replacement for formal training purchased through a FMS. However, the commander must still ensure the cost, duration, and personnel organization of the training do not rise to the level of formal training that would normally be purchased in a FMS.

To avoid formal training, the commander must narrowly tailor the Stryker instruction. If the training consists of short demonstrations given to Malaysian soldiers without significant hands-on training, then it will be easier to classify the event as mere familiarization with no transfer of a new skill. However, if the training consists of more elaborate and costly instruction and provides Malaysian soldiers with the ability to use the vehicle, the little t analysis will point toward formal training and prohibited foreign assistance.

##### 2. Medical Training

Medical training also requires an equal analysis of all the little t factors, because the transfer of new skills is greatly dependent on the duration and organization of the training. The easiest way to create fiscal problems is to award a new medical certification to the foreign soldiers, such as the combat lifesavers (CLS) certificate.<sup>110</sup> For a U.S. Soldier to be qualified as a CLS, she must take part in forty hours of didactic and practical training and pass a forty-question

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View/Article/604728/special-report-dod-focus-on-asia-pacific-rebalance (last visited Aug. 16, 2016) [hereinafter *Special Report*] (describing the ongoing U.S. efforts to strengthen alliances in the Asian-Pacific region).

<sup>103</sup> Hon. Bill Alexander, *supra* note 16, at 44.

<sup>104</sup> The Stryker was introduced in 2000 as an eight-wheeled, medium-weight armored vehicle that prioritized flexibility and speed. *Stryker Family*, GEN. DYNAMICS LAND SYS., <http://www.gdls.com/products/stryker-family.php> (last visited Aug. 16, 2016). It currently has ten different configurations that allow for a variety of uses on the battlefield. *Id.*

<sup>105</sup> Amanni Lyle, *Soldiers Learn Survival Skills at Jungle Training Center*, DEF. MEDIA ACTIVITY (May 21, 2015), <http://archive.defense.gov/news/newsarticle.aspx?id=128874>.

<sup>106</sup> Sec'y of Def. Ash Carter, *Media Availability with Secretary Carter at the ASEAN Defense Ministers-Plus Meeting in Kuala Lumpur, Malaysia*, U.S. DEP'T OF DEF. (Nov. 4, 2015), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/627598/media-availability-with>

secretary-carter-at-the-asean-defense-ministers-plus-me (discussing the significant issues facing U.S. allies at a conference hosted by Malaysia).

<sup>107</sup> *Special Report*, *supra* note 102.

<sup>108</sup> *Malaysia World Factbook*, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/my.html> (last visited Aug. 16, 2016) (discussing Malaysia's overall military capabilities).

<sup>109</sup> Lithuania and Iraq are the only two countries actively pursuing foreign military sales of the Stryker. See *Lithuania—M1126 Stryker Infantry Carrier Vehicles*, U.S. DEP'T OF DEF. SEC. COOPERATION AGENCY (Nov. 5, 2015), <http://www.dsca.mil/major-arms-sales/lithuania-m-1126-stryker-infantry-carrier-vehicles-icv-30mm-cannon-and-m2-machine>; see also *Iraq—M1135 Stryker Nuclear, Biological, and Chemical Reconnaissance Vehicles*, U.S. DEP'T OF DEF. SEC. COOPERATION AGENCY (Jul. 25, 2013), <http://www.dsca.mil/major-arms-sales/iraq-m1135-stryker-nuclear-biological-and-chemical-reconnaissance-vehicles>.

<sup>110</sup> *Medical Simulation Training Center*, *supra* note 9.

exam.<sup>111</sup> Just as the U.S. Army could not avoid the formality of the Honduran medical training by classifying it as humanitarian,<sup>112</sup> a commander cannot overcome the formality of a CLS training event by reclassifying it as interoperability and familiarization training.

To ensure the medical training satisfies little t criteria, the commander should organize the training to be mutually beneficial. If the medical training consists of relatively equal numbers of U.S. and Malaysian soldiers, then it will appear to be more of an equal transfer of medical methods for interoperability and safety. The cost and duration of the event should also be narrowly tailored to avoid tipping the scales in favor of foreign assistance.

### 3. Jungle Survival Training

Regardless of its overall level of sophistication, the Malaysian military is an expert in jungle survival training.<sup>113</sup> This established skill set will greatly impact the little t analysis, because it is reasonable to assume that the average Malaysian soldier is more skilled in jungle survival than the average Soldier in 3rd SBCT.<sup>114</sup> Therefore, the commander can utilize the near-peer mindset when analyzing this training. As with the U.K., it will be far easier to classify this event as interoperability and safety training, even if it requires a somewhat larger investment of time and resources.

## VII. Avoiding Fiscal Issues with Acquisition and Cross-Servicing Agreements

An acquisition and cross-servicing agreement (ACSA) is another tool that can help reduce some of the fiscal risk inherent in little t training. An ACSA is an agreement between the United States and another country or international organization for reciprocal logistic support, supplies, and services (LSSS).<sup>115</sup> The purpose of these agreements is to facilitate logistic support for each country's military when it is forward deployed away from its national logistics system.<sup>116</sup> A brigade staff should consider using an ACSA to decrease the cost of little t training, because the DoD directive that implements ACSA authority specifically contemplates their use during combined exercises.<sup>117</sup>

Once an ACSA is established between countries, each military can place an order for logistic support with the other country's military. ACSA orders can include a wide variety of logistic support, including: food; billeting; transportation; fuel; spare parts; clothing; small-arms ammunition; and training.<sup>118</sup> However, there are limitations to the type of support that can be provided through an ACSA.<sup>119</sup> Commands must coordinate with the ACSA program manager for the relevant combatant command to ensure the contemplated LSSS is permissible.<sup>120</sup>

When an ACSA order requests a non-returnable transfer of resources, such as food or fuel, the receiving country must repay the transfer through one of three methods: 1) payment-in-kind; 2) replacement-in-kind; or 3) equal-value-exchange.<sup>121</sup> This establishes a flexible system in which the United States can use O&M funds to provide logistics support to a foreign force without violating fiscal law. Therefore, commanders can utilize an ACSA to remove a great deal of the potential cost of interoperability training and sway the overall little t analysis.

For example, most of the heavy-rigging training with the U.K. soldiers described above could potentially be included in an ACSA order. The U.K. could submit an ACSA order for food, transportation, and the rigging materials required to conduct the training. These types of ACSA orders could provide commanders with more leeway in planning interoperability training, because the reimbursement by the U.K. removes most of the expenditure of O&M funds. However, even if an ACSA order greatly alleviates the cost of training, judge advocates must still complete little t analysis to ensure the event does not rise to level of formal training.

## VIII. Conclusion

With the United States continuing to work extensively with foreign allies, fiscal issues related to foreign security assistance will continue to be a significant aspect of operational planning. Although many of our combined exercises are supported with funds specifically authorized by Congress,<sup>122</sup> these funds are not under the control of brigade commanders.<sup>123</sup> Judge advocates must understand the little t paradigm to help provide their commanders with the flexibility to plan necessary training at the brigade level and

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

<sup>112</sup> Hon. Bill Alexander, *supra* note 16, at 48.

<sup>113</sup> Lyle, *supra* note 105.

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

<sup>115</sup> 10 U.S.C. §§ 2341-50 (2013); *see also* U.S. DEP'T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003) [hereinafter DODD 2010.9].

<sup>116</sup> Major Ryan A. Howard, *Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity*, ARMY LAW., Oct. 2013, at 26.

<sup>117</sup> DODD 2010.9, *supra* note 115.

<sup>118</sup> CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2120.01D, ACQUISITION AND CROSS-SERVICING AGREEMENTS encl. A, app. A (21 May 2015) [hereinafter CJCSI 2120.01D].

<sup>119</sup> DODD 2010.9, *supra* note 115, para. 4.5.

<sup>120</sup> Howard, *supra* note 116, at 33 (discussing the role of the combatant command ACSA program manager).

<sup>121</sup> CJCSI 2120.01D, *supra* note 118, para. 4d.

<sup>122</sup> *See Operation Atlantic Resolve*, *supra* note 101; *see also Special Report*, *supra* note 102.

<sup>123</sup> GAO-15-568, *supra* note 2.

below.

As discussed, there are many ways a BJA can use the little t paradigm to help the staff plan for combined exercises. First, the BJA can ensure the S-2<sup>124</sup> is gathering information on the sophistication of the foreign forces and their competence in the specific skills necessary for the combined exercise. Second, the BJA can ensure the S-4<sup>125</sup> makes contact with the combatant command to determine whether an ACSA exists. Finally, the BJA can help the S-3 apply all of this information to the various operational tasks to devise courses of action that may be funded with O&M appropriations. This legal advice will help your fellow staff officers take the initiative and demonstrate to them the value of integrating the BJA into the planning process.

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<sup>124</sup> The S-2, or intelligence officer, is the principal staff officer responsible for gathering and analyzing information on the enemy, terrain, weather, and other important considerations for the commander. FM 6-0, *supra* note 1, para. 2-44.

<sup>125</sup> The S-4, or logistics officer, is the primary staff officer responsible for sustainment, supply, maintenance, transportation, services and contract support. FM 6-0, *supra* note 1, para. 2-55.

## The Use of Conditional Waivers for Suspended Discharges: A Rehabilitation Tool for Reserve Component Commanders

Major T. Scott Randall & Major Tanya Roland\*

“Judge, I have a Soldier that tested positive for marijuana during our February battle assembly. He is a good kid; he has two tours in Iraq and is a local police officer. I really want to recover this guy. What are my options?” This is a situation many judge advocates have faced in the Reserve Component. There is a Soldier that clearly committed misconduct, and the command clearly wants to retain him.

However, unlike an active component case, punishment under the Uniform Code of Military Justice would not be appropriate because the Soldier was almost certainly not in a military status when he ingested the marijuana.<sup>1</sup> Therefore, the command is left with adverse administrative actions to deal with the situation.<sup>2</sup> For the Reserve Component, civilian conduct can form the basis of an involuntary separation and can be considered when determining a Soldier’s characterization of service.<sup>3</sup> While the initiation of an enlisted separation action is mandatory for abuse of illegal drugs, there is no requirement that the command actually separate the Soldier.<sup>4</sup> The Army views abuse of illegal drugs as serious misconduct and requires commanders to “process” for separation “all Soldiers” who “test positive for illegal drug use.”<sup>5</sup> Hence, the command must flag and process for separation even this highly regarded Soldier.<sup>6</sup>

In most cases, the command will want to be viewed as taking action on drug offenses and send the message that drug use is not tolerated. But, how can it accomplish these goals without actually separating the highly deserving Soldier? Fortunately, there is another option. The Soldier’s commander may initiate an administrative separation action, but support a conditional waiver that suspends the separation for up to twelve months on the condition the Soldier waives his right to an administrative separation board.<sup>7</sup> This course of action meets the goals of the command, and is likely in the best interests of the Army.

Conditional waivers are available when the Soldier has a right to an administrative separation board.<sup>8</sup> This right accrues when the Soldier has more than six years of creditable service or when the Soldier could be separated with an under other than honorable conditions characterization of service.<sup>9</sup> For serious misconduct like abuse of an illegal drug, the characterization of service will “normally be under other than honorable conditions.”<sup>10</sup> Therefore, it is highly likely that a conditional waiver for a suspended discharge will be an option for any Soldier being separated for illegal drug use.<sup>11</sup>

Essentially, a conditional waiver for a suspended discharge places a Soldier on probation for twelve months to see if he can avoid any further incidents of misconduct.<sup>12</sup> During the probationary period, the Soldier remains flagged with a nontransferable flag because, although the separation is suspended, the Soldier is still pending involuntary separation.<sup>13</sup> As a result of the non-transferrable flag, any favorable action regarding the Soldier during the period of suspension is prohibited.<sup>14</sup> This includes actions such as reenlistment, appearance before a promotion board, promotion, receipt of awards, attendance at schools, and the payment of bonuses.<sup>15</sup> At the conclusion of the probationary period, the command has the ability to remit execution of the approved separation provided the Soldier has not committed any additional incidents of misconduct.<sup>16</sup>

If the Soldier does commit new incidents of misconduct or otherwise fails to meet appropriate standards of performance, the command may initiate a new separation action, or it can advise the Soldier in writing that the command is considering vacating the suspended separation.<sup>17</sup> In either case, the Soldier has time to consult with counsel and

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<sup>1</sup> See UCMJ, art. 2 (2012).

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

<sup>3</sup> U.S. DEP’T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND ARMY RESERVE ENLISTED ADMINISTRATIVE SEPARATIONS, paras.12-1, 12-2, 2-8(c), 2-10(e) (18 Mar. 2014) [hereinafter AR 135-178].

<sup>4</sup> *Id.* para. 12-1(d).

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

<sup>6</sup> *Id.* See also U.S. DEP’T OF ARMY, REG. 600-8-2, SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAG) paras. 1-4(j), 2-1(d) (23 Oct. 2012) [hereinafter AR 600-8-2].

<sup>7</sup> See AR 135-178, *supra* note 3, para. 2-5(a).

<sup>8</sup> *Id.* para. 3-16.

<sup>9</sup> *Id.* paras. 3-5(a)(7), 2-9(c)(3).

<sup>10</sup> *Id.* para. 12-1(d).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* paras. 2-5, 2-6.

<sup>13</sup> See AR 600-8-2, *supra* note 6, para. 2-2(d).

<sup>14</sup> *Id.* para. 3-1(a).

<sup>15</sup> *Id.* para. 3-1.

<sup>16</sup> See AR 135-178, *supra* note 3, para. 2-6.

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

respond to the proposed action.<sup>18</sup> Failure to respond waives the Soldier's rights.<sup>19</sup> For the suspended discharge, the separation authority must consider any response by the Soldier and either vacate the suspension, thereby allowing the Soldier to be discharged, or continue with the period of suspension.<sup>20</sup>

In the traditional case, a conditional waiver waives the Soldier's right to an administrative separation board so long as the characterization of service upon separation is higher than the least favorable characterization authorized for the basis of the separation listed in the notification memorandum.<sup>21</sup> This would mean only an honorable discharge or general under honorable conditions discharge would be available to a commander considering a conventional conditional waiver.<sup>22</sup> However, in the case of a conditional waiver for a suspended discharge, a commander may arguably also approve a Soldier for discharge under other than honorable conditions.<sup>23</sup> This is the case because the command would be providing a benefit (i.e., the suspended discharge) in exchange for the Soldier's waiver of his right to a board, which is analogous to the command offering a better discharge than the least favorable available for the basis of separation.<sup>24</sup> In this case, the highly deserving Soldier would submit a conditional waiver waiving his right to a board so long as he receives either an honorable, general under honorable conditions, or an under other than honorable conditions discharge, which is suspended for twelve months.<sup>25</sup> When considering what characterization of service to recommend, commanders may consider conduct by a reserve Soldier in his civilian capacity.<sup>26</sup>

The separation authority does not change with the submission of a conditional waiver.<sup>27</sup> Once the conditional waiver has been submitted, each commander in the Soldier's chain of command will submit a recommendation to the Separation Authority regarding whether to approve or disapprove the conditional waiver.<sup>28</sup> If the conditional waiver is approved by the separation authority, then the separation authority will assign a characterization of service and suspend its execution.<sup>29</sup> If the conditional waiver is disapproved, the case will be referred to a hearing before an administrative separation board, unless there is a subsequent unconditional waiver of a right to a hearing before a board.<sup>30</sup> While the conditional waiver is pending, there is no requirement to

delay the board proceedings.<sup>31</sup> However, once a board has made its findings and recommendations, the convening authority may not approve the conditional waiver.<sup>32</sup>

A conditional waiver for a suspended discharge provides the command an important tool to retain the most deserving Soldiers by placing them on probation for up to a twelve month period.<sup>33</sup> This allows the Soldier to remain in the Army Reserve while he shows he has learned from his mistakes.<sup>34</sup> While not appropriate in all cases, this procedure supports the Army Reserve's substantial investment in Soldiers and is a reasonable effort at rehabilitation prior to discharging the Soldier.<sup>35</sup>

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<sup>18</sup> *Id.* paras. 2-6, 3-16(b).

<sup>19</sup> *Id.* para. 2-6.

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

<sup>21</sup> *Id.* para. 3-16.

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* paras. 2-8(c), 2-10(e).

<sup>27</sup> *Id.* paras. 2-5.

<sup>28</sup> *Id.* paras. 3-8, 3-9, 3-14, 3-15.

<sup>29</sup> *Id.* para. 3-10(f).

<sup>30</sup> *Id.* paras. 3-5(a)(7), 3-11(a).

<sup>31</sup> *Id.* para. 3-16.

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

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* para. 2-2(a).

# The Strategic Captain: The Current Use and Limitations of Official Representation Funds in the U.S. Army and Ways to Improve the Program

Major Deirdre Keegan Baker\*

*War is merely the continuation of politics by other means.*<sup>1</sup>

## I. Introduction

In late October 2015, Captain (CPT) Carter, the commander for Echo Company, 3d Brigade, 82d Airborne Division, seeks a way to engage with local tribal leaders in Wardak province, Afghanistan. As a key aspect of current operational objectives, the commander of United States Forces Afghanistan (USFOR-A) directed all company-level units to engage with local leaders within their areas of responsibility (AOR) at least once a week, or more, if feasible. The objective is to reduce the violence in the province and undermine the influence of the Taliban within the local population. This type of key leader engagement is recognized as a central aspect of the current counterinsurgency (COIN) tactics used by the U.S. military to boost the faith of the local population in the nascent Afghan central government.<sup>2</sup>

Captain Carter is eager to prove he is able to handle this task. He meets with the battalion intelligence office to try to develop a list of leaders to focus on for these meetings.<sup>3</sup> Next, CPT Carter meets with the battalion civil affairs officer to figure out what type of meetings would result in the greatest impact for the unit and also help reduce future violence within the AOR. The civil affairs officer tells CPT Carter that if he wants to really ingratiate himself with the local leaders he should organize a *shura*, a local assembly of tribal leaders who meet and discuss issues as a form of local governance for the people in the area.<sup>4</sup> As part of a *shura*, the civil affairs officer tells Captain Carter that a full meal should be provided by the host as a sign of respect for those in attendance and

a way to create a relaxed atmosphere in adherence to local customs and traditions.<sup>5</sup> As he processes all of this information, CPT Carter returns to his office and searches online for the latest copy of Money as a Weapon System for Afghanistan (MAAWS-A) and starts to read through the possible money sources that would allow him to purchase food for a *shura*.<sup>6</sup> He considers all of the available sources and determines the most likely sources may include: Operation Maintenance, Army (OMA), Afghan Security Forces Funds (ASFF), and Official Representation Funds (ORF).<sup>7</sup> Upon further review, it appears that the only source available to purchase food for receptions is ORF.<sup>8</sup>

Captain Carter calls his Brigade Judge Advocate (BJA), Major (MAJ) Morgan, and explains his idea to fund a weekly *shura* with the leaders in his AOR and asks whether this seems like an appropriate expenditure of ORF funds. Not an expert in fiscal law, MAJ Morgan tells CPT Carter that this sounds like a good use of ORF funds, since ORF is the only appropriate fund she can think of that may be used to purchase food for receptions.<sup>9</sup> The BJA instructs CPT Carter to develop a funding request and assures him that she will forward it to the USFOR-A legal office for expedited review. A week after its submission, CPT Carter receives a phone call from MAJ Morgan who tells him that his ORF request to fund the *shuras* was denied by the USFOR-A Staff Judge Advocate as legally objectionable because he was not in the rank of Colonel (O-6).<sup>10</sup> Dejected, CPT Carter must begin again from square one. In this scenario, if the USFOR-A Commanding General could authorize company-level

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<sup>1</sup> CARL VON CLAUSEWITZ, ON WAR, ch. 1, sec. 24, (Princeton Univ. Press trans. 1976) (1832).

<sup>2</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3.24.2, TACTICS IN COUNTERINSURGENCY (21 Apr. 2009) [hereinafter FM 3.24.2].

<sup>3</sup> Memorandum for Record from United States Forces-Afghanistan, Office

of the Staff Judge Advocate (USFOR-A SJA), subject: Propriety of Using OCO OMA to Provide Food at Informal Shuras, (4 Nov. 2015) [hereinafter Memorandum for Record]. This vignette is based on the question addressed within this memorandum, and with conversations about the background of this issue with one of the memorandum authors, Major John Dohn. The facts discussed within the vignette are otherwise fictitious.

<sup>4</sup> *Definition for Shura*, DICTIONARY.COM, <http://dictionary.reference.com/browse/shura> (last visited Aug. 1, 2016).

<sup>5</sup> Lieutenant Colonel Maurice A. Lescault, Jr., *Official Representation Funds: Fiscally Controlled Funds or "Easy Money"?*, ARMY LAW., Dec. 2003, at 18.

<sup>6</sup> U.S. FORCES AFG., PUB. 1-06, MONEY AS A WEAPON SYSTEM para. 2.35 (11 Apr. 2015) [hereinafter MAAWS-A].

<sup>7</sup> *Id.* paras. 2.2, 2.14, 2.35.

<sup>8</sup> U.S. DEP'T OF THE ARMY, REG. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY para. 2-1a.(2)(a) (18 Sept. 2012) [hereinafter AR 37-47].

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

<sup>10</sup> Memorandum for Record, *supra* note 3; *see also* AR 37-47, *supra* note 8, para. 2-1b.

commanders to host ORF funded receptions and gift exchanges in contingency environments, “strategic captains” like CPT Carter could pursue the type of local community contacts and relationship building required as part of counterinsurgency operations.<sup>11</sup>

This introductory vignette is a real-world demonstration of how policy restrictions on ORF funds adversely impact the lowest level commanders in their pursuit of non-lethal engagements with local leaders and military counterparts in their AORs. Every Soldier, like CPT Carter, who is deployed in combat is a representative of U.S. values and policy.

Lesser known than the military and diplomatic leaders at the national level, these Soldier-diplomats engage with key leaders on a daily basis in an effort to execute U.S. policy objectives on the frontlines in Afghanistan and Iraq. The “strategic captain” is the “most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well.”<sup>12</sup>

To facilitate military commanders in achieving a baseline of diplomatic courtesies, the Service Secretaries are authorized the use of a subset of Operations and Maintenance funds for “Emergency and Extraordinary Expenses” that may arise during the course of a fiscal year.<sup>13</sup> Official Representation Funds are derived from this Emergency and Extraordinary Expenses fund authority.<sup>14</sup> These funds are the creation of the Service Secretaries, not a Congressional authorization, and may be used for emergent needs that arise. As a result, ORF funds are intentionally flexible.

Current Army Regulations and policy limitations on the use of ORFs unduly limit commanders from effectively using diplomatic courtesies to advance U.S. policy objectives through strategic engagements and gift exchanges with foreign leaders and military counterparts.<sup>15</sup> In addition, the limitations on the rank of event hosts unnecessarily limit these company-level commanders, or strategic captains, from fully executing the type of local community engagements that are a cornerstone of the counterinsurgency strategy at the forefront of the wars in Iraq and Afghanistan.<sup>16</sup>

<sup>11</sup> General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAGAZINE, Jan. 1999. The “strategic captain” is a modern interpretation of General Krulak’s article in which he describes the importance of the “strategic corporal” in modern warfare. *Id.* at 3. In Krulak’s scenario, Corporal Hernandez represents the rifleman who needs to make quick decisions far from the flagpole “without direct supervision of senior leadership” involvement in his decisions. *Id.* Through his actions, Corporal Hernandez is the symbol of U.S. military power and foreign policy. *Id.*

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Emergency and Extraordinary Expenses Funds, 10 U.S.C. § 127(a) (2006) [hereinafter EEE Funds].

<sup>14</sup> AR 37-47, *supra* note 8, para. 1-1.

<sup>15</sup> *Id.* para. 2-1a.

Service Secretaries should use the flexibility given them by Congress to adapt ORF funds to more appropriately meet the emerging challenges the Soldier-diplomat at the company level encounters on a daily basis in contingency operations.<sup>17</sup> To accomplish this change, the publication of a new Department of Defense Instruction on the use of ORFs could easily carve out new authority on their use, specifically in contingency environments. As a result, service members in contingency operations would be able to more effectively accomplish their missions and ultimately meet the objectives of the commanders they serve.

This paper will first briefly explore the legal authorities of ORFs and Emergency and Extraordinary Expense funds in the Army with an overview of the appropriations process. The next section will provide an overview on ORF authorities and how ORFs are used as a tool of U.S. diplomacy by commanders in contingency operations. The final section will include recommended changes to the ORF program based, in part, on feedback from judge advocates and comptrollers who use ORFs at Army Service Component Commands (ASCC).

## II. ORF Legal Authority and Statutory Fund Limitations

### A. Fund Appropriations

In order for the President to wield his or her power as the Commander-in-Chief, Congress must first appropriate funds.<sup>18</sup> “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .”<sup>19</sup> Nearly two hundred years after the establishment of the Constitution, the Supreme Court expressed its affirmation in the power of Congress to appropriate when it stated that, “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.”<sup>20</sup>

“Federal funds are made available for obligation and expenditure by means of appropriation acts (or occasionally by other legislation) and the subsequent administrative actions that release appropriations to the spending agencies.”<sup>21</sup> Congress prepares the Federal budget through three primary means: discretionary spending, mandatory, or

<sup>16</sup> Krulak, *supra* note 11; *see also* AR 37-47, *supra* note 8, paras. 2-1a, 2-1b; *see generally* FM 3.24.4, *supra* note 2.

<sup>17</sup> AR 37-47, *supra* note 8, para. 1-1; *see also* EEE Funds, *supra* note 13.

<sup>18</sup> U.S. CONST., art. I, § 8, cl. 1. “Congress is empowered to pay the Debts and provide for the common Defense and general Welfare of the United States,” and to—“make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” *Id.*

<sup>19</sup> U.S. CONST., art. I, § 9, cl. 7. This section is also known as the “Appropriations Clause.”

<sup>20</sup> *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>21</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, OFFICE OF THE GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-2 (3d ed.

direct spending, and through an analysis of current or expected Federal revenues.<sup>22</sup> *Mandatory* spending is that which is required by laws or other appropriation acts, while *discretionary* spending, to include defense appropriations, stems from the authority provided in annual appropriations acts.<sup>23</sup>

“Congress may give the executive branch considerable discretion concerning how to implement the laws and hence how to obligate and expend funds appropriated, but it is ultimately up to Congress to determine how much the executive branch can spend.”<sup>24</sup> Appropriations and authorization bills are generally detailed and lengthy, including numerous requirements before funds may be expended. As an example, the National Defense Authorization Act for Fiscal Year 2015 was 698 pages long, with specific details and steps each military service must follow in order to properly expend the funds appropriated.<sup>25</sup> In short, Congress rarely leaves discretionary expenditures to the whim of the end-user. It is therefore remarkable when Congress does in fact authorize expenditures at the discretion of the Secretaries of the Services and the Secretary of Defense. Official Representation Funds are an example of appropriated funds with great potential flexibility and discretion in their use.<sup>26</sup>

#### B. Emergency and Extraordinary Expense Funds.

Official Representation Funds are apportioned as a part of Operations and Maintenance, Army (OMA) funds, in a further subset known as Emergency and Extraordinary Expenses (EEE) funds.<sup>27</sup> These EEE funds do not constitute a separate fund outside of OMA, rather they are subject to the same fiscal limitations and regulations that govern OMA funds.<sup>28</sup> The definition of what is characterized as an emergency and extraordinary expense is largely up to the interpretation of the Service Secretaries.<sup>29</sup>

Subject to the limitations of subsection (c), and

within the limitation of appropriations made for the purpose, the Secretary of Defense, the Inspector General of the Department of Defense, and the Secretary of a military department within his department may provide for any emergency or extraordinary expense which cannot be anticipated or classified. When it is so provided in such an appropriation, the funds may be spent on approval or authority of the Secretary concerned or the Inspector General for any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers of the United States. The Secretary concerned or the Inspector General may certify the amount of any such expenditure authorized by him that he considers advisable not to specify, and his certificate is sufficient voucher for the expenditure of that amount.<sup>30</sup>

As with most funding authority, Congress inserted a limitation to this flexibility—EEE funds are intentionally limited in supply.<sup>31</sup>

For Army operational expenses, only \$12,478,000 is authorized under the category of EEE funds for exclusive use and approval of the Secretary of the Army.<sup>32</sup> It is notable to highlight that the amount of EEE funds authorized for use by the Army Secretary is less than half of the authorization for defense-wide purposes at the disposal of the Secretary of Defense.<sup>33</sup> Clearly, this disparity in the amount appropriated to the Secretary of the Army and Secretary of Defense appears to be an intentional act on the part of Congress. By only appropriating a small amount of money, Congress seems to maintain at least some minimal oversight on the use of ORFs. Congress must also receive annual reports of all ORF expenditures, so “if they are not happy with the expenditures being reported to it, it can simply reduce or eliminate the funds appropriated for that purpose.”<sup>34</sup>

Provided that the funds are available, any emergent

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2010) [hereinafter GAO Red Book].

<sup>22</sup> *Frequently Asked Questions About CBO Cost Estimates*, CONGRESSIONAL BUDGET OFFICE, <https://www.cbo.gov/about/products/ce-faq> (last visited Aug. 1, 2016).

<sup>23</sup> *Id.* Mandatory appropriations or spending are generally required for entitlement programs, such as the Medicare and Social Security programs. *Id.*

<sup>24</sup> GAO Red Book, *supra* note 21, 6-4.

<sup>25</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter FY 15 NDAA]. The Authorization Act is divided into four different parts, with numerous subsections throughout: Department of Defense Authorizations; Military Construction Authorizations; Department of Energy; and, National Security Authorizations and Other Authorizations. *Id.*

<sup>26</sup> Matter of HUD gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1986).

<sup>27</sup> Consolidated and Further Continuing Appropriations Act, 2015 (FY 15

Appropriations Act), Pub. L. No. 113-235, div. C, tit. II, 128 Stat. 2130, 2236 (2014).

<sup>28</sup> AR 37-47, *supra* note 8, para. 1-1.

<sup>29</sup> *Lescault*, *supra* note 5, at 20. “The General Accounting Office (GAO) has generally given wide latitude to the Secretaries in the executive branch, at least with some categories of emergency and extraordinary expenses.” *Id.*

<sup>30</sup> EEE Funds, *supra* note 13, para. (a).

<sup>31</sup> FY 15 Appropriations Act. Of Operation and Maintenances, Defense-Wide, \$ 6,211,025,000 is appropriated, and of that, \$15,000,000 may be used for emergency and extraordinary expenses. *Id.* at 128 stat. 2287-88.

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

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

<sup>34</sup> *Lescault*, *supra* note 5, 19; *see also* EEE Funds, *supra* note 13, para. (d).

requirement could be paid for with EEE funds subject to the concurrence of the Secretary of that Service.<sup>35</sup> In an era of budget austerity and seemingly daily requirements for military presence throughout the world, EEE funds are a powerful tool. However, Congress ensured that EEE funds could not be used to sustain long-term endeavors by limiting the amount appropriated each year.<sup>36</sup> Despite limitations compared to the billions appropriated for greater defense-wide operations, EEE funds may still make an impact.

### C. Official Representation Funds

#### 1. Limitations on Commanders

The legal framework of ORF in the military originates from the Secretary of Defense who issued a Department of Defense Directive (DoDD). The DoDD gives the Secretaries of the Services, the Chairman of the Joint Chiefs of Staff, and the Inspector General of the Department of Defense the authority to use appropriated funds for official representation purposes.<sup>37</sup> The DoDD provides general guidance as to whom official courtesies should be extended, what types of costs are prohibited, and the requirements necessary for record keeping the use of the funds.<sup>38</sup> Additionally, the DoDD directs the Secretaries of the each Service to provide all necessary policy, administration, and approval of ORF expenditures within their respective service components.<sup>39</sup> From the DoDD, the Department of Defense issued a Department of Defense Instruction (DoDI). The DoDI provided more detailed and extensive guidelines on the ranks of ORF hosts, authorized guests, and reporting requirements on expenditures.<sup>40</sup> Army Regulation (AR) 37-47 implements DoDI 7250.13, which is authorized by Title 10, § 127 of the United States Code for EEE funds.<sup>41</sup> With the guidance contained in the DoDI, the Secretary of the Army outlines

how ORFs will be used within the Army, and expands significantly guidance on specific levels of expenses and the nature of the participants at ORF-funded events.<sup>42</sup> For members of the Army, AR 37-47 is the authoritative guide upon which all of their ORF questions should be analyzed.

The primary purpose of ORF expenditures is to extend official courtesies on behalf of the Department of Defense (DoD) to guests of the United States.<sup>43</sup> As discussed above, not all commanders can extend official courtesies.<sup>44</sup> The type and nature of the courtesy is “dictated by the occasion and conducted on a modest basis to maintain the standing and prestige of the United States at home and abroad.”<sup>45</sup> Official Representation Fund expenses noted in the regulation are varied, and range from mundane items like disposable flatware for receptions to entertainment and fees for traveler checks.<sup>46</sup> However, the use of ORF is not intended to be easily delegable.<sup>47</sup> The regulation dictates that generally only members of the Senior Executive Service (SES) or General Officers (GO) may extend official courtesies and host ORF events.<sup>48</sup> A general schedule (GS)-15 equivalent or O-6 level of leadership may host an event only by exception and with the written authorization of an SES or GO.<sup>49</sup> If an event involves a base commander, the level of leadership of the host may be delegated down to an O-5 with no further exceptions authorized.<sup>50</sup>

Official Representation Funds are used to fund “official receptions.”<sup>51</sup> According to the Comptroller General, the term “representation,” as used in the phrase “official reception and representation,” means precisely what it implies—representing the agency or the U.S. in dealings with others in an official context.<sup>52</sup> As long as it is an official function of the United States that involves representing the United States to others, receptions and events with light refreshments are permitted with the use of ORF funds.<sup>53</sup> There is no

<sup>35</sup> EEE Funds, *supra* note 13, para. (a).

<sup>36</sup> See *supra* note 31 and accompanying text.

<sup>37</sup> U.S. DEP’T OF DEF., DIR. 7250.13, OFFICIAL REPRESENTATION FUNDS (ORF) para.1.2 (14 Feb. 2004) [hereinafter DODD 7250.13].

<sup>38</sup> *Id.* paras. 3.1, 3.3, 3.4, 3.5.

<sup>39</sup> *Id.* para. 4.2.1.

<sup>40</sup> U.S. DEP’T OF DEF., INSTR. 7250.13, USE OF APPROPRIATED FUNDS FOR OFFICIAL REPRESENTATION PURPOSES para. 3a, encls. 2, 3. (30 Jun. 2009) [hereinafter DoDI 7250.13]. Official representation purposes consist of:

official receptions, dinners, and similar events, [the purpose of which is] to otherwise extend official courtesies to guests of the United States and the Department of Defense for the purpose of maintaining the standing and prestige of the United States and the Department of Defense. These events are normally hosted and attended by (not simply sponsored by) members of the Senior Executive Service (SES) or flag officers (FOs).

*Id.* para 3a.

<sup>41</sup> AR 37-47, *supra* note 8, para. i.

<sup>42</sup> *Id.* paras. 1-4, 2.4a, 2.4c.

<sup>43</sup> *Id.* para. 2-1.

<sup>44</sup> *Id.* para. 2-1b.

<sup>45</sup> *Id.* para. 2-1a. Official courtesies and ORF-related expenses include: lodging, meals and refreshments in honor of authorized guests, receptions hosted for local authorized guests in order to maintain civic relations, events co-hosted by non-Army-hosted events to reciprocate the host, receptions to allow a new commander to meet appropriate senior officials and community leaders. *Id.* para. 2-1a (1)-(2)(d).

<sup>46</sup> *Id.* para. 2-1a(3)-(13).

<sup>47</sup> *Id.* at para. 2-1b.

<sup>48</sup> AR 37-47, *supra* note 8, para. 2-1b.

<sup>49</sup> *Id.* para. 2-1b.

<sup>50</sup> DoDI 7250.13, *supra* note 40, para. 3a; see also AR 37-47, *supra* note 8, para. 2-1b.

<sup>51</sup> *Lescault*, *supra* note 5, at 23.

<sup>52</sup> *Id.* (quoting Matter of U.S. Trade Representative—Use of Reception and Representation Funds, B223678, 1989 U.S. Comp. Gen. LEXIS 598 (June 5, 1989)).

<sup>53</sup> *Id.* at 24.

congressional limitation on the status an individual representative of the United States must have in order to convey official courtesies through the use of ORFs or EEE funds.<sup>54</sup> Status limitations are the creation of the Secretary of Defense.<sup>55</sup> It is this limitation on the rank of the host that makes the use of ORFs so difficult in a contingency environment. Most contacts with local leaders take place at the company, platoon, and squad-level. It is within the discretion of the Secretary of Defense to amend the instruction to allow for the possibility that company-level commanders may extend ORF-funded courtesies on behalf of the United States.

## 2. Authorized Guests.

The recipients of ORF-funded courtesies are up to the interpretation of “designated officials”.<sup>56</sup> Designated officials are commanders and heads of organizations who are issued written authority from the Assistant Secretary of the Army (Financial Management and Comptroller) to expend ORF and are also members of the Senior Executive Service (SES) or general officers (GO).<sup>57</sup> Authorized guests are defined as “civilian or military dignitaries and officials of foreign governments.”<sup>58</sup> This broad definition leaves the designated officials a unique opportunity to adapt to any situation and environment United States’ forces may find themselves.

According to the regulations, there are few limitations on who a designated official may designate as an authorized guest. Understandably, this wide-ranging discretion could lead to uneven results in terms of which officials are characterized as authorized guests for one event and which ones for other events.<sup>59</sup> For example, at an event to welcome an incoming task force commander, ambassadors to various partner nations may be invited and expected to attend as authorized guests properly allowed to receive ORF- expended courtesies.<sup>60</sup> While just down the road, an O-6-level commander is conducting an exercise with the armed forces of a partner nation and is handing out tokens funded with ORF to all members of the foreign military who participated in the exercise.<sup>61</sup> In such circumstances, the commander can properly determine that foreign ambassadors and low ranking

soldiers are each authorized guests of the United States. Whether a commander should equate the two is a matter of discretion, and should properly be evaluated separately in terms of the mission requirements and objectives for each event.

This is the exact type of flexibility Congress gave the Secretary of Defense when they authorized EEE funds.<sup>62</sup> It was the Service Secretaries, not Congress, who directed restrictions as to the rank of the individual who may host an ORF-funded event or convey a gift purchased with ORFs, while at the same time allowing the designated official the flexibility to determine who qualifies as authorized guest.<sup>63</sup> In terms of the attendees of the *shura* vignette, this would mean that CPT Carter, or perhaps his Brigade Commander (O-

6) would be able to determine which Afghan village elder would qualify as a foreign dignitary or authorized guest.<sup>64</sup> The regulation is very broad and allows the commander to independently make the decision as to whom an authorized guest is within a given situation, and most importantly, who is an appropriate recipient of ORF-funded courtesies.<sup>65</sup>

## 3. Gifts/Tokens.

Consistent with the general flexibility inherent in the use of ORF funds, designated officials are granted wide discretion to determine what constitutes a gift or memento with ORF funds. The guidance states that:

Gifts and mementos are presented to honor or otherwise recognize an individual or organization or are exchanged with authorized guests and non- DoD hosts during official ORF events. Designated officials should select gifts or mementos that portray unique American, Army, command, organization, or other appropriate themes that may be relevant or significant to the particular event. To a lesser extent, geographic or cultural themes, traditions, and the expectations of the authorized guest may be considered.

Purchasing wrapping paper, ribbon and bows, and professional wrapping services in connection with the item is included in the aggregate cost of the gift

with this paper.

<sup>54</sup> EEE Funds, *supra* note 13, para. a.

<sup>55</sup> DoDI 7250.13, *supra* note 40, para. 3a.

<sup>56</sup> AR 37-47, *supra* note 8, para. 1-4f.

<sup>57</sup> *Id.* para.1-4f.

<sup>58</sup> *Id.* The further definition of authorized guest in paragraphs 2-2b through 2e define the various U.S. government officials, distinguished and prominent U.S. citizens, members of the media, and other Department of Defense (DoD) personnel eligible for official courtesies.

<sup>59</sup> Survey Response from Army Service Component Command (ASCC), to author (Nov. 2015) (on file with author) [hereinafter ASCC Survey]. This survey was sent out in November 2015 to five ASCCs with questions on the use application of ORF funds within their units. The respondents were promised a guarantee of anonymity in their responses and use in association

<sup>60</sup> ASCC Survey, *supra* note 59. Some events, especially during exercises between U.S. forces and military counterparts, have more low-ranked participants involved in ORF events. In such circumstances, the designated officials must make the determination to whether an authorized guest is simply a member of a foreign Armed Force, or if there is a highly level threshold. *Id.*

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

<sup>62</sup> EEE Funds, *supra* note 13, para. (a).

<sup>63</sup> AR 37-47, *supra* note 8, para. 2-2a.

<sup>64</sup> *Id.* para. 2-2a.

<sup>65</sup> AR 37-47, *supra* note 8, para. 2-2a.

or memento.<sup>66</sup>

In other words, the selection of the gift or memento is up to the designated official, usually a combatant-level commander. This allows the commander an ability to exercise his or her discretion in the manner in which he or she exercises diplomacy or community relations within their area of operations. This is another example of the type of flexibility Congress gave to the Service Secretaries through the appropriation of EEE funds.<sup>67</sup>

The discretion of the designated officials is not, however, without any limitation and is subject to a few key guidelines under Title 22 of the United States Code.<sup>68</sup> Limitations on the purchase of gifts for foreign individuals are based upon a baseline “minimal value” cost as determined through an adjustment to the consumer price index every three years.<sup>69</sup> The “minimal value” is the retail value of the gift at the time of acceptance at or below the threshold established by the General Services Administration (GSA).<sup>70</sup> The current gift threshold in effect under ORF is \$375.00.<sup>71</sup> Notably, any government agency may use their own regulatory discretion to specify a lower value than this government-wide value threshold.<sup>72</sup>

Interpretations of what constitutes a gift or memento are also wide-ranging and sometimes inconsistent. A review of current practices in various ASCCs is instructive here. Some commands for example, choose gifts with special cultural traits or significance from the area where they are geographically located.<sup>73</sup> Others may choose gifts and mementos based upon the preferences of the commander’s spouse or the protocol advisor.<sup>74</sup> A small number of ASCCs utilize the special knowledge and capabilities of their internal Foreign Area Officers (FAOs) in order to inform their commanders on the cultural significance of a particular gift or event held in honor of a foreign dignitary or military counterpart.<sup>75</sup> The one consistent practice throughout all of the ASCCs is that the gifts purchased with ORFs are *de minimis* and perfunctory in nature, intentionally meant not to overwhelm the occasion.<sup>76</sup> While some of the types of gifts

and recipients of gifts varied from command to command, all ASCC respondents agree that the use of ORF funds is not an attempt to encourage foreign leaders or military counterparts to feel required to exceed the courtesies extended by their U.S. hosts.<sup>77</sup>

This examination of current ORF trends regarding gift use in the ASCCs demonstrates that commanders are amply capable of responsibly regulating the use of ORF funds throughout various theaters of operations. Current practice indicates that commanders can be trusted to use ORFs more flexibly in contingency environments. To maximize the use of ORF funds, the DoDI must be amended to delegate the use of ORF to those commanders with the most contact with foreign nationals: company-grade commanders, or strategic captains.<sup>78</sup>

#### 4. Receptions

As with gifts, the use of ORFs for receptions must be conducted on a modest basis.<sup>79</sup> Unlike gifts, however, there is no statutory dollar threshold to determine what amount of money constitutes a “modest basis.”<sup>80</sup> Rather, designated officials are instructed to:

Balance policy objectives and the interests of the U.S. taxpayer and the perspectives of the general public and authorized guests. Socially acceptable mores of American society, the rank and position of the authorized guest—not the host—and the number of participants should also influence the level of expenditures for events, gifts, and mementos.<sup>81</sup>

Designated officials are encouraged to individually establish reasonable limits on ORF expenditures according to the conditions of their command environment.<sup>82</sup>

The tenor of the regulation seems to encourage designated officials to be as flexible as necessary to carry out their critical mission requirements by adapting ORF funds to their

<sup>66</sup> *Id.* para. 2-9a.

<sup>67</sup> EEE Funds, *supra* note 13, para. (a).

<sup>68</sup> 22 U.S.C. § 2694(2)(1977) (“[l]imitation on Purchase of Gifts for Foreign Individuals Report to Speaker of the House and Chairman of the Committee on Foreign Relations of the Senate”). This section of Title 22 limited members of the Department of State from using appropriated funds only from “Emergencies in the Diplomatic and Consular Service” account to be used to purchase any gift of more than the “minimal value” for any foreign individual unless such gift has been approved by Congress. *Id.* § (1).

<sup>69</sup> 22 U.S.C. § 2694(2); *see also*, 41 C.F.R. § 102.42-10 (“Utilization, Donation, and Disposal of Foreign Gifts and Decorations,” and “Minimal Value”).

<sup>70</sup> 41 C.F.R. § 102.42-10.

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

<sup>72</sup> 41 C.F.R. § 102.42-10(2) (GSA Minimal Value).

<sup>73</sup> ASCC Survey, *supra* note 59.

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

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

<sup>76</sup> ASCC Survey, *supra* note 59. The gift dollar threshold limitation certainly seems to have the intended effect of severely limiting the extravagance of the gifts presented with ORFs. 41 C.F.R. § 102.42-10(2).

<sup>77</sup> *Id.*

<sup>78</sup> *See infra* Appendix A.

<sup>79</sup> AR 37-47, *supra* note 8, para. 2-4a.

<sup>80</sup> *Id.* para. 2-4a.

<sup>81</sup> AR 37-47, *supra* note 8, para. 2-4a.

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

individual needs. As an example, in more austere contingency environments, commanders may not require full meals at restaurants since mission requirements may call for less formal, more intimate events with local leaders and military counterparts. The omission of a dollar amount to define a “modest basis,” and the ability of the commander to designate recipients of official courtesies would seem to inherently allow a commander to adapt the use of ORFs to the needs of contingency environments.

This type of flexibility would benefit a company commander as a successful COIN operation demands lower-level command empowerment, and the elevation in prestige and esteem of the “strategic captains” or company commanders like CPT Carter.<sup>83</sup> While company-level commanders may not be proper stewards of ORF-funded courtesies in a garrison environment, they are the face of the U.S. military and a conduit of foreign policy at their remote outposts in Iraq and Afghanistan. As a sign of recognition of their importance and to legitimize their authority, the Secretary of Defense should amend the DoDI to allow company-level commanders the limited authority to convey ORF-funded courtesies in a contingency theater of operations.

### III. The Use of Appropriated Funds as a Foreign Policy Tool

#### A. Use of ORFs in Afghanistan and Iraq

In general, military departments continue to maintain an aversion to the expenditure of appropriated funds for gifts and food.<sup>84</sup> However, cultural demands of a country may at times demand small levels of courtesies in the form of food to further U.S. military and policy objectives. Over time, and the military developed an understanding that:

From common experience, however, that in many cultures, certain etiquette obligations are expected to be met in order to meet with officials and obtain decisions necessary to accomplish an objective. Many of these are expensive, involve food, drink or other entertainment expenses, but do not fit within normal congressional appropriations.<sup>85</sup>

The onset of a COIN strategy in Afghanistan and Iraq, and the need for etiquette-oriented obligations of courtesy to local leaders, has never been greater.<sup>86</sup>

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<sup>83</sup> FM 3.24.2, *supra* note 2, para. 1-91.

<sup>84</sup> *Lescault, supra* note 5, at 18.

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

<sup>86</sup> Gian P. Gentile, *A Strategy of Tactics: Population-centric COIN and the Army*, PARAMETERS, Aug. 2009, at 1.

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

<sup>88</sup> FM 3.24.2, *supra* note 2, para. 1-3.

#### 1. Tactics in the Population-Centric War.<sup>87</sup>

Counterinsurgency is defined as the “comprehensive civilian and military efforts designed to simultaneously defeat and contain insurgency and address its root causes.”<sup>88</sup> Central to a successful counterinsurgency is the “high confidence in the infallibility of military leadership at all levels of engagement (from privates to generals) with the indigenous population throughout the conflict zone.”<sup>89</sup> The empowerment of the commander at the lowest levels of command, or those commanders who are living amongst the target population, is key to the success of COIN. Those commanders require flexibility to produce timely intelligence, conduct effective tactical operations, and manage intelligence and civil military operations.<sup>90</sup>

Moreover, “[e]ffective counterinsurgency operations are decentralized, and higher commanders owe it to their subordinates to push as many capabilities as possible down to their levels.”<sup>91</sup> The population of the host-country is the “prize” and key to the success of COIN and the ultimate defeat of the insurgent forces.<sup>92</sup> Those commanders who are closest to the population wield the most power in terms of persuasion and influence. Therefore, resources and flexibility must be invested in these local commanders in order to achieve the basic goals of COIN.

#### 2. Undue Limitations on Use of ORFs in Contingency Operations.

In the vignette scenario in the introduction, the company commander in Wardak province in Afghanistan is frustrated in his attempt to develop engagements with local political and tribal leaders in an effort to reduce tensions and insurgent activities. While fictitious, this is a common quandary among company-level commanders engaged in COIN operations.

Company-grade commanders must find the means and opportunities to stay engaged with the local population to reduce hostilities. The company commanders are the fulcrum of COIN, yet this philosophy is not supported by the Service Secretaries’ policy regarding ORF. Food is a cultural imperative in some societies. It is not the food itself that is the objective, rather it is the atmosphere required to facilitate discussions that is the goal, in this case through a *shura*. The most appropriate fund source to pay for this type of food-oriented meeting with locals is ORF. Other potential fund sources geared for the Afghans, such as ASFF, are not

<sup>89</sup> Karl W. Eikenberry, *The Limits of Counterinsurgency Doctrine in Afghanistan, The Other Side of the COIN*, FOREIGN AFFAIRS, Aug. 12, 2013, at 1.

<sup>90</sup> FM 3.24.2, *supra* note 2, para. 1-91.

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

<sup>92</sup> FM 3.24.2 *supra* note 2, paras. 1-1, 1-28, 5-18.

designed to purchase food for the Afghans, and U.S. military personnel are prohibited from benefiting directly from these appropriations.<sup>93</sup>

Under current ORF limitations, only an O-6 level commander can host in ORF-funded receptions, and such courtesies are not to be of the type of recurring basis as would be required under the CPT Carter *shura* scenario. While national leaders and military commanders continue to advocate for and insist on the importance of the strategic captain in the context of COIN operations in Afghanistan, the Service Secretaries are unwilling to extend to them a simple tool to support the very type of local community engagements needed through the use of ORFs.

#### IV. Recommendations for Policy Changes to ORFs

The easiest solution to resolve these service imposed limitations on the use of ORFs by a company-level commander would be to revise the Department of Defense Instruction (DoDI) 7250.13 to include exceptions in contingency environments.<sup>94</sup> The DoDI would be the simplest and quickest way to revise ORF requirements and would have the most wide-ranging impact because it would apply to all the services. Such a revision could include the ability to authorize combatant commanders of a named contingency operation the ability to further delegate, on a case by case basis, the authority to extend ORF courtesies to company Commanders.<sup>95</sup> Thus, commanders like CPT Carter could host receptions or small-scale meetings, such as *shuras* to achieve operational objectives within specific areas of operation. The restrictions imposed by the combatant commander could be as stringent as deemed sufficient to support the need to adapt to operational requirements.<sup>96</sup>

Additionally, any further delegation to a company commander in the use of ORF courtesies could contain limitations on the cost of such events, and name the specific types of events contemplated for use with such funds, such as *shuras*, cultural celebrations, national holidays, etc. This way, the designated official would be able to easily adapt the use of ORF-funded courtesies to meet the needs of the operational environment as needed, while also empowering that strategic company commander to fully realize the population-centric goals set forth in a COIN environment.<sup>97</sup>

Some survey respondents at the ASCCs argue that allowing company-level commanders the ability to extend

ORF-funded courtesies may lead to misuse of government funds.<sup>98</sup> However, there are at least two arguments against this view. First, the limited amount of funds allocated to ORF in contingency environments makes abuse unlikely. For Fiscal Year 2015, USFOR-A was allocated \$40,000 in emergency and extraordinary expense funds to be used exclusively for ORF activities.<sup>99</sup> In the context of misuse of appropriated funds in Afghanistan, the mere potential for misuse of ORF by company commanders pales in comparison to the billions of dollars the Special Inspector General for Afghanistan Reconstruction (SIGAR) identified as wasted in countless fraudulent contracts and misguided projects throughout Afghanistan since 2002.<sup>100</sup> Second, a *de minimis* amount of funds set forth by the combatant commander could sufficiently accommodate the purchase of modest portions of food and refreshments sufficient to allow a company commander to appropriately engage with local leaders and counterparts without exceeding fund limitations.

Most survey respondents were civilian employees of the Department of the Army who worked either as fiscal law attorneys or protocol officers.<sup>101</sup> Only two of the respondents were uniformed members of the Armed Services.<sup>102</sup> Additionally, because of the geographic focus of each ASCC, only one respondent was a member of a unit actively engaged in a current named contingency operation.<sup>103</sup> This combination of civilians coupled with the lack of active involvement in the unique nature of combat operations seemed to create a type of garrison focus in the use of ORF funds from the survey respondents. Perhaps a resolution to this garrison-mentality would be to ensure that ORF actions were reviewed and approved by operational sections and foreign area officers (FAO). That said, each survey respondent was well versed in the cultural dynamics of their geographic areas of focus, some respondents simply were not focused on the nuances attributed to current requirements of COIN operations in Iraq and Afghanistan. Such a view is not dissimilar to the argument most members in a brigade have when they complain that their higher headquarters does not provide them with enough support, or does not understand the complexities of their mission. At the designated official level, there is no empathy for CPT Carter or his plight. A revised DoDI may help overcome this myopic garrison-minded approach to ORF.

A second argument against allowing company commanders to host ORF-funded engagements is that doing so would lower the prestige of the event. However, a counter-argument would be that the purpose of a population-centric

<sup>93</sup> MAAWS-A, *supra* note 6, para. 2.14.

<sup>94</sup> See *infra* Appendix A.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Gentile, *supra* note 86, at 6; see also FM 3.24.2, *supra* note 2, para. 1-91.

<sup>98</sup> ASCC Survey, *supra* note 59.

<sup>99</sup> Memorandum for Record, *supra* note 3, at 5.

<sup>100</sup> About SIGAR, THE SPECIAL INSPECTOR GENERAL for AFGHAN RECONSTRUCTION, <https://www.sigar.mil/about/index.aspx?SSR=1> (last visited Aug. 1, 2016) [hereinafter SIGAR]

<sup>101</sup> ASCC Survey, *supra* note 59.

<sup>102</sup> *Id.*

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

COIN strategy is to immerse military units within communities, with the goal of reducing violence and helping to build societies.<sup>104</sup> The U.S. representative in these small villages is typically a company commander. If company commanders are trusted to carry out complex military objectives within the tribal environments of Iraq and Afghanistan, they should also be trusted to use ORF to host small weekly meetings with tea and finger foods. A weekly *shura* may not be an appropriate engagement in all theaters of operation, but the point is that COIN demands company commanders immerse themselves into the dynamics of the areas under which they operate.<sup>105</sup> If the only way to truly recognize the established tribal leadership and engage the local population is through small-scale *shuras*, the designated official should be allowed to approve such a request if it coincides with mission objectives. While appropriate for engagements within the continental United States, the requirement to delegate the ability to extend ORF courtesies no lower than to a Colonel (O-6) simply does not meet the operational requirements in a contingency environment.<sup>106</sup>

## V. Conclusion

Through the nature of their position and status as representatives of the U.S. government, all military commanders must equally balance military requirements with diplomatic gestures of goodwill, to achieve United States policy objectives. An untrained observer may assume that such objectives are opposite or contradictory. However, the modern U.S. commander is by necessity a Soldier-diplomat. Although, probably not recognized as such by contemporaries in the foreign services, the military commander is the front-line conduit of U.S. foreign policy and power, particularly during the wars in Afghanistan and Iraq.

By statute, OMA funds are to be used for the support and maintenance of United States forces, not for hosting receptions for Afghans or Iraqis.<sup>107</sup> Congress appropriated emergency and extraordinary expenses as a type of stop-gap to enable the Service Secretaries to meet emergent needs with few limitations. Official Representation Funds are the primary vehicle of EEE funds.<sup>108</sup> The current limitations that do exist on the use of ORFs, were created by the Service Secretaries, and can therefore be easily resolved in favor of a more COIN-centric Army.

Moreover, it is not the general officer at the center of the COIN efforts, but the strategic captain stationed in vast territories usually with few resources. This strategic captain is the linchpin to all community outreach with local leaders, and is usually responsible for identifying foes and friends alike up the chain of command. It is this grassroots-type war strategy that makes the company commander's role and

influence in COIN efforts so critical.

The company commander is with his Soldiers, not under the glare of press lights in Kabul or Baghdad. But, his role in executing policy objectives as the face of U.S. power and diplomacy cannot be underestimated. Combatant commanders should be allowed to make case by case decisions within their areas of authority in contingency environments to authorize company-grade commanders the ability to extend ORF funded courtesies.

Empower strategic captains with the ability to use ORFs to extend small courtesies and receptions on behalf of the United States to fully accomplish the principle of a population-centric war effort.

<sup>104</sup> FM 3.24.2, *supra* note 2, para. 1-91.

<sup>105</sup> Gentile, *supra* note 86, at 6; *see also* FM 3.24.2, *supra* note 2, para. 1-91.

<sup>106</sup> AR 37-47, *supra* note 8, para. 2-1b.

<sup>107</sup> Consolidated and Further Continuing Appropriations Act, 2015 (FY 15 Appropriations Act), Pub. L. No. 113-235, div. C, tit. II, 128 Stat. 2130, 2236 (2014).

<sup>108</sup> AR 37-47, *supra* note 8, para. 2-1.

### Recommend Revision

3(d) Contingency Exception. In named combat operations declared by the President of the United States or Secretary of Defense, the Secretary of the Service may authorize the combatant commander, upon written request, to further delegate to company-level commanders the ability to host official receptions, dinners, and similar events, and to otherwise extend official courtesies to guests of the United States and the Department of Defense for the purpose of maintain the standing and prestige of the United States and Department of Defense. Approval of this further delegation authority will be in-writing to the combatant commander and may contain any further limitations on the type and nature of the courtesies authorized under this exception. This further delegation authority should be limited and ORF funded courtesies must approved by the combatant commander on a case by case basis.

## Book Review

### Missoula: Rape and the Justice System in a College Town<sup>1</sup>

Reviewed by Major Michelle E. Borgnino\*

*“You better prepare for the hardest, nastiest fight of your life . . . .”*<sup>2</sup>

#### I. Introduction

Passion for a cause is often born of personal experience. Judge advocates who try “he said–she said” sexual assault cases, either as prosecution or defense, understandably have a passion for the issue. But author Jon Krakauer,<sup>3</sup> “admits to having known or cared virtually nothing about [non-stranger rape]”<sup>4</sup> until a close family friend revealed she had been assaulted by not one, but two men she knew.<sup>5</sup> He wrote *Missoula* as an outgrowth of his quest to learn more about the phenomenon.<sup>6</sup> The “rash of [alleged] sexual assaults”<sup>7</sup> which occurred in Missoula, Montana, from 2010 to 2012, followed by the dismal police work and complete lack of prosecution in those cases prompted the Department of Justice to conduct an investigation of 350 reported sexual assaults in Missoula.<sup>8</sup> With this background in mind, *Missoula* provides judge advocates with the framework for an affecting discussion of the poor investigation of and reluctance to prosecute sexual assault cases, the consequences of cutting victims out of the process, and serves as a reminder of the contentious and personal nature of a sexual assault trial.

To illustrate these themes, Krakauer tells of five women who were sexually assaulted while attending or visiting the University of Montana in Missoula (University) and charts the path each took (or did not take) through the criminal justice system. No two handled it the same. Each women reported their assault to the Missoula Police Department, and two of the five also reported to the University.<sup>9</sup> Only two offenders were ever prosecuted.<sup>10</sup> Yet these five women

share one commonality—they were each attacked by someone they knew.

#### II. Poor Police Investigations and a Reluctance to Prosecute

If those charged with discovering the facts behind an alleged sexual assault fail to complete a thorough and impartial investigation, there is little to no chance that the case will ever see the inside of a courtroom. Three of the cases discussed in *Missoula* illustrate the lack of police initiative and professionalism that can doom a case from the outset.

Kelsey Belnap was gang raped by four members of the University of Montana football team after having consumed between eight and eleven shots of liquor in forty-five minutes.<sup>11</sup> Approximately two hours after the attack, Kelsey was admitted to the hospital with a blood alcohol concentration (BAC) of 0.219.<sup>12</sup> But when the police questioned her attackers all four students claimed the sex was consensual and that Kelsey was moaning.<sup>13</sup> The police took her attackers at their word and promptly disregarded her BAC.<sup>14</sup> To make matters worse, two male officers interviewed her with no victim advocate present.<sup>15</sup> The officers asked her if she thought the men who raped her would have believed the sex was consensual—she thought they might—because she had been too intoxicated to verbalize that she wanted them to stop.<sup>16</sup> She also told police that she had a

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<sup>1</sup> JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

<sup>2</sup> Krakauer, *supra* note 1, at 31.

<sup>3</sup> Jon Krakauer is the national bestselling author of *Where Men Win Glory*, *Into Thin Air*, *Into the Wild* and *Under the Banner of Heaven*. Books, JON KRAKAUER, <http://www.jonkrakauer.com/books> (last visited July 14, 2016).

<sup>4</sup> *Review: Jon Krakauer's 'Missoula' Looks at Date Rape in a College Town*, N.Y. TIMES, [http://www.nytimes.com/2015/04/20/books/review-jon-krakauer-missoula-looks-at-date-rape-in-a-college-town.html?\\_r=0](http://www.nytimes.com/2015/04/20/books/review-jon-krakauer-missoula-looks-at-date-rape-in-a-college-town.html?_r=0) (last visited July 14, 2016).

<sup>5</sup> KRAKAUER, *supra* note 1, at 348.

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

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

<sup>8</sup> Letter from Jocelyn Samuels, Acting Assistant U.S. Attorney General, Civil Rights Division, & Michael W. Cotter, U.S. Attorney, District of Montana, to Fred Van Valkenburg, County Attorney (Feb. 14, 2014)

[hereinafter *Missoula Letter*], [https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula\\_itr\\_2-14-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_itr_2-14-14.pdf).

<sup>9</sup> KRAKAUER, *supra* note 1, at 4, 38, 51, 67, 133.

<sup>10</sup> *Id.* at 159, 229.

<sup>11</sup> *Id.* at 36.

<sup>12</sup> *Id.* at 37.

<sup>13</sup> *Id.* at 42. Montana criminalizes rape as sexual intercourse without consent. The individual committing the act must know that there is not consent. MONT. CODE ANN. § 45-5-503 (West 2015). The definition of without consent allows that a victim may be incapable of consent because they are “mentally . . . incapacitated.” MONT. CODE ANN. § 45-5-501 (West 2015).

<sup>14</sup> KRAKAUER, *supra* note 1, at 41.

<sup>15</sup> Kelsey was never told that she could ask for a victim advocate to be present with her during her interview. *Id.* at 40.

<sup>16</sup> *Id.* This statement became the center of the police chief’s argument as to why no probable cause was found. *Id.* at 42.

boyfriend, which made them immediately skeptical of her veracity.<sup>17</sup>

Kerry Barrett went to the police station and reported being raped by a man she just met the night before.<sup>18</sup> The responding officer told Kerry that “since no one saw you, and you were fooling around before it happened, it’s hard to really prove anything.”<sup>19</sup> He also asked her if she had a boyfriend because, “[S]ometimes girls cheat on their boyfriends, and regret it, and then claim they were raped.”<sup>20</sup> The investigating detective assured the accused that the police would “half-ass” his case because they didn’t “really believe this happened.”<sup>21</sup> Though she understood that it would have been difficult to convince a jury she had been sexually assaulted, Kerry will never know “how strong [her] case really was, because the police wouldn’t even conduct a thorough investigation.”<sup>22</sup>

Kaitlynn Kelly, like Kerry Barrett, met her attacker on the night he allegedly raped her.<sup>23</sup> She was assaulted while her roommate and roommate’s boyfriend slept in the same room.<sup>24</sup> Kaitlynn underwent a sexual assault examination, but didn’t want to report initially.<sup>25</sup> When she did, the police questioned Kaitlynn relentlessly about why she did not scream, because if the attack had actually occurred, she would have screamed to wake up her roommate.<sup>26</sup>

Even if a more thorough investigation had been done in these cases, based on the track record of the Missoula County Prosecutor’s Office, none of them would have been taken to trial.<sup>27</sup> The prosecutors in Missoula County were not trained on how to try complex sexual assault cases and were not encouraged to pursue them.<sup>28</sup> Neither Kelsey, Kerry or Kaitlynn ever spoke to a prosecutor.<sup>29</sup> Even more shocking, the prosecutor in charge of all sex crimes in Missoula, testified on behalf of Kelsey’s attacker, Calvin Smith,<sup>30</sup> at his

University Conduct Board hearing. Even though she refused to speak with Kelsey, she testified at length about how impressive it was that Calvin would make a statement to police, and what a liar Kelsey was.<sup>31</sup>

The experiences of Kelsey, Kaitlynn and Kerry are not confined to the college world. They endured experiences with law enforcement and prosecutors similar to those reported many victims of military sexual assault.<sup>32</sup> The military came under heavy fire for how sexual assault cases were handled after the film *The Invisible War* was released in 2012.<sup>33</sup> The parallels are haunting and *Missoula* serves to reemphasize the importance of communication with victims throughout the criminal justice process. Prosecutors must maintain an active role in the investigation of sexual assault cases and never assume that someone else (even a Special Victim’s Counsel) is giving the victim the information she needs about the direction a case is taking.

### III. Left to Their Own Devices

When victims do not feel that law enforcement is listening, they often look elsewhere to have their voices heard.<sup>34</sup> They speak to the press, they write their Congressman and they turn to each other. After seeing an article in the *Missoulian* about another gang rape allegedly perpetrated by Griz football players, Kelsey told her story to the press;<sup>35</sup> hers would become one of many articles published about the seemingly endless series of rapes occurring across Missoula.<sup>36</sup> Kerry Barrett also took matters into her own hands in an attempt to ensure that Kaitlynn’s case was actually investigated.<sup>37</sup>

Military victims who feel mistreated by law enforcement and prosecutors also go to the press;<sup>38</sup> and they lobby to

<sup>17</sup> *Id.* at 40.

<sup>18</sup> *Id.* at 51-55.

<sup>19</sup> *Id.* at 54.

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

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

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

<sup>23</sup> *Id.* at 63.

<sup>24</sup> *Id.* at 64.

<sup>25</sup> *Id.* at 67.

<sup>26</sup> *Id.* at 70.

<sup>27</sup> *Id.* at 338. See also Missoula Letter, *supra* note 9.

<sup>28</sup> Missoula Letter, *supra* note 9.

<sup>29</sup> KRAKAUER, *supra* note 1, at 42, 60, 91. Montana law requires that the prosecuting attorney consult with the victim of a felony offense regarding the dismissal of the case. MONT. CODE ANN. § 46-24-104 (West 2015).

<sup>30</sup> This name is a pseudonym used by the author. KRAKAUER, *supra* note 1, at 63.

<sup>31</sup> *Id.* at 91.

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

<sup>33</sup> THE INVISIBLE WAR (Chain Camera Pictures 2012).

<sup>34</sup> See *What We Do*, SERVICE WOMEN’S ACTION NETWORK, <http://servicewomen.org/what-we-do/> (last visited Aug. 16, 2016).

<sup>35</sup> KRAKAUER, *supra* note 1, at 34. A search of the *Missoulian* did not uncover the original article by Gwen Florio, but an article regarding the 60 Minutes interview police chief Mark Muir gave discussing the case was discovered. Martin Kidston, 60 Minutes Sports Looks at Allegations of Rape, Cover-Up at UM, MISSOULIAN (Nov. 5, 2014), [http://missoulian.com/helena/news/local/minutes-sports-looks-at-allegations-of-rape-cover-up-at/article\\_edf50-1fd4-57bc-a746-55561a2f760d.html](http://missoulian.com/helena/news/local/minutes-sports-looks-at-allegations-of-rape-cover-up-at/article_edf50-1fd4-57bc-a746-55561a2f760d.html).

<sup>36</sup> A search of the *Missoulian* archives using the term “UM Rape” showed well over 100 articles regarding the rape crisis in Missoula during 2010-2012. Search Result for “UM Rape,” GOOGLE NEWS, <https://www.google.com/search?q=%22UM+Rape%22&ie=utf-8&oe=utf-8#q=%22UM+Rape%22&tbm=nws> (last visited Aug. 16, 2016).

<sup>37</sup> Kerry found security camera footage of Kaitlynn and her attacker entering her dorm and him leaving holding a pair of pants in his hands. KRAKAUER, *supra* note 1, at 66.

<sup>38</sup> See Tom Vanden Brook, *Insults to Injury: Military Sexual-Assault Victims Endure Retaliation*, USA TODAY (May 18, 2015),

Congress through advocacy groups.<sup>39</sup> This desperate outcry, which began with *The Invisible War* continues to bring scrutiny upon the military justice system.<sup>40</sup> Even with due care and attention, not every victim will be satisfied by how his or her case is handled, however one victim who is unduly ignored, and speaks out about it, can have repercussions which will be felt across the services.

#### IV. The Trials

Readers see through the stories of Allison Huguet and Celia Washburn<sup>41</sup> how critical the interactions between the prosecutor and the victim truly are. The trials of their attackers make up the majority of the book.

Allison was raped by Beau Donaldson a member of the Griz football team. She had known Beau since she was five; they grew up together and she considered him her brother.<sup>42</sup>

Beau's guilty plea proceedings show the importance of maintaining contact with a victim throughout negotiations and of acknowledging that even though her wishes may not be the only consideration when it comes to a proposed sentence, they are an important consideration. The prosecutor assured Allison that he would seek a harsh sentence,<sup>43</sup> yet it is clear the prosecutor put too much stock in "the environment in Missoula," meaning the fact that Beau's status as a member of the Griz football team had to be taken into consideration.<sup>44</sup> Throughout the negotiation process Allison felt like she was "pushed in the direction [the prosecution] wanted to go. [She] felt like [she] continually had to push back to try to get the prosecutor's office to do the right thing."<sup>45</sup>

Beau Donaldson's trial is also interesting because he requested review of his sentence by Sentence Review Division.<sup>46</sup> This process appears similar to the review

conducted by a General Court Martial Convening authority under Article 60 of the Uniform Code of Military Justice (UCMJ). In Montana, though, there are three members of a panel who conduct an in-person hearing and they can actually increase the sentence, whereas commanders review written matters and can only affirm or reduce the sentence.<sup>47</sup>

Celia Washburn alleged that the star quarterback of the Grizzlies, whom she had known for a while and dated casually, assaulted her in December of 2011.<sup>48</sup> Mr. Krakauer describes the trial of Jordan Johnson in harsh and vivid detail, providing numerous transcript excerpts, and discussing at length the testimony of prosecution expert Dr. David Lisak,<sup>49</sup> and the defense's strategy of the case which revolved around a vicious attack of Celia's character. After a three-week trial, the jury deliberated for only two hours before rendering a verdict of not guilty.<sup>50</sup> This painstaking rendition provides prosecutors with one idea of how to approach a sexual assault trial: Each reader can come to her own conclusion about whether the tactics used were ideal for this set of facts. It also shows some of the lengths defense counsel will go to in order to defend their client.<sup>51</sup>

#### V. University Adjudication

Though Kaitlynn Kelly's<sup>52</sup> case, like so many cases, never saw the inside of a courtroom, she also reported the assault to the campus police and therefore the Dean of Students conducted his own investigation in compliance with the requirements of Title IX of the Education Amendments of 1972.<sup>53</sup> Why Krakauer chose the rape scandal at the University of Montana is unclear, but it is a fortunate coincidence for judge advocates, as the University's conduct adjudications are strikingly similar to an enlisted separation board or a Show Cause proceeding:<sup>54</sup> The dean conducted

<http://www.usatoday.com/story/news/nation/2015/05/18/military-sexual-assault-retaliation/27395845/>.

<sup>39</sup> See, e.g., *About*, SERVICE WOMEN'S ACTION NETWORK, <http://www.servicewomen.org/who-we-are/#about> (last visited Aug. 16, 2016).

<sup>40</sup> See Jenna McLaughlin, *The US Military's Sexual-Assault Problem Is So Bad the UN is Getting Involved*, MOTHER JONES (May 14, 2015), <http://www.motherjones.com/politics/2015/05/un-human-rights-council-us-military-do-better-victims-sexual-violence>.

<sup>41</sup> This name is a pseudonym used by the author. KRAKAUER, *supra* note 1, at 133.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> *Id.* at 159.

<sup>44</sup> *Id.* at 164.

<sup>45</sup> *Id.* at 165.

<sup>46</sup> MONT. CODE ANN § 46-18-901 (West 2015). A Defendant who has received a sentence of incarceration for a term of one year or more in the Montana State Prison or to the custody of the Montana Department of Corrections, has a right to apply to the Sentence Review Division for a review of his district court sentence. The Division may order a different sentence imposed if it is clearly inadequate or clearly excessive (increase,

decrease or modify) or may affirm the imposed sentence. MONTANA COURTS, [http://courts.mt.gov/supreme/boards/sentence\\_review](http://courts.mt.gov/supreme/boards/sentence_review) (last visited July 14, 2016).

<sup>47</sup> UCMJ art. 60 (2012).

<sup>48</sup> KRAKAUER, *supra* note 1, at 133.

<sup>49</sup> Dr. Lisak is a nationally recognized forensic consultant, trainer and lecturer. His research and forensic work focuses on non-stranger rape and he works closely with the military, serving as an expert witness. DAVID LISAK, <http://www.davidlisak.com> (last visited July 14, 2016).

<sup>50</sup> KRAKAUER, *supra* note 1, at 299.

<sup>51</sup> *Id.* at 258, 268-73, 246-51.

<sup>52</sup> Celia Washburn also reported her assault to campus police and Jordan Johnson faced an adjudication that mirrors that of Calvin Smith. On his final appeal however, the decision to expel Johnson was overturned and he was allowed to return to the school and to play football. *Id.* at 187, 301.

<sup>53</sup> *Id.* at 79-101.

<sup>54</sup> See U.S. DEP'T OF ARMY REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (6 June 2005); see also U.S. DEP'T OF ARMY REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr 2006) (RAR 13 Sept. 2011). Though Title IX was intended to protect students from sexual harassment and violence it also required that educational institutions

personal interviews and then a hearing was held before a three-person panel who found Calvin guilty, by a preponderance of the evidence, of a violation of Student Conduct Code Section V.A. 18 which prohibits rape<sup>55</sup>, and ruled that he should be expelled from the University.<sup>56</sup> Calvin was allowed to appeal.<sup>57</sup>

#### IV. A Grain of Salt

Anyone reading *Missoula* should go into it understanding its limitations. This book is written only from the perspective of the victims. The issues and practical considerations that prosecutors may face in handling sexual assault cases are never acknowledged and would likely be dismissed as excuses if raised to the author. Defense counsel and their clients are vilified: the idea that a defense attorney has a professional responsibility to defend her client is completely tossed aside. Everything is viewed in terms of how it will impact the victim.

However, the book appears to be a well-researched venting of the author's rage. While he provides some closure to the reader by detailing the DOJ investigation of the Missoula Police Department and County Prosecutor's Office,<sup>58</sup> whether he believes the measures emplaced by DOJ are appropriate or will have the desired effect is absent. At the end the reader is left with one idea: Rape is bad and law enforcement should treat victims better.

#### V. Conclusions

Despite its limitations, *Missoula* is a well written, accessible book and is a must read for any judge advocate preparing for a position in military justice. It provides an overview of a sexual assault case for those who have never tried one and is a great refresher for those who have been out of the game for a while. Most importantly, *Missoula* reminds the reader that sexual assault cases at every stage are significant emotional events, not only for the victim and the accused, but for all those involved in their investigation and prosecution.

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establish a system for handling sexual assault complaints.  
20 U.S.C.A. § 11211 (West 2015).

<sup>55</sup> KRAKAUER, *supra* note 1, at 176.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 79-101. His expulsion was upheld. *Id.*

<sup>58</sup> *Id.* at 338-40.

## Book Review

### Platoon Leader: A Memoir of Command in Combat<sup>1</sup>

Reviewed by Major Angel M. Overgaard\*

[T]he commander was the link to order and civility, and he had to be humane. At the same time he had to be uncompromising to protect the lives of all. The job was not easy.<sup>2</sup>

#### I. Introduction

*Platoon Leader: A Memoir of Command in Combat* is exactly what the title describes, a first-hand account of an American platoon leader's experiences in combat in Vietnam.<sup>3</sup> The book elucidates a new leader's challenges in trying to establish and follow a leadership strategy amid the fog of war. The author, James McDonough, is a retired Army Colonel documenting his first assignment in the U.S. Army after graduating from West Point and completing his infantry officer training.<sup>4</sup> McDonough's expertly crafted prose succinctly conveys a litany of key leadership concepts.<sup>5</sup> His striking honesty in revealing his loneliness, mistakes, and insecurities, as well as his journey to self-confidence enable a deep understanding of the endless challenges of a platoon leader in combat.

McDonough's experiences and lessons in leadership are useful and relevant in today's Army.<sup>6</sup> Through his leadership strategy, McDonough strives to create a moral, adaptable, and agile force.<sup>7</sup> This coincides with military leadership expectations spelled out in current Army doctrine.<sup>8</sup> McDonough, however, does not argue that he is a good leader and does not force doctrine or lessons on the reader. Instead, he effectively reveals his strategy and journey to establishing

trust with his Soldiers<sup>9</sup> through thrilling war stories and personal analysis. The reader is left to glean lessons from McDonough's successes, failures, and the decisions that fall somewhere in between.

All new military leaders should read *Platoon Leader*, but they should treat it as a teaching tool and not as a field manual. Although McDonough makes mistakes (as all leaders do) in every attribute and competency of leadership, he is nonetheless a good leader.<sup>10</sup> By acknowledging his mistakes, he creates invaluable discussion points for the classroom. The book is particularly valuable to judge advocates to remind them of the complexity of command decisions and the importance of ensuring that commanders understand relevant law.<sup>11</sup> *Platoon Leader* also evokes thought and discussion on morality and the laws of war and how they coincide and diverge. Finally, the book is a fascinating account of the Vietnam War from a Soldier in combat and thus, a stimulating read for any Soldier or civilian interested in that subject.

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<sup>1</sup> JAMES R. McDONOUGH, *PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT* (Presidio Press 2003) (1985).

<sup>2</sup> *Id.* at 78.

<sup>3</sup> The author writes, "Since this book is neither an adventure yarn nor a definitive description of the war in Vietnam, one might ask, What is its purpose? In response I can only suggest that the book is about an American platoon leader in combat." *Id.* at 1.

<sup>4</sup> See *id.* inside back cover (containing McDonough's biography); see also *id.* at 12-13 (discussing his "road to war").

<sup>5</sup> Leadership concepts in *Platoon Leader* include how a leader can quickly and effectively establish his role, have unity of command with his senior non-commissioned officer (NCO), apply training to combat, have discipline in all things, efficiently institute continuous training, face the tactical challenges of warfare with an intelligent and unpredictable enemy, preserve morality, and understand the humanity of the Soldiers answering the call of duty. See generally *id.*

<sup>6</sup> The mission of the Infantry Basic Officer Leader Course "is to educate, train, and inspire Infantry Lieutenants so that upon IBOLC graduation, they demonstrate the competence, confidence, physical and mental toughness, and moral/ethical fiber necessary to lead platoons in any operational environment." *Infantry Basic Officer Leader Course Mission Statement*, U.S. ARMY MANEUVER CTR. OF EXCELLENCE, [http://www.benning.army.mil/infantry/199th/ibolc/content/pdf/IBOLC\\_Mission\\_Statement.pdf](http://www.benning.army.mil/infantry/199th/ibolc/content/pdf/IBOLC_Mission_Statement.pdf) (last

visited Sept. 5, 2016).

<sup>7</sup> See generally U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADP 6-22] (establishing leadership principles that apply to all Soldiers and Army Civilians).

<sup>8</sup> While serving as Chief of Staff of the Army, General Odierno enumerated the following leadership expectations: "Have a vision and lead change"; "Be your formation's moral and ethical compass"; "Learn, think, adapt"; "Balance risk and opportunity to retain the initiative"; "Build agile, effective, high-performing teams"; "Empower subordinates and underwrite risk"; "Develop bold, adaptive, and broadened leaders"; and "Communicate—up, down, and laterally; tell the whole story." General Raymond T. Odierno, *Foreword* to ADP 6-22, *supra* note 7.

<sup>9</sup> This review uses "Soldiers" to refer to all servicemembers and masculine references to represent both genders.

<sup>10</sup> Although there are numerous sources for leadership in the military, this statement relies on the Leadership Requirements Model. See ADP 6-22, *supra* note 7, paras. 22-38.

<sup>11</sup> See Geoffrey S. Corn, *Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command*, INT'L REV. RED CROSS (Dec. 2015), <https://www.icrc.org/en/international-review/article/contemplating-true-nature-notion-responsibility-responsible-command> (arguing the importance of a commander's understanding and effective implementation of the law of armed conflict).

## II. Journey to Leadership<sup>12</sup>

McDonough spends six months as the leader of 2d Platoon, Bravo Company, 4th Battalion, 503d Infantry Airborne, in the village of Truong Lam, in Tam Quon district, Binh Dinh province.<sup>13</sup> While Truong Lam is a symbol of the sustainability of South Vietnam's government,<sup>14</sup> it also may be the most Viet Cong-controlled locale in the country.<sup>15</sup> Family members of the Viet Cong have front row seats to the platoon's every move.<sup>16</sup> His unit's mission is to secure the village,<sup>17</sup> not a simple task given the circumstances.

As McDonough takes control of his platoon, he reveals the weight and loneliness of leadership: "I was alone. That was my first sensation as a leader."<sup>18</sup> Loneliness is a byproduct of perhaps the most important lesson of *Platoon Leader*: A leader is responsible for his men. McDonough has his radio to call for air support, ground reinforcements, or medical evacuations, but he is the commander on the ground responsible for the lives of all his Soldiers. He is best positioned to assess the options to make the best tactical decisions. McDonough quickly grasps that he has no choice but to become the leader his men need:

I might describe myself as "along for the ride," but whatever happened here or back at the perimeter I would have to account for—to my superiors, to my men, and to myself. I felt I was living a lie: I was trying desperately to learn what I was already supposed to know.<sup>19</sup>

Junior leaders should note how efficiently McDonough establishes and institutes his vision for his men.<sup>20</sup> Within hours of taking command, McDonough determines his style

of leadership and meets with his key subordinates.<sup>21</sup> He bases his tactical goals on the Army's strategic goal to "control the countryside"<sup>22</sup> and his need to learn and establish leadership from the most beneficial position.<sup>23</sup> When McDonough gives his first order, he is very conscious of his words and tone, demonstrating the importance of first impressions and attention to detail in honing leadership skills.<sup>24</sup> All the while, McDonough is conscious of his inexperience but shows resilience and presses forward with decisive action and in so doing, builds confidence.<sup>25</sup>

McDonough reveals another major and ongoing challenge for the new tactical leader: taking all the Army's training and effectively applying it to combat.<sup>26</sup> Implementation requires a quick assessment of a leader's men, the enemy, and the terrain and stresses the importance of having the technical skills down from day one. Most leaders will have and need substantially more time to determine and effect their vision.

Because he has the knowledge and tactical proficiency, however, McDonough can immediately begin training and critiquing his men as they perform their duties.<sup>27</sup> He focuses on tactics and discipline, ensuring that his men have the detailed knowledge required to assist in minimizing their casualties and maximizing casualties to the enemy.<sup>28</sup> McDonough's competent example is useful in learning not only how to "[b]uild agile, effective, high-performing teams"<sup>29</sup> but how to establish authority over more combat-experienced men.<sup>30</sup> This is an important lesson for new leaders as many of their Soldiers will have experienced multiple deployments.

Junior leaders also need to understand the importance of their relationships with the non-commissioned officers (NCO) in their commands. McDonough empowers his NCO

<sup>12</sup> "Leader development is achieved through the life-long synthesis of knowledge, skills, and experiences gained through the training and education opportunities in the institutional, operational, and self-development domains." U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-10(a)(2) (19 Aug. 2014).

<sup>13</sup> MCDONOUGH, *supra* note 1, at 28, 30. Before the title page is a useful map of the 2d Platoon's position aside the village of Truong Lam, in Tam Quon district, Binh Dinh province. *See id.* *illus.*

<sup>14</sup> *Id.* at 89.

<sup>15</sup> *Id.* at 30. Truong Lam's divided purpose provides no reprieve to the villagers. *See id.* at 237-39.

<sup>16</sup> *See id.* at 29. "Modern wars, particularly the Vietnam War, draw little distinction between battlefields and civilian communities. The callousness of war that infects soldiers was every bit as evident in the peasant population in the village where my platoon worked. The peasants were the families of the Viet Cong." *Id.* at 78.

<sup>17</sup> *Id.* at 30.

<sup>18</sup> *Id.* at 37.

<sup>19</sup> *Id.* at 47.

<sup>20</sup> *See* ADP 6-22, *supra* note 7, para. 3 ("Leadership is the process of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization.").

<sup>21</sup> He determines that "[he] would communicate [his] style of leadership through [his] tactical instruction." MCDONOUGH, *supra* note 1, at 38.

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

<sup>23</sup> Until he establishes his leadership, he determines that he will go out on every other patrol as he is more effective leading from inside the perimeter where the majority of his men are located. *Id.* at 38-41.

<sup>24</sup> *See id.* at 41. "Everyone was wondering what the new lieutenant would be like, and I would be telling them with my first words, my gestures, my demeanor, my eyes. . . . If I began with a blunder, my credibility would be shot, and so might some of my men." *Id.* at 37-38.

<sup>25</sup> *See id.* at 41.

<sup>26</sup> *See id.* at 27.

<sup>27</sup> *See id.* at 48-49. "Unit training and leader development are inextricably linked. Good training supports leader development and good leaders develop good training programs for their subordinates." General Raymond T. Odierno, *Foreword* to U.S. DEP'T OF ARMY, DOCTRINE PUB. 7-0, TRAINING UNITS AND DEVELOPING LEADERS, FOREWORD (23 Aug. 2012).

<sup>28</sup> MCDONOUGH, *supra* note 1, at 73.

<sup>29</sup> General Raymond T. Odierno, *Foreword* to ADP 6-22, *supra* note 7.

<sup>30</sup> *See* MCDONOUGH, *supra* note 1, at 48-49.

leadership, discussing the importance of unity of command.<sup>31</sup> He also discusses the blurred lines between the platoon leader and sergeant, which cause friction.<sup>32</sup> Junior officers and NCOs would benefit from further discussing this topic to learn from each other and effectively communicate expected roles. McDonough shows the necessity of effectively utilizing his NCOs to complete all checks and to ensure discipline in all things.<sup>33</sup> He recognizes that discipline is necessary not only to keep Soldiers alive, but to allow them to maintain their civility.<sup>34</sup>

Leaders must always remember that Soldiers are human. This fact can be easy to forget when surviving in inhumane conditions where death is commonplace. Soldiers have homes, families, and personal goals. Through revealing personalities and stories of his Soldiers, McDonough garners respect for those who serve, while at the same time conveys important leadership lessons. He shows why a good leader must listen to and get to know his men.<sup>35</sup> This assists in not only creating an open and cohesive work environment, but it also allows leaders to learn Soldiers' strengths and weaknesses.

McDonough also demonstrates the importance of clear, consistent, and impartial leadership, which was particularly necessary for 2d Platoon. According to McDonough, "Only those without skill, without schooling, and without friends . . . made it to the field."<sup>36</sup> There are Soldiers who require more time and energy than all others combined, but discipline and unit cohesion are great combatants to complacency and crime. In most cases, McDonough quickly and effectively remedies misconduct.<sup>37</sup> There were a few situations, however, that McDonough should have handled differently. For example, King, an incoming Soldier with a drug and attitude problem, fires a 40-millimeter round just past McDonough's ear, threatening his life and authority.<sup>38</sup> As McDonough tells it,

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. . . . War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader had to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity.

*Id.* at 77-78.

<sup>35</sup> *See id.* at 75-76. "Leaders must balance successful mission accomplishment with how they treat and care for organizational members. Taking care of people involves creating and sustaining a positive climate through open communications, trust, cohesion, and teamwork." ADP 6-22, *supra* note 7, para. 6.

he calmly switches his M-16 to fire, places the muzzle under his Soldier's chin and threatens to "blow [his] brains to kingdom come."<sup>39</sup>

No matter how tactically necessary his actions seem given the exigencies of war, most Judge Advocates would see McDonough's action as a Uniform Code of Military Justice violation. McDonough, however, sees this incident as a turning point in his leadership. He notes, "[King] had given me a clear chance to establish my authority over the platoon once and for all, and from that point on I would never fear any of my men. The experience gave me the self-confidence to take the platoon through whatever might come."<sup>40</sup> Importantly, this scenario stimulates discussion on what other actions a platoon leader could take under difficult circumstances to survive and continue the mission.<sup>41</sup>

### III. Morality in Leadership

McDonough wholeheartedly takes on the role of his platoon's "moral and ethical compass."<sup>42</sup> McDonough makes mistakes in this role; however, already by his third patrol, McDonough shows he is fit to lead men. Because he does not perceive imminent danger, he stops his squad before they shoot a man and young boy who the squad leader determined were lawful Viet Cong targets.<sup>43</sup> McDonough recounts, "If I relinquished my command, the squad would open fire; both man and boy were as good as dead. Maybe [the squad leader] was right. . . . If I let him give the orders, the consequences were his. If I gave the orders, they were mine."<sup>44</sup>

His courage is an important example to junior leaders. McDonough's decision not only establishes his standing in the platoon but institutes his restricted rules of engagement. Instead of killing whenever legally justified, his platoon conducts an instantaneous risk assessment, balancing danger

<sup>31</sup> "[I]n battle there is nothing more important than unity of command . . ." *Id.* at 119.

<sup>32</sup> *See id.*

<sup>33</sup> *See id.* at 74. "For instance, health habits had to be inspected as diligently as weapons were." *Id.*

<sup>34</sup> *Id.* at 77.

<sup>36</sup> MCDONOUGH, *supra* note 1, at 79.

<sup>37</sup> "[L]eaders will face—and have to overcome—fear, danger, and physical and moral adversity while caring for those they lead and protecting the organization entrusted to them." ADP 6-22, *supra* note 7, para. 13.

<sup>38</sup> MCDONOUGH, *supra* note 1, at 93.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 94.

<sup>41</sup> Other instances that merit more discussion are when McDonough suspects two of his subordinates of war crimes, and instead of reporting his suspicions to his chain of command, he transfers the Soldiers to other units. *Id.* at 154, 200-01.

<sup>42</sup> General Raymond T. Odierno, *Foreword* to ADP 6-22, *supra* note 7.

<sup>43</sup> MCDONOUGH, *supra* note 1, at 52. Under the prior ineffective platoon leader, the squad leader had become, in essence, the acting platoon leader, but McDonough asserts his leadership to take the burden.

<sup>44</sup> *Id.* at 53. McDonough makes other tough calls to spare the villagers undue suffering. He stops Vietnamese Soldiers from beating suspected Viet Cong sympathizers that McDonough detained and had turned over to them. *Id.* at 143-44. McDonough also redirects an airstrike from hitting the village even though the pilots spot the enemy there. *Id.* at 108-09.

against the need to use lethal force. It is vital that McDonough establishes his position early on, so his men know the standard to make the tough calls. Later in combat, when McDonough falters, his men have the confidence and fortitude of well-trained leaders to bring him back into line.<sup>45</sup>

McDonough makes no specific mention of rules of engagement in *Platoon Leader* but reveals his knowledge of the Geneva Conventions in recounting his thought process during an engagement.<sup>46</sup> In an example where the balance weighs in the Soldiers' favor, McDonough threatens to kill a farmer unless he leads his squad through a heavily mined area.<sup>47</sup> McDonough acknowledges that "[he] had crossed a line" and that "the threat itself was criminal,"<sup>48</sup> but he determines that the lives of his men outweigh the risk to the civilian.

While making a strong case for establishing a line for his subordinates, McDonough makes compromises. Arguably, since McDonough takes ownership of his actions and orders, he protects his men from any adverse impact. He focuses on preserving human life, not a "rigid" reading of the laws of war, observing:

I was hardened to my task, yet I knew there were points at which to draw the line. Determining those points was my responsibility, and it weighed heavily on me.

It was not a simple matter of kill or be killed. I had to think of my men. I could not let them be killed because of a rigid morality on my part. But if I compromised with that morality too often, I would become little more than a war criminal, unfit to lead those men. I had to struggle to keep a sense of balance.<sup>49</sup>

Most judge advocates would recommend a more rigid adherence to the laws of war, but McDonough justifies his actions. At least in the book, McDonough's balancing test seems to save more Vietnamese and American lives than it costs. At times, he crosses the line, and at times, he makes the rules of engagement more restrictive. McDonough notes the dangerousness of being the arbitrator of the laws of war,<sup>50</sup> but his balancing test and result evoke useful fodder for

discussing morality and the laws of war.

#### IV. Conclusion

*Platoon Leader* is a fast-paced, succinct read that manages to integrate humanity and emotion into a hands-on guide for junior leaders. Through successes and failures, moral triumphs and follies, McDonough guides the junior leader through difficult leadership tasks. Although McDonough's exact recipe for asserting leadership and gaining trust will not work for all Soldiers (e.g., deploying to an extremely volatile area, getting blown up,<sup>51</sup> holding an M-16 to a subordinate's head), *Platoon Leader* provides numerous learning points that demand its studied review.

All new military leaders should read *Platoon Leader*; it allows for review and evaluation of a successful leader's actions. The book effectively illustrates leadership in combat at the tactical level and also raises several questions about morality in leadership. Because of the war story format, *Platoon Leader* is a great read for any Soldier to relate to or civilian to learn from. For judge advocates, *Platoon Leader* is valuable not only as a lesson in leadership, but assists in issue-spotting to prepare commanders for battle. In particular, McDonough's memoir highlights the military's need to ensure all leaders understand the laws of war because there will not always be another leader or judge advocate available to consult.

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<sup>45</sup> His platoon sergeant stops McDonough from beating a prisoner of war (POW) to death after the POW tries to kill him. *Id.* at 132. Another Soldier reminds him that the Viet Cong are Soldiers too when McDonough is on the verge of letting his anger get the best of him with another POW. *Id.* at 199.

<sup>46</sup> McDonough shows a sophisticated understanding of the laws of war. Whether he had the understanding as a lieutenant or developed it in the years between Vietnam and writing the book is unknown.

<sup>47</sup> MCDONOUGH, *supra* note 1, at 173-74. McDonough often enlists the help of civilians in locating booby traps as the villagers frequently navigate the area. *See id.* at 172.

<sup>48</sup> *Id.* at 174.

<sup>49</sup> *Id.* at 178. McDonough is discussing the moral qualms he had when

disrupting enemy signaling at a Buddhist temple and pagoda. *See id.* at 177-78.

<sup>50</sup> *Id.* at 174. McDonough admits, "A leader who arbitrates when the laws of land warfare are overtaken by pragmatic concerns is treading on dangerous ground. . . . But the consequences of my decisions were immediate, and I could not afford the comfort of a philosophical debate on the issues." *Id.* at 173. McDonough was surely referencing the "authoritative guidance to military personnel" in Field Manual 27-10. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 Jul. 1956).

<sup>51</sup> During his third mission, a booby trap injures McDonough, an event which he believes helps establish his toughness in his men's eyes. MCDONOUGH, *supra* note 1, at 54, 70.

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