

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 2 • 2019

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## **AROUND THE CORPS**

A statute of Lady Justice sits near the entrance to the Noncommissioned Officers Academy offices at TJAGLCS. (Credit: Chris Tyree)



## **AROUND THE CORPS**

Judge advocates in the graduate course wait for their next class to begin inside Decker Auditorium at TJAGLCS. (Credit: Chris Tyree)

# Army Lawyer

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Issue 2 • 2019

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On the cover: Judge advocates stand near The Park at the University of Virginia after a morning PT run. (Credit: Chris Tyree)

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# TJAG Sends

## Evolving with the Threat The Changing Nature of our Practice

By Lieutenant General Charles N. Pede

**This edition of *The Army Lawyer* is devoted to our National Security Law Practice.** Members of the Regiment should take notice. The *Army Lawyer* is not simply an excellent collection of eclectic writings on our practice of law. Foremost, it is designed to catalyze thought and focus energies on premier lawyering in uniform.

So the focus is deliberate, and the first message I want you to take away with this issue is *focus*: Focus on the purpose of this issue and the name change to our practice. Understand it so you can own it and explain it, authoritatively. Message two is: “*Become part of the effort.*” Devote time to recognize and understand what this issue is trying to tell you. At a tactical level, think: “What does this mean to my practice day-to-day in a plans or targeting cell? How do I engage at the Brigade S3 or the Division G2 staff more effectively?”

Think “how do I improve my own, and my team’s understanding of where, for example, U.S. Policy ends and the Additional Protocols leap forward, or where an ICRC ‘interpretation of LOAC’ has gone beyond its moorings in International Agreement or State Practice?”

At the next level, you should ask yourself, “What is my Corps doing with this practice area and why is it important to me and my team—and future teams that I might lead—to understand?”

The first part of the answer is that we’ve renamed the practice of International and Operational Law deliberately to convey a larger strategic embrace of multiple practice areas in a constantly evolving arena. Cyber, intelligence, domestic operations,

and information operations are a foundational area of our practice. Alone and without Corps-wide attention and focus, they remain niche practices. As we look to the future, however, relegating these important practice areas to the fringes is untenable. We need the entire arena to be seen as a larger body of practice.

What does this achieve? Integration and synergy—from recruiting to talent management (which is more than assignment decisions), to resourcing (how many billets in what location), to curriculum (what and how often we teach). Ten years ago we had the same challenge in military justice. If we needed an especially skilled litigator, we “cold called” SJAs and asked if they had any especially skilled litigators. Ten years into the SVP program, we now have a known population of accomplished trial attorneys as a direct result of the program. We will do the same thing with NSL—grow, train, educate and assign in such a way as to leverage experience and grow the bench.

NSL is an umbrella term that incorporates multiple practice areas. The choice to change was not a result of “keeping up” with academics or playing to trends. Anyone who leads any organization knows that words matter. Focus matters. And yes, actions matter more. That is why this isn’t fast food. It takes time and persistent effort—which is where you come in.

The National Security Law Division of the Office of the Judge Advocate General and the National Security Law Department of The Judge Advocate General’s School were renamed to reflect the broad expansion of the traditional “operational and

international law” practice. This doesn’t mean you’ll stop doing operational law at the small unit level. It simply means “ops” is part of a larger sight picture.

At the higher echelons of our Army, “National Security Law” more accurately describes the strategic nature of our practice covering traditional *Jus ad Bellum* and *Jus in Bello* concepts, domestic operations, coalition interoperability, special or clandestine operations, cyber and intelligence law, and the constitutional and international legal underpinnings of the practice.

Emerging technologies (such as artificial intelligence), changing doctrine (such as Multi-Domain Operations), and new threats (such as hypersonic weapon delivery systems) signaled a need to broaden the aperture of our practice area. In addition to capturing the true nature of our practice in this field, the name change serves to create harmony with our interagency and academic partners using a common language. Furthermore, the enhanced approach to the breadth of national security challenges will bring synergy to our talent management. We are committed to building and sustaining experts in a manner that is persistent and deliberate.

This is an evolution in the notion given to me long ago by the inimitable then Captain E.J. O’Brien that, “You don’t have to be sick to get better.”

Keep getting after it. **TAL**





# Court is Assembled

## Leading From the Front

By Brigadier General William B. Dyer III

*Unselfishness, as far as you are concerned, means simply this—you will put first the honour and interests of your country and your regiment; next, you will put the safety, well-being, and comfort of your men; and last—and last all the time—you will put your own interest . . .*

Field Marshall Sir William Slim (1957)

**A call to attention.** The order is published. Applause rings out. Then the honoree invariably observes that whatever

accomplishments were attained, they were the result of teamwork, outstanding leadership, and collective dedication to the mission. Yet despite our instinct to deflect praise to those by our side, most of us view our military careers as a deeply personal matter. I felt called to duty. I enjoy serving. I was promoted. I was selected. Both collective and personal sentiments are valid, and justified. But their uneasy coexistence, and the emotional attachment to the personal

nature of our service, presents a subtle and significant danger to our ability to lead effectively.

Colonel Ken Gill rose meteorically through the Marine Corps, gaining momentum at every step. Through successful deployments and transformative commands, he earned the admiration of all he touched. He was destined for greatness in the Corps he loved. But on an early morning run, a pothole sent him reeling. His broken ankle was surgically repaired—repeatedly—but never fully healed. Assigned to a billet leveraging his strategic insight while minimizing the need for a good ankle, he abruptly retired. A heartfelt Facebook post explained his physical limitation prevented him from leading in the way he expected to be led—from the front. And thus, a Marine’s Marine did a sharp about-face and walked away from the only cause he had ever served, into the unfamiliar abyss of the civilian world.

Colonel Gill’s exceptional self-awareness was exceeded only by his understanding of a fundamental leadership truth. As military leaders, we are both the instrument by which our nation exercises geopolitics when other means have failed, and we are the vehicle by which our blood and treasure is applied prudently and effectively in conflict. And though personal accomplishments, realization of individual ambitions, and even the comfort of remaining among our fellow patriots as long as we can may be rewards of serving well, their pursuit does not justify continuing to lead when our capability to lead effectively is diminished.

The topic of continued service notwithstanding diminished capabilities invites disagreement. Could Colonel Gill have performed superbly in a strategic billet, leveraging more than two decades of leading Marines? Certainly. Can a judge advocate who cannot deploy still perform top-shelf legal analysis? What about the judge advocate who breathes a sigh of relief with every passing Army Physical Fitness Test score? Or every height/weight measurement? Or perhaps the leader who is dogged by external, medical, or psychological challenges that, despite all efforts to overcome them, remain and distract. If one of these queries hits close to home, are you



leading the way you want to be led? Or has your personal attachment to service allowed you to give yourself a pass. Have you placed your interests ahead of your country's and your Soldiers' interests?

Many reading this article are emerging leaders, and not yet at the inflection point of choosing between personal interests and our country's and our Soldiers' interests. But that inflection point is avoidable. Developing leaders have the ability to avoid having to make this choice if they appreciate that the privilege of increased rank does not lessen the imperative of continuing to master the building blocks of Soldiering that are the foundation of great leadership. True, some will succumb to a pothole, literally or figuratively. But many more will be slowed by the cumulative effect of poor choices along the way. Failure to deal with lingering effects of a deployment. Throwing yourself into your work and

finding comfort in an outstanding evaluation, rather than facing challenges on the home front that the demands of military service often lodge. Or failure to care, physically, for what General Milley refers to as the "most important combat system in the Army"—yourself. Without lifelong attention to factors that steel our resilience, these failures come to roost, eventually. And when they do, a distracted, diminished leader results.

Few topics are as over-written and over-studied as leadership. Principles, elements, and guidelines. Tenets, keys, and qualities. There are 3.9 billion Google results on this single topic, much of which was authored by individuals who were successful leaders. But if you prefer the Cliff Notes version of this mammoth body of work, ask yourself what kind of leaders inspire you. In a dynamic, demanding, conflict-laden environment, who would you

rather follow? Someone who places nation above self, or someone the system entitles to lead by virtue of tenure or rank? Someone who exceeds the standard, or someone who gets a pass, despite diminishing factors that could have been avoided? In every military organization, there will be great patriots who are overcome by their personal desire to serve, despite shortcomings. There are far fewer Ken Gills. My challenge to you is to be neither. Take care of your business, and take care of yourself. Now. And when your time to lead arrives, you will be able to lead from the front. **TAL**

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*BG Dyer is the Director, Rule of Law, for the Combined Security Transition Command—Afghanistan. He and Colonel (Ret.) Ken Gill, U.S.M.C., were classmates at the Virginia Military Institute.*

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# News & Notes

## 1. BG Berger Visits NTC

Brigadier General (BG) Joseph Berger, the Commander of the U.S Army Legal Services Agency, led a team of JAG Corps leaders on an Article 6 inspection to the National Training Center at Fort Irwin, California, to assess the legal office's readiness and effectiveness in supporting the U.S. Army's mission of training our Soldiers for conflict.

During the inspection the team enjoyed an early morning hike up Mount Blackie, led by Private First Class Custer-Jones, for physical training. The team then conducted an aerial orientation of "The Box" while Lieutenant Colonel Eric Husby briefed them on changes to the National Training Center's direct action training scenarios, designed to make training more realistic to what our Soldiers face in combat.

Upon their arrival at "Gilmore Gulch" the Fort Irwin Staff Judge Advocate, Lieutenant Colonel Phil Staten, led the dedication of a memorial to Chief Warrant

Officer Five Sharon Swartworth, which was placed next to the previously dedicated memorial to Sergeant Major Cornell Gilmore, which overlooks the gulch.

In addition to the inspection, BG Berger was able to recognize several members of the Fort Irwin Legal Office for their outstanding hard work and dedication to the Army Mission.

## 2. CSM Fassler Addresses Western Region Training

Command Sgt. Maj. Jeremiah Fassler addressed Soldiers during the Western Region On-Site Legal Training 11 January 2019. The event was hosted by the 87th Legal Operations Detachment at Anchors Catering and Conference Center at Naval Base San Diego. United States Army Legal Command conducts mission command and control of legal forces across 104 cities in 43 states in the continental U.S., Puerto Rico, and Europe.

## 3. CW4 Carrol Gives Briefing During First Multi-Component Training

Chief Warrant Officer 4 James (Jim) Carroll, chair of the The Judge Advocate General's Legal Center and School's Legal Administrator and Paralegal Studies Department, presented a brief on leadership at the U.S. Army Reserve Legal Command South Eastern Region On-Site Legal Training (OSLT) at Fort Benning, GA, Feb. 22. The OSLT was the first Army legal training event where Army, Army Reserve, and National Guard judge advocates and paralegals trained together.

## 4. Artic Wolves Legal Team Trains with Japanese Counterparts

The 1/25 SBCT "Arctic Wolves," 25th Infantry Division brigade legal team took a tactical pause during their readiness rotation in February at the National Training Center at Fort Irwin, California, to pose with a judge advocate from the Japan Ground Self-Defense Force and the Senior Legal Observer Controller/Trainer (OC/T). Pictured here from left to right: Staff Sergeant Ian Chope, Major Daniel Curley, Lieutenant Colonel S. Takahashi, Captain Lindsey Brown, and Lieutenant Colonel Eric Husby.

## 5. Multi National Forces Judge Advocates (JA) participated in Exercise Cobra Gold 2019 in February

The exercise, in its 38th iteration, emphasizes coordination on civic action and demonstrates the commitment of the Kingdom of Thailand and the United States to our long-standing alliance, and promotes regional partnerships and security cooperation in the Indo-Pacific region. CPT Jonathan Patton, pictured third from right, a JA from 1-2 SBCT JBLM, Washington, participated in the exercise alongside JAs from South Korea, Malaysia, Thailand and Indonesia.

## 6. ACCA Oral Argument at Yale

Yale Law School hosted the Army Court of Criminal Appeals in January for an evening outreach argument in the case of *U.S. v. Miller*. The follow-on Q&A and reception with students was marked by a robust discussion about military justice.





Accused Hesse jewel thief David Watson, pictured far right, third row. (Credit: U.S. Army/National Archives)

# Lore of the Corps

## The Hesse Jewels Courts-Martial

### The Rest of the Story

By Mr. Fred L. Borch

The last “Lore of the Corps” in *The Army Lawyer* (Issue 1 2019) featured the infamous theft of the Hesse Jewels and a brief look at the follow-on courts-martial against Colonel (COL) Jack W. Durant, Captain (CPT) Kathleen B. Nash Durant,<sup>1</sup> and Major (MAJ) David F. Watson.<sup>2</sup> All three were convicted at separate trials and all three were dismissed from the service and sentenced to terms of confinement at hard labor. Colonel Durant’s term of

imprisonment was fourteen years; CPT Nash Durant and MAJ Watson were sentenced to five and three years, respectively.<sup>3</sup> What happened after the three officers were convicted, however, is every bit as interesting as the crime itself, especially since President Dwight D. Eisenhower would ultimately grant a full and unconditional pardon to one of the three. What follows is the “rest of the story” surrounding the theft of Hesse family’s jewels.<sup>4</sup>

Kathleen (also known as “Katie” or “Vonie”) Nash Durant was the first to be tried. Her court-martial started in Frankfurt, Germany on 22 August 1946 and finished on 30 September 1946. She was convicted of “feloniously” taking, stealing, and carrying away, “in conjunction with” COL Durant and MAJ Watson, various jewels, gold, silver, and other “personal property” belonging to aristocratic members of the Hesse family, in violation of Article 93, Articles of War (AW). Nash Durant also was found guilty of being Absent Without Leave (AWOL) for three days, in violation of AW 61. This AWOL arose out of her refusal to report to Fort Sheridan, Illinois, after her terminal leave orders were revoked by the Army.<sup>5</sup>

After the reviewing authority took action in her case, a Board of Review consisting of three judge advocate colonels examined the record of trial for legal sufficiency.<sup>6</sup> On appeal, CPT Nash Durant raised a multitude of errors, but her principal claim was that the Army had no court-martial jurisdiction over her because she was on “terminal leave status” and was honorably discharged on 30 May 1946. Nash Durant insisted that the Secretary of War’s order to revoke these orders and return her to active duty was a nullity and that she had been discharged. The Board rejected this claim, finding that her terminal leave status had been revoked on 24 May and that she knew it had been revoked when The Adjutant General notified her by telegram that she must report for duty at Fort Sheridan. After rejecting Nash Durant’s other assignments of error,<sup>7</sup> the Board recommended to The Judge Advocate General (TJAG) that he advise the Secretary of War to affirm the results in her case; the Secretary did so on 27 March 1947.<sup>8</sup>

No sooner did Nash Durant begin serving her five year prison sentence at the Federal Reformatory for Women at Anderson, West Virginia, however, than she began a collateral attack on her conviction with a petition for a writ of habeas corpus in the nearby U.S. District. No doubt the U.S. Attorney responding to



Watson receiving his Bronze Star Medal from General Eisenhower. Watson was awarded the medal prior to his involvement in the Hesse case. (Credit: U.S. Army/National Archives)

Nash Durant's petition was surprised when her counsel persuaded the judge that Nash Durant had been wrongly convicted and must be released from custody.

The District Court not only found that the Army had no in personam jurisdiction over Nash Durant, but he concluded that such jurisdiction had terminated over her on 9 March 1946, the date that Nash Durant was placed on terminal leave. Consequently, the judge ordered Nash's release and she left the Federal prison on 10 September 1947.

The government appealed. The U.S. Court of Appeals for the Fourth Circuit reversed, holding the U.S. District Court judge had erred. The Court of Appeals determined that that Nash was "definitely on active duty" at the time of her court-martial. In *Hironimus v. Durant*, the petition for writ of habeas corpus was reversed and Nash was sent back to prison.<sup>9</sup> The U.S. Supreme Court declined to review her case in October 1948.<sup>10</sup>

Born in October 1902, Nash Durant was forty-two years old, divorced, and was working as an assistant manager at the Phoenix Country Club, Phoenix, Arizona, when she lied about her age and joined the Women's Auxiliary Army Corps (WAAC)

in February 1943; she claimed to be thirty-two years old. When the WAAC became the Women's Army Corps (WAC), Nash commissioned as a WAC first lieutenant, was subsequently promoted to captain in September 1944, and served in Europe after the cessation of hostilities.<sup>11</sup> While Nash Durant was on terminal leave, she and COL Jack Durant married on 28 May 1946. When they were apprehended at 0200 on 3 June, the Durants were in the bridal suite of a Chicago hotel.

After serving her sentence in West Virginia—and probably while Jack Durant was still serving his fourteen year sentence to confinement—the couple divorced. Nash Durant then apparently moved back home to Arizona, where she died in April 1972, at the age of sixty-nine.

The second accused to face a court-martial panel was MAJ David Watson. His trial opened in Frankfurt on 15 October 1946, and finished two weeks later. Watson had been charged with larceny of the Hesse family jewels, gold, silver, and other property, but was found not guilty of that charge. This acquittal most likely occurred because the evidence presented at trial was that COL Durant

and CPT Nash Durant had done the actual stealing from the cellar of Schloss Friedrichshof.<sup>12</sup> Watson was, however, found guilty of conspiracy under Article 96, AW, in that he had conspired with Durant and Nash Durant to receive and transport numerous items of jewelry and other property, then knowing them to be stolen. The court-martial panel sentenced Watson to be dismissed from the service, to forfeit all pay and allowances, and to be confined at hard labor for three years.<sup>13</sup>

Watson's fine military record was now wrecked. This was a shame, as he had performed well as an officer in the Quartermaster Branch. He had gone from lieutenant to major in three years, and had been personally decorated with the Bronze Star Medal by General Dwight D. Eisenhower while serving at the Supreme Headquarters Allied Forces Europe. Watson had also been decorated by Belgium, France, and the Soviet Union, which was unusual for an officer of his rank; he had received the Soviet Medal for Battle Merit, the Belgian Croix de Guerre, and the French Croix de Guerre.<sup>14</sup> No doubt hoping to salvage something from his career as a commissioned officer, Watson now began soliciting statements from his fellow officers, friends, and acquaintances attesting to his good character.

Watson seems to have told those persons writing statements that he had been found not guilty of stealing the jewels and other treasures—which was certainly true—and that his involvement with Durant and Durant Nash in selling some jewels, gold, and silver grew out of his genuine belief that the loot, having belonged either to Nazis or members of the SS, would never be returned to them and consequently was "war booty."<sup>15</sup> As such, the jewels, gold, silver and other Hesse family property lawfully belonged to Durant and Nash Durant. Watson had argued at trial—and he certainly told his friends and colleagues—that he lacked the requisite mens rea to be found guilty. In Watson's view, this was because "... other persons had committed offenses against enemy property for which they had not been tried and by doing only what other people were doing with impunity [he] was following precedent and therefore he was acting without a guilty mind."<sup>16</sup> While this

novel argument might have persuaded those who wrote letters attesting to Watson's good character, the argument had no basis in criminal law: the fact that certain criminal conduct prevails in a community or neighborhood does not create a defense to a prosecution for such crimes.

Watson also suggested that he had been swept along in the entire affair because of the undue influence of a senior ranking officer, in this case COL Durant. While it seems unlikely that the thirty-three year old Watson could have been persuaded to go along with Durant and Nash Durant's scheme because of undue influence, it is true that Watson worked for Durant and that his promotion to major was the result of Durant's recommendation.<sup>17</sup> Pure greed, however, was the mostly likely motive for Watson's criminal conduct.

Ultimately, Watson gathered together more than 275 letters from military personnel and civilian colleagues, all of which either urged clemency or else attested to Watson's good character, or both. Some of these letters were from prominent politicians, including members of the House of Representatives and Senate. All of these letters were submitted to the Board of Review examining the record of trial in Watson's case, and the Board did consider these matters. The Board members also recognized that all the members of the court-martial that had heard the evidence against Watson also recommended clemency (but only as to the sentence, not the findings).<sup>18</sup>

The same three judge advocate colonels who sat on the Board of Review in Katie Nash Durant's case also carefully examined Watson's assignments of error, and considered the matters submitted in his request for clemency. But the Board declined to recommend clemency and instead advised TJAG to recommend to the Secretary of War to confirm the results in *United States v. Watson*. The Secretary did so on 23 July 1947.<sup>19</sup> Watson was imprisoned at the U.S. Disciplinary Barracks located at Fort Hancock, New Jersey. He was paroled on 19 December 1947, and returned to California.

In the meantime, he had retained the services of Smith W. Brookhart, a Washington D.C. attorney, to handle his case. After the decision of the Board of Review and action by the Secretary of War,



Then Captain Watson's ID card from 1945. (Credit: U.S. Army/National Archives)

Brookhart advised Watson in a 30 August 1948 letter that he had two courses of action. First, although he had been dismissed from the service, Watson could "request restoration to duty as an EM [Enlisted Man] to serve two years and receive an honorable discharge," assuming that this term of service was honorable. Brookhart counseled that such a restoration request could be made as long as Watson was still in a parole status—which he was—but Brookhart also wrote that it was unlikely that such a request would be granted.<sup>20</sup>

On 24 December 1948, David Watson received official notice that his parole was at an end: having completed his sentence to confinement and having complied with the requirements for parole, he was "hereby released and set at liberty."<sup>21</sup> At this point, David Watson could have tried a collateral attack on his conviction. Since Katie Nash Durant had been unsuccessful in her petition for a writ of habeas corpus, this course of action was unlikely to succeed for Watson. In fact, Watson apparently never attempted an attack on his conviction in U.S. District Court, but he did have one more avenue to clear his name and reverse his court-martial conviction: a presidential pardon.

Smith Brookhart had advised Watson that no application for a pardon would be

considered by the White House "until a person has had at least three years freedom after parole."<sup>22</sup> The result was that, starting in 1952, David Watson began gathering together letters from friends, colleagues, politicians, business and community leaders who would vouch for his good character. Watson had worked as a manager for Safeway Stores, the large retail grocery chain, prior to entering the Army in 1942, and he returned to retail management work after his release from prison.

Ultimately, Watson provided his lawyer with many sworn affidavits expressing the conviction that Watson had been conducting himself in "a moral and law abiding manner." These "character affidavits" all requested that Watson receive a Presidential pardon that would "restore his full civil rights." Lawrence Giles, a management consultant from Laguna Beach, California, for example, wrote that he had known Watson for more than twenty-seven years and that he had "seen the applicant [Watson] on many occasions." Giles was "sure" that Watson had never been in any trouble since his release from prison.<sup>23</sup>

Arthur Stewart, the Controller and Director of Safeway Stores wrote that he had known Watson more than twenty years, and that he had frequent contact with Watson in the latter's capacity as

Vice President and General Manager of Handyspot Company of Northern California. According to Stewart, Watson was overseeing the delivery of toiletries and cosmetics to more than 170 grocery stores, and was a highly respected member of the community. Stewart wrote that he was “intimately acquainted with Mr. Watson’s family,” and that Watson and his wife Barbara were “well thought of by neighbors and friends, and wish to adopt some children as soon as this can be done.”<sup>24</sup>

Watson submitted his petition for a presidential pardon in late 1952, and received a note from his attorney—still Smith Brookhart—in January 1953 that the petition had been received at the Department of Justice (DOJ) and that the Federal Bureau of Investigation would now investigate the case.<sup>25</sup> Six months later, in July 1953, Watson received bad news: the Army objected to any pardon for him. According to Smith Brookhart, Major General Ernest M. Brannon, then serving as TJAG, refused to reconsider his decision to oppose the pardon.<sup>26</sup>

As the saying goes, “persistence wins the prize,” and David Watson did not give up. He now enlisted the support of his local member of congress, J. Arthur Younger. Younger contacted the Army about its opposition to Watson’s pardon and was informed in January 1954 that the Army would “consider again” its view on the matter.<sup>27</sup> But there still was no good news: on 17 February 1954, the DOJ informed Watson that, because the Army continued to oppose his request for a pardon, it would take no further action on his behalf.<sup>28</sup>

Over the next few years, as the result of telephone calls and correspondence, Congressman Younger persuaded the Army to alter its view on Watson’s pardon petition. While the Army continued to maintain that Watson’s trial had been just and his sentence fair, the Army now notified Watson in April 1956 that it would no longer “interpose any objection” if the DOJ wanted to process Watson’s petition. In short, the Army declined to make a favorable recommendation on Watson’s petition, but it would not stand in the way of its processing by the Office of the Pardon Attorney.<sup>29</sup>

The absence of a positive recommendation from the Army did not affect the merits of the petition, as reflected by the results: on 31 July 1957, President Dwight David Eisenhower granted David F. Watson “a full and unconditional pardon.”<sup>30</sup> It was an amazing end to a long and convoluted process.

A short biographical note on Watson. Born 4 December 1912, he graduated from Pomona College in 1934. After his release from the U.S. Disciplinary Barracks in 1947, Watson lived in Piedmont, California. After retiring as President and General Manager of Handyspot Company in 1973, Watson and his wife opened a Hallmark Gift and Card shop, which they owned until 1976. Later, the couple managed a retail jewelry store in California.

Jack Durant was the last of the three officers to be tried. The Army certainly viewed him as the most culpable of the three accuseds, given his rank and position. Durant’s trial began in Frankfurt, Germany, on 11 December 1946 and finished on 30 April 1947. After the reviewing authority took action in COL Durant’s case, the Board of Review examined the court-martial for legal sufficiency.

Durant had been convicted, “in conjunction with” CPT Nash Durant and MAJ Watson of “felonious” larceny of “goods, chattels, and items of personal property . . . of a total value of more than one million dollars (\$1,000,000.00), the property of Prince Wolfgang of Hesse. The charge sheet listed more than 250 items, including gold, silver and platinum necklaces, bracelets and ring. Also listed were various precious jewels, including diamonds, emeralds, sapphires, pearls, moonstones, and rubies.

Durant also was convicted of “unlawfully” agreeing and conspiring with Nash Durant and Watson to “steal, embezzle, convert to their own use, transport and dispose of” more than \$1.5 million worth of “goods, chattel, and items of personal property” belonging to Prince Wolfgang and other family members of the House of Hesse. The conspiracy specification explained in great detail how the three officers had broken and dismantled jewelry, mutilated settings and fittings to remove precious stones, and then shipped the jewels

back to the United States with the intent to sell them there later.<sup>31</sup>

Just as he had at his trial in Frankfurt, COL Durant did not contest the merits of the case. On the contrary, he argued to the Board of Review that his conviction was invalid because the court-martial had no in personam jurisdiction over him. Durant’s argument was identical to the argument made by his wife, Katie Nash Durant: that because he had been on terminal leave since 17 May 1946 and had orders that would automatically release him from active duty on 23 July 1946, the Army’s attempt to revoke his terminal leave orders and order him to report to Fort Sheridan was unlawful.

The Board of Review rejected this jurisdiction argument, finding that the Army had properly revoked COL Durant’s terminal leave orders. On 7 November 1947, the three judge advocate colonels examining the case published an eighty page, single-spaced, typewritten opinion in which they affirmed the findings (with only minor exceptions) and the sentence.<sup>32</sup>

No doubt following the earlier lead of his wife, Jack Durant now challenged the legality of his court-martial conviction by filing a petition for a writ of habeas corpus in the U.S. District Court for Northern District of Georgia. Although Durant raised a number of errors, his chief complaint was that the Army lacked in personam jurisdiction over him for the reasons he had raised at trial and at the Board of Review.

Jack Durant must have been disappointed, but perhaps not too surprised, when the District Court found that “the court-martial was legally constituted” and that Durant had not been denied due process of law. The court specifically found that the court-martial had jurisdiction over Durant and that his sentence to fourteen years confinement at hard labor was “within the limits permitted by law.”<sup>33</sup> Consequently, the judge dismissed Durant’s petition for a writ of habeas corpus and ordered him to be returned to prison.

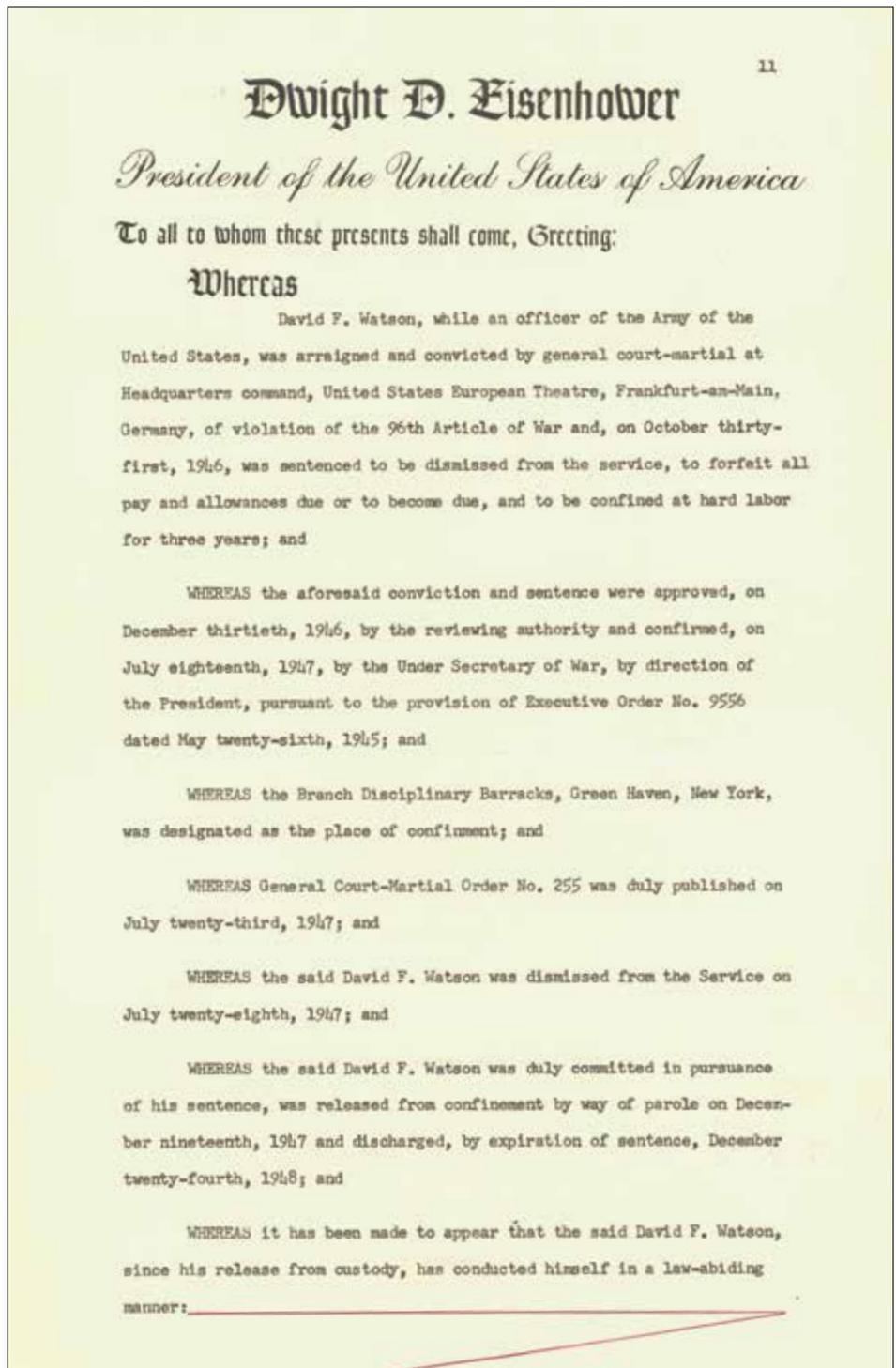
Some biographical details on Jack Durant: Born in Decatur, Illinois on 25 September 1909, he received a B.A. from the University of Illinois in 1931. Durant worked as a statistical clerk in the U.S. Department of Labor from 1934 to 1937, after which he worked as a fiscal clerk in

the Department of the Interior. While he was working in Washington, D.C., Jack Durant attended American University and Georgetown University and received an LL.B. from Georgetown in 1941. He passed the bar and was admitted to practice in the District of Columbia. No doubt the court-martial panel hearing the case against Jack Durant must have been surprised to learn that the law-breaking accused before them was a licensed attorney.

Durant had been a member of the Reserve Officer's Training Corps while in high school and college and, upon graduation from the University of Illinois, was commissioned as a second lieutenant in the Cavalry Reserve. He was ordered to active duty with the Army Air Corps in 1940, and was exclusively involved in personnel work between 1940 and 1945. Durant was an outstanding performer; he was promoted to major in February 1942, lieutenant colonel in September 1942, and colonel in November 1944. He finished out the war with the ribbons of the Legion of Merit, Bronze Star Medal, and various campaign medals on his chest.<sup>34</sup>

As for his personal life, Durant had married Elvera Duller in 1930, and had two sons with her. He divorced her in 1944 and married then CPT Nash in May 1946. Their marriage was short lived. Jack Wybrant Durant died in Miami-Dade County, Florida, on 19 December 1984 at the age of seventy-five.

Two final notes about the Hesse jewels heist. Then Lieutenant Colonel Joseph S. Robinson had been one of the prosecutors in the proceedings against Jack Durant. As a result of his connection with the case, the members of the Hesse family hired him—after Robinson's discharge from active duty and his return to civilian life—to help them recover the jewels, which were still in the custody of the United States. Along with another recently discharged Army colleague, Robinson had opened a civilian law office in Frankfurt, and consequently had close contact with Hesse family. In 1951, as a result of Robinson's efforts, about \$600,000 worth of jewels were flown to Germany. The seventy-nine year old Countess of Hesse, Princess Margarethe of Hollenzollern, a granddaughter of Queen Victoria, and a sister of Kaiser Wilhelm



President Eisenhower's pardon of Watson. (Credit: U.S. Army/National Archives)

II, took custody of the jewels at the U.S. Consulate in Frankfurt.<sup>35</sup>

There also was a civil suit involving the crime. Jack Durant had mailed some of the stolen goods to his brother, James E. Durant, who lived in Falls Church, Virginia. A subsequent search of a "wooded

spot on the Leesburg Pike near Falls Church" resulted in the recovery of \$28,000 in U.S. currency, which had been buried in a glass jar.<sup>36</sup> The Hesse family sued for the return of the money in U.S. District Court for the Eastern District of Virginia. They ultimately prevailed, but not before ex-CPT

Glenn V. Brumbaugh, who had represented Jack Durant as his defense counsel in his court-martial, filed a claim for the money. Brumbaugh insisted that the \$28,000 had been promised to him “as payment for legal services beyond customary representation at the colonel’s court-martial.” United States District Court Judge Albert V. Bryan rejected Brumbaugh’s claim and ordered the moneys and property returned to the Hesse family.<sup>37</sup>

And so ends the saga of the Hesse jewels and Jack W. Durant, Katie B. Nash Durant, and David F. Watson—except that a large part of the Hesse treasure was never found and no one knows what happened to the remainder of the loot, now worth millions of dollars. Truth is stranger than fiction. **TAL**

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*Mr. Borch is the Regimental Historian & Archivist*

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## Notes

1. While they had not been married at the time of the crime, COL Durant and CPT Nash Durant subsequently married in Chicago in May 1946, just days before they were apprehended by the military police and sent back to Germany for trial.
2. The author thanks MAJ David A. Brown, U.S. Army (Retired), Attorney-at-Law, Walnut Creek, California, for providing extensive information about David Watson’s life after his trial by court-martial.
3. Although the officer panel sentenced Durant to fifteen years, the reviewing authority reduced the confinement to fourteen years because Durant had spent a year in confinement prior to the completion of his trial. *United States v. Durant*, CM 324235, 73 BMR 49, 130 (1947).
4. With a “tip of the hat” to conservative talk show host Paul Harvey, whose “The Rest of the Story” was a Monday-through-Friday radio program that aired from 1976 until Harvey’s death in 2009. Each broadcast ended with the phrase, “And now you know the rest of the story.” PAUL HARVEY, <http://www.paulharvey.com/> (last visited Nov. 21, 2018); Paul Harvey, Talk-Radio Pioneer, Dead at 90, N.Y. TIMES, Feb. 28, 2009, at A18.
5. *United States v. Nash Durant*, CM 317327, 66 BMR 277, 279-80 (1947). Article 93 was the forerunner of Article 121, Uniform Code of Military Justice (UCMJ). Article 63 was the antecedent of Article 86, UCMJ. Both AW provisions are essentially the same as their UCMJ counterparts. The facts supporting the Article 63 offense were that both CPT Nash Durant and COL Durant were on terminal leave orders when the Army decided to court-martial them for stealing Hesse family property. Since their terminal leave orders ultimately would have automatically discharged them from active duty, the Army revoked these orders and ordered the two officers to report for duty. Both declined to obey these orders, which resulted in the AWOL charge against CPT Nash Durant.
6. The three Board of Review members were COLs Chester D. Silvers, Carlos E. McAfee, and Gilbert G. Ackroyd. McAfee had spent all of World War II in a prisoner of war camp after being captured by the Japanese in the Philippines in March 1942. McAfee was one of only two judge advocates to be decorated with the Silver Star in World War II; he was cited for gallantry in action during the defense of Bataan. Department of the Army, General Orders No. 27 (30 Dec. 1947).
7. For example, Nash Durant claimed that “confessions” she had made when apprehended by the military police were the product of “undue pressure” and therefore inadmissible. She also claimed that the seizure of jewels and other personal property by the military police from her sister’s home in Hudson, Wisconsin was an “unlawful search and seizure.” The Board rejected both claimed errors. *Nash Durant*, 66 BMR at 300-02.
8. War Department, General Court-Martial Order 110 (27 Mar. 1947).
9. *Hironimus v. Durant*, 168 F.2d 288 (4th Cir. 1948).
10. *Mrs. Durant Denied High Court Review of Gem Conviction*, EVENING STAR (WASHINGTON), Oct. 11, 1948, A4.
11. *Nash Durant*, 66 BMR at 315.
12. Schloss Friedrichshof was also known as “Kronberg Castle” and the two names are used interchangeably in the records of trial of the three courts-martial. The connection is that Schloss (or Castle) Friedrichshof is located near the town of Kronberg, Germany.
13. *United States v. Watson*, CM 319747, 69 BMR 47 (1947).
14. War Department, Adjutant General’s Office Form 53-99, Military Record and Report of Separation / Discharge from the Army of the United States, David F. Watson (28 July 1947).
15. THE JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER 172 (1975).
16. *Watson*, 69 BMR at 62.
17. Colonel Durant was the executive officer to the G-1, U.S. Forces, European Theater, and Watson was Durant’s assistant. *Watson*, 69 BMR at 61.
18. The panel members cited various reasons for recommending clemency on sentencing. Colonel Victor W. B. Wales, for example, wrote that Watson deserved clemency because he “is not believed to be a criminal character” and that he “probably was laboring under considerable pressure through his immediate military supervisor [COL Jack Durant].” Similarly, COLs Harold J. Baum and John R. Knittel supported clemency because of Watson’s “limited participation . . . in the offenses charged.” Interestingly, the law member, COL Nathan J. Roberts, JAGD, supported clemency for Watson because he believed “that the accused is not of a criminal character but that his offense was largely an outgrowth of poor judgment.” Appendix C, Brief for the Accused Before Board of Review No. 2, *United States v. Watson*, CM 319747, 69 BMR 47 (1947) (on file with author).
19. War Department, General Court Martial Order 255 (23 July 1947).
20. Letter, Smith W. Brookhart to David F. Watson (Aug. 30, 1948) (on file with author).
21. Department of the Army, Adjutant Generals’ Office Form 01124, 1 Oct 1948, U.S. Disciplinary Barracks, Certificate of Release from Parole, David F. Watson (24 Dec. 1948).
22. Letter, Brookhart to Watson, supra note 20.
23. Character Affidavit from Lawrence Giles, for David F. Watson (Feb. 1953) (on file with author).
24. Character Affidavit from Arthur Stewart, for David F. Watson (March 7, 1953) (on file with author).
25. Letter, Smith Brookhart to David Watson (Jan. 10, 1953) (on file with author).
26. Letter, Smith Brookhart to David Watson (July 9, 1953) (on file with author).
27. Letter, COL John P. Maher to Representative J. Arthur Younger (Jan. 18, 1954) (on file with author).
28. Letter, Daniel M. Lyons, Pardon Attorney, Department of Justice, to David F. Watson (Feb. 17, 1957) (on file with author).
29. Letter, Franklin G. Floete, General Services Administration, to David F. Watson (Apr. 7, 1956) (on file with author).
30. Presidential Pardon, Dwight David Eisenhower (on file with author).
31. The evidence at trial was that COL Durant had “mailed twenty or thirty packages” containing these stolen jewels to his brother in Falls Church, Virginia. Captain Nash Durant had likewise mailed packages to her sister in Hudson, Wisconsin. After returning to the United States in early 1946, the Durants in fact did sell some jewels in Washington, D.C. Other jewels and a small quantity of gold, however, were taken by MAJ Watson to Belfast, Northern Ireland, and sold to the owner of a pawn shop. *Durant*, 73 BMR at 75-6.
32. The three colonels were Abner Lipscomb, H. Johnson, and Gilbert Ackroyd. Ackroyd had also been a member of the Boards of Review that examined the Nash Durant and Watson records of trial. *Id.* at 49.
33. *Durant v. Hiatt*, 81 F. Supp. 948, 957 (N. D. Ga. 1948).
34. *Durant*, 73 BMR at 127.
35. Born in 1906 in Maple Hill, New York, Robinson graduated from Fordham University’s law school in 1927, when he was twenty-one years old. He enlisted in 1941 as a private in the Army Air Corps and, after graduating from the 11th Officer Course at The Judge Advocate General’s School at the University of Michigan, joined the JAG Corps. STUDENT AND FACULTY DIRECTORY, THE JUDGE ADVOCATE GENERAL’S SCHOOL at 40 (1946). When he was released from active duty in 1946, he was a lieutenant colonel. Robinson practiced law in Frankfurt from 1946 until 1954, when he returned to New York. He maintained a general practice of law in Manhattan until he retired in 1988. Robinson died in February 1996, aged eighty-nine. Joseph S. Robinson, 89, Lawyer Noted for Roles in War Cases, N.Y. TIMES, Feb. 27, 1996, at B7.
36. *Durant*, 73 BMR at 97.
37. Wolfgang, Prinz von Hessen et al v. Brucker et al, Civil Action No. 1111, U.S.D.C. (E.D. Va.), Nov. 1955; 28,000 Found in Cache Awarded to Hesse Family, WASH. (DC) STAR, Sept. 28, 1956, A1.



# WRITECOM

## Email ROE

By Lieutenant Colonel Edward C. Linneweber

### The pen is mightier than the sword.

As lawyers, we want to believe this. We must believe this. Words matter. Words have consequences. Words can damage just like weapons. Like a weapon, email can be quickly employed in the heat of passion, often without thinking, and with disastrous consequences. But unlike the sword, where we have rules of engagement (ROE) to guide its use, we have no rules for the use of email.

The twenty two rules that follow are principles for the effective employment of email. These rules should not only help you avoid embarrassing mistakes, but also help you better leverage this powerful tool.

#### **1. Don't Do It—Email Is Probably Not the Right Medium.**

Although sent almost continuously, email is rarely the best medium for effective

communication. In general, face-to-face communication is the best. Voice communication alone, such as by telephone, is less desirable but sometimes necessary because of timing and location. Written text—including email—is the worst. Written text forfeits the ability to communicate using visual cues such as facial expressions and body language. If written text is absolutely required, then drafters must spend the time necessary to ensure that they convey the appropriate message, tone, and emotion. Words can mean many things to many different people.

Before you even draft an email, ask yourself, “How can I better connect to the recipient?” If there is only one recipient, can you call him on the phone, or even better, go to his desk to chat? If there are multiple recipients, can you hold a meeting or facilitate a conference call to share the

information? By doing so, you can improve the quality of communication and obtain immediate feedback.

#### **2. Use Email for Short, Administrative, Non-Emotional Communications.**

Email is appropriate for efficient, and sometimes broad, distribution of administrative materials, such as memorialization of meetings and updates on routine schedule changes, or distribution of non-controversial information. Just as an infantryman would use an M4—and not a Javelin—to engage dismounted enemy personnel, so should good attorneys and staff officers use person-to-person communication—and not email—to share difficult, emotional, or controversial materials.

#### **3. Clear, Concise, and Correct.**

Army Regulation (AR) 25-50 recommends against using written text as the primary method of communicating, noting, “Conduct official business by personal contact, telephone, or Defense Switched Network (DSN) whenever possible and appropriate.”<sup>1</sup> Additionally, AR 25-50 requires Army writing be “clear, concise, and effective. . . . The reader must be able to understand the writer’s ideas in a single reading.”<sup>2</sup> This directive applies to email. Use short, direct sentences that the reader can comprehend after a single reading.

Email is a horrible medium for nuanced issues requiring long, thorough discussion.<sup>3</sup> Readers expect emails to be short, precise, and clearly to the point. Just as fast food restaurants do not serve five course meals, neither should email drafters send long, complicated messages. There are other—much better—mediums for that form of communication. Use the right ingredients in your email recipes: clear, concise, and correct prose.

#### **4. BLUF It!**

Many readers appreciate the use of a Bottom Line Up Front (BLUF) in an email. If you need more than a short, one-sentence BLUF to summarize your message, then email is not the proper medium. Find the proper medium: perhaps a face-to-face communication or a legal memorandum in which you can thoroughly address nuanced issues.

### **5. The Subject Line Is a Mini-BLUF.**

A subject line that provides most of the relevant content is the ultimate in clear and concise communication. For example: “*SUBJECT: Calendar Change—CPT Smith Award Ceremony Rescheduled to 6 JUL at 1500.*” Failing to properly use a subject line is like failing to effectively employ a weapons system. Use all resources available to communicate effectively.

### **6. Do Not Use Email to Make Time Sensitive Changes.**

No matter how many exclamation points and read receipts you use, email fails in communicating real time changes. If something has a short suspense, deliver the information face-to-face or by phone.

### **7. Remember Mobile.**

Many of your recipients will be reading on mobile devices—especially our more senior ranking clients. Always write for a mobile device reader when you draft. Although modern mobile devices can open most kinds of attachments, have you ever tried to review a slide show presentation on a four-inch screen? Not fun. Plus, your reader will probably only read a few slides or pages before giving up and cursing you for not summarizing the attachment in the body of the email message.

If necessary to include an attachment, and there is any chance a reader may be on a mobile device, summarize the attachment for the reader. If needed for clarity, cut and paste key sections from the attachment into the body of the message.

Even if you know the reader will be on a desktop or laptop, make clear to the reader the general content and importance of the attachments. A short one or two sentence summary of each is often helpful. Your reader should never open an attachment unsure of what she will find.

### **8. Don't Do Humor in Email.**

Really. You are not that funny, especially in email. Remember Rule 1—text lacks most of the communication cues found in voice or body language. Your intended reader may not realize you are joking. Additionally, your “joke” could be forwarded on to others who have no idea that you may be attempting—and likely failing—to be funny. At best,

your joke will fall flat, reducing efficiency. At worst, you could offend a recipient. High risk, no reward. Do not do it.

### **9. Assume Your Email Will be Forwarded.**

You lose all control of your message once you hit send. Assume it will be forwarded to everyone you would rather not read it: the opposing counsel, the judge, the media, your mother, and your father. Email is not the place for negative personal comments. Assume any such unprofessional comments will find their way to the subject and irreparably harm your relationship.

### **10. Remember that Email Is Releasable Under FOIA.**

Everything you type on a government computer or send through a government email system is potentially releasable under FOIA (as well as subject to subpoena).<sup>4</sup> Before sending, or even drafting, think about your message being published by your favorite—or least favorite—media outlet. Including a boilerplate attorney-client disclaimer at the bottom of your email will not protect you from embarrassment if the material is not actually protected by an attorney-client relationship. If you would not say it publicly, think hard about putting it in email.

If your communication is truly protected by attorney-client privilege, then should you be having the conversation in email at all?

### **11. Proofread One Time for EACH Recipient.**

That is, if you are sending the message to five people (counting both the TO and CC lines), then you should proofread it at least five times. If at all possible, get others to review and edit your messages before sending. The wider the distribution, or the higher the rank of the recipient, the more editing and proofreading you should do.

A professional, error free message is important for building and maintaining credibility. Errors in email messages cause readers to perceive the “writer to be less conscientious, intelligent, and trustworthy.”<sup>5</sup> Not a reputation you want to develop.

### **12. Carefully Check the Distribution Lists.**

Are the right people on the list? Is anyone not on the list that should be added? Will

recipients on the list perceive this as unnecessarily clogging their inbox? Plus, be sure who you think is on the list is actually on the list. Outlook likes to autocomplete addresses—but Outlook might correct to John Smith when you wanted Joseph Smith. This could be bad, very bad. This could even violate your professional ethics if the wrong Smith is on the other side of the “v.”

Personally, I screwed up several times and sent emails to the wrong Sexton. Oops. Thankfully, those emails were administrative, non-legal, and not sensitive, but I was lucky. After doing this way too many times (once is too many, really), I figured out how to delete the “wrong” Sexton from the Outlook autocomplete library. When you begin typing a name, Outlook autocomplete will bring up multiple possibilities. Use your mouse to click on the “x” beside names you would like to remove from the autocomplete list. I did this and have not sent an email to the wrong Sexton since!

### **13. Do Not Assume Message Recall Will Work.**

It probably won't. Once sent, email is gone forever. Someone on the distribution list will probably open your email within seconds. You cannot un-ring that bell.

### **14. Never Send (or Even Draft) an Email When You Are Mad. Likewise, Never Use All Capital Letters Because That Symbolizes Yelling and Anger.**

Remember the ROE, email is for non-emotional administrative communications, not for heated discussions, or worse, personal attacks. We have all seen email disagreements escalate through tit-for-tat exchanges, each party becoming less rational and more emotional with each message sent. While some may find these exchanges mildly entertaining, the exchanges remain unprofessional, unhelpful, and ineffective.

The Operational Law Handbook notes that one purpose of ROE is to “provide a limit on operations and . . . not trigger undesired escalation, i.e., forcing a potential opponent into a ‘self-defense’ response.”<sup>6</sup> That is the purpose of this rule. If you ever start to feel emotions—especially anger—creeping into your email, STOP. Close the open message on your computer. Pull out your CAC card. Go for a walk. This is good for you, the other party, and your unit.

If you find yourself angry and you want to “write it out,” take a page from President Lincoln. Known for writing unsent angry letters, President Lincoln would write (in longhand, of course) an angry letter addressed to the other party (General Meade in one particularly well known example). Lincoln, however, would never sign or send these angry letters.<sup>7</sup> Channel your inner Lincoln next time you feel dragged into a tit-for-tat email exchange: Find pen and paper; write (in longhand, just like Lincoln) your angry letter. Then put it in your desk drawer. Think about it overnight. You will see the matter differently the following day. While not sending an angry email may deprive those on the CC line of some cheap entertainment, it will prevent damage to your relationship with the other party, keep the tone of conversation professional, and set a good example for others in your office.

**15. Think Hard Before Adding Your (or the Recipient’s) Boss to the CC Line Because You Are Upset.**

Adding a boss to the CC line will rarely build the relationship between the parties. If you really think you should add a supervisor to the conversation, take the following steps. First, call or visit the other party. Talk to the person about your concerns. Listen to their concerns. Recognize you may not know everything about the situation. Second, think about it overnight. Follow the Lincoln example, and handwrite the angry message. Third, talk to a mentor or your supervisor before escalating, and explain to them what happened during your person-to-person conversation with the other party.

**16. Keep Evaluations and Email Separate.**

Email is not the appropriate substitute for OER and NCOER counseling. This is especially true if an evaluation is unexpected, unwelcomed, or career-ending. Using email to shield yourself from difficult conversations is not leadership; it is cowardice.

**17. Never Use BCC.**

Violate this rule at your own peril. If someone should be included in the conversation, then include her in the conversation. If her inclusion would upset someone, then address that bigger issue first. Email is for efficient distribution of administrative

material. Fix the relationship; do not use BCC or other email features to cover for a dysfunctional relationship. Plus, assume the BCCed person will hit “REPLY ALL” to the email, outing you for using BCC. If you want to add someone to the conversation, own that decision.

**18. Include the Most Recent Message in Any Response.**

When responding to someone, always include the triggering email. If necessary to include a chain of emails, summarize the content, especially if sending to a superior. Never say, “See below.” If you insist on forwarding a chain, be sure to summarize the message(s), perhaps even pasting the key provisions into your email. Your reader’s time is valuable.

**19. Have a Signature Block—and Include Your Phone Number.**

Always include your signature block with your phone number and email address on every message. Set up Outlook so that every email—responses and new messages—includes your standard signature block with phone numbers. If you do not know how to do this, ask your IT support. Additionally, consider having a different signature block for civilian recipients. How many civilians know what DSN stands for? Or what a LTC is?

**20. Acknowledge Direct Emails.**

A simple “got it” or “thanks” lets the sender know that you have received the message. This is much more than just about acknowledging tasks from your boss. Providing an acknowledgement will build goodwill. Remember, use email as a tool to build and cultivate relationships. If someone called to remind you of an event, you would certainly thank her for the reminder. Do the same with email.

**21. Do Not Forward General Officer Emails.**

Just don’t do it. Nothing good will come of it.

**22. Do Not Send Emails Outside of Duty Hours (Especially to a Subordinate).**

If something is urgent after duty hours, call or go meet with someone. If the issue is not urgent, do not send the email until the next duty day. Your subordinates are checking

the sent times. Telling them you do not expect a response is poor leadership that fails to recognize that perceptions matter. Your subordinates’ perception is that their boss is working late (again?), so they will do the same . . . until their spouse encourages them to seek employment elsewhere.<sup>8</sup>

These were just a few thoughts on proper use of email. Like weapons, emails can cause great damage. They can also be very effective. Follow these rules to avoid professional embarrassment and to improve your use of email as a communications tool. Email is not going away; we need to use it effectively. But we need to remember there is usually a better medium for communicating the message and building the relationship. Whenever possible, communicate in person. If not possible, communicate by phone or VTC. If written text is required, consider a deliberate, well-written memorandum for anything more than short, administrative messages. **TAL**

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*LTC Linneweber is the chair of the Administrative & Civil Law Department at The Judge Advocate General’s Legal Center and School, in Charlottesville, Virginia.*

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**Notes**

1. U.S. DEP’T OF ARMY, REG. 25-50, PREPARING AND MANAGING CORRESPONDENCE para 1-7a (17 May 2013) [hereinafter AR 25-50].
2. *Id.* para 1-10.
3. Legal advice must often be long, nuanced, and thoroughly analyzed. Email is almost always the wrong venue for legal advice. See Brigadier General Charles N. Pele, *Communication Is the Key—Tips for the Judge Advocate, Staff Officer, and Leader*, ARMY LAW., June 2016, at 4, 6.
4. U.S. DEP’T OF DEF., 5400.07-M, DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (Jan. 1997).
5. <http://theconversation.com/why-grammar-mistakes-in-a-short-email-could-make-some-people-judge-you-57168>.
6. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 78 (2017).
7. Maria Konnikova, *The Lost Art of the Unsent Angry Letter*, N.Y. TIMES (Mar. 22, 2014), <https://www.nytimes.com/2014/03/23/opinion/sunday/the-lost-art-of-the-unsent-angry-letter.html>.
8. An advanced feature of Outlook is the ability to use time delayed sending. Draft the message now, but have Outlook send it at 0830 the next morning. See your G6 support personnel for assistance. <https://support.office.com/en-us/article/Delay-or-schedule-sending-email-messages-026af69f-c287-490a-a72f-6c65793744ba>.



# Career Note

## Executive Counsel

### A Deputy Legal Advisor's Work at the NSC

By Colonel Peter R. Hayden

**The judge advocate career model calls for continual professional development** throughout the course of one's service. This includes broadening assignments to develop the capability to see, work, learn, and contribute outside one's own perspective or individual level of understanding for the betterment of both the individual and the institution.<sup>1</sup> For the past year, I had the privilege to see, work, learn, and contribute in an environment vastly different from the unit and installation Office of the Staff Judge Advocate assignments in which judge advocates spend much of our time—as a Deputy Legal Advisor on the National Security Council (NSC) staff at the White House.

#### NSC Overview

The NSC is the President's principal forum for considering national security and foreign policy matters with his senior national

security advisors and cabinet officials. Its purpose is to provide advice and recommendations to the President so as to enable the armed forces and other departments and agencies of the U.S. Government to cooperate more effectively in matters involving the national security.<sup>2</sup>

For example, let's assume that the President's strategy for a certain region calls for building a strategic partnership with country X. The Department of State may propose a security and defense cooperation agreement involving arms transfers and joint exercises. The Defense Department and Joint Staff representatives may evaluate the proposal with regard to forces available and impact on the National Defense Strategy. The Treasury and Commerce Departments may advise that economic measures imposed against key individuals in country X may complicate implementation, such as

sanctions or export license entity-listing. Thus, while the authority to take action may lie with one or more agency heads, NSC coordination enables all concerned agencies to identify the various policy factors at play, and recommend solutions to the collective agency heads and, if appropriate, to the President for review and approval.

By law, the NSC includes the President, Vice President, the Secretary of State, the Secretary of Defense, the Secretary of Energy, the Secretary of the Treasury, and such other officers of the U.S. Government as the President may designate.<sup>3</sup> By presidential directive, several other executive agency heads and White House officials attend NSC meetings, including the National Security Advisor,<sup>4</sup> White House Counsel,<sup>5</sup> and Deputy Counsel to the President for National Security Affairs.<sup>6</sup>

The NSC has a full-time staff composed of agency detailees and direct-hire employees, and is led by political appointees. The staff serves both the NSC and the Homeland Security Council,<sup>7</sup> and is divided into roughly twenty directorates covering regional and functional areas of concern, as well as administrative support (e.g., Legal, Executive Secretariat). The staff prepares policy options for the President through the National Security Advisor, and coordinates the activities of the executive departments and agencies in support of the President's objectives. As part of the President's immediate staff, the work of the NSC and its staff is confidential and not subject to the Freedom of Information Act.<sup>8</sup>

The NSC/Legal office is small—fewer than ten attorneys detailed to the NSC from executive agencies. It is led by two members of the White House Counsel's Office, including the Deputy Counsel to the President for National Security Affairs. Thus, much like a Brigade Judge Advocate (BJA) or Trial Counsel (TC) reports to both the Staff Judge Advocate (SJA) and Commander, the detailed attorneys report to both the "technical chain" in the Counsel's office and the National Security Advisor. Each detailee maintains a portfolio supporting three to five client directorates, though many issues cross over and all attorneys routinely cover for one another. For the past year, my portfolio included direct support to two regional and two functional directorates, as

well as certain ad hoc issues such as the use of military force and assisting with ethics for the NSC staff. A typical day is spent attending meetings with policymakers, and reviewing and editing documents or talking points. On any given day, an NSC attorney routinely touches between fifteen to thirty different issues. As with all agency detailees to the NSC staff, the attorneys in NSC/Legal facilitate interagency coordination but do not function as liaison officers to their home agencies. Therefore, for the duration of the detail, the President is the sole client for purposes of professional responsibility obligations, executive privilege, etc.

### Issues

Many legal issues confronting the NSC/Legal attorney would be familiar to judge advocates at some level. Over the course of the year, matters requiring attention at the NSC included ROE and other authorities for U.S. Forces in Afghanistan, use of force in Syria, the elevation of U.S. Cyber Command to a unified combatant command, general and flag officer nominations, and an executive order approving the 2018 Manual for Courts-Martial.

However, most legal issues before the NSC aren't covered in The Judge Advocate General's School curriculum. Topics such as an unmanned aerial system export policy, an agreement for peaceful nuclear cooperation with Mexico, and efforts to hold the Syrian regime accountable for violations of the Chemical Weapons Convention all fall well outside the Operational Law handbook. As with any new legal issue confronting a BJA or SJA, the key is to spot a potential issue and identify who within the U.S. Government has the expertise to quickly analyze and, if necessary, resolve it. The agency legal offices are filled with staggeringly talented and professional experts. Building relationships with a wider network of attorneys by solving tough problems together is one of the most rewarding aspects of any broadening assignment.

### Decision-making Processes

The NSC also employs a number of processes for coordinating information and recommendations, and preparing senior leaders to make decisions. National Security Presidential Memorandum – 4 describes

the formal coordination structure for the NSC, consisting of the three main policy coordination bodies.<sup>9</sup> A Policy Coordination Committee (PCC) is a subject-specific forum to consider policy matters at the Assistant Secretary level, led by an NSC staff director. When the PCC has vetted a proposed option and is ready to recommend it for approval by either a Cabinet official or the President, the PCC will prepare a discussion paper and forward the matter to the National Security Advisor who will chair either a Deputies Committee (DC) composed of agency Deputy Secretaries (or equivalents), and/or, if appropriate, a Principals Committee (PC) composed of the agency heads. The DC and PC may approve the proposal, disapprove it, or return it to the PCC for refinement.

The NSC process also accommodates less formal mechanisms to work out detailed issues and develop information. For example, attorneys from interested agencies will often confer under the leadership of the Deputy Counsel to the President for National Security Affairs, or his designee, to ensure that significant policy proposals are thoroughly reviewed or to address novel questions of law. Participating agencies' counsel will vary from issue to issue, and usually include attorneys from the Department of Justice's Office of Legal Counsel. Participating counsel may simply agree to brief their respective Principals on the results of the discussion, or prepare one or more papers to advise the PC or DC. In appropriate cases, an agency may produce a formal opinion, as in the case of the May 2018 Justice Department opinion on the airstrikes against Syrian chemical weapons facilities.<sup>10</sup>

As with any broadening assignment, the key takeaways include an understanding of what's important to the leadership of other organizations and how they make decisions—in this case, both the executive branch as a whole and, to a degree, other federal departments and agencies. This insight includes not only the formal and informal NSC processes discussed above, but also the *minutiae* of communication and staffing for senior civilian executives: how to prepare a discussion paper, talking points, memoranda, policy rollout strategies, read-ahead packages, press points, etc. A broadening assignment will likely involve learning new law, but more important-

ly, one will observe how other attorneys practice law effectively in support of senior government officials. It also provides an opportunity to convey the professionalism and skill of the Army JAG Corps to the broader legal community while building relationships which enrich and enhance one's service as a judge advocate. In the end, broadening assignments help both the Corps and the individual judge advocate as they provide new perspectives on how to lead, practice law, and engage with outside agencies throughout one's career. **TAL**

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### Notes

1. JALS PUB. 1-1, PERSONNEL POLICIES (1 May 2018); DEP'T OF THE ARMY, PAM. 600-3, COMMISSIONED OFFICE PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT para. 3-4f (26 June 2017).
2. 50 U.S.C. § 3021(b).
3. 50 U.S.C. § 3021(c).
4. Formal title: Assistant to the President for National Security Affairs.
5. Formal title: Assistant to the President and Counsel to the President.
6. Formal title: Deputy Assistant to the President, Deputy Counsel to the President for National Security Affairs, and Legal Advisor to the National Security Council. In National Security Presidential Memorandum – 4, *Organization of the National Security Council, the Homeland Security Council, and Subcommittees* (April 4, 2017) [hereinafter "NSPM-4"], the President directed that the NSC shall also routinely include the Attorney General, Secretary of Homeland Security, Assistant to the President for National Security Affairs (National Security Advisor), and the Representative of the United States to the United Nations. The Director of National Intelligence and the Chairman of the Joint Chiefs of Staff, as statutory advisors to the NSC, are also regular attendees, as is the Director of the Central Intelligence Agency. The Assistant to the President and Chief of Staff (Chief of Staff to the President), the Counsel to the President, the Deputy Counsel to the President for National Security Affairs, and the Director of the Office of Management and Budget are invited as attendees to any NSC meeting. Other officials may be invited at the President's direction when relevant issues are on the agenda.
7. Created by Exec. Order No. 13,228, Establishing the Office of Homeland Security and the Homeland Security Council, 66 Fed. Reg. 51,812 (Oct. 8, 2001).
8. *See* Main Street Legal Services, Inc. v. National Security Council, 811 F.3d 542 (2d Cir., 2016); *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir., 1996).
9. NSPM-4, *supra* note 6.
10. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 O.L.C. \_\_\_\_ (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download>.



# Life Hack

## TRICARE: Another Reason to Stay

Major Jodie L. Grimm

**Ten years ago, as a single, healthy, adventurous twenty-something finishing** up law school, none of the benefits offered to military members and their families factored into my decision to join the Army. I joined to serve my country and for the exciting legal career opportunities. I stay because I enjoy it, take pride in it, and now more than ever I understand the value of the benefits, especially health care.

If, despite your job satisfaction and competence, you come to think civilian life would be a better fit for you and your

family, you should probably go into the Reserves. The reason is simple: the military benefits are worth it. Most of us are tracking the benefits available to us and our families by virtue of our service, including the G.I. Bill, Tuition Assistance, subsidized child care, military pension, Thrift Savings Plan, life insurance, and installation services such as military commissaries, exchanges, and fitness centers. The value of our health care benefit, TRICARE, can be hard to quantify, but it is one of the most valuable military benefits.

### Overview of TRICARE Plans

Mandatory for active duty service members and optional for their family members, TRICARE Prime is a health maintenance organization (HMO)-like program. Health care is managed by an assigned primary care manager and provided by military or civilian network providers.<sup>1</sup> On 1 January 2018, TRICARE Select replaced TRICARE Standard and TRICARE Extra. TRICARE Select is a preferred provider organization (PPO) that allows eligible beneficiaries to choose their own TRICARE-authorized providers and manage their own health care.<sup>2</sup> It allows enrollees to go to any doctor or hospital that accepts TRICARE Select insurance without a referral. There are additional TRICARE plans that, for example, offer coverage to active duty families in remote U.S. locations and overseas, to qualified National Guard and Reserve members, and to qualified adult children of eligible sponsors.<sup>3</sup>

### Overview of TRICARE Costs

For active duty service members and their family members enrolled in TRICARE Prime, there is no annual enrollment fee, no monthly premiums, no deductible, and no out-of-pocket costs for covered services.<sup>4</sup> For retirees and their families, the yearly enrollment fee is \$289.08 per individual or \$578.16 per family;<sup>5</sup> there is no annual deductible or monthly premiums; and out-of-pocket costs entail between \$20 and \$30 per outpatient primary, specialty, or urgent care visit, \$60 per emergency room visit, and \$150 per inpatient admission.<sup>6</sup> Allowing more freedom of choice in providers and being available to all non-active duty beneficiaries, TRICARE Select costs are higher than Prime. Currently there is no annual enrollment fee or monthly premiums for active duty family members, but there is an annual deductible ranging between \$50 and \$300 depending on: the sponsor's pay grade, whether it is individual or family coverage, and whether the service member entered the military before or after January 1, 2018.<sup>7</sup> Out-of-pocket costs range from \$15 to \$31 for primary, specialty, or urgent care visits to in-network providers, \$40 to \$81 for in-network emergency room visits, and \$18 per day or up to \$60 per admission for

in-network hospitalizations.<sup>8</sup> For retirees and their families, the costs are moderately higher.<sup>9</sup> Under both TRICARE Prime and TRICARE Select, there is a \$1,000 catastrophic cap for active duty family members and \$3,000 to \$3,500 cap for retirees and their families, meaning that is the most the family will pay for covered health care services each calendar year.<sup>10</sup> Active duty service members have no prescription drug costs when using a military pharmacy, TRICARE Pharmacy Home Delivery, or a TRICARE retail network pharmacy.<sup>11</sup> Pharmacy costs for all others range from \$0 to \$53, not including non-network pharmacies.<sup>12</sup>

### **Comparison of Military Health Benefit to Civilian Health Care Benefit**

Premiums, deductibles, and out-of-pocket costs are the main components of the health care benefit. A 2017 Kaiser Family Foundation (KFF) and Health Research & Educational Trust (HRET) survey of private and non-federal public employers provides some insight into the value of our TRICARE benefit. The Defense Health Agency (DHA)'s Evaluation of the TRICARE Program: Fiscal Year 2017 Report to Congress also provides some information on military health care costs compared to the average private health insurance plan.

#### **Premiums**

As noted above, whether enrolled in TRICARE Prime or TRICARE Select, active duty service members, retirees, and their families pay no monthly premiums. Note that retirees and their families do pay a \$578 annual enrollment fee for family coverage under TRICARE Prime, and under TRICARE Select, those who joined the military after 1 January 2018 will have an annual enrollment fee of \$900 per family.<sup>13</sup> DHA's 2017 Evaluation of the TRICARE Program found that from FY 2003 to FY 2016, the average private health insurance family premium increased substantially, whereas the TRICARE Prime enrollment fee declined slightly.<sup>14</sup> During this time period, 29.8% of retirees switched from private health insurance to TRICARE, mostly because of increasing costs with

private health insurance and some because of loss of coverage.<sup>15</sup> The 2017 KFF/HRET survey found that private and non-federal employees paid an average of \$5,714 toward family coverage annual premiums.<sup>16</sup> Premiums for employer-provided family health care plans have increased nineteen percent since 2012 and fifty-five percent since 2007.<sup>17</sup> The lack of premiums with TRICARE Prime and Select, as well as the no cost or low cost annual enrollment fees (especially for families with service members who joined the military prior to 1 January 2018) are a significant value compared to the consistently rising premiums in the civilian sector.

#### **Deductibles**

While enrollees in TRICARE Prime pay no deductibles and those in TRICARE Select may pay up to \$300, the 2017 KFF/HRET survey found that the average deductible amounts for private-sector workers enrolled in family coverage were \$2,732 for HMOs, \$2,503 for PPOs, \$2,697 for point-of-service plans, and \$4,527 for high-deductible plans with a savings option.<sup>18</sup> Again, huge value for TRICARE Prime and Select enrollees.

#### **Cost-Sharing**

The majority of health plans require cost-sharing such as a copayment (a fixed dollar amount) or coinsurance (a percentage of the covered amount) in addition to any annual deductible.<sup>19</sup> Among plans with copayments, the 2017 KFF/HRET survey found that the average was \$25 for primary care office visits, \$38 for specialty care office visits, and \$336 per hospital admission.<sup>20</sup> Copayments for prescription drugs ranged from \$11 to \$110.<sup>21</sup> Note that the majority of plans with annual deductibles cover primary care visits and prescription drugs before the annual deductible is met.<sup>22</sup> As outlined in the TRICARE Costs overview above, there are no copayments or coinsurance for active duty service members and families enrolled in TRICARE Prime, and retirees enrolled in Prime, as well as all TRICARE Select enrollees have copayment or coinsurance costs fairly comparable to those found in the 2017 KFF/HRET survey.

#### **Total Out-of-Pocket Costs**

Compared to active duty service members who have no out-of-pocket costs, active duty family members who have a \$1,000 out-of-pocket/catastrophic cap, and retirees and their families who have a \$3,000-\$3,500 out-of-pocket/catastrophic cap, the 2017 KFF/HRET survey found that fifty-seven percent of workers are in health plans with an annual out-of-pocket maximum for *single* coverage of more than \$3,000 and eighteen percent have an out-of-pocket maximum of \$6,000 or more.<sup>23</sup> Complex out-of-pocket structures made it difficult for the KFF/HRET survey to accurately capture specific data in this area.<sup>24</sup> The DHA's 2017 Evaluation of the TRICARE Program found that in FY 2016, out-of-pocket costs for civilian counterparts under age sixty-five were \$5,500 more than those incurred by active duty families enrolled in TRICARE Prime and \$4,800 more than those incurred by retiree families enrolled in Prime.<sup>25</sup>

#### **Additional TRICARE Value Considerations**

While the comparisons above provide some useful data on how much money you may save with TRICARE health care coverage compared to what you could expect to pay with another employer-provided health plan, you may wonder if there is a more precise calculation of the value. Two additional comparison options are what you and your family would expect to pay under the Continued Health Care Benefit Program (CHCBP) and what health insurance would cost you on the Health Insurance Marketplace (healthcare.gov) exchange.<sup>26</sup>

#### **Continued Health Care Benefit Program**

The CHCBP is a premium-based health care program managed by Humana Military that offers continued health coverage for up to 18 months (or 36 months in select circumstances) after TRICARE eligibility ends, acting as a bridge between military health benefits and a new civilian health plan.<sup>27</sup> It provides the same coverage as TRICARE Select.<sup>28</sup> The CHCBP premium for family coverage is currently \$3,210 per quarter, amounting to \$12,840 per year.<sup>29</sup> In addition to these premiums, there are yearly deductibles and cost-shares, the amounts



based on the status of the sponsor at the time of enrollment and type of provider seen.<sup>30</sup> The annual deductible for family coverage is \$300, and copayments for doctor visits, emergency room visits, and hospitalization are the same as for retirees enrolled in TRICARE Select.<sup>31</sup>

#### **Health Insurance Marketplace**

Operated by the federal government for most states, HealthCare.gov is the Health Insurance Marketplace that helps people shop for and enroll in affordable health insurance.<sup>32</sup> Upon providing income and household information through the HealthCare.gov website, various health care plans are offered for purchase: the Bronze category of plans has the lowest monthly premiums but higher deductibles and copayments; the Silver category has higher monthly premiums than Bronze but lower deductibles and copayments; and the Gold category has the highest premiums but lowest deductibles and copayments.<sup>33</sup> Consider the example of a single income, thirty-something, married couple with two young children living in Virginia, with \$70,000 annual income. One spouse is eligible for health insurance through his employer but checks the Health Insurance Marketplace for better options. HealthCare.gov estimates that this family would qualify for a \$1,725 credit on premiums each month. With this credit taken into account, they are offered Bronze plans with an average premium of \$29 per month, average deductible of \$13,200, and average out-of-pocket maximum of \$13,900 with \$25 copayments for generic drugs and

\$40 to \$60 copayments after the deductible for doctor visits; Silver plans with an average premium of \$500 per month, average deductible of \$7,450, and average out-of-pocket maximum of \$12,950 with \$25 copayment for generic drugs after the deductible and \$30 to \$60 copayments for doctor visits; or a Gold plan with a premium of \$1,538 per month, deductible of \$3,000, and out-of-pocket maximum of \$14,700 with \$25 copayments for generic drugs and \$35 to \$65 copayments for doctor visits. If neither spouse were eligible for health insurance through an employer, the marketplace estimates the family would qualify for a higher credit on the premiums, amounting to a monthly premium of less than \$9 on a Bronze plan, but the rest of the numbers in each of the plan options remain similar. Though individual family medical situations would dictate the value of these insurance plans, in general, they appear to be very expensive options.

#### **Reserve Component TRICARE Options**

So you decide to get out and are considering your health insurance options. Maybe you are fortunate enough to find an amazing new employer that offers a plan as good as TRICARE, or maybe you are fortunate enough to get such a high-paying job that expensive health care is a non-issue for you. But many of you will face sticker shock when you see your new health insurance costs in the civilian world. The highly valuable military benefits—namely the pension and health care coverage—should make you strongly consider not taking off

your uniform completely.<sup>34</sup> While activated National Guard and Reserve members and their families are eligible for active duty TRICARE benefits up to 180 days before and during their activations, even non-activated members and their families are eligible for TRICARE benefits.<sup>35</sup> TRICARE Reserve Select may be purchased by members of the Selected Reserve<sup>36</sup> who are not in an activated status.<sup>37</sup> It is a premium-based health plan with coverage similar to TRICARE Select for active duty family members.<sup>38</sup> The monthly premiums have remained relatively stable over the past few years, \$47.82 for individual coverage and \$217.51 for family coverage in Calendar Year 2017.<sup>39</sup> The annual deductible and out-of-pocket costs are the same as for active duty family members enrolled in TRICARE Select.<sup>40</sup> Upon retirement, additional insurance options include TRICARE Retired Reserve, TRICARE Prime, and TRICARE for Life.<sup>41</sup>

#### **Quality of Military Health Care**

Most of you, like me, have probably appreciated the access to free health care, not having to worry whether a doctor or hospital visit was worth the cost, and knowing that you would receive any treatment needed without any financial hardship. It is even worth the headache of dealing with referrals and inefficient scheduling and medical advice lines. One significant concern, however, is with the quality of care which seems to vary greatly across Military Treatment Facilities.

TRICARE beneficiaries are overall more satisfied with their health care plans than civilians in private-sector health plans, likely due to the broad coverage of benefits and low out-of-pocket costs.<sup>42</sup> However, the military has underperformed in regard to health outcomes and functioning of the health care delivery system.<sup>43</sup> Survey results for access measures (such as getting an appointment with a specialist and getting care quickly), as well as for quality measures (such as primary care physician and specialty care physician) fall short of civilian benchmarks.<sup>44</sup> The Military Health System has consistently had higher than expected rates of harm and complications in maternity care and surgery.<sup>45</sup> Statistics show that babies born at military hospitals are twice

as likely to be injured during delivery as newborns nationwide, and their mothers are more likely to hemorrhage after childbirth than mothers at civilian hospitals.<sup>46</sup> According to a review from the American College of Surgeons, in surgeries, half of the military's largest hospitals performed worse than established benchmarks in categories including infections and improperly done procedures.<sup>47</sup> While this is certainly disturbing, it is encouraging that the Military Health System is currently moving forward initiating its most significant changes in decades.<sup>48</sup> Lawmakers have recently begun incorporating comprehensive recommendations from respected groups of experts to reform the Military Health System in order to better support the readiness of medical providers, deliver higher quality services, and achieve a more efficient system.<sup>49</sup>

## The Future of Military Health Care

The design of the Military Health System and aspects of the military health care benefit have attracted intense scrutiny recently, and for the first time in many years, lawmakers have initiated major changes to military health care.<sup>50</sup> While changes involving delivery, quality, and efficiency of services have been enacted, lawmakers have not supported recommendations involving substantial changes to the TRICARE benefit.<sup>51</sup> While changes were recently implemented to modestly increase TRICARE fees for future retirees, changes to the TRICARE benefit design and costs for beneficiaries are very controversial, and thus unlikely to be enacted in any manner to substantially affect current military members.<sup>52</sup>

Although not without its faults, TRICARE likely offers the best health care coverage available. The broad coverage and low or no cost for active duty service members and their families would be very hard to beat. Even service members and their families in the Reserve Component are offered TRICARE plans that appear to be better deals than much of what may be available in the private sector. And by staying active duty or by going into the Reserves, you can maintain your eligibility for TRICARE coverage upon retirement, which has become increasingly valued and utilized by retirees in recent years. So whatever your reasons are for staying in the Army so far,

think hard about the benefits before leaving, including TRICARE, which may be the most valuable benefit of them all. **TAL**

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## Notes

1. *Comparing TRICARE Prime and TRICARE Select*, HEALTH.MIL (Mar. 26, 2018), <https://health.mil/News/Articles/2018/03/26/Comparing-TRICARE-Prime-and-TRICARE-Select>.
2. *Id.*
3. HUMANA MILITARY, <https://www.humanamilitary.com/beneficiary/plans-and-programs>.
4. TRICARE Costs and Fees Sheet 2018, TRICARE, <https://www.tricare.mil/costs> [hereinafter TRICARE Costs and Fees 2018].
5. The enrollment fee is twenty-one percent higher for retirees who enter the military after 1 January 2018. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *See id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. DEF. HEALTH AGENCY, EVALUATION OF THE TRICARE PROGRAM: FISCAL YEAR 2017 REPORT TO CONGRESS (2017) at 170, <https://health.mil/Reference-Center/Reports/2017/06/08/Evaluation-of-the-TRICARE-Program> [hereinafter DHA EVALUATION REPORT 2017].
15. *Id.*
16. THE KAISER FAMILY FOUNDATION, THE KAISER FAMILY FOUNDATION AND HEALTH RESEARCH & EDUCATIONAL TRUST EMPLOYER HEALTH BENEFITS 2017 ANNUAL SURVEY, <https://www.kff.org/report-section/ehbs-2017-section-1-cost-of-health-insurance/> [hereinafter KAISER FAMILY SURVEY 2017].
17. *Id.* at 4.
18. *Id.* figure 7.21.
19. *Id.* at 8.
20. *Id.*
21. *Id.* figure. 9.6.
22. *Id.* at 117.
23. KAISER FAMILY SURVEY 2017, *supra* note 16.
24. *Id.* at 127.
25. DHA EVALUATION REPORT 2017, *supra* note 14, at 171.
26. Doug Nordman, *How Much Is Your Military Pay Really Worth?*, THE MILITARY GUIDE (Mar. 2, 2017), <https://the-military-guide.com/much-military-pay-really-worth/>.
27. TRICARE Choices in the United States Handbook, Mar. 2018, at 12, [https://TRICARE.mil/-/media/Files/TRICARE/Publications/Handbooks/Choices\\_HB.ashx](https://TRICARE.mil/-/media/Files/TRICARE/Publications/Handbooks/Choices_HB.ashx); <https://TRICARE.mil/chcbp>.
28. *Continued Health Care Benefit Program*, TRICARE, <https://www.TRICARE.mil/Plans/SpecialPrograms/CHCBP>.
29. *Continued Health Care Benefit Program (CHCBP)*, HUMANA MILITARY, <https://www.humanamilitary.com/chcbp>.
30. *Id.*
31. TRICARE Costs and Fees 2018, *supra* note 4.
32. *Health Insurance Marketplace*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/health-insurance-marketplace-glossary/>.
33. *See 2018 health insurance plans & prices*, HEALTHCARE.GOV, <https://www.healthcare.gov/see-plans/>.
34. *See* GOARMY.COM, <https://www.goarmy.com/reserve/prior-service.html#/benefits> for information on all the benefits with transitioning from active duty to the U.S. Army Reserves.
35. TRICARE CHOICES FOR NATIONAL GUARD AND RESERVE HANDBOOK (2018), at 5, <https://tricare.mil/publications> [hereinafter GUARD AND RESERVE HANDBOOK 2018].
36. The Selected Reserve is one category of the Ready Reserve. Members of the Selected Reserve are generally required to perform one weekend of training each month and two weeks of training each year. <https://fas.org/srg/crs/natsec/IF10540.pdf>.
37. GUARD AND RESERVE HANDBOOK 2018, *supra* note 35, at 6.
38. *Id.*
39. DHA EVALUATION REPORT 2017, *supra* note 14, at 138, <https://health.mil/Reference-Center/Reports/2017/06/08/Evaluation-of-the-TRICARE-Program>.
40. TRICARE Costs and Fees 2018, *supra* note 4.
41. *See* GUARD AND RESERVE HANDBOOK 2018, *supra* note 35, at 5, 10–11.
42. BIPARTISAN POLICY CENTER, HEALTH, HEALTH CARE, AND A HIGH-PERFORMANCE FORCE (2017), <https://bipartisanpolicy.org/wp-content/uploads/2017/03/BPC-Defense-Health-Care.pdf> [hereinafter HEALTH CARE AND HIGH PERFORMANCE 2017].
43. *Id.*
44. *Id.*
45. Sharon LaFraniere & Andrew W. Lehren, *In Military Care, a Pattern of Errors but Not Scrutiny*, N.Y. TIMES (June 28, 2014), <https://www.nytimes.com/2014/06/29/us/in-military-care-a-pattern-of-errors-but-not-scrutiny.html>.
46. *Id.*
47. *Id.*
48. *See Military Health System Reform*, MILITARY OFFICERS ASSOCIATION OF AMERICA (Apr. 21 2017), <http://www.moaa.org/Content/Take-Action/Top-Issues/Currently-Serving/Military-Health-System-Reform.aspx>.
49. HEALTH CARE AND HIGH PERFORMANCE 2017, *supra* note 42.
50. *Id.*
51. *Id.*
52. *See id.*



The United States Army Legal Services Agency at Fort Belvoir, Virginia (Credit: Chris Tyree).

# USALSA Notes

## Readiness and the National Environmental Policy Act

By Mr. David B. Howlett

In 2006, the 9th Circuit, in *Ilio'ulaokalani Coalition v. Rumsfeld*, ruled that the U.S. Army's plans to stand up a Stryker Brigade Combat Team (SBCT) at a Hawaiian base violated the National Environmental Policy Act (NEPA) because the Army failed to consider other Army locations to station the team.

The Court's injunction prohibited fielding equipment and training, notwithstanding the Secretary of the Army's judgment that the immediate fielding of the SBCT was critical to the war.

As *Ilio'ulaokalani* demonstrated, NEPA can be a powerful environmental law with great potential to impact Army readiness. Installations and unit legal advisors must be

vigilant regarding the applicability of NEPA in planning.

Under NEPA, decision-makers—often commanders—are required to consider the environmental effects of their proposed actions before making decisions. This sometimes requires solicitation of public comments. With respect to the Army's readiness focus, a NEPA analysis may be necessary when considering new training ranges or alterations to training areas. A failure to adhere to NEPA requirements may invite litigation that could delay the activity sought to be accomplished and could result in degraded training opportunities.

Under NEPA, the level of analysis required depends on the likely environ-

mental impacts of a proposed activity. In accordance with the criteria found at 32 CFR part 651, it may also be necessary to prepare one of the following documents before a decision is made: (1) a brief Record of Environmental Consideration, (2) a more robust Environmental Assessment, or (3) an intensive Environmental Impact Statement. Regarding each, early involvement by legal advisors will ensure completeness and legal compliance. Of particular importance, legal advisors must ensure that the administrative record is well-documented and complete, and provides a basis for the decision. National Environmental Policy Act litigation is fought on whether the Army complied with NEPA's requirements as evidenced in the administrative record. By contributing early in the planning process and by communicating NEPA's importance to other staff sections, legal advisors can either prevent litigation or pave the way to the successful resolution of unavoidable litigation.

Although ensuring legal sufficiency is the primary duty of the legal advisor, attorneys should also be mindful of how they explain NEPA's purpose and process to commanders and decision-makers. One useful tactic is to analogize NEPA to the Military Decision Making Process. Under both processes, mission success is achieved by collecting relevant information, developing various alternatives (or COAs), comparing the environmental impacts of these COAs, and selecting the best alternative. National Environmental Policy Act documents also identify mitigation measures for adverse effects. However, NEPA does not require decision makers to choose the alternative with the least environmental impact. Rather, decision-makers must be aware of how each alternative considered would affect the environment. Legal advisors should embed themselves in the planning process and identify other issues as they arise. Ultimately, the resulting end-state is a more-ready and better-trained Army through compliance with NEPA. **TAL**

*Mr. Howlett is an Environmental Law Attorney in the Environmental Law Division at USALSA.*

# Identifying Two Acceptable Offerors in an LPTA Procurement Is Key

By Captain Jeremy D. Burkhart

**In a Lowest Priced Technically Acceptable (LPTA) procurement**, award is made to the lowest priced offeror who is also deemed to be technically acceptable.<sup>1</sup> When quotations are received, procuring agencies typically rank the offerors by price, technically evaluating each offeror until a technically acceptable offeror is found. At that point, the temptation is to stop evaluating. The LPTA has been identified and award can be made. Most people might think the contracting team's job is finished, but the end of source selection is often not the end of the process. The best practice is to continue evaluating offerors for technical acceptability until a second, and perhaps even a third, technically acceptable offeror is identified. Having additional offerors who are "next in line" provides the agency with a basis to have potential bid protests dismissed.

When a new award is announced, disappointed offerors have the ability to protest the award decision, either to the agency itself, the Government Accountability Office (GAO), or to the Court of Federal Claims (COFC).<sup>2</sup> While the chance to "stay alive" for award consideration is incentive enough for many firms to protest, the incumbent contractor has an especially strong financial incentive to protest. The Competition in Contracting Act (CICA) mandates an automatic stay when the agency receives notice of a protest filed within ten days of award, or five days after the date offered for a required debriefing.<sup>3</sup> Contract performance must remain suspended until the protest is resolved.<sup>4</sup> For incumbent contractors, protesting is often simply a matter of dollars and sense. If the incumbent's legal fees for pursuing the protest are less than the expected profit from continued performance, there is a strong incentive to protest.

With the protest filed and the CICA stay in place, it is now up to the attorneys to litigate the merits of the source selection.

This process can take anywhere from 100 days for protests filed at the GAO,<sup>5</sup> to a potentially much longer period of time for protests filed at the COFC. All the while, the new contract cannot be awarded, and the customer is stuck with a potentially under-performing contractor operating off an outdated requirement. An astute Contracting Officer can insulate the agency from some of this risk simply by taking the extra step to evaluate and identify more than one technically acceptable offeror in an LPTA procurement.

## Protests Considered by the GAO

In order for a protest to be considered by the GAO, a protester<sup>6</sup> must be an interested party, that is, an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract.<sup>7</sup> The GAO has consistently held that a protester has a direct economic interest only when it will be next in line to receive the award should its protest be successful ("a protester is not an interested party where it would not be in line for contract award were its protest to be sustained").<sup>8</sup> Therefore, in an LPTA procurement, if a protest is filed by an offeror who is not next in line for award, the agency can provide the GAO with the source selection documentation showing that another technically acceptable offeror exists who would be next in line were the awardee to be knocked out, and have the case dismissed. However, this cannot occur if only the awardee was evaluated for technical acceptability. In that case, there is no offeror who is next in line because the second-highest priced offeror could potentially be technically unacceptable. Accordingly, the protester will necessarily be an interested party to challenge the award because the record does not establish that any intervening vendor is technically acceptable, and thus necessarily next in line for award ahead of the protester.<sup>9</sup>

## Protests Considered by the COFC

This same general rule and reasoning applies to protests before the COFC, although there the rule is described in terms of prejudice. Regardless of whether there was an error in the procurement process, a COFC protester must demonstrate prejudice in order to have standing to protest.<sup>10</sup> In order to establish that it was prejudiced, a party must "show that it had a substantial chance of being awarded the contract but for the alleged violation of the procurement statute or regulation."<sup>11</sup> In addition, to qualify as an "interested party," a protester must establish that: (1) it was an actual or prospective bidder or offeror, and (2) it had a direct economic interest in the procurement or proposed procurement.<sup>12</sup> The COFC has held that in an LPTA procurement, a protester who has not challenged intervening lower-priced offerors lacks prejudice for purposes of standing and does not have a "direct economic interest" to qualify as an interested party.<sup>13</sup> Likewise, the COFC has specifically found standing in cases where the protester, although higher-priced, has challenged the intervening offerors in addition to the awardee, rather than just the awardee.<sup>14</sup>

For example, let's assume an LPTA procurement has five offerors, named 1–5, who submit quotes. For simplicity's sake, let's assume the offerors price their proposals in the same price order that they are named—with 1 being the lowest-priced proposal and 5 being the highest-priced proposal. Here, 1 is evaluated, but found to be technically Unacceptable. So the source selection team moves on to evaluate 2. If 2 is found to be Acceptable, many contracting offices will stop evaluating because 2 is the LPTA offeror. However, it would be prudent to evaluate 3 for technical acceptability as well. If 3 is found to be technically acceptable, the agency has now identified 3 as a "next in line" offeror. After award to 2 is announced, if 4 or 5 file a bid protest, the agency can move to dismiss the protest because 4 and 5 are not interested parties.<sup>15</sup>

## Best Practice

It is highly recommended that Contracting Officers evaluate and identify multiple technically acceptable offerors in an LPTA procurement. This additional evaluation should

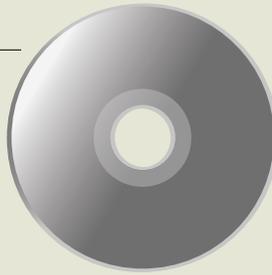
## TJAG Creates Electronic Discovery Program

The explosion of electronically stored information (ESI) has dramatically affected our Corps' practice, creating a myriad of challenges on how we preserve, collect, and process information for litigation. The Federal Rules of Civil Procedure have expanded to address ESI, and our attorneys must keep pace with technological developments, or face sanctions by the courts. Additionally, most state bars have adopted rules regarding technology, such that the ethical obligation of competence now requires each of us to be cognizant how ESI and electronic discovery affects our practice.

To address these issues, The Judge Advocate General has approved the creation of the United States Army Electronic Discovery Program (eDiscovery Program). Led by Ms. Allison Polchek, the eDiscovery Program will provide the technical supervision and training for eDiscovery issues throughout our Corps, and will assist the U.S. Army Legal Services Agency (USALSA) litigating divisions as they conduct day-to-day litigation matters. The Program is located at Fort Belvoir, Virginia, in the USALSA, and is incorporated within USALSA as the eDiscovery Division.

The program has already launched a number of initiatives, including Training with Industry, which will prepare selected mid-grade noncommissioned officers to serve as eDiscovery specialists. This two-year program, which begins this summer, includes a comprehensive industry training program, followed by an assignment at USALSA. Details on how to apply will be announced in the coming weeks.

Other notable efforts of the program include preparing policies and standard operating procedures to address eDiscovery issues, developing training packages and materials to train practitioners and installation staffs in the field, and acquiring technology tools to enhance our litigation practice.



be reflected in contemporaneous documentation and the Source Selection Decision should include a note that identifies the additional offerors who were deemed to be technically acceptable. The number of offerors that need to be evaluated and identified as technically acceptable depends on several factors. It is recommended that *at least* one additional technically acceptable offeror is identified other than the awardee. However, in certain circumstances, it may be wise to identify more than one. Considerations include the value of the procurement, overall number of offerors, whether the incumbent is one of the unsuccessful offerors, and the time and resources required to technically evaluate additional offerors ("simple" evaluations that can be conducted quickly favor identifying multiple additional technically acceptable offerors).

Agency attorneys litigating bid protests in LPTA procurements should communicate with the contracting team in order to

determine if a next in line offeror exists. If so, the attorney should immediately file a motion to dismiss for lack of interested party status because the protester would not be next in line for award even if its protest were to be sustained. These motions are relatively simple, requiring only a brief recitation of the facts, citations to the law, and the evaluation documentation proving that a next in line vendor exist between the awardee and the protester.

A few extra hours of technical evaluation on the front end could save the government months of stayed performance on the back end. Or, as Ben Franklin would prefer to say, an ounce of contract formation prevention is worth a pound of bid protest litigation cure. **TAL**

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## Notes

1. FAR 15.101-2.
2. FAR 33.103-33.105; 31 U.S.C. § 3553.
3. 31 U.S.C. § 3553(c) and (d).
4. The agency can "override" the CICA stay of performance, but only when "urgent and compelling circumstances" justifies doing so. 31 U.S.C. § 3553(c).
5. 31 U.S.C. § 3554(a)(1); 4 C.F.R. § 21.9(a).
6. Generally, the term "protester" is spelled with an "-er" in protests at GAO and with an "-or" ("protestor") in protests before the COFC or CAFC. For purposes of consistency within this article, "protester" is spelled with an "-er" throughout.
7. 4 C.F.R. § 21.0(a)(1); *Cattlemen's Meat Co.*, B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1.
8. *CACI Dynamic Systems, Inc.*, B-406130, Feb. 28, 2012, 2012 CPD ¶ 77 at 8.
9. *SKE Italy Srl*, B-414884.3, Jan. 24, 2018, 2018 CPD ¶ 37 at 7 n.2; *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 3 n.2.
10. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed. Cir. 1996).
11. *CW Gov't Travel, Inc. v. United States*, 110 Fed. Cl. 462, 494 (2013); *see also Data Gen. Corp.*, 78 F.3d at 1562 ("[T]o establish prejudice, a protester must show that, had it not been for the alleged error in the procurement process, there was a reasonable likelihood that the protester would have been awarded the contract.").
12. *Distrib. Solutions, Inc. v. United States*, 539 F.3d 1340, 1344 (Fed. Cir. 2008).
13. *Universal Marine Co., K.S.C. v. United States*, 120 Fed. Cl. 240, 248-249 (2015) ("Direct economic interest requires a showing that but for the alleged error, Universal Marine had a 'substantial chance' of winning the contract.") (citing *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed. Cir. 1996)).
14. *Hyperion, Inc. v. United States*, 115 Fed. Cl. 541, 557 (2014) (highest-priced of four "Acceptable" offerors in an LPTA solicitation demonstrated prejudice where by challenging the proposals of all three lower-priced offerors, including the awardee).
15. *SKE Italy Srl*, B-414884.3, Jan. 24, 2018, 2018 CPD ¶ 37 at 7 n.2; *Universal Marine Co., K.S.C.*, 120 Fed. Cl. at 248-249.



(Credit: Collection of Doug Helton, NOAA/NOS/ORR)

## Recouping Cleanup Costs with Affirmative Cost Recovery

By Major Josiah T. Griffin

**With the affirmative cost recovery (ACR) program,** the Environmental Law Division can assist installations in recovering funds spent on environmental cleanup. The Army is involved in the cleanup of numerous past or presently-owned military facilities, representing billions of dollars in expended and projected cleanup costs. The mission of the ACR program is to recover cleanup costs from contractors or other responsible entities for contamination on Army property, and to avoid expending funds to cleanup contamination caused by a third-party.

In 1998, the Department of Defense (DoD) issued policy guidance concerning

cost-recovery and cost-sharing activities at DoD environmental cleanup sites.<sup>1</sup> This guidance requires DoD components to identify all opportunities for the potential recovery or sharing of costs associated with environmental restoration from other potentially responsible parties (PRPs), such as contractors or adjacent landowners. All potential ACR claims must be pursued “if such activity appears to be potentially cost-effective.”<sup>2</sup> The Army directly benefits from cost recovery actions because amounts recovered by the ACR Program are credited to the Army’s Environmental Restoration Account (ERA), rather than the Department of Treasury’s general account

fund; this provides a distinct advantage to the Army, since ERA exists solely to fund environmental remediation.

The primary method for recovery is through the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. The CERCLA was created to fund the cleanup of hazardous waste sites while providing for both the recovery of damages for injury to natural resources as well as the reimbursement to the parties undertaking the cleanup of contamination. In some instances, cost recovery claims cannot be pursued under CERCLA because the statute of limitations has lapsed or the statute does not cover the hazardous contamination, e.g. petroleum discharge. In those instances, the Army may still be able to pursue a cost recovery claim under an applicable state environmental program or through contract dispute resolution. Comprehensive Environmental Response, Compensation, and Liability Act settlements and contract compromise settlements are often pursued as a precursor to any litigation. However, because PRPs frequently deny liability, litigation is a necessary option to pursue cost recovery for clean-up responses.

An aggressive ACR program is more important than ever, given the complex uncertainty of fiscal constraints facing the Army. For the Army’s ACR program to be fully successful, it must identify and investigate all opportunities for potential cost recovery from third parties. **TAL**

*MAJ Griffin is a Litigation Attorney in the Affirmative Cost Branch of the Environmental Law Division at USALSA.*

### Notes

1. U.S. DEP’T OF DEF., UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS MEMORANDUM, “POLICY COVERING COST RECOVERY/COST SHARING UNDER THE DEFENSE ENVIRONMENTAL RESTORATION PROGRAM (DERP),” (27 Feb. 1998), implemented by U.S. DEP’T OF DEF., 4715.20-M, DEFENSE ENVIRONMENTAL RESTORATION PROGRAM MANAGEMENT (9 Mar. 2012) [hereinafter DoD 4715.20-M].

2. DoD 4715.20-M at 71.



# Practice Notes

## The Enigmatic Adjudicator A Brief Primer on the DoD CAF Process

By Major Michael J. Lebowitz

**The Department of Defense (DoD) Consolidated Adjudication Facility (CAF) is an enigma** for many DoD personnel holding top secret security clearances. For example, the accused in a joint military commission faced the prospect of losing their defense counsel over security clearance issues.<sup>1</sup> Specifically, a security officer believed each of the accused's defense attorneys willfully disseminated classified

information over an unclassified network. The security manager subsequently "referred" the matter to the DoD CAF for adjudication. The military judge—already frustrated at the perceived slow pace of security clearance adjudications for new personnel—soon became focused on a litany of DoD CAF-related questions, including what exactly the DoD CAF's role was in the process, whether a referral created a conflict

of interest for defense counsel, how best to speed things up to resolve the matter and avoid delay, and what a "referral" actually meant. Ultimately, the military judge ordered witness testimony to help him "understand the morass of regulations and how they all work . . ."<sup>2</sup>

Indeed, the bureaucracy behind the DoD CAF's adjudication process remains somewhat of a mystery. The Directorate of Plans, Training, Mobilization and Security (DPTMS) at Fort Meade even attempts a "myth buster" webpage to help educate military personnel.<sup>3</sup> Typically, prospective or current clearance holders understand they may obtain access to classified information upon completion of various administrative processes, including the electronic Questionnaire for Investigations Processing (e-QIP) and participating in an interview with an investigator.<sup>4</sup> But it is the little-known DoD CAF procedures occurring post-investigation that may have significant and lasting effects on individual security clearance holders. This primer will help judge advocates better understand the process.

The Fort Meade-based DoD CAF is the sole authority to determine security clearance eligibility of most DoD personnel occupying sensitive positions or requiring access to classified material.<sup>5</sup> The process is outlined in Department of Defense Memorandum (DoDM) 5200.02, which is DoD's implementation of Executive Order 12968.<sup>6</sup> The purpose of DoDM 5200.02 and Executive Order 12968 is to uniformly set procedures governing access to classified information. As such, the DoD CAF is tasked with determining whether individuals are permitted access to such material.<sup>7</sup>

### Adjudication Process

The DoD CAF, which consolidated a disparate array of adjudication authorities into one entity in 2013, does not conduct background investigations. That responsibility falls to the Office of Personnel Management (OPM).<sup>8</sup> Responses to the e-QIP, for example, initially make their way to OPM.<sup>9</sup> This is the more familiar part of the process where DoD personnel may be contacted by an investigator. Once the OPM investigation is concluded, information is entered into the DoD CAF's internal system

known as the Case Adjudication Tracking System (CATS).<sup>10</sup> From there, information from the investigation is passed to a DoD CAF adjudicator.

Adjudicators do not investigate.<sup>11</sup> As such, they will not knock on a neighbor's door asking questions. Instead, an adjudicator's job is to review anything that is available, relevant, and reliable in order to make an educated determination on whether an individual can be trusted to access classified information. Information typically available to the adjudicator includes the e-QIP information, credit reports, and OPM interviewer's notes. Adjudicators assess the information in order to get a good picture of an individual—often referred to as the “whole-person concept.”<sup>12</sup> The overall timeframe between the OPM investigation and adjudication is typically contingent on the information relevant to each individual. As such, an individual with extensive foreign contacts or financial dealings may take longer to adjudicate than someone with a more generic background.

Adjudicators generally look to thirteen guidelines as the basis for their determinations.<sup>13</sup> These guidelines range from categories such as allegiance to the United States, foreign influence, alcohol consumption, criminal conduct, and use of information technology systems. Pursuant to the “whole-person concept,” each guideline possesses disqualifying conditions and mitigating factors. When an individual file contains information relevant to particular guidelines, adjudicators evaluate items such as the seriousness of the conduct, the individual's age and maturity at the time of the conduct, recency of the conduct, and likelihood of continuation or recurrence of the conduct.

Although adjudicators do not investigate, they can seek out additional information without re-initiating the investigation.<sup>14</sup> For example, if the adjudicator cannot make a determination with the available information, the adjudicator may submit interrogatories to the individual via the local security office. They may also obtain or rely upon official, publicly accessible government records. Any additional information obtained by the adjudicator will be attached to the individual's permanent file for future reviews.

Once all of the information is considered, there are generally two potential scenarios. One is that the adjudicator issues a favorable determination and the individual is on track to access classified material.<sup>15</sup> The other scenario involves an adjudicator determining an individual fails to meet the requirements for eligibility and access to classified information; thereby entitling the individual to administrative due process.<sup>16</sup> Specifically, the DoD CAF will provide the individual a detailed written explanation known as a Statement of Reasons (SOR) articulating the basis for the unfavorable determination. The individual can then submit matters rebutting the unfavorable determination. If unsuccessful, the individual may then seek additional appellate review through the Defense Office of Hearings and Appeals or the Personnel Security Appeal Board.

### **Referrals to the DoD Consolidated Adjudication Facility**

All security clearance holders are subject to continuous evaluation.<sup>17</sup> If something happens in an individual's life related to the thirteen adjudicative guidelines, the individual must self-report that information to appropriate security personnel. This can be anything from DUI arrests to new foreign contacts. Similarly, once an individual obtains a security clearance, the DoD CAF may continue to receive information about that person beyond the self-reporting requirement.

For example, security officers and commanders possessing potentially derogatory information relevant to the thirteen adjudicative guidelines have the discretion to inform the DoD CAF about that information.<sup>18</sup> This is known as “referral.”<sup>19</sup> Generally, if the matter is egregious enough, security managers or commanders have the discretion to suspend access to certain classified information, but they do not have the authority to revoke clearances.<sup>20</sup> Revocation primarily falls to the DoD CAF.<sup>21</sup>

Typically, the individual is not informed that a referral has taken place.<sup>22</sup> Neither security officers, commanders, nor the DoD CAF are under any obligation to do so, although other factors such as FLAGS or administrative investigations

related to the underlying offense may bring the referral to light. Security managers within an individual's command generally coordinate with the DoD CAF when referrals are submitted. In addition, security officers have access to the Joint Personnel Adjudication System (JPAS), which indicates that status of the adjudication process, to include whether the matter is under review.<sup>23</sup> Accordingly, commanders should remain in constant communication with their security officers in order to remain apprised of the eligibility status of security clearance holders, particularly where a referral is submitted to the DoD CAF.

Upon referral, the matter is assigned to an adjudicator. The adjudicator provides an initial assessment of the new information to determine whether any immediate action is necessary. If not, the adjudication process essentially reverts to the DoD CAF's traditional role. Notably, the adjudicator's review is not limited to just the new information. Instead, the adjudicator reviews the individual's entire file in order to make a determination under the “whole-person concept.” If the adjudicator issues a favorable determination, the information is noted in JPAS and the individual may never know that his or her eligibility to access classified information was under active review. However, if the adjudicator cannot issue a favorable determination, requests for additional information or due process is afforded to the individual in the same manner as if this were an initial determination.

### **The Case for Inoculating the DoD Consolidated Adjudication Facility from National Security Litigation**

On occasion, the DoD CAF has come under scrutiny in the context of national security litigation. The reason may be obvious. National security litigation typically requires counsel on both sides to maintain access to classified information. Parties, to include military judges, have grown impatient with the length of time it sometimes takes to complete the adjudication process. As such, military judges have been tempted to entertain facts surrounding the determination process or otherwise sought to pressure the government into expediting security clearance determinations. Despite the justified basis for such concerns,

precedent cautions that military judges should resist the temptation to intercede in the DoD CAF process.<sup>24</sup>

For good reason, trial courts should not make themselves de facto arbiters of security clearances. In *Department of the Navy v. Egan*—an expansive Supreme Court decision in the context of security clearance adjudications—the Court noted that “there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information.”<sup>25</sup> The Court in *Egan* went on to state that “[c]ertainly, it is not reasonably possible for an outside non-expert body to review the substance of such a [security clearance adjudication] and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.”<sup>26</sup> *Egan’s* deference, which has historically been adhered to with little caveat, does not permit courts to substitute their judgment for that of the agencies responsible for the security clearance process.

Moreover, because courts are usually without subject matter jurisdiction to review the merits of security clearance determinations and adjudications, a judge should not be forced into a position of second-guessing the discretionary judgment of the appropriate agency of the executive branch in assessing national security risks.<sup>27</sup> Accordingly, efforts to intervene in the security function—including the DoD CAF’s role—should not be taken into account by military courts.<sup>28</sup> **TAL**

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## Notes

1. The example cited in this article pertains to Appellate Exhibit 532, *et seq.*, *United States v. Khalid Shaikh Mohammad*, available at [www.mc.mil](http://www.mc.mil).
2. Unauthenticated Transcript at 17774, *United States v. Khalid Shaikh Mohammad*, et al.

3. See [http://www.ftmeade.army.mil/directorates/dptms/myth\\_busterv2.pdf](http://www.ftmeade.army.mil/directorates/dptms/myth_busterv2.pdf).

4. See, e.g., DEP’T OF DEF., 5200.02-M, PROCEDURES FOR THE DoD PERSONNEL SECURITY PROGRAM para. 7C2 (3 Apr. 2017) [hereinafter DoD 5200.02-M]. Standard Form (SF) 86 is used by DoD for national security background investigations. The automated version of the SF 86 is the e-QIP.

5. See <https://www.dodcaf.whs.mil/mission>.

6. See DoD 5200.02-M, *supra* note 4. Contractors are generally governed by a parallel process described in DoD 5220.22-M, National Industrial Security Program. See also DEP’T OF DEF., DIR. 5220.6, DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM (2 Jan. 1992) (C4, 20 Apr. 1999) (describing administrative due process for contractor personnel).

7. See, e.g., DoD 5200.02-M, *supra* note 4, para. 7.

8. See *generally id.* para. 5.4.

9. *Id.*

10. *Id.* para. 7.7.

11. See *generally id.* para. 7.

12. Moreover, procedures for the DoD personnel security program require that personnel security data, reports, and records must be handled with the highest degree of discretion. See DoD 5200.02-M, *supra* note 4, para. 5.7. The manual further states that “[a]ccess to such information is afforded only for the purposes in the applicable Privacy Act System of Record Notice (SORN) and to persons whose official duties require such information.” *Id.*

13. See Security Executive Agent Directive 4, National Security Adjudicative Guidelines (8 June 2017), [http://ogc.osd.mil/doha/SEAD4\\_20170608.pdf](http://ogc.osd.mil/doha/SEAD4_20170608.pdf); see also Exec. Order No. 12,968, 60 Fed. Reg. 40,245, § 3.1(f) (Aug. 2, 1995) (as amended by Exec. Order No. 13,467, 73 Fed. Reg. 38,103 (June 30, 2008)) (ordering Security Executive Agent to develop a common set of adjudicative guidelines).

14. See DoDM 5200.02, *supra* note 4, para. 7C.1(c) – (e).

15. See, e.g., *id.* para. 10.4.

16. *Id.* para. 10.

17. See also Exec. Order No. 12,968, *supra* note 13, § 1.2(d).

18. See DoD 5200.02-M, *supra* note 4, at 83.

19. See *id.* para. 9.2(b), (c) (Reports of derogatory information involving contractor personnel must be referred directly to the DoD CAF and the Defense Security Service or the Personnel Security Management Office for Industry).

20. *Id.* para. 7A.2.

21. See also *id.* para. 7A.1 (specific officials authorized to grant, deny, revoke, or suspend national security eligibility also include the Secretary of Defense and the secretaries of the service branches).

22. DoD 5200.02-M only requires notification in the event that an unfavorable determination is made.

23. See DoD 5200.02-M, *supra* note 4, para. 9.2(b).

24. See Appellate Exhibit 532, *supra* note 1.

25. *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

26. *Id.*

27. See, e.g., *Hegab v. Long*, 716 F.3d 790, 794 (Fed. Cir. 2013); *Egan*, 484 U.S. at 527; see also *Cheney v. DOJ*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *Ryan v. DHS*, 793 F.3d 1368 (Fed. Cir. 2015); *Gargiulo v. DHS*, 727 F.3d 1181 (Fed. Cir. 2013).

28. Constitutional challenges to a security clearance denial, standing alone, may be presented in court under extremely limited circumstances. However, any attempt to examine the merits of an agency’s underlying decision-making process must be denied for failure to state a claim. See *Hegab*, 716 F.3d at 796–97. Courts may only have subject matter jurisdiction over security clearance and special access determinations when the reason for the agency’s denial was to deprive an individual of a constitutional right—that showing must be unequivocal and unambiguous, i.e., the agency’s stated reason for denial was solely to deny an individual a constitutional right; inference and innuendo is not enough. See, e.g., *El-Ganayni v. U.S. Dep’t of Energy*, 591 F.3d 176, 183–85 (3d Cir. 2010) (holding that the court had jurisdiction to review plaintiff’s claims that an agency violated his constitutional rights in the process of revoking his security clearance, but concluding that any claim that requires reviewing the merits of the security clearance decision fails to state a claim); *Oryszak v. Sullivan*, 576 F.3d 522, 526, 388 U.S. App. D.C. 64 (D.C. Cir. 2009) (noting that while courts may have jurisdiction over the review of security clearance claims, such claims other than constitutional claims fail to state a claim); *Dorfmont v. Brown*, 913 F.2d 1399, 1401–04 (9th Cir. 1990) (holding that courts lack jurisdiction to review the merits of security clearance determinations, except possibly in the limited case where an individual has a colorable constitutional challenge); *Hill v. Dep’t of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) (suggesting that *Egan* would be “hardly worth the effort” if it could be “bypassed simply by invoking alleged constitutional rights”).



Sgt. Emmett Browne (left), a team leader with U.S. Army Alaska's 1st Battalion (Airborne), 501st Infantry Regiment, 4th Infantry Brigade Combat Team (Airborne), 25th Infantry Division, trains with Japanese soldiers as part of Exercise North Wind 2015 (Credit: U.S. Army Sgt. Eric-James Estrada/Released).

## Military Exchange Personnel Balancing Interoperability and Accountability

By Lieutenant Colonel Daniel R. Kicza

**Recognizing the importance of interoperability with our allies**, the U.S. Army has fully embraced the Military Personnel Exchange Program (MPEP). The Army currently has 156 total exchanges with fifteen countries. The foreign personnel serving in U.S. Army positions includes nine foreign general officers serving as deputy commanding general or chief of staff at the division, corps, and Army Service Component Command levels.

While this relationship building provides incredible benefits to the United States and the allied force, the robust expansion of the responsibilities and duties assigned to foreign general officers has raised concern at the congressional and Joint Staff levels. In response, on 7 August 2018, the Deputy Secretary of Defense published updated guidance on the permissible and impermissible duties for foreign general officers. Legal advisors must stay attuned to the policy limitations on

foreign general officer duties in order to support their commanders. Legal advisors must also appreciate the balance between interoperability and building partnerships, and legitimate policy concerns over accountability and authority.

### The Program

Under the MPEP, foreign exchange personnel are assigned to duty positions in the U.S. Army. Memorandums of Agreement between the United States and the foreign partner create the exchanges. They are enforceable international agreements and may be reciprocal or non-reciprocal. Unlike Foreign Liaison Officers who perform duties on behalf of their home nation, foreign exchange personnel are assigned to duty positions within authorized U.S. Army manpower requirements and are given the same authority and supervisory responsibilities that would be given U.S. personnel in the same unit in a similar position.<sup>1</sup>

### The Legal Basis and Legal Restriction on Duties Performed

Section 311 of Title 10 of the U.S. Code<sup>2</sup> authorizes the Secretary of Defense to enter into exchange programs with an ally or other friendly foreign nation. The statute prohibits exchange personnel "to take an oath of allegiance to the host country or to hold an official capacity in the government of such country."<sup>3</sup> The statute does not define the term "official capacity."

### Policy limitations and Restrictions on Duties Performed

Army Regulation 614-10, *Army Military Personnel Exchange Program with Military Services of Other Nations*, places several restrictions on the duties performed by foreign exchange personnel. Foreign exchange personnel may not be assigned to positions that would require them to "exercise responsibilities reserved by law or regulation to an officer or employee of the USG"<sup>4</sup> or "perform duties reserved for U.S. personnel."<sup>5</sup> They may, however, "exercise general supervisory functions over U.S. military and civilian employees."<sup>6</sup>

The regulation specifically prohibits foreign exchange personnel from exercising disciplinary powers over U.S. personnel<sup>7</sup> or taking "personnel actions of a disciplinary nature" which affect civilian employees.<sup>8</sup> Additionally, "[w]hen attending meetings or conferences outside the host command and/or activity, the PN (Partner Nation) MPEP participant must make it clear that they are performing in an exchange role and cannot represent the U.S. Army. Under no circumstance will they be sent as the sole representative of the command and/or activity."<sup>9</sup> As far as rating and evaluating U.S. personnel, foreign exchange personnel may rate, but not senior rate, U.S. officers and noncommissioned officers.<sup>10</sup>

## Updated Guidance from the Department of Defense

On 7 August 2018, the Deputy Secretary of Defense issued “Updated Guidance on the Foreign Personnel Exchange Program.” In it, the Deputy Secretary of Defense found “that the Department lacks clear guidance, central oversight, and a means of certifying compliance with Section 311, including guidance on the duties and functions that may be performed by foreign exchange personnel consistent with Articles II and VI of the U.S. Constitution.”<sup>11</sup> The memorandum further directed review, amendment, and certification of all position descriptions, functions, and responsibilities of foreign general officer exchange personnel.

Included with the memo is a non-exclusive list of permissible and impermissible functions and duties for foreign general officers. In general, most advisory functions are permissible and the foreign general officer may execute “internal office and organizational functions.”<sup>12</sup> The examples of prohibited functions and duties contains some relatively bright-line prohibitions (e.g., no commanding U.S. military forces or controlling intelligence or counterintelligence operations; no receiving, disbursing, or distributing public funds or U.S. Government real property.) Two other prohibitions, however, appear straight forward, but upon further analysis, may raise questions and debate when applied to the practical duties performed by a foreign general officer serving as a deputy commanding general or chief of staff. Those prohibitions are: 1) no making final determinations regarding plans, policies, directives, or orders; and 2) no conducting “foreign relations.”<sup>13</sup>

### **No Making Final Determinations**

At first glance, compliance with this prohibition appears easy. A foreign general officer serving as a deputy commanding general should only be advising the commander and the commander makes the final determination on everything. The commander makes the decision explicitly, or they issue detailed guidance on the issue. Potentially lost, however, is a broad spectrum of situations where a motivated foreign general officer could act with disciplined initiative, especially regarding interoperability issues that the commander

may not be aware of, has not considered, and for which they have not issued guidance. In reality, much of a command’s day-to-day decision making is accomplished based on very broad guidance and trust that the officer can and will make the right call.

### **No Conducting Foreign Relations**

Again, at first glance this prohibition appears straightforward and obvious. The memo provides further explanation that the prohibition includes representing, speaking, or acting on behalf of the United States, or making determinations of foreign policy. Additionally, the Army regulation prohibits foreign exchange personnel from attending activities outside of their assigned command as the sole representative of the command, and they must make it clear to other attendees they are present in an exchange capacity and cannot represent the U.S. Army.

Consider, however, what a senior U.S. commander expects of a deputy commanding general in an exercise with foreign partners or even in the garrison environment in a command located outside of the United States. Can they pledge the command’s support to the local community surrounding an OCONUS base? Can they state the U.S. Army’s official position on a certain issue, or state the commander’s established policy and priorities to another allied foreign military’s representative? While not making determinations of foreign policy, is the foreign deputy commanding general impermissibly representing or speaking on behalf of the United States? Arguably they are.

Where the policy likely contemplates, and seeks to prevent, a situation where a foreign general officer establishes the policy of the unit or the U.S. Government by himself or herself, it likely neglected to factor in a situation where the foreign general officer is representing the command by stating already established official policy originally promulgated by the appropriate U.S. authority.

### **Staying Out of the Danger Zone**

The risk is that if the Army pushes the limits of the permissible duties of a foreign general officer, there will be even more restrictive guidance published which will make the Army’s foreign general officer positions potentially ineffective with no benefit to

interoperability. For example, a proposed draft legislative proposal to amend 10 U.S.C. § 311 would have prohibited any foreign exchange personnel from performing an inherently governmental function.<sup>14</sup>

To avoid such restrictions on a program that Army commander-clients are heavily invested in, the National Security Law Division (NSLD) at The Office of the Judge Advocate General (OTJAG) recommends the following guidance to legal advisors who are tasked with determining the legality of a proposed duty or action to be performed by a foreign general officer: Brief incoming foreign general officers on the legal and policy restrictions on their duties. Make them comfortable with seeking legal guidance if they sense the commander is asking them to perform possibly prohibited functions, or if their assigned duties seemingly require them to perform prohibited functions in order to be effective. More importantly, ensure they contact you if, upon reflection, they question whether an action they already took might have been impermissible.

Ensure a foreign general officer’s decisions are never the absolute final determinations. Make the commander aware of and acknowledge or adopt the determinations of a foreign general officer. If that does not happen through normal operations, ensure an appropriate staff member notifies the commander of the action taken. This may sound burdensome, but it is no different from what judge advocates often do when reports come up through legal channels and must be cross-leveled with the operations community.

When foreign general officers interact with any foreign entity, NSLD OTJAG recommends the command’s legal advisor draw a line well short of anything that an outsider could reasonably interpret as representing, speaking, or acting on behalf of the United States. Any statement, comment, or action by a foreign general officer that causes a foreign military, government, or official to rely on the United States or obligates (or appears to obligate) the United States to take some action or refrain from some action is potentially the impermissible conduct of foreign relations.

The best way to support commanders who value their foreign general officers is to advise them to avoid pushing the

limits of the new policy. Some within the Department of Defense see the Army's use of foreign general officers as deputy commanding generals as beyond the scope of the implementing statute.<sup>15</sup> Avoiding policy or law that further restricts their duties will require a delicate balance and a conservative reading of the duty restrictions. **TAL**

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## Notes

1. U.S. DEP'T OF ARMY, REG. 614-10, ARMY MILITARY PERSONNEL EXCHANGE PROGRAM WITH MILITARY SERVICES OF OTHER NATIONS, para 4-5 (14 July 2011) [hereinafter AR 614-10].

2. As amended by Nat'l Def. Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301.

3. 10 U.S. Code § 311(e).

4. AR 614-10, *supra* note 1, para 5-1a(3).

5. AR 614-10, *supra* note 1, para 4-9.

6. AR 614-10, *supra* note 1, para 4-9.

7. AR 614-10, *supra* note 1, para 4-7.

8. AR 614-10, *supra* note 1, para 4-9.

9. AR 614-10, *supra* note 1, para 5-1a(3).

10. U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM, para 2-1a(1) & b(1) (4 Nov. 2015).

11. Memorandum from Deputy Secretary of Defense, subject: Updated Guidance on the Foreign Personnel Exchange Program (7 Aug. 2018) [hereinafter Foreign Personnel Exchange Program Memo].

12. *Id.*

13. Further clarified as "representing, speaking or acting on behalf of the United States, or making determinations of foreign policy."

14. The term "inherently governmental function" is defined in the Federal Activities Inventory Reform (FAIR) Act of 1998 as "... a function that is so intimately related to the public interest as to require performance by Federal Government employees." Those functions "... includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government..." Using the FAIR Act standard for inherently governmental functions would likely greatly restrict the duties of foreign general officers and potentially negate any value of the program to Army commanders.

15. This view is the author's and is based upon conversations with the action officer of the updated guidance memorandum in the Office of the Under Secretary of Defense Policy.



The National Geospatial Intelligence Agency at night (Credit: Trevor Paglen).

## A JA's Role at the National Geospatial-Intelligence Agency

*By Lieutenant Colonel Evah K. McGinley*

**Shortly before reporting to the National Geospatial-Intelligence Agency (NGA) as the only active duty military attorney assigned to the Office of Counsel, I sat down with the incumbent for some left-seat/right-seat. Those two days felt akin to drinking from a classified firehose. While each new assignment poses challenges, by the time a judge advocate hits the field grade ranks, they have at least seen or heard about most issues, even if from a distance. Not here. Despite having nearly two decades of judge advocate work behind me, I found myself in a position requiring virtually a different language. "I haven't practiced this type of law before," I found myself preemptively apologizing. "Don't worry," I was told, "No one has—not until they get here."**

Unless a judge advocate is pulled from another Intelligence Community (IC)

element, or has operational experience supporting the same, this is an entirely new field. No law school course or internship opportunity covers the material; it is largely on-the-job training (OJT). However, it is OJT with significant merit. The IC partners (and their priorities) frequently overlap, collaborate, and coordinate, meaning practice in any IC element provides that invaluable "I've at least seen or heard of this before" level of experience.<sup>1</sup> While that experience is missing for most judge advocates with a conventional background and traditional career track, it is crucial for the Judge Advocate General's Corps (JAGC) to build an effective bench of national security law practitioners. For this reason and the many others described below, billets such as the one at the NGA will continue to yield returns as we support both Army and Joint operations.

## The History of the NGA and the Judge Advocate's Role

Although a relatively new arrival to the IC, the NGA is a young body with an old soul.<sup>2</sup> The organization is composed of personnel, former agencies, and skill sets representing seasoned intelligence veterans.

The NGA originally grew out of a need for geospatial intelligence (GEOINT) recognized more than twenty years ago. During negotiations for the Dayton Peace Accords in 1995, a team led by the Defense Mapping Agency (DMA) proved itself essential to the negotiation effort and demonstrated the value of combining cartographic and analytic skill sets.<sup>3</sup> With the goal of institutionalizing this type of collaboration, the U.S. Government pulled together personnel and resources from eight different organizations, forming the National Imagery and Mapping Agency (NIMA) in 1996.<sup>4</sup> In 2003, NIMA became NGA, reflecting increased emphasis on GEOINT support to customers across the IC in the wake of the September 11, 2001 attacks.<sup>5</sup> The move established NGA as a GEOINT-specific Combat Support Agency for the Department of Defense (DoD).<sup>6</sup>

In spite of its DoD identity, NGA's intelligence pedigree means the agency maintains a relatively small uniformed population, making up less than five percent of the workforce. Assigned military personnel rely heavily upon civilian GEOINT subject matter experts, who provide sourcing and analysis on a range of fronts. The NGA Office of General Counsel (OGC) reflects the same balance: As of the writing of this article, the OGC holds one military billet, currently filled by the Army.<sup>7</sup>

The first Army judge advocate at the NGA arrived in 2014, as an early effort to expand the JAGC bench in intelligence-related practice areas.<sup>8</sup> The position is now in its third assignment cycle, with the uniformed attorney continuing to support the Mission and International Law Division. The division is known as "OGCM" in the language of NGA acronyms, or more familiarly as just "the mission team."<sup>9</sup> The mission team supports clients across the agency, from the Analysis to the Source directorates, as well as the Directorate of Expeditionary Operations. However, the OGC as a whole supports the legal needs of the entire agency, offering opportunities

in everything from administrative law to contracts and fiscal law to labor and employment law, and everything in between.

## A Judge Advocate's Legal Practice at the NGA

Legal practice at the NGA is diverse and complex. The OGC provides in-house support for every legal function from contracts to administrative law to international and operational law, and everything in between.<sup>10</sup> To varying degrees, the mission team touches virtually all of those areas—and so does the assigned judge advocate. The resulting portfolio combines statutory interpretation, domestic and international operations, and common practice areas, all with an intricate IC twist.

## Bifurcated Statutory Authorities

The NGA's complex source of authorities makes legal practice here both unique and challenging. The primary source of the NGA's authority as an IC member flows from the president's constitutional authority, conveyed by Executive Order 12333, as amended.<sup>11</sup> However, the NGA also holds broad authorities granted by Congress, under both Title 10 and Title 50.<sup>12</sup>

The NGA's Title 10 authorities provide the agency's charter and establish it as a Combat Support Agency.<sup>13</sup> In this role, the NGA supports the national security objectives of the United States with imagery, imagery intelligence, and geospatial information.<sup>14</sup> Supporting this mission, the NGA personnel embedded within commands and offices across the globe provide on-site senior-level GEOINT expertise. The NGA also regularly deploys personnel, with a resulting need for legal work in the development and delivery of pre-deployment guidance. With such a small percentage of the workforce in uniform, judge advocates bring a unique military perspective which helps deploying civilians support NGA clients abroad.

The NGA's Title 50 authorities call upon a different legal skill set.<sup>15</sup> Title 50 provides the NGA the authority and obligation to support GEOINT requirements of other Federal agencies.<sup>16</sup> Although the statute only names the Department of State individually, it includes a broad "other" category covering a swath of potential NGA customers.<sup>17</sup> This "other" category allows NGA to

support not only the rest of the IC, but also virtually any other federal department and agency, from the Treasury Department to the Department of Agriculture—provided the requested support fits within a national intelligence priority.<sup>18</sup> Those priorities are as broad as the customer base. On any given day, the NGA may be assisting a disaster relief effort somewhere in the Pacific, or lending help to efforts monitoring the spread of Ebola in Africa.

The NGA's Title 10 and Title 50 authorities and functions may also overlap. A common scenario involves the National Guard. For example, if the National Guard is federalized in an exercise or disaster response, the NGA can support it directly through Title 10. If the National Guard remains in a state status, the NGA may indirectly support it, normally through a different lead federal agency triggering the NGA's Title 50 authorities.

Overlaying this web of statutory authorities is the role of the NGA Director as the Functional Manager for GEOINT.<sup>19</sup> Functional Managers work across the IC to ensure a unified, coordinated, and integrated approach, advising the Director of National Intelligence (DNI) on all matters within their assigned functional area. For the GEOINT Functional Manager, that includes standards regarding training, tradecraft, reporting, and technical mechanisms (or "architecture"). Even research and development initiatives may fall under the Functional Manager's purview.<sup>20</sup>

Given the complexities of the executive, statutory, and regulatory authorities accorded the NGA, the directorates across the agency frequently call upon OGC to assist in not only understanding what missions can be supported, but also the appropriate source of the authority to do so. As part of the mission team, the assigned judge advocate plays a frontline role in this intricate interpretation.

## Domestic and International Operations

The NGA stands unique among its IC brethren as the only full-fledged intelligence agency with the mission and the authority to support some distinctly non-intelligence-centric agencies, and to do so with a specifically intelligence-based

tool set.<sup>21</sup> Operating in both domestic and international arenas, with both Title 10 and Title 50 in play, the blend of domestic and international work requires similarly blended legal advice.

Global maritime and aeronautical navigation—both within the NGA’s mission set—require broad sharing of accurate mapping data in order to ensure the safety and efficiency of travel across the globe. Title 10 holds the NGA’s most significant authorities to enter into international agreements and arrangements allowing for that kind of sharing and exchange.<sup>22</sup> The provision of imagery intelligence and sharing of geospatial information with other foreign partners, including regional organizations and security alliances, includes a role for legal guidance in negotiations and drafting.<sup>23</sup> Statutory allowances for agreements to exchange mapping and charting information, not only with foreign partners but also with non-governmental organizations and even academic institutions, emphasize the NGA’s unique role, and provide further opportunities for the mission team to provide critical support to international agreements.

On the domestic front, Title 50 issues run the gamut from support to other IC partners to support to non-IC entities. As an example, NGA participates as a member of the Civil Applications Committee (CAC), where specifically non-national intelligence support is deemed a national intelligence priority.<sup>24</sup> The mission team provides guidance on the NGA’s interpretation of how to lawfully use intelligence tools in this domestic setting. Environmental studies, migration patterns, and terrain mapping all have useful civil applications. Frequently, counsel advising other CAC members are not familiar with the nuanced legal issues facing the IC; they look at things from a civil perspective. Attorneys at the NGA, however, are able to translate IC equities and enable civil applications to function more effectively, making a positive impact outside of the traditional IC world.

### **Common Practice Areas with an Intelligence Community Twist**

Legal practice within the NGA in many ways resembles work already familiar to judge advocates, although it is infused with

the special considerations applicable to the IC. The mission team attorneys support the warfighter with advice to the agency’s directorates in a manner similar to a judge advocate supporting a Division or Corps, functioning like staff officers, advising leaders and integrating into the team. For larger policy-level issues, attorneys assume a role like legal advisors to a Combatant Command or the Office of The Judge Advocate General, assisting with the drafting and execution of policies driven by guidance and directives from the Office of the DNI, the DoD, and the legislature. As mentioned in the introduction, daily issues include all of the usual suspects, from administrative law, contract and fiscal law, and intellectual property and copyrights, to ethics and personnel law, in addition to operational and international law.

Exposure to actions involving these more familiar practice areas is common, and allows attorneys through the office, including the assigned judge advocate, to take advantage of experience not isolated to the NGA but applicable to a wider set of DoD and federal clients. The review of interagency agreements under the Economy Act, or the staff legal review of a Joint publication, is undertaken in a similar way regardless of the subject matter of those agreements or publications.<sup>25</sup> Likewise international agreements may have a specific intelligence focus, such as Imagery Sharing Agreements (ISAs) or Basic Cooperation and Exchange Agreements (BECAs), but the nuts and bolts of the legal work to negotiate and draft them are seen across federal practice; the Case Act requirements and the DoD Directive remain the same, whether negotiating for the sharing of imagery or negotiating for access to an airfield.<sup>26</sup>

Nonetheless, the classification levels and special considerations relevant to intelligence work give these familiar practice areas an IC twist that enriches the experience, especially for a judge advocate. For example, the mission team evaluates requests for support under NGA policies, such as the domestic imagery policy which governs all imagery taken of domestic targets.<sup>27</sup> Sometimes the imagery is needed for traditional functions, like military exercises, but sometimes it is needed for a civil, rather than intelligence-related purpose.

Imagine the local department of public works attempting to use an S-2 product to fix a faulty road and one can envision the potential concerns: an intelligence-centric tool to address a civil problem.

Legal practice at the NGA also allows for those practice areas not commonly seen in other DoD billets. Intelligence oversight rules and regulations provide a prime example of a body of knowledge crucial to any IC practice, but outside of the average judge advocate’s legal experience.<sup>28</sup> After all, within the NGA, that same domestic imagery used for a civil purpose might also be sought for a foreign or counter-intelligence purpose, and would therefore be subject to a different set of policy considerations. The task of advising which activities fall into a foreign or counter-intelligence purpose, which activities require a Proper Use Memorandum (PUM) for compliance, and whether the PUM in question is legally sufficient, are all IC-centric issues falling to the mission team.<sup>29</sup> Only practice and on-the-job training can provide a true appreciation of these concerns and how they impact both the client and the attorney.

As the focus on national security law increases within the JAGC, providing judge advocates with this type of experience will enrich the depth and quality of the advice provided to our commanders and senior leaders across the enterprise. The NGA billet offers a unique and important experience with an inclusive, collaborative, and professional environment; rich with former judge advocates from every service; at a location within reach of Fort Belvoir and the Pentagon. Positions like this not only continue to build a bench of uniformed professionals conversant in the language and practices of the IC, but also the language and practices of the federal government writ large. **TAL**

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*LTC McGinley is currently assigned to the National Geospatial-Intelligence Agency Office of General Counsel as an Assistant General Counsel within the Mission and International Law Division. For additional information regarding practice within the NGA Office of General Counsel, contact the mission team: Mission and International Law Division at [OGCM@nga.mil](mailto:OGCM@nga.mil).*

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## Notes

1. While assigned at NGA, uniformed attorneys regularly interact and collaborate with counsel from various other IC members, including those from the Defense Intelligence Agency (DIA), National Security Agency (NSA), and the Central Intelligence Agency (CIA), among others.
2. See National Imagery and Mapping Agency Act of 1996, Pub. L. No. 104-203, 110 Stat. 2431; see generally ANNE DAUGHERTY MILES, JOINT MILITARY INTELLIGENCE COLLEGE, THE CREATION OF THE NATIONAL IMAGERY AND MAPPING AGENCY: CONGRESS'S ROLE AS OVERSEER, OCCASIONAL PAPER NUMBER NINE (2002), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a476770.pdf>.
3. NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, THE ADVENT OF NGA 1 (2017); see *id.* DMA was its own “merger of Army, Navy, and Air Force mapping, charting, and geodesy organizations.” *Id.* at 22.
4. *Id.* at 1–3.
5. *Id.*
6. The Combat Support Agencies are identified in Title 10 of the U.S. Code and include, in addition to NGA: Defense Intelligence Agency, Defense Information Systems Agency (DISA), Defense Logistics Agency, and those agencies designated by the Secretary of Defense. See 10 U.S.C. § 193(f). The Secretary of Defense in turn designated additional agencies to include: Defense Contract Management Agency, Defense Health Agency, and Defense Threat Reduction Agency. See U.S. DEP'T OF DEF., DIR. 3000.06, COMBAT SUPPORT AGENCIES (CSAs) encl. 3 (27 June 2013). The Secretary of Defense also designated the National Security Agency and Central Security Service as a Combat Support Agency when providing combat support. *Id.*
7. Efforts are underway to expand the opportunity to other Services.
8. Other Army judge advocate opportunities in the IC include assignments at the Defense Intelligence Agency, the National Security Agency, U.S. Army Intelligence and Security Command, and the Office of the Director of National Intelligence.
9. Although the billet currently serves with the Mission Team, the opportunities for judge advocates at NGA extend well beyond international and operational law issues. Military attorneys with specialties in a range of subject areas, from litigation to contract and fiscal law to administrative law would all find rewarding work within the OGC.
10. Fort Belvoir provides military justice ad Special Assistant U.S. Attorney (SAUSA) support as part of the installation-level legal services. As such, the Senior Service Leaders at NGA for the Army, Air Force, and Navy do not have UCMJ jurisdiction over the personnel assigned to NGA; that authority is held and exercised by the local General Court-Martial Convening Authority (GCMCA). For the Army, this GCMCA is at Fort Belvoir.
11. See generally Exec. Order. No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981), amended by Exec. Order. No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008) [hereinafter E.O. 12333].
12. See 10 U.S.C. § 442 et seq. See also 50 U.S.C. § 3045 et seq.
13. 10 U.S.C. § 442. See also U.S. DEP'T OF DEF., DIR. 5105.60, NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY (29 July 2009).
14. 10 U.S.C. § 442.

15. The skill set required for an analyst varies depending upon the mission and product required, rather than upon the statutory authority behind the request. The difference in the legal approach required is based upon that difference in statutory authority.

16. 50 U.S.C. § 3045. “In addition to the Department of Defense missions set forth in section 442 of title 10, the National Geospatial-Intelligence Agency shall support the geospatial intelligence requirements of the Department of State and other departments and agencies of the United States outside of the Department of Defense.” See *id.* § 3045(a).

17. See *id.*

18. See *id.*

19. E. O. 12333, *supra* note 11, 1.3(b)(12)(A)(iii). See also DIRECTOR OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIR. 113, para. D.1 (19 May 2009) [hereinafter ICD 113].

20. *Id.* para. D.5.b.

21. Normally this type of authority is reserved for agencies with a primary purpose other than intelligence, such as the FBI. The NGA is an entirely intelligence-centric organization.

22. See 10 U.S.C. § 443 and § 454.

23. See 10 U.S.C. § 443.

24. President Gerald R. Ford directed the establishment of what is now the CAC in 1975. Memorandum from The White House on President Ford's Initial Review of the Report on the Commission on CIA Activities within the United States (Aug. 16, 1975) (on file with author). The CAC's most recent Charter, signed by the Director of Central Intelligence, the Secretary of the Interior, the Director of the Office of Management and Budget, and the Assistant to the President for National Security Affairs, specifies that the intended “civil uses” would refer to “non-intelligence and non-military purposes.” Civil Applications Committee Charter footnote 1.

25. See Economy Act, 38 U.S.C. § 701.

26. See Case-Zablocki Act, 1 U.S.C. § 112b. See generally U.S. DEP'T OF DEF., DIR. 5530.3, INTERNATIONAL AGREEMENTS (11 June 1987).

27. See NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, INSTR. 8900.5, para. 4.b. (23 Jan. 2018).

28. See generally U.S. DEP'T OF DEF., 5240.01-M, PROCEDURES GOVERNING THE CONDUCT OF DoD INTELLIGENCE ACTIVITIES (8 Aug. 2016).

29. See *id.*

## Reflections on Multi-National Interoperability from the IIHL

By Major Phillip C. Maxwell

**In amplifying TJAG's mantra to “Be Ready” we must understand our multi-national partners.** If you are to assume anything in a multi-national military operation, assume your multi-national partners view the world, and, relevant to this article, the Law of Armed Conflict (LOAC), differently than you. The consequences of an opposite assumption could have significant legal and, more importantly, operational impacts. Compounding the challenges when working with a multi-national partner whose experience may vary from zero understanding of LOAC to incredibly sophisticated insight—the partner nation will almost certainly have different permissions and authorities enabling more or less operational flexibility.

Understanding interoperability is not just an operator requirement—those who advise operators must understand how their legal advisor counterparts operate as

well. And you must understand this before an operation. You may *think* you have an understanding of how partner forces interpret LOAC, but you need to *know*. How can you gain this knowledge? Strategic engagements, multi-national training exercises, or courses at the International Institute for Humanitarian Law (IIHL) are a few examples of where to gain the insight necessary to properly advise commanders on the multi-national battlefield.

The IIHL is an independent, non-profit organization located in San Remo, Italy. The Military Department of IIHL was created to support governments' military institutions and organizations in providing specific training in the field of International Humanitarian Law (IHL)/LOAC, in order to fill the gaps in knowledge and to enhance the capacities of military institutions and organizations engaged in situation of armed conflicts and international

operations. Training courses provide a sound understanding of fundamental issues and deliver practical and experience-based instruction, supported by exercises and case studies to reinforce participants' understanding. Course leaders and participants come from across the world, ensuring a unique environment with a diverse, challenging, and stimulating international perspective. All of the training conducted by IIHL shares the following overarching objectives: (1) Increase participants' ability to apply the relevant international norms underpinning the crucial issues relating to the protection of non-combatants in armed conflicts; (2) Encourage the sharing of different nations' perspectives with regard to interpretation of LOAC principles, policies, operational constraints, and monitoring mechanisms; (3) Provide military officers and government officials with the opportunity to learn how to apply the principles and rules of IHL/LOAC; and (4) Promote the respect and implementation of the relevant corresponding IHL/LOAC frameworks and instruments.

The IIHL's geographic location is far from where most of its participants serve, which facilitates a more collegiate atmosphere, one where students are more prone to speak and learn freely—something referred to as the Spirit of San Remo. Due to its neutral status and location, the IIHL has the ability to draw nations otherwise unreachable in standard Department of Defense schools, such as Russia, China, and Pakistan. The participants include legal advisors, commanders, politicians, diplomats, academics, members of non-governmental organizations, and interested civilians. It is in this forum where some LOAC interpretation differences come to light and where nations can begin to understand and appreciate, if not agree on, LOAC principles. Based on a fairly robust and diverse sampling of students passing through the IIHL, there is no wholesale agreement on LOAC and some perspectives are, frankly, troubling. A training venue such as the IIHL, however, is a far better place to learn and adapt to these differences than the Joint Operations Center at a forward deployed location.

So what? Before advising your commander in a multi-national operational



The logo of the International Institute of Humanitarian Law.

environment you must be ready. First, you must truly know LOAC and the specific national authorities and permissions you and your commander must follow. Next, be aware of how your counterpart may see things—what is the same, what is different. Those differences may impact how your commander allocates assets. From an operational law perspective, just because your counterpart calls herself a legal advisor (LEGAD) or himself an OPLAW attorney does not mean they have the same training and education. For example, in many other nations, such as France and the Netherlands, the LEGADs are not attorneys and may have no formal legal education. This is important when trying to understand other nations' perspectives. It's not that attorneys are better, but it is that attorneys are trained to think in a different way. Another assumption one might have is that a partner-nation LEGAD and the U.S. judge advocate have the same understanding of military terminology. Experience suggests otherwise. You may be working with a senior legal advisor of a close ally who does not know the difference between indirect fire and warning shots. Or you find your U.S. Army based view of hostile act and hostile intent—and what that entitles you to do on the battlefield—differs from that of our North Atlantic Treaty Organization (NATO) allies. More fundamentally, keep in mind that there is often a language barrier when working with multi-national partners, even amongst English speaking countries—don't assume everyone knows

and understands what you are talking about. Whatever the situation, there is no room for ego or pride when advising commanders or troops on the ground. Moreover, if your commander belongs to a nation who needs something more or different to lawfully engage a target, you need to know. Sort it out early.

Regardless of one's "expertise" on a subject, there is great value in understanding a different point of view. It may reinforce your understanding or it may do the exact opposite. Either way, you are learning and developing a better understanding to advise your commander. Conveniently, you are also helping your counterparts. The more assumptions we can turn into facts, the better we can advise our commanders. And, given we are in the customer service business, providing sound, timely, and relevant legal advice to our commanders is a priority.

The IIHL offers a variety of courses for all experience levels, exposing participants to a variety of nations and perspectives all eager to better understand LOAC. For more information, feel free to consult the website at <http://www.iihl.org/> or contact Major Phil Maxwell at [philip.c.maxwell@mail.mil](mailto:philip.c.maxwell@mail.mil) or [phil.maxwell@iihl.org](mailto:phil.maxwell@iihl.org). **TAL**

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29 OCT-9 NOV	Foundations Course on IHL



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## No. 1

# Are We Allowed To Be There?

## Understanding Mission Authority in the Context of the Fatal Niger Ambush

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By Major Anthony V. Lenze

*I believe that the troops who were sadly killed in Niger in October of 2017 were engaged in a mission that they were not authorized by law to participate in . . . and that is a significant reason that they tragically lost their lives.<sup>1</sup>*

–Senator Tim Kaine

National security law and fiscal law converge at one word: authority. All military missions cross this legal intersection. The commentary and confusion surrounding the fatal Niger ambush highlights the need to strengthen our understanding of the union between mission and funding authorities.

In October of 2017, four American and four Nigerien Soldiers tragically lost their lives near a remote village in Niger.<sup>2</sup> The four American Soldiers were part of a small Special Forces (SF)<sup>3</sup> team executing multiple missions that spanned two days, resulting in a fatal ambush by a larger enemy force. Their deaths triggered numerous questions from legislators and the press, to include: how did this happen and who is to blame?<sup>4</sup> While the Department of Defense (DoD) investigation identified the superior enemy force as the predominate cause, it also identified improper mission approvals as a contributing factor.<sup>5</sup> The DoD's investigation determined that the SF team initially did not obtain proper mission approval at the battalion-level command in N'Djamena, Chad.<sup>6</sup> Instead, the initial mission was mischaracterized, approved by a lower level company-grade officer, and executed absent mission authority.<sup>7</sup> The *proper* approval authority then directed a follow-on

mission for the next day that ultimately failed to achieve its objective.<sup>8</sup> After the follow-on mission, the SF team was ambushed while returning to its base.<sup>9</sup> The tragic events in Niger sparked a national debate concerning the legality of our counter-terrorism (CT) strategy in Africa's volatile Sahel region.<sup>10</sup> This article does not examine that strategy or the accompanying policy debate.<sup>11</sup>

Using the 2017 incident in Niger as a backdrop, this article distills the authorities needed to execute a mission, highlighting the need to understand and apply mission authority. This article then asserts a basic formula for analyzing executable missions and applies this formula to examine whether the DoD had authority to train and operate in Niger.

### Congressional Authorities

The SF team's mission in Niger concerns two equally important, but distinct, congressional authorities—mission authority and funding authority. Both of these authorities impact commanders at all levels of every Service. First, operational missions flow through combatant commanders (CCDRs).<sup>12</sup> Our command structure requires this chain of approval to synchronize the armed forces

toward specific priorities in the interest of national security.<sup>13</sup> The practical aspect of this congressional requirement is that the Services (e.g., the Army) cannot generate their own operational missions.<sup>14</sup> Rather, the Services present trained forces to the CCDRs who receive mission authority from the Secretary of Defense (SECDEF).<sup>15</sup> Although CCDRs manage the DoD's operational activities, the Services still get the bill. In other words, the Services not only provide the forces to CCDRs, but they must also fund the CCDRs' missions.<sup>16</sup> This funding paradox magnifies the operational powers of the CCDR and implores Services to program and budget according to combatant command requirements.

The other pertinent congressional control is the broad requirement to operate within the bounds of a designated funding authority.<sup>17</sup> Funding authorities are found in Title 10 of the U.S. Code as well as the annual Defense-wide authorization and appropriation acts. Generally, commanders fund missions using operation and maintenance (O&M) authorizations and appropriations.<sup>18</sup> However, U.S. activities that directly assist foreign forces with training or operations require more specific funding authorities from Congress.<sup>19</sup>

Working within the mission and funding authorities ensures that resources go toward authorized missions in accordance with fiscal law, i.e., the Purpose Statute.<sup>20</sup> However, guidance linking these congressional legal requirements does not exist.<sup>21</sup> While numerous articles address the various statutory funding authorities, few, if any, discuss mission authority as a part of the equation.<sup>22</sup> Department of Defense doctrine does not define mission authority, nor does it articulate the legal requirement to obtain it.<sup>23</sup>

### **Mission Authority<sup>24</sup>**

Understanding mission authority is vital for both commanders and legal advisors. Mission authority runs through a unified or specified CCDR possessing command authority.<sup>25</sup> Although mission authority and command authority sound similar in function and effect, they are distinct. Command authority is the statutory authority that permits organizing and employing forces to accomplish *assigned* missions.<sup>26</sup> *Mission*

*authority is the directive or right—provided through a CCDR—to execute a particular task.*<sup>27</sup>

As an example, a commander may have command authority to operationally control his assigned forces, but it is possible that the same commander may not have the mission authority to carry out a specific mission. To identify this missing link, all one has to do is read the orders.

The U.S. military issues orders<sup>28</sup> to dictate mission authority and specify tasks and objectives for subordinate commanders.<sup>29</sup> In doing so, mission authority both validates and defines the requirement the commander is to achieve.<sup>30</sup> Certainly commanders may take initiative to execute unspecified tasks in furtherance of an objective.<sup>31</sup> Such requirements are implied tasks.<sup>32</sup> However, until commanders receive the mission authority that conveys the ability to *act* toward the objective, they do not have mission authority and they cannot take action.<sup>33</sup> When provided authority to carry out a task, all commanders may do so; however, only certain individuals within the U.S. government may create an original mission and then convey that mission (and mission authority) to a subordinate commander.

### *Flow*

Only the President and the SECDEF may initiate and convey *original* mission authority.<sup>34</sup> For major operations, the President or SECDEF authorizes the mission. Then, typically, the Chairman, Joint Chiefs of Staff (CJCS) issues an execute order (EXORD) to the supported CCDR.<sup>35</sup> For steady-state activities, CCDRs issue orders and plans based upon the Unified Command Plan.<sup>36</sup> The orders include both specified and implied tasks for the subordinate commanders to execute.<sup>37</sup>

Conducting a mission outside the bounds of a valid military order subjects commanders to both operational and fiscal law risk.<sup>38</sup> Operational risk often involves mission authority as emphasized by commentators on the Niger tragedy.<sup>39</sup> Fiscal law risk, on the other hand, revolves around the connection between mission authority and Congress' most powerful constraint on funding: the Purpose Statute.

### *Relation to Fiscal Law*

One of the legal "checks" that keeps the DoD from operating outside the wishes of Congress is fiscal law.<sup>40</sup> Congress requires adherence to fiscal law through legislation that protects its "power of the purse."<sup>41</sup>

Commanders must have mission authority before expending resources or directing forces to execute an objective. When it comes to spending appropriated funds, Congress controls the expenditure and use of all government funds through 31 U.S.C. § 1301(a), otherwise known as the Purpose Statute. The Purpose Statute requires that appropriations only pay for objects for which the appropriations were made, except as otherwise provided by law.<sup>42</sup> For supplies or services, commanders typically use a validation process known as a requirements board to ensure their expenditure carries a proper purpose.<sup>43</sup> But the use of Soldiers' time, labor, and the incremental expenses needed for an action in the field also expends resources; a priori validation for these particular expenses is conveyed through mission authority.

Mission authority validates mission requirements.<sup>44</sup> In other words, when mission authority is conveyed, the authorization to expend resources that enable that mission is also conveyed.<sup>45</sup> This is important because spending time and resources toward unauthorized missions violates the Purpose Statute if the expenditures are outside the intent of appropriation.<sup>46</sup> However, mission authority is only a third of the equation; commanders must also work within the specific statutory (i.e., funding) authority and proper funding source.<sup>47</sup>

### **The Funding Formula for Executable Missions**

From day-to-day tasks to large-scale operations, mission authority is crucial to the funding analysis. The current paradigm squares only the funding authority with the relevant appropriation.<sup>48</sup> This is an oversimplification that misleads commanders because it assumes mission authority.<sup>49</sup> Additionally, missions often change, and those changes can alter the requirement and even extinguish the need outright. All the while, funding authorities and the appropriations remain relatively static. Incorporating mission authority into the

operational funding framework addresses this issue.<sup>50</sup> Thus, the correct equation is:

$$\text{Mission Authority} + \text{Funding Authority} + \text{Proper Funds}^{51} = \text{Executable Mission}$$

Returning to this article's backdrop, media outlets and Congress have publicly questioned the DoD's authority to prosecute missions in Niger. Answers to these questions lie in understanding the U.S. military's multiple national security objectives in Niger and the SF team's specific mission authority.

*The troops that were in Niger were there pursuant to a congressional authorization to engage in train-and-equip missions; they were not on a train and equip mission.*<sup>52</sup> - Senator Tim Kaine

### Mission Authority in Niger

The DoD has had a presence in Niger with mission and funding authorities since 2002.<sup>53</sup> Operationally, EXORDs are in place to address violent extremist organizations by, with, and through Nigerien forces. The original mission authority for these EXORDs was conveyed to the CCDRs by the Joint Staff at the direction of the SECDEF. The DoD was also utilizing the EXORDs to direct congressionally approved funding toward "train and equip" activities for Nigerien security forces.<sup>54</sup> Having multiple, parallel operational authorities is not unique to Niger nor does that diminish the authorities' effect. Moreover, commanders may shift their resources between these parallel authorities as required.

*It's not new, and lawmakers that seem to be aghast at these missions going on are simply not well-read.*<sup>55</sup> - Representative Charlie Dent

### From Training to Operating

Commanders may shift service members from training missions to operational missions and vice versa so long as sufficient mission and fiscal authority underlies both.<sup>56</sup> The multiple lines of effort dictated in the DoD's Niger investigation infer such variances. Moving between training and

operating simply requires commanders to adhere to the existing legal framework discussed above. These command decisions ensure support to emerging requirements. Determining whether a unit has the expertise and the capability to support an additional mission is another question—one best left to the proper approval authorities, officers with command authority and responsibility. Mistaken mission approvals, as in those identified in the DoD's Niger investigation serve to potentially invalidate mission authority.

### An Approved Mission

The SF team had mission authority in Niger despite their initial missteps. It is undisputed that a company-level officer mischaracterized and then mistakenly approved the initial mission. However, a battalion-level officer (O-5) with new intelligence subsequently ordered the follow-on mission. This, in effect, reaffirmed the chain of mission authority for the SF team. As stated within the DoD investigation, the follow-on mission occurred a day after the initial mission and resulted in a failed attempt to capture its target. It was not until the SF team was traveling back to its base camp that it was ambushed. The O-5's approval and follow-on mission validated the mission authority. With valid mission authority, the SF team utilized the funding authorities and resources provided by Congress in accordance with the equation asserted in this article.

### Mission Authority in the Abstract:

#### No Purpose Statute Violation

Had the SF team operated *solely* at the direction of the company-level commander, its activities in Niger would have lacked mission authority and an approved purpose. *However, spending O&M funds toward an unauthorized mission does not violate the Purpose Statute, unless the expenditure violates a specific statutory control on funding.* This is because the Purpose Statute restricts appropriations to the purposes for which Congress appropriates them. Congress specifically appropriates O&M funds for mission-related activities. Even with a hypothetical lack of mission authority, the SF team still expended its resources toward the purpose for which Congress appropriated

O&M funds. This does not suggest that commanders can discount the Purpose Statute altogether. The DoD's Purpose Statute violations and their corresponding investigations are well-documented. It does serve to argue that mission authority issues highlight operational scope and approval problems, not necessarily Purpose Statute violations.

Reviewing the SF team's mission authority is essential to determining whether it was authorized to train, equip, and operate within Niger. Mission authority, while absent from DoD doctrine, is established by law and present in every valid mission the DoD executes. Initially, the SF team did not have mission authority; however, its lack of authority was corrected at the right approval level, enabling it to execute its assigned missions. As the DoD's investigation indicates, the loss of life in Niger in October of 2017 was attributable to a number of factors that went against the SF team. The multi-day chain of events: initial errors in approval authority, receipt of mission authority, follow-on mission, travel and ambush—calls into question the assertion that mission approvals were a contributing factor that led to the ambush. Contending that the DoD did not have authority to train, equip, and operate in Niger simply neglects the U.S.'s long-standing strategic policy and the SF team's valid mission authority in Niger. **TAL**

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### Notes

1. Maegan Vazquez & Barbara Starr, *Kaine Says US Troops Killed in Niger were on Unauthorized Mission*, CNN.COM (May 9, 2018, 2:45 PM), <https://www.cnn.com/2018/05/09/politics/tim-kaine-niger-unauthorized-cnntv/index.html> (statement of Senator Tim Kaine).
2. U.S. DEP'T OF DEF., OCT 2017 NIGER AMBUSH SUMMARY OF INVESTIGATION (May 10, 2018), [https://dod.defense.gov/portals/1/features/2018/0418\\_niger/img/Oct-2017-Niger-Ambush-Summary-of-Investigation.pdf](https://dod.defense.gov/portals/1/features/2018/0418_niger/img/Oct-2017-Niger-Ambush-Summary-of-Investigation.pdf) (hereinafter DoD INVESTIGATION SUMMARY).
3. Special Forces are United States Army forces organized, trained, and equipped to conduct special operations with an emphasis on unconventional warfare capabilities. JOINT CHIEFS OF STAFF, DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Feb. 2019).
4. Zack Beauchamp, *Why Did 4 US Troops Die in Niger? Even the Military Doesn't Know*,

Vox (Oct. 23, 2017 6:15 PM), <https://www.vox.com/world/2017/10/23/16526884/niger-troops-trump-johnson-dunford>.

5. DoD INVESTIGATION SUMMARY, *supra* note 2, para. 3(e).

6. *Id.*

7. *Id.*

8. *Id.* para. 3(f).

9. *Id.* para. 3(g).

10. Rukmini Callimachi et al., *An Endless War: Why 4 U.S. Soldiers Died in a Remote African Desert*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/interactive/2018/02/17/world/africa/niger-ambush-american-soldiers.html> (discussing the validity of the Authorization for Use of Military Force (AUMF)). The AUMF authorizes the president to use “all necessary and appropriate force” against the nations, organizations or people that “he determines planned, authorized, committed, or aided” the terrorist attacks on September 11, 2001 “to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

11. This article does not address any issues related to the AUMF nor the inherent right of self-defense. Self-defense against an armed-attack is recognized as a right under international law. U.N. CHARTER art. 51.

12. 10 U.S.C. § 164(c) (2018). Since 1986, the authority of a combatant commander (CCDR) has included: giving authoritative direction to subordinate commands, prescribing the chain of command, organizing commands and forces, employing forces within that command to carry out missions. Goldwater-Nichols Dep’t of Def. Reorganization Act of 1986, 99 P.L. 433, 100 Stat. 992 (1986). The Goldwater-Nichols Act provides that the chain of command for operational missions runs from the President, through the Secretary of Defense (SECDEF), to the Combatant Commanders. See JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES II-2 (25 Mar. 2013) (C1, 12 July 2017) [hereinafter JP 1]. A CCDR’s command authority, as articulated in 10 U.S.C. § 164, cannot be delegated or transferred. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS III-3 (17 Jan. 2017) (C1, 22 Oct. 2018) [hereinafter JP 3-0].

13. See generally ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS (2013).

14. See, e.g., 10 U.S.C. § 3013 (2018) (providing the Secretary of the Army with authorities only necessary to carry out the affairs of the Army); see also JP 1, *supra* note 12. The president or SECDEF direct military operations through the CCDRs, not the service chiefs. *Id.* at II-9, III-8.

15. JP 1, *supra* note 12, at II-9, III-8. This command structure is in place to prevent the operational issues repeated throughout the early 1980s. “The 1980 Desert One tragedy and the 1983 loss of 237 Marines in Beirut, combined with the command and control problems experienced during Grenada in 1983 heightened apprehensions about DoD’s ability to manage the Services, including special operations forces who were ‘owned’ by their respective service.” FEICKERT, *supra* note 13, at 15.

16. See generally Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986) (realigning the DoD’s command structure, not its budget authority). See also U.S. ARMY WAR COLLEGE, HOW THE ARMY RUNS: A SENIOR LEADER REFERENCE HANDBOOK 9-2 (2018).

17. Funding authorities permit appropriations for specific programs and provide a program’s legislative purpose. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 19-21 (2017).

18. See, e.g., National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 113-66, § 301 (2018) (authorizing funds to be appropriated “for the use of the Armed Forces . . . for operation and maintenance[.]”)

19. These specific authorities enable the DoD to provide foreign assistance, which is typically a Department of State (DoS) mission. The DoS is the lead U.S. agency for foreign assistance. See Foreign Assistance Act of 1961 Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §2151 (2018)); see also Exec. Order No. 10,973, 26 C.F.R. § 639 (1961), which delegated the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the DoS.

20. 31 U.S.C. § 1301(a) (2018) (stating “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”).

21. For example, the Necessary Expense Doctrine does not ask whether an agency’s mission was properly approved to expend resources—it assumes the presence of mission authority. See U.S. GOV’T ACCOUNTABILITY OFFICE (GAO), GAO-17-797SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 16-17 (2017). The Necessary Expense Doctrine provides a three-step analysis that asks: does the expenditure bear a logical relationship to the appropriation, is the expenditure prohibited by law, and is the expenditure otherwise provided for in some other appropriation? *Id.* The GAO seems to acknowledge the limitations to the Necessary Expense Doctrine. *Id.* at 15 (stating “The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable.”).

22. 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., Aug. 2016 (discussing only a funding authority).

23. Previously, the DoD defined operational authority as “the authority exercised by a commander in the chain of command.” JP 1, *supra* note 12. However, the DoD removed the definition from its joint publications in 2012. Email from George E. Katsos, J7 DoD Terminologist to the author (2 October 2018, 09:00:00 EST) (on file with author). According to the Army, authority is the delegated power to judge, act, or command. U.S. DEP’T OF ARMY, ARMY DOCTRINE PUB. 6-0, MISSION COMMAND para. 25 (May 2012) (C2, 12 Mar. 2014) [hereinafter ADP 6-0]. However, doctrine does not connect authority in this sense to analyzing the expenditure.

24. Mission authority, in the context of this article, concerns missions specifically pertaining to the Constitutional or statutory authority of the President, SECDEF, or CCDRs.

25. JP 3-0, *supra* note 12, at III-3 – III-5 (“Normally, this authority is exercised through subordinate [Joint Force Commands] and Service and/or functional component commanders. [Command authority] provides full authority to organize and employ commands and forces as the CCDR considers necessary to accomplish assigned missions.”). Mission authority originates from the President or the SECDEF. *Infra* note 34.

26. JP 3-0, *supra* note 12, at III-3, para. (c)(1).

27. This definition is asserted solely by the author as neither law nor doctrine define “mission authority.” This definition is consistent with the basic understanding that military orders provide the authority to conduct a mission. Major Michael J. O’Connor, *A Judge Advocate’s Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5, 27.

28. Use of Mission Orders is one of the six principles of mission command. ADP 6-0, *supra* note 23, para. 7. Mission command enables the execution of military operations through orders. See JP 3-0, *supra* note 12, at II-2 – I-3.

29. Commanders use mission orders to assign tasks, allocate resources, and issue broad guidance. ADP 6-0, *supra* note 23, para. 19.

30. *Id.* (stating “[m]ission orders are directives that emphasize to subordinates the results to be attained, not how they are to achieve them.”). Additionally, “commanders have a responsibility to act *within* their higher commander’s intent to achieve the desired end state.” ADP 6-0, *supra* note 23, para. 2-32 (emphasis added).

31. See, e.g., HQ, U.S. SOUTHERN COMMAND, JOINT TASK FORCE LEEWARD ISLANDS EXECUTE ORDER 001 para. 3.C.1.D. (Sept. 13, 2017) (tasking the Joint Task Force Commander to coordinate with partner forces in the joint operations area). An operations order (OPORD) or fragmentary order (FRAGORD) is issued to specify the purpose of the support relationship, the effect desired, and the scope of the action to be taken. U.S. DEP’T OF ARMY, FIELD MANUAL 6-05, MULTI-SERVICE TACTICS para. 8.b. (4 Apr. 2018).

32. See JP 3-0, *supra* note 12, at I-14 (“The purpose of military action may be specified in a mission statement or implied from an order.”).

33. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 3-21.10, INFANTRY RIFLE COMPANY App. B-7 (14 May 2018) (stating the first step of the troop-leading procedures is Receive the Mission).

34. The President derives original mission authority as the Commander in Chief of the Armed Forces. U.S. CONST. art. II. The SECDEF derives original mission authority through 10 U.S.C. § 113. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING II-15 para. (d)(1) (16 June 2017) [hereinafter JP 5-0] (“An execute order (EXORD), or other authorizing directive, is issued by the CJCS at the direction of the President or SECDEF to initiate or conduct the military operations.”).

35. JP 5-0, *supra* note 34, at II-15 (“An execute order (EXORD), or other authorizing directive, is issued by the CJCS at the direction of the President or SECDEF to initiate or conduct the military operations.”).

36. *Id.* at xv.

37. *Id.* at V-10 (discussing specified, implied, and essential tasks).

38. Understanding a mission’s authorization allows commanders to determine a mission’s left and right limits. Operating near the boundaries (or within the

“gray areas”) of mission authority and managing that risk—with the advice of counsel—is the sole job of a commander.

39. See, e.g., Andrew Rudalevige, *When Did Congress Authorize Fighting in Niger? That's an Excellent Question*, WASH. POST (Nov. 11, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/11/when-did-congress-authorize-fighting-in-niger-thats-an-excellent-question/?noredirect=on&utm\\_term=.1f5f87b3c517](https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/11/when-did-congress-authorize-fighting-in-niger-thats-an-excellent-question/?noredirect=on&utm_term=.1f5f87b3c517); Jimmy Gurulé, *Deploying US Armed Forces in Niger is Unlawful*, CNN.COM (Oct. 24, 2017, 7:01 PM), <https://www.cnn.com/2017/10/24/opinions/deploying-us-armed-forces-in-niger-is-unlawful-opinion-gurul/index.html>.

40. Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, ARMY LAW. at 1, 1 (Aug. 2005) (noting that fiscal law constrains military operations).

41. U.S. CONST. art. I, § 9 (“No money shall be drawn from the Treasury, but in consequence of appropriations made by law.”).

42. 31 U.S.C. § 1301(a) (2018).

43. In the joint environment, this is referred to as the Joint Requirements Review Board (JRRB) and serves to coordinate, review, prioritize, and approve contract support requests. JOINT CHIEFS OF STAFF, JOINT PUB. 4-10, OPERATIONAL CONTRACT SUPPORT III-6 (4 Mar. 2014).

44. Telephone Interview with Colonel (Ret., USAF) James H. Dapper, Attorney-Advisor, U.S. Africa Command, (Sept. 7, 2018) (equating mission authority within an order with the statement of work within a contract).

45. See, e.g., MAJ Paul Robson et al., *Setting the Theater the Army Service Component Way: A Humanitarian Response to the Ebola Epidemic in Liberia*, ARMY LAW., Feb. 2017, at 18, 38 (stating mission orders to “be prepared to” did not convey actual operational authority to obligate funds).

46. 31 U.S.C. § 1301(a) (2018). Additionally, GAO decisions “consistently apply the principle that the use of appropriated funds for unauthorized purposes potentially violates the Antideficiency Act.” U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, vol. II, ch. 6, 6-83 (3d ed. 2006). However, it is unlikely that even an unauthorized mission, funded with operation and maintenance dollars (O&M) for benefit the U.S. or its forces, will result in an Antideficiency Act (ADA) violation. See Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, 2009 CPD ¶ 72, at 5 (stating that the ADA only covers deficiencies caused by excess spending and violations of statutory controls on funding).

47. The Necessary Expense Doctrine examines whether an expenditure is authorized and fits within a particular appropriation. A-17673, 6 Comp. Gen. 619, 621 (1927); Hon. Bill Alexander, 63 Comp. Gen. 422, App. A (1984).

48. See Hon. Bill Alexander, 63 Comp. Gen. 422, App. A at 4 (1984).

49. See *id.* (using the Necessary Expense Test to analyze Operation and Maintenance expenditures without addressing the DoD's mission authority in Honduras).

50. Senior fiscal law practitioners already incorporate a mission authority analysis into their legal advice. See Colonel Jose A. Cora, Staff Judge Advocate, U.S.

Army Central Command, *Fiscal Law*, at slide 2 (Jan. 23, 2018) (unpublished PowerPoint presentation) (on file with author) (stating that “[i]n order to execute ANY mission, you need 1) Mission Authority . . . and 2) Funding Authority . . . .”); see also, Email from Lieutenant Colonel (Ret., USAF) Sarah Scullion (Fiscal Law Attorney, U.S. Army Africa) to author (5 Sept. 2018, 03:26:00 EST) (on file with author) (noting that she requires operational orders for every mission funding request before she provides a legal review).

51. Although not central to the purpose of this article, the requirement to ensure the availability of proper funds is required by the Antideficiency Act and maintains a rightful place in the operational funding analysis. 31 U.S.C. §§ 1341-42, 1511-19 (2018).

52. Vazquez & Starr, *supra* note 1.

53. Krishnadev Calamur, *The Region Where ISIS, Al-Qaeda, and Boko Haram Converge*, THE ATLANTIC (Oct. 5, 2017), <https://www.theatlantic.com/international/archive/2017/10/us-niger-green-berets/542190/>.

54. DoD INVESTIGATION SUMMARY, *supra* note 2, para. 3(a); telephone interview with James H. Dapper, Attorney-Advisor, U.S. Africa Command, (Sept. 7, 2018).

55. Daniella Diaz, *Key Senators Say They Didn't Know the US Had Troops in Niger*, CNN.COM (Oct. 23, 2017, 12:00 PM), <https://www.cnn.com/2017/10/23/politics/niger-troops-lawmakers/index.html> (statement of Representative Charlie Dent).

56. See, e.g., Bradley Larschan, *The War Powers Resolution: Conflicting Constitutional Powers, The War Powers, and U.S. Foreign Policy*, 16 DENVER J. INT'L L. & POL. 33, 45 (1987) (arguing that the President becomes the final arbiter of the armed forces once Congress has raised an army and appropriated funds for engagements short of war); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 956-58 (2008) (describing President Polk's use of a Mexican War regiment that Congress raised for purposes specific to Oregon).



(Credit: istockphoto.com/-Antonio-)

## No. 2

# The Changing Face of Warfare

## The Army and Joint Force Need a Holistic Information Warfare Strategy

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*By Major Henry “Wayne” Janoe*

Information is altering the character of international conflict in an era of strategic competition, and the U.S. military will not successfully grapple with this changing landscape by happenstance. In the words of former Secretary of Defense James Mattis, the “advent of the internet, the expansion of information technology, the widespread availability of wireless communications, and the far-reaching impact of social media have dramatically impacted operations and changed the character of modern warfare.”<sup>1</sup>

As the cadre of National Security Law practitioners prepare to play a key role in operations in the information environment in the coming years, we hear repeatedly that America’s status as the foremost global military, economic, and diplomatic power is not guaranteed. According to the unclassified summary of the 2018 National Defense Strategy (NDS), we are “emerging from a period of strategic atrophy, aware that our competitive military advantage has been eroding.”<sup>2</sup> Examples abound of adversaries using technology and an understanding of the power of information to “diminish the physical overmatch of a broad range of U.S. lethal capabilities.”<sup>3</sup> The bad news is that our lack of a coherent, doctrinally supported concept of Information Warfare (IW) leaves us ill-equipped to dominate in this evolving security environment. The good news is that the Joint Staff and elements within the Services have taken the first steps to lay a foundation

for operations in the information environment. We must build on that progress.

Inter-state strategic competition with nations, rather than terrorism, is now the primary concern in U.S. national security.<sup>4</sup> This long-term strategic competition, principally with Russia and China, must take into account that competitors and adversaries seek to “optimize their targeting of our battle networks and operational concepts, while also using other areas of competition short of open warfare to achieve their ends (e.g., information warfare, ambiguous or denied proxy operations, and subversion).”<sup>5</sup> Winning in long-term strategic competition requires seamless integration of multiple elements of national power, including diplomacy, information, economics, finance, intelligence, law enforcement, and military.<sup>6</sup>

The 2018 Joint Concept for Integrated Campaigning (JCIC) provides a framework for an expanded view of the operating environment by proposing a notion of a competition continuum that replaces the obsolete peace/war binary with a new model of cooperation, competition below armed conflict, and conflict.<sup>7</sup> With a focus on better alignment of military and non-military activities, the JCIC acknowledges that “war and international competition remain a clash of wills in which each actor attempts to impose its will, an endeavor that is inherently human, political,

and uncertain.”<sup>8</sup> This integration requires a rational information strategy at the national level, and the Department of Defense (DoD) and Army must bring more than leftovers to the interagency table in the form of a thoughtful IW strategy.

### The Threat

Our competitors have determined that dominating the information environment requires a whole-of-society approach. The Russian concept of IW “describes preemptive operations to achieve political goals and to control the information space, deploying all elements of Society to include patriotic hacker groups and private citizens.”<sup>9</sup> Russia describes its activities in doctrine as IW. One Russian strategy document defines IW as “a conflict between two or more states in the information space with the goal of inflicting damage to information systems as well as carrying out mass psychological campaigns against the population of a State in order to destabilize society and the government; as well as forcing a State to make decisions in the interests of their opponents.”<sup>10</sup> Russia’s IW goals include achieving political aims without the use of military force and shaping a favorable international response in its military actions and those of its allies and proxies.<sup>11</sup> As many have noted, “Russia seized Crimea without firing a shot due in part to a successful information campaign.”<sup>12</sup> Information warfare tactics include breaches and exfiltration of useful data, release of manipulated and/or sensitive information to influence electoral systems, and the use of cyber tools and information to create psychological effects within foreign populations.<sup>13</sup> Admiral Michael Rogers, then Commander of U.S. Cyber Command and Director of the National Security Agency, testified before the Senate Committee on Armed Forces on 27 February 2018 that Russia’s leaders see few consequences for their efforts to undermine U.S. institutions.<sup>14</sup> Some experts argue that the success of previous operations and the relatively modest consequences will contribute to continued operations in this space.<sup>15</sup>

The Chinese strategy of IW seeks to methodically build and maintain information superiority. The concept of “Unrestricted Warfare” combines “information operations, cyberspace operations, irregular warfare,

lawfare, and foreign relations, carried out in peacetime as well as in conflict.”<sup>16</sup> Lawfare has been described as “a form of asymmetric warfare consisting of the use of the legal system against a foe, by damaging and delegitimizing them, or winning a public relations victory.”<sup>17</sup> Chinese efforts include cyberspace-enabled reconnaissance and espionage to conduct network intrusions to steal military and industrial data in order to gain a competitive edge. Defensively, the Chinese use internal censorship and surveillance to form the “Great Firewall of China” to block its adversaries from IW effects against its domestic population and to ensure Communist Party control.<sup>18</sup> China has also used financial incentives and other means to pressure foreign academic institutions and think tanks, including in the U.S., to portray it in a positive light, and has been “propagating an image of itself as a peaceful, nonthreatening nation focused on international development rather than the pursuit of international power.”<sup>19</sup>

Our principal adversaries are adept at leveraging the informational element of national power, in part, because they continuously use the power of information against their own domestic populations. It isn’t much of a stretch for these adversaries to apply those well-honed skills to foreign populations, including the American populace. Beyond our near-peer competitors, there are examples of coordinated IW strategies by North Korea, Iran, and violent extremist organizations such as the Islamic State, and the success of previous efforts leaves no reason to expect an abatement of this threat in the future.

While the U.S. investment in weapons modernization and cyber-related capabilities is laudable, an imbalanced focus on technical solutions misses the larger picture. We may be very proud of our status as the reigning world champions in a very expensive game of checkers while our adversaries are seizing the opportunity to master their skills at chess. As the best resourced military in the world, one could argue the U.S. military has grown complacent in its largesse. While the U.S. has been content to rely on its overwhelming conventional military overmatch, our adversaries’ relative indigence has necessitated innovation, improvisation, and the savvy

use of information to dilute our conventional advantage. In order for the U.S. to preserve its security and produce enduring strategic outcomes, it must develop a comprehensive, multi-domain strategy distinct from the ineffective strategies of the Iraq and Afghanistan conflicts. In addition to modernization efforts focused on materiel solutions, an established and accepted IW strategy should be considered a vital weapon system in a modern U.S. arsenal.

### A Foundation to Build Upon

While we currently lack an official definition of IW in U.S. government policy and DoD doctrine, and there have been months of debate about such a definition and whether the term should be used at all, it is generally understood as “the use and management of information to pursue a competitive advantage, including offensive and defensive efforts.”<sup>20</sup> Despite the lack of a firm definition, the DoD has been slowly waking up to the need for vision and action in this area. If the first step to recovery is recognizing that we have a problem, select leaders within the DoD are working to lead us down the right path.

The 2016 DoD Strategy for Operations in the Information Environment (SOIE)—developed, in part, as a response to the requirement for an information operations strategy in the National Defense Authorization Act for Fiscal Year 2014—seeks to align DoD actions and ensure effective integration of DoD efforts in a dynamic information environment.<sup>21</sup> In 2017, the Chairman of the Joint Chiefs of Staff, recognizing the increasing impact activities in the information environment, felt the role of information was so critical that he issued an out-of-cycle change to Joint Publication (JP) 1, *Doctrine of the Armed Forces*, introducing “information” as the seventh joint function.<sup>22</sup> The most recent National Security Strategy recognizes that America’s competitors “weaponize information to attack the values and institutions that underpin free societies, while shielding themselves from outside information.”<sup>23</sup> The 2018 National Defense Strategy recognizes the imperative to maintain information superiority in the face of adversary capabilities.<sup>24</sup> Finally, the 2018 Joint Concept for Operations in the Information

Environment (JCOIE) provides a crucial roadmap for the Joint Force to “develop the necessary mindset—individually, as a whole, and as part of the interagency—to leverage information and the inherent informational aspects of military activities to gain and maintain an information advantage.”<sup>25</sup>

Adding information as a seventh joint function, alongside command and control, intelligence, fires, movement and maneuver, protection, and sustainment, is no small step. As Secretary Mattis stated in his memorandum endorsing the change, it “signals a fundamental appreciation for the military role of information at the strategic, operational and tactical levels within today’s complex operating environment.”<sup>26</sup> The information function encompasses the management and application of information and its deliberate integration with other joint functions to influence relevant-actor perceptions, behavior, action or inaction, and support human and automated decision making.<sup>27</sup> It helps commanders and staffs to leverage the pervasive nature of information, its military uses, and its application during all military operations.<sup>28</sup>

The JCOIE is a pivotal document in the progression of this effort. It describes how the Joint Force will “build information into operational art to design operations that deliberately leverage information and informational aspects of military activities to achieve enduring strategic outcomes.”<sup>29</sup> It seeks to institutionalize and operationalize the Joint Force’s approach to competition in the information environment, which requires an understanding of information, the informational aspects of military activities, and informational power.<sup>30</sup> It describes a security environment of contested norms and persistent disorder, and it recognizes that the Joint Force must “shift how it thinks about information from an afterthought and the sole purview of information professionals to a foundational consideration for all military activities.”<sup>31</sup> Instead of relying primarily on physical power as a form of destructive and disruptive force, the JCOIE advocates normalizing the “integration of physical and informational power to capitalize on the constructive and informational aspects of military power.”<sup>32</sup> Because perceptions and attitudes shape behavior, the Joint Force must treat them as “key terrain.”

The JCOIE describes a failure on the part of the Joint Force to integrate the full range of capabilities to maintain freedom of action in and through the information environment.<sup>33</sup> While adversaries have been more agile in changing their approach, the Joint Force has been “hampered by its policies, conventions, cultural mindsets, and approaches to information, [and] has built barriers fostering a disconnected approach to conducting activities in and through a pervasive [information environment].”<sup>34</sup>

It also describes a Joint Force that has lacked emphasis, policy, resources, training, and education to address the full power of information. Some of the contributing factors to this failure include 1) lack of effective inter-organizational coordination; 2) ineffective organization of information capabilities; 3) ambiguity of doctrine and terminology; 4) limited ability to understand narratives; 5) insufficient authorities at the appropriate level; and 6) the reluctance to acknowledge that physical capabilities create informational effects. By contrast, through our adversaries’ bolder and less risk-averse approach they have created political, social, and military advantages that exceed their traditional military power.<sup>35</sup> While not a specific focus of the JCOIE, the lack of certain statutory authorities should be taken into account. Development of a compelling IW strategy that addresses distinctive U.S. constitutional and moral limitations would assist the DoD in making a case to Congress and the American people that winning in a changing environment will require new approaches to warfare. It will also inform a whole-of-government approach that respects our national values while addressing growing threats to our national security.

### **The Next Steps**

Maintaining U.S. superiority amidst the changing nature of modern conflict requires a strong foundation in updated Joint Doctrine, which constitutes the “fundamental principles that guide the employment of United States military forces in coordinated action toward a common objective . . . .”<sup>36</sup> Fortunately, the Joint Staff is building on the momentum of recent years to further develop a doctrinal underpinning for information as a joint

function. Currently under development, Joint Publication “3-XX” will further establish and illuminate the role of information in joint operations.<sup>37</sup> It is expected to provide an approved construct and doctrinal paradigm for information as a joint function and to reconcile what some have deemed “stray terms” such as “Information Warfare” and “Informational power.”

The Army and broader DoD community must embrace this critical next step and undertake the hard work of updating the doctrine of each Service and ensuring appropriate changes in organizational structure to meet the evolving needs of the Joint Force. The Army must embrace the necessary changes to ensure that the forward-thinking efforts of the Joint Staff are not squandered, as doctrine is of little utility if the Army and other Services are not postured to man, train, and equip the Joint Force in this changing security environment. A holistic and effective approach to IW will cross all functional areas, with a likely emphasis on Cyberspace Operations, Information Operations (including Military Deception (MILDEC) and Military Information Support Operations (MISO)), Electronic Warfare, Public Affairs Operations, and Civil Affairs. In addition, the informational power of kinetic effects should be acknowledged and incorporated more fully into military planning. The Joint Force and Services, including the Army, often treat these functional areas as separately operated, compartmentalized capabilities with distinct doctrine and training pipelines. Instead they should be “inseparable with regard to achieving desired, coordinated effects.”<sup>38</sup>

The emerging Army doctrine of Multi-Domain Operations (MDO), if enhanced and implemented boldly, presents a key opportunity to accomplish these goals. *The U.S. Army in Multi-Domain Operations 2028*, released as Training and Doctrine Command (TRADOC) Pamphlet 525-3-1 on 6 December 2018, represents a sweeping new approach to Army operations. It updates the Multi-Domain Battle concept, and a key addition is a description of how Army forces fight across all domains, the electromagnetic spectrum (EMS), and the information environment.<sup>39</sup> It defines MDO as “operations conducted across

multiple domains and contested spaces to overcome an adversary's (or enemy's) strengths by presenting them with several operational and/or tactical dilemmas through the combined application of calibrated force posture; employment of multi-domain formations; and convergence of capabilities across all domains, environments, and functions in time and space to achieve operational and tactical objectives.<sup>40</sup> Convergence, in this context, is "rapid and continuous integration of capabilities in all domains, the EMS, and information environment that optimizes effects to overmatch the enemy through cross-domain synergy and multiple forms of attack all enabled by mission command and disciplined initiative."<sup>41</sup>

The *MDO 2028* is clear-eyed in its appraisal of both the threat of near-peer adversaries leveraging the power of information and in the urgent need for evolution in the American way of war. While it limits its application of the term "Information Warfare" to adversary activities, it introduces the supporting idea of "Information Environment Operations (IEO)," which it defines as the "integrated employment of [IRC] in concert with other lines of operation to influence, deceive, disrupt, corrupt, or usurp the decision making of enemies and adversaries while protecting our own; to influence enemy formations and populations to reduce their will to fight; and influence friendly and neutral populations to enable friendly operations."<sup>42</sup> General Milley, in his foreword to the *MDO 2028*, describes the document as one step in a doctrinal evolution that will be updated after feedback from the force and lessons-learned from wargames and exercises.<sup>43</sup>

One relatively straight-forward enhancement to the MDO concept would be to specifically reference and incorporate the roadmap provided by the JCOIE, which it currently fails to do, to ensure that the failures identified by the Joint Staff are taken into account. Stakeholders from across the Army and Joint Force should work together to ensure that appropriate terms and definitions are reconciled and that IW (or IEO, should that be settled upon as the final term) is more thoroughly developed and occupies an even more central role in the concept. This effort also requires a sense

of urgency outside TRADOC that would facilitate changes in force structure and resourcing decisions far earlier than 2028. Army Cyber Command (ARCYBER), for instance, is given the responsibility in Army Regulation 10-87, *Army Commands, Army Service Component Commands, and Direct Reporting Units*, to coordinate, synchronize, direct, and conduct "integrated [cyberspace operations], information operations (IO), and electronic warfare (EW) to ensure freedom of action in and through cyberspace and the information environment and to deny the same to our adversaries."<sup>44</sup> Finally, it requires leaders at all levels who are empowered to experiment, assume risk, fail early, and adapt.

### The Role of Judge Advocates

The Army JAG Corps, for its part, is uniquely postured to help meet the challenges of this transformation with the recent establishment of a National Security Law functional area that more adequately captures the breadth of what will be expected of judge advocates in the coming years. This recognition of the need for versatility and a broader view of the complex security environment is exactly the type of thinking that will allow judge advocates to support commanders as they begin to implement innovative and potentially novel capabilities into operations. In addition to operations in a deployed environment, judge advocates will be expected to advise on transregional, multi-domain operations that will often fall below the traditional threshold of the use of force.<sup>45</sup> As recognized in the enclosure to TJAG and DJAG Special Announcement 40-04, the "current operational environment stretches from peacetime garrison activities to kinetic operations and encompasses everything in between."<sup>46</sup>

Advising commanders in the coming years will require versatile expertise in areas including constitutional law, international law, the law of armed conflict (and hostilities below the threshold of armed conflict), cyberspace operations, IO, and a grasp of nuances in policy and evolving command responsibilities. As commanders require further integration of information into planning efforts at every level, judge advocates will be natural assets as

trained communicators who understand the importance of language and narrative. Judge advocates will be expected to think and write to ensure that U.S. interests are represented in the face of our adversaries' deliberate lawfare campaigns.

Information warfare and the military's role in influence operations is fraught with complicated legal issues, and judge advocates will be expected to help commanders find an appropriate balance in an increasingly connected age. Judge advocates understand that we must not only win the contest of wills with adversaries, but we must also abide by constitutional and policy limitations and maintain the trust and confidence of the American people and allied populations.

Forward-looking elements within the Joint Staff and Services have recognized the changing face of warfare and have begun to lay a promising groundwork for a comprehensive approach to IW. Leaders and thinkers within the Army and broader DoD community must seize this momentum to fully integrate the power of information into every level of military operations, and the JAG Corps in particular is well-positioned to build on its more robust approach to the practice of National Security Law to contribute to this effort. We have urgent work to do to catch up with and maintain overmatch against our adversaries in the information environment, and with the appropriate attention and innovation there is little doubt that the Army and Joint Force will rise to the challenges of modern conflict. **TAL**

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### Notes

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16. *Id.* at 11.
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23. PRESIDENT OF THE U.S., NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 34 (2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf>.
24. 2018 NDS SUMMARY, *supra* note 2, at 6.
25. JCOIE, *supra* note 3, at iii. Note that when the JCOIE uses "Joint Force," it is referring "to a formal combination of the Joint Staff, Combatants Commands, subordinate joint forces, and supporting joint organizations." *Id.* at vii n. 1. This article uses the term "Joint Force" in the same manner.
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27. JP 1 at I-19.
28. *Id.*
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U.S. Army UH-60 Black Hawk helicopters prepare to pick up and transport Soldiers for an air assault mission near Samarra, Iraq (U.S. Air Force photo by Tech. Sgt. Molly Dzitko).

## No. 3

# Fostering Enduring Partnerships

## An Overview of Security Cooperation Offices Through the Lens of Iraq

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*By Captain Harry Parent, Captain Reed Lorch, Major Deidre Baker, Lieutenant Colonel Timothy Litka, Colonel Luisa Santiago, Colonel Anthony Adolph, and Colonel William Smoot*

*... in pursuing a foreign policy based on American interests, we will embrace diplomacy. The world must know that we do not go abroad in search of enemies, that we are always happy when old enemies become friends, and when old friends become allies.<sup>1</sup>*

Security cooperation (SC) is clearly a topic of current interest to Congress and the Defense community. In recent years, several changes to the regulatory and statutory guidance have taken place that include the publication of a RAND Report reviewing Title 10 authorities for security cooperation in 2016,<sup>2</sup> issuance of revisions to at least seven key joint references in 2017,<sup>3</sup> the publication of a Government Accountability Office (GAO) Report on Building Partner Capacity in March 2017,<sup>4</sup> the designation of a new chapter under Title 10—Chapter 16 Security Cooperation—and the push to professionalize and develop the security cooperation workforce under the newly formed Department of Defense Security Cooperation Workforce Development Program (SCWD) within the Fiscal Year (FY) 2017 National Defense Authorization Act (NDAA).<sup>5</sup>

Provided through the lens of the largest current Security Cooperation Office (SCO)—the Office of Security Cooperation – Iraq (OSC-I)—this article is meant to serve as a primer for judge

advocates facing assignment to an SCO, as well as judge advocates who may have an SCO in their geographic area.

### **What Is Security Assistance, What Is Security Cooperation, and Who Does What?**

While the term “security assistance” (SA) has been in frequent use in the Department of Defense (DoD) since at least 1971,<sup>6</sup> the term “security cooperation” was first introduced by the Defense Reform Initiative in 1997.<sup>7</sup> The Defense Reform Initiative led to the Defense Security Assistance Agency (DSAA) being renamed the Defense Security Cooperation Agency (DSCA), effective 1 October 1998,<sup>8</sup> to reflect the enlarged mission and additional international programs DSCA would go on to administer. These programs are carried out by SCOs and DoD Regional Centers for Security Studies.<sup>9</sup> Explanation and definitions of SA and SC are provided herein, followed by more information on SCOs and DoD Centers for Security Studies.

### **Security Assistance**

Security assistance primarily encompasses foreign military financing and sales, military education and training, peacekeeping, and counter-narcotics efforts.<sup>10</sup> Department of Defense Directive (DoDD) 5132.03, reissued on 29 December 2016, defines SA in conformity with the underlying U.S. Code provision, and specifies that SA is one element within the broader category of SC:

Security Assistance. Group of programs authorized by the Foreign Assistance Act [(FAA)] of 1961 and the Arms Export Control Act [(AECA)] of 1976 or other related statutes by which the United States provides defense articles, military training, and other defense-related services by grant, loan, credit, or cash sales in furtherance of national policies and objectives. Security assistance is one element of security cooperation, which is funded and authorized by the Department of State and administered by the DSCA.

This definition received additional minor modifications in the 23 May 2017, Joint Publication 3-20, *Security Cooperation*.<sup>11</sup> The only substantive modifications were adding “lease” to the methods of providing defense articles, changing that assistance is authorized “through” Department of State rather than “by” Department of State, and adding DoD as administering in conjunction with DSCA.<sup>12</sup> The most substantive update contained within both DoDD 5132.03 and Joint Publication 3-20 is the recognition that security assistance is one element of security cooperation.

### **Security Cooperation**

While this term was the product of the 1997 Defense Reform Initiative,<sup>13</sup> and entered the DoD lexicon with the renaming of DSAA to DSCA in October 1998,<sup>14</sup> security cooperation remained ill-defined until 9 June 2004, when it was first formally defined within Joint Publication 1-02:

All DoD interactions with foreign defense establishments to build defense relationships that promote specific U.S. security interests, develop allied

and friendly military capabilities for self-defense and multinational operations, and provide U.S. forces with peacetime and contingency access to a host nation.<sup>15</sup>

That broad definition has continued to take shape, with 10 U.S.C. Ch. 16 § 301 currently defining security cooperation programs and activities of the DoD as meaning any program, activity (including an exercise), or interaction of the DoD with the security establishment of a foreign country to achieve a purpose as follows: build and develop allied and friendly security capabilities for self-defense and multinational operations; to provide the armed forces with access to the foreign country during peacetime or a contingency operation; to build relationships that promote specific U.S. security interests.<sup>16</sup>

Department of Defense Directive 5132.03, reissued on 29 December 2016, includes a definition of SC in conformity with the underlying U.S. Code provision, and, like the current definition for SA, specifies that SA is included within SC:

Security Cooperation. All DoD interactions with foreign defense establishments to build defense relationships that promote specific U.S. security interests, develop allied and partner nation military and security capabilities for self-defense and multinational operations, and provide U.S. forces with peacetime and contingency access to allied and partner nations. This also includes DoD-administered security assistance programs.

This definition received an additional minor modification in the 23 May 2017, Joint Publication 3-20, *Security Cooperation*, replacing the word “defense” relationships with “security” relationships.

### **Defense Security Assistance Agency, Security Cooperation Offices, and Regional Centers for Security Studies**

The DSCA’s mission is to lead the Security Cooperation Community (SCC) in developing and executing innovative security cooperation solutions that support mutual

U.S. and partner interests.<sup>17</sup> This mission is executed through SCOs, which bring together DoD security cooperation and DoS security assistance efforts, as well as DoD Regional Centers for Security Studies which act as venues for international discussion and course work teaching security cooperation. While DSCA falls under the DoD and is thus a Title 10 entity, it draws its authorities to establish and operate SCOs from Title 22 under the DoS, a structure which indicates Congress’s desire that DoD and DoS synchronize security cooperation efforts.

Security Cooperation Offices are authorized by section 515 of the Foreign Assistance Act of 1961.<sup>18</sup> Through that provision, Congress authorized the President to assign members of the Armed Forces of the United States to a foreign country to carry out the President’s duties under the FAA and AECA to perform one or more of seven enumerated functions: (1) equipment and services case management; (2) training management; (3) program monitoring; (4) evaluation and planning of the host government’s military capabilities and requirements; (5) administrative support; (6) promoting rationalization, standardization, interoperability, and other defense cooperation measures; and (7) liaison functions exclusive of advisory and training assistance.

Notably, advisory and training assistance is limited under 22 U.S.C. § 2321i(b):

Advisory and training assistance conducted by military personnel assigned under this section shall be kept to an absolute minimum. It is the sense of the Congress that advising and training assistance in countries to which military personnel are assigned under this section shall be provided primarily by other personnel who are not assigned under this section and who are detailed for limited periods to perform specific tasks.

Security Cooperation Organization is defined in DoDI 5132.13 as:

All DoD elements located in a foreign country with assigned responsibilities for carrying out security cooperation/

assistance management functions. It includes military assistance advisory groups, military missions and groups, offices of defense and military cooperation, liaison groups, and defense attaché personnel designated to perform security cooperation/assistance functions.<sup>19</sup>

Security Cooperation Offices go by different names, with different mission sets, in different countries. Examples, in addition to the Office of Security Cooperation – Iraq, are the United States Military Training Mission (USMTM) in Saudi Arabia,<sup>20</sup> the Office of Military Cooperation – Egypt;<sup>21</sup> Office of Defense Cooperation – India;<sup>22</sup> and Office of Defense Representative – Pakistan.<sup>23</sup> While each of these organizations carries a different name, they all perform an SA mission involving Foreign Military Sales and International Military Education and Training, and all play a role in security cooperation efforts such as training exercises.

The Director of the DSCA, in coordination with the Combatant Commanders (CCDRs) and the Chairman of the Joint Chiefs of Staff, has approval authority for establishing SCOs and for making staffing changes.<sup>24</sup> Security Cooperation Offices operate in foreign countries under the authority of the Chief of Mission (CoM).<sup>25</sup> The CoM, under the direction of the President, has full responsibility for the direction, coordination, and supervision of all U.S. Government executive branch employees in that country; shall ensure all such employees comply fully with all applicable directives of the CoM; and shall keep fully and currently informed with respect to all activities and operations of the U.S. Government within that country.

Any executive branch agency with employees in the country has a reciprocal duty to keep the CoM informed.<sup>26</sup> An exception is employees under the command of a U.S. area military commander.<sup>27</sup> However, as discussed below, CoMs exercise considerable authority over SCO personnel, to include Title 10 DoD employees. Chiefs of Mission also have, as a principal duty, the promotion of U.S. goods and services for export to such country.<sup>28</sup> Given this statutory framework, the Title 10 DoD security

cooperation and Title 22 DoS security assistance missions are clearly linked, and a key role of DSCA, through SCOs, is to help ensure a synchronicity of effort between DoS and DoD on security assistance and cooperation efforts.

During President Barack Obama's Administration, directives used to promulgate presidential decisions on national security matters were designated as presidential policy directives (PPDs).<sup>29</sup> Presidential Policy Directive 23, Security Sector Assistance, dated 5 April 2013, articulated policy guidelines for U.S. SSA. That document included, among others, the following policy guideline for U.S. Security Sector Assistance (SSA):

Build sustainable capacity through comprehensive sector strategies. Partner capacity can only be sustained over the long-term when partner governments have the political will, absorptive capacity, credible and effective institutions, willingness to independently sustain U.S. investments, an equal stake in the success of security sector initiatives, and policy commitment to security sector reform. United States Government efforts must be sensitive to these requirements, including anticipation of partner capacity, sustainment and oversight needs, coordination with partner governments across the breadth of security sector assistance activities, and pursuit of security sector reform as part of a broader, long term effort to improve governance and promote sustainable economic development.<sup>30</sup>

This policy guideline effectively summarizes the key goals of an SCO—assisting partner nations in identifying and resourcing requirements to develop and build capacity in a sustainable manner, as well as utilizing security assistance as an element of security cooperation to help develop or reform the security sectors of partner nations.

### ***Building Partner Capacity, Defense Institution Building, Security Sector Assistance, Security Sector Reform***

Frequently heard doctrinal “buzz words” in an SCO include “building partner capacity” (BPC), “defense institution building” (DIB), “security sector assistance,” and “security sector reform” (SSR). Joint Publication 3-20 provides important doctrinal distinctions between these terms.

In setting forth security cooperation related activities and objectives, Joint Publication 3-20 states “SC can be conducted across the range of military operations and during all phases of an operation or campaign. Department of Defense policy supports SC activities that enable building security relationships, building partner capacity, and gaining/maintaining access.” It goes on to describe the roles of foreign assistance; SA; SSR; DIB, and security force assistance as SC-related activities and objectives.<sup>31</sup>

Judge advocates serving on SCO staff may provide valuable insight by reminding other staff members of the doctrinal definitions and checking for consistency in use of terminology across staff products undergoing legal review.

Building Partner Capacity involves developing specific partner nation capabilities and capacity for security and defense, addressing the partner's internal security and their participation or coordination in operations with U.S. Armed Forces or multinational operations.<sup>32</sup> Importantly, Joint Publication 3-20 notes: “Partner capacity can be described as an extant yet limited capability (e.g., forces, skills, or functions) within a PN's security or civil sector that can be improved and employed on a national level.”<sup>33</sup> The Security Assistance Management Manual states BPC programs “encompass security cooperation and security assistance activities funded with U.S. Government (USG) appropriations and administered as cases within the Foreign Military Sales (FMS) infrastructure.”<sup>34</sup>

At an action officer level, judge advocates may hear “building partner capacity” used interchangeably with “defense institution building;” however, the two terms have distinct definitions, with DIB defined as:

...security cooperation activities that empower partner nation defense institutions to establish or re-orient their policies and structures to make their defense sector more transparent, accountable, effective, affordable, and responsible to civilian control. DIB improves defense governance, increases the sustainability of other DOD security cooperation programs, and is carried out in cooperation with partner nations pursuant to appropriate and available legal authority. It is typically conducted at the ministerial, general, joint staff, military service headquarters, and related defense agency level, and when appropriate, with other supporting defense entities.<sup>35</sup>

One way to think of the distinction between these two SC components is to consider how building partner capacity, from a “bottom-up” approach, may help to form the forces, skills, or functions required to support defense institutions; while defense institution building, from a “top-down” approach, may provide the policies and structures to employ building partner capacity efforts effectively, affordably, and accountably. This is not necessarily a conundrum of which came first, the chicken or the egg; rather, it highlights that both of these SC components can be implemented simultaneously and in coordination to achieve two separate but related objectives.

Security Sector Reform improves or develops institutions, processes, and forces to provide security under the rule of law, often involving military, police, intelligence services, and border guards to secure points of entry and improve the way the country provides safety, security, and justice.<sup>36</sup> Joint Publication 3-20 cautions against confusing SSR with SSA and DIB.<sup>37</sup> Security Sector Assistance refers to the “overarching USG policy, processes, programs, and activities that integrate and synchronize DOS and DOD strategies, planning, programming, and budgeting for foreign assistance involving the security sectors” of partner nations.<sup>38</sup> Development, restructuring, or reform of defense institutions at the ministry/department or joint/Service military headquarters level is more specifically

characterized as DIB, and may or may not be part of a larger SSR effort.<sup>39</sup>

### **Regional Centers for Security Studies**

The Department of Defense has established five Regional Centers for Security Studies. Section 342 of Title 10 of the U.S. Code authorizes the regional centers “as international venues for bilateral and multilateral research, communication, exchange of ideas, and training involving military and civilian participants.”<sup>40</sup> The five centers include the George C. Marshall European Center for Security Studies, located in Garmisch-Partenkirchen, Germany; the Daniel K. Inouye Asia-Pacific Center for Security Studies, located in Honolulu, Hawaii; and three located in Washington D.C.: the William J. Perry Center for Hemispheric Defense Studies, the Africa Center for Strategic Studies, and the Near East South Asia Center for Strategic Studies.<sup>41</sup>

The judge advocate for an SCO needs to know and understand the Regional Centers for Security Studies. Regional centers host educational opportunities for partner nation attorneys and members of their government. International military training, discussed later in this article is the mechanism for how this is accomplished. Regional centers may also provide subject matter experts if you are tasked to research and learn more about a specific country in order to speak with or provide talking points to a senior leader. Finally, the George C. Marshall Center is co-located with the Partnership for Peace Consortium (PfPC). The PfPC can make an assessment of a partner nation’s defense institutions educational capacity. The PfPC accomplishes this assessment and training through their Defense Education Enhancement Program (DEEP). The DEEP addresses the professional defense education component of DIB and will support the Security Sector Reform Group (SSRG)’s line of effort by supporting faculty development (how to teach) and curriculum development (what to teach).

### **Authorities and Funding**

Security Cooperation Offices derive their authorities and funding from a variety of sources, but predominately through appropriations under Title 10, Title 22,

and release of funds held in the Security Assistance Administrative Trust Fund, which is a depository account held by Defense Finance and Accounting Service for administrative fees paid by host nations on foreign military sales cases.

The complexity of SCO authorities and funding can be highlighted by a comparison of three recent reports: RAND’s February 2016 *From Patchwork to Framework: A Review of Title 10 Authorities for Security Cooperation*,<sup>42</sup> Congressional Research Service (CRS)’s August 2016 *DoD Security Cooperation: An Overview of Authorities and Issues*,<sup>43</sup> and GAO’s March 2017 *Building Partner Capacity: Inventory of Department of Defense Security Cooperation and Department of State’s Security Assistance Efforts*.<sup>44</sup>

The RAND report catalogs 123 Title 10 authorities relating to SC, which it notes are in addition to statutes in Title 22 and other legislation, as well as programs that arise out of appropriations rather than authorizations, with a resulting conclusion that delivery of security cooperation is increasingly difficult for the DoD personnel who develop, plan, and execute initiatives with foreign partners.<sup>45</sup>

The CRS report estimates there are “more than 80 separate authorities to assist and engage with foreign governments, militaries, security forces, and populations...”<sup>46</sup> It goes on to state that other organizations have adopted different counting methodologies, resulting in a larger number of authorities, noting a different, earlier RAND report from 2013, titled *Review of Security Cooperation Mechanisms Combatant Commands Utilize to Build Partner Capacity*,<sup>47</sup> which listed 184 separate authorities, including authorities under Titles 6, 22, 32, 42, 50, public laws, and executive orders.<sup>48</sup>

The GAO, in its report, identified 194 DoD SC and DoS SA efforts that may be used to build partner capacity to address security-related threats.<sup>49</sup> Of those, eighty-seven are DoD efforts requiring some level of DoS involvement, and thirty are DoS efforts requiring some level of DoD involvement.<sup>50</sup>

Upon review of the draft report, the Office of the Assistant Secretary of Defense (OASD) responded that the GAO’s study methodology was flawed. Reasons included that a number of listed efforts are not



used to build partner capacity, such as the Afghanistan-Pakistan Hands program, Bi-Lateral Meetings, and Counterpart Visits of Senior Foreign Officials.<sup>51</sup> Additionally, OASD noted that the report's conflation of terms such as "programs," "activities," and "authorities" leads to an overall inventory that is misleading and repetitive. For example, "Global Train and Equip" authority under 10 U.S.C. § 2282 is cited only once, while "Multilateral, bilateral, or regional cooperation programs: payment of personnel expenses" authority under 10 U.S.C. § 1051 is described as an "activity" and cited at least twenty-three times.<sup>52</sup> Moreover, the report did not include updates for the FY2017 NDAA, which included modification or repeal of at least twenty-one authorities.<sup>53</sup> The letter stated that the 2016 RAND report may serve as a more accurate reference for DoD SC authorities.<sup>54</sup>

The 2016 RAND report includes an appendix listing authorities, categorized as activity-based, mission-based, or

partner-based, and further breaking each of those categories out into subgroups. It also lists twenty-seven SC programs introduced through appropriations legislation or other means.<sup>55</sup>

The activity-based authority subgroups are: military-to-military engagements; exercises; individual education/technical training; unit train and equip; equipment and logistics support; research, development, test, and evaluation (RDT&E); intelligence sharing and exchange.<sup>56</sup>

The mission-based subgroups are: humanitarian assistance/health; defense institution building; counter-narcotics; cooperative threat reduction and nonproliferation; counterterrorism; cooperative ballistic missile defense; maritime security; and cybersecurity.<sup>57</sup>

The partner-based authorities are not subgrouped, but include authorities for Afghanistan, Burma, Iraq, Israel, Jordan, Pakistan, Syria, Uganda, and Ukraine, as well as regional authorities encompassing Africa, Europe, the Independent States of

the Former Soviet Union, the Indo-Asia-Pacific Region, and the Levant.<sup>58</sup>

Three clear takeaways that can be consistently drawn from a review of these reports are: (1) SC encompasses a vast number of authorities and appropriations which may be onerous to navigate at the SCO level; (2) Given the number and broad range of authorities, it is likely that whatever SC-related activity an SCO is interested in performing it is covered by an authority with a corresponding appropriation; the challenge is identifying it early enough in the planning cycle to allow time to confirm fund availability; (3) Close coordination with the GCC, DSCA, and DoS will likely be necessary to ensure funds are available to the SCO to conduct the desired security cooperation activity.

For a judge advocate beginning an assignment at an SCO, one of the first priorities should be to learn what authorities the SCO has historically relied on. Depending on the size and staff structure of the SCO, that may mean coordination with

the SCO J-3/5 and J-8, or reaching back to COCOM staff to inquire.

Throughout an assignment at an SCO, judge advocates can add value to planning cycles by reminding staff to always consider the source of authorities in planning future activities. The broad range of security cooperation activities also creates an environment where an unauthorized commitment may occur if a proper fiscal analysis is not performed or if availability of funds is not confirmed in advance.

Maintaining a continuity file listing frequently used authorities, including detail on how those authorities have been amended over time, facilitates future fiscal reviews as it allows the legal advisor to quickly identify the congressional intent behind the authority and to see how the authority has evolved over time, which may provide insight into purposes the authority is or is not designed to support. An example of such an analysis is provided later in this article—in the “Organization & Mission” section—reviewing OSC-I’s special authority.

#### ***Title 10 Security Cooperation***

Security cooperation programs and activities of the DoD encompass programs, activities, exercises, and interactions of the DoD with the security establishment of a foreign country to achieve one of three purposes: (1) build and develop allied and friendly security capabilities for self-defense and multinational operations; (2) provide the armed forces with access to the foreign country during peacetime or a contingency operation; and (3) build relationships that promote specific U.S. security interests.<sup>59</sup>

This language clearly defines the role of Title 10 authorities in encouraging and establishing enduring relationships between the DoD and foreign militaries. Additionally, other authorities under Title 10 enable DoD to conduct humanitarian assistance, military and government educational programs, and other efforts which are capable of assisting and enabling foreign militaries.<sup>60</sup> Judge advocates interested in learning more about the various authorities under Title 10 are encouraged to consult the RAND, CRS, and GAO reports referenced earlier in this article.<sup>61</sup>

#### ***Title 22 Security Assistance***

Authorities under Title 22 enable the U.S. Government to train, equip, and assist foreign militaries through security assistance mechanisms such as Foreign Military Sales (FMS), Foreign Military Financing (FMF), and International Military Education and Training (IMET).<sup>62</sup> These DoS-driven authorities are rooted in the Foreign Assistance Act of 1961 (FAA)<sup>63</sup> and the Arms Export Control Act of 1976 (AECA).<sup>64</sup>

Title 22 funds flow to the SCO from DSCA, through the GCC.<sup>65</sup> The DSCA receives the funds from both the Security Assistance Administrative Trust Fund and from Title 22 appropriations. The result is that the SCO’s Title 22 DoS-led SA mission is executed by Title 10 DoD personnel, operating under Title 22 Chief of Mission Authority.

Foreign Military Sales is a non-appropriated program administered by DSCA through which partner nations purchase defense articles, services, and training from the U.S. Government.<sup>66</sup> Foreign Military Financing is an appropriated program administered by DSCA. Congressionally appropriated grants and loans allow partner nations to purchase defense articles, services, and training through either FMS or direct commercial sales. International Military Education and Training is also an appropriated program administered by DSCA, allowing partner nation military and civilian personnel to receive grant financial assistance for training in the U.S. and overseas facilities.

Part of the IMET training accomplished through the SCO takes place at DoD Regional Centers for Security Studies. Section 342 of Title 10 of the U.S. Code authorizes the regional centers “as international venues for bilateral and multicultural research, communication, exchange of ideas, and training involving military and civilian participants.”<sup>67</sup> The OSC-I deals primarily with the Near East South Asia Center for Strategic Studies, in Washington, D.C.<sup>68</sup>

Judge advocates should involve themselves in the IMET planning process, as well as the draft process for the SSRG training Letters of Request (LORs) to include training courses specifically geared

towards the legal community. The current IMET program offers three courses geared towards legal professionals. The Judge Advocate General’s Legal Center and School offers international students eight courses: the Judge Advocate Officer Basic Course; the Judge Advocate Officer Graduate Course; the Military Judge’s Course; Operational Law of Armed Conflict Course; Contract Attorneys Course; Emergent Topics in International & Operational Law; Law for Paralegals Course; and the Advanced Law for Paralegals Course.<sup>69</sup>

A consideration for judge advocates regarding Title 22 SA authorities is that while these stem from DoS appropriations, they are largely administered by DoD through DSCA. Within DoS, the Office of Security Assistance (PM/SA) manages DoS SA efforts.<sup>70</sup>

The DSCA Green Book identifies twelve major SA programs authorized by the FAA or AECA, with the following breakdown of administration—<sup>71</sup>

DSCA Administered: Foreign Military Sales (FMS);<sup>72</sup> Foreign Military Construction Services (FMCS);<sup>73</sup> Foreign Military Financing (FMF);<sup>74</sup> Leases;<sup>75</sup> Military Assistance Program (MAP);<sup>76</sup> International Military Education & Training (IMET);<sup>77</sup> and Drawdowns.<sup>78</sup>

DoS Administered: Economic Support Fund (ESF) [USAID];<sup>79</sup> Peacekeeping Operations;<sup>80</sup> International Narcotics Control and Law Enforcement (INCLE);<sup>81</sup> Nonproliferation, Antiterrorism, Demining, and Related Programs (NADR);<sup>82</sup> and Direct Commercial Sales.<sup>83</sup>

#### ***“T-20” Security Assistance Administrative Trust Fund & Foreign Military Financing Administrative Funds.***

It is important to note that “T-20 funds” is how DSCA refers to the Security Assistance Administrative Trust Fund (SAATF).<sup>84</sup> These are not “Title 20” funds.<sup>85</sup> Security Cooperation Offices receive SAATF Administrative Funds and FMF Administrative Funds to finance SCO basic operating costs. The DoS uses the

International Cooperative Administrative Support Services (ICASS) to effectively bill tenants utilizing mission resources for their use.

As an example, for OSC-I, life support on the Baghdad Embassy Complex, to include housing, meals, office space, security details, transportation, motor pool access, etc., is paid for through ICASS. Additionally, travel for SCO SA personnel is typically funded through FMS case funds.<sup>86</sup> The takeaway is that “T-20” funds are not directly linked to a U.S. appropriation; however, Congress does control the release of funds, which are collected by DFAS, administered by DSCA, and apportioned to the COCOMs for distribution to SCOs.<sup>87</sup>

### ***Judge Advocates as “The Authority on Authorities”***

Judge advocates in an SCO face several challenges related to authorities. Upon arrival, judge advocates must quickly gain an understanding of the different applicable authorities. Throughout their tour, they must track proposed changes to any authorities directly applicable to their SCO through each legislative cycle in order to effectively advise on the impact of proposed changes to the authorities. Most importantly, judge advocates must emphasize the importance of authorities to other staff members, to ensure that operations are shaped according to the authorities available to the organization. Having explored the background and general mission of SCOs, the remainder of this paper provides insight into SCO operations and a judge advocate’s role in the SCO through an exploration of what is currently the largest SCO, the OSC-I.

### **The Creation and Location of the Office of Security Cooperation – Iraq**

In remarks delivered at Camp Lejeune, North Carolina, on 27 February 2009, President Obama indicated that following the planned withdrawal of U.S. troops by 31 December 2011, the United States was committed to pursuing sustained diplomacy to build a lasting strategic relationship between the United States and Iraq.<sup>88</sup>

As of 1 January 2010, the three Iraq major commands, Multi-National Forces – Iraq (MNF-I), Multi-National Corps – Iraq (MNC-I), and Multi-National Security Transition Command – Iraq (MNSTC-I), merged into a single command as U.S. Forces – Iraq (USF-I).<sup>89</sup> Through its Deputy Commanding General for Advising and Training, USF-I performed the initial planning for establishing OSC-I and transitioning security assistance from DoD to DoS.<sup>90</sup> The initial roles of OSC-I included oversight of foreign military sales as well as international education and training.<sup>91</sup>

The OSC-I obtained Initial Operating Capacity on 1 June 2011, and Full Operating Capacity on 1 October 2011.<sup>92</sup> The OSC-I initially planned to operate out of ten sites, five shared with the DoS.<sup>93</sup> Projected DoD sites were Besmaya, Tikrit, Taji, Umm Qasr, and Union III.<sup>94</sup> Projected sites for OSC-I to share with DoS were Basra, Erbil, Kirkuk, Camp Sather, and Camp Shield.<sup>95</sup> Shortly after OSC-I achieved operating capacity, on 12 December 2011, DSCA notified Congress of Iraq’s interest in a foreign military sale of eighteen F-16 aircraft.<sup>96</sup> That this notification occurred just prior to the withdrawal of military forces on 31 December 2011 indicates that OSC-I, from its outset, was managing its SA mission while simultaneously serving a role in managing the transition from DoD to DoS control of facilities utilized by the U.S. Government in Iraq.

The stated mission of OSC-I as of November 2012 was: “The Office of Security Cooperation – Iraq, in coordination with USCENTCOM and USM-I, conducts Security Cooperation activities to build partner capacity in support of the developing strategic partnership with a stable, self-reliant, and regionally-integrated Iraq.”<sup>97</sup> The four lines of effort associated with these BPC efforts were modernize, train, professionalize, and integrate regional activities.<sup>98</sup>

In its first two years as an SCO managing Iraq’s FMS portfolio, OSC-I oversaw the delivery of twenty-seven IA-407 helicopters, six C-130J aircraft, a Rapid Avenger surface-to-air missile battery, and twelve P-301 patrol boats.<sup>99</sup> As of 22 March 2017, the United States had approved “more than 22 billion worth of FMS to Iraq.”<sup>100</sup>

Today, the DoS maintains the U.S. Embassy—referred to as the “Baghdad Embassy Complex”—located in Baghdad, with consulates in Basrah and Erbil and a Diplomatic Support Center (BDSC) located adjacent to Baghdad International Airport (BIAP). The OSC-I, as a member of the Country Team, operates in these DoS facilities, primarily the Baghdad Embassy Complex.

### **Organization & Mission**

The OSC-I’s mission statement is currently: “In support of the U.S. Mission and CENTCOM, the Office of Security Cooperation-Iraq conducts Defense Institution Building, Security Assistance, and regional engagements to enhance Iraqi Security Forces (ISF) capabilities and ensure the enduring strategic partnership between the U.S. Military and the ISF.”<sup>101</sup> To accomplish this, OSC-I coordinates with the DoS and Iraq’s Office of the National Security Advisor in Security Sector Reform activities. The OSC-I also works with representatives from the North Atlantic Treaty Organization, the United Nations Development Program, CJTF-OIR, and the European Union in this effort while ensuring that the strategy aligns with OSC-I Country Security Cooperation Plan objectives derived from the U.S. Central Command’s (USCENTCOM) Theater Campaign Plan.<sup>102</sup>

Essential OSC-I tasks include: managing FMS, conducting End Use Monitoring (EUM), both routine and enhanced, managing the IMET program, promoting defense reform initiatives/institutionalize reform, and facilitating Military-to-Military regional engagements.<sup>103</sup>

The OSC-I does this through an organized structure which includes: SA, SSRG, Senior Advisory Group, Tribal Engagement Coordination Cell, and Counter Terrorism Service. The role of each section is briefly described below.

### **Security Assistance**

The SA section focuses on acquiring equipment, items, and training necessary to the government of Iraq (GOI) and in accordance with U.S. national security interests, managing a multi-billion-dollar FMS program with hundreds of contracts.



U.S. Army Spc. John Galebach scans the horizon in Baqubah, Iraq, while standing rear air guard atop a Stryker assigned to Charlie Company, 2nd Battalion, 1st Infantry Regiment, 3rd Brigade Combat Team, 2nd Infantry Division. (Credit: Mass Communication Specialist 2nd Class Summer M. Anderson)

Security Assistance then works with SSRG, to ensure the FMS and FMF programs are part of the overall Iraqi strategy and considerations are given to the sustained maintenance and viability of programs.

The OSC-I legal section's coordination with SA ensures legal coverage and guidance when SA meets with U.S. industry, as well as when they correspond or interact with the GOI. It is important that judge advocates stay current with DoD guidance on interacting with U.S. industry. The Office of the Secretary of Defense periodically makes its intent known through publication of an official memorandum on engaging with industry.<sup>104</sup> Knowing the implications of such memoranda will allow a judge advocate to give clear and direct guidance on what type of assistance and information is meant to be shared with industry representatives. Additionally, the “dos and don’ts” related to industry are laid out in the Security Assistance Manual and found in Appendix I of this article. Judge advocates assigned to the SCO mission should familiarize themselves with these left and right limits to properly advise, not only SA, but all of the members of OSC-I who come in contact with industry.

#### ***Security Sector Reform Group***

Security Sector Reform, led by DoS, is focused on reinforcing diplomacy and defense while reducing long-term security threats by helping to build stable, prosperous, and peaceful societies.<sup>105</sup> It includes the set of policies, plans, programs, and activities that a government undertakes to improve the way it provides safety, security, and justice.<sup>106</sup>

Within OSC-I, the SSRG works with the DoS, the GOI, the United Nations, the European Union, and other international partners on SSR efforts. The OSC-I SSRG section also oversees portions of the international military education and training program, through which Iraqi leaders attend U.S. training courses with an emphasis on SSR and long-term sustainment.

The OSC-I Legal Advisor’s coordination with the SSRG helps shape their legal line of effort. Over the years, it is through this involvement that a number of Iraqi attorneys have had the opportunity to attend courses at The Judge Advocate General’s Legal Center and School<sup>107</sup>, and the Defense Institute for International Legal Studies (DIILS).<sup>108</sup> It is also through this involvement that DIILS mobile training teams have

come to Iraq to teach Iraqi attorneys and members of the GOI courses such as The Law of Armed Conflict and Human Rights (Feb. 2017) and Combatting Corruption (Feb. 2019).

#### ***Senior Advisory Group & Tribal Engagement Coordination Cell***

The OSC-I Senior Advisory Group consists of colonels who advise Iraq’s ministries on matters related to defense institution building. These advisors are often the “public face” of OSC-I to senior Iraqi military and civilian officials. Separately, the Tribal Engagement Coordination Cell interacts with local leaders throughout Iraq, which provides insight into how building partner capacity efforts are working from the ground up, and how institution-level initiatives are impacting local populations from the top down.

#### ***Counter Terrorism Service***

Iraq’s Counter Terrorism Service (CTS) is structured to operate independently from both the Ministry of Defense and Ministry of Interior, organized with a headquarters, the Counter Terrorism Command, and three Iraqi Special Operations Forces Brigades.<sup>109</sup>

The CTS has played an instrumental role in Iraq's fight against ISIS,<sup>110</sup> and from 2011 to the present, OSC-I has provided institution-level advisors to the CTS.<sup>111</sup>

### ***Judge Advocate Support***

The number of attorneys assigned to OSC-I has fluctuated over time from two to one and back to two. A key challenge to this assignment is balancing traditional staff roles while also fostering and maintaining key leader engagements (KLEs); providing input to SSRG efforts that include the GOI's Rule of Law initiatives; SA efforts in keeping the FMS process running smoothly; as well as attending U.S. industry meetings with the Chief of OSC-I and members of the SA section. The KLEs with the Iraqi legal community are important as the GOI Ministries rely heavily on their attorneys. Having the OSC-I Legal Advisor engage early and regularly with counsel for the ministries produces results when issues arise.

### ***The Office of Security Cooperation – Iraq's Special Authority: National Defense Authorization Acts***

The OSC-I's special authority originated as section 1215 of the FY2012 NDAA. The original authority provided for operations and activities of OSC-I and SA teams in Iraq, and stated such operations and activities "may include life support, transportation and personal security, and construction and renovation of facilities."<sup>112</sup>

The OSC-I's authority evolved with the FY2013–FY2017 NDAA's to permit OSC-I to conduct non-operational training activities in support of Iraq's Ministry of Defense (MoD) and CTS personnel,<sup>113</sup> as well as requiring training to include observing and respecting human rights and respect for legitimate civilian authority within Iraq.<sup>114</sup> This timeframe also witnessed OSC-I being given the authorization to conduct training activities in support of the MoD and CTS personnel at a base or facility of the GOI to address capability gaps, integrate processes relating to intelligence, air sovereignty, combined arms, logistics and maintenance, and to manage and integrate defense-related institutions.<sup>115</sup>

The FY2018 NDAA increased OSC-I's ability to engage in DIB activities with internal security forces, such as regional

border guards and energy police, which do not fall under the MoD or CTS.<sup>116</sup> This ability increased because OSC-I was given authority to conduct "activities to support" DIB and professionalization and reform of "military and other security forces with a national security mission."<sup>117</sup>

The FY2019 NDAA, limits funding and adds new items to the congressional reporting requirements.<sup>118</sup> After seven years of existence, Congress is asking OSC-I to normalize in order "... to conform to other offices of security cooperation, including the transition of funding from the Department of Defense to the Department of State by the beginning of fiscal year 2020."<sup>119</sup>

### ***Consolidated Appropriations Acts (CAAs)***

Similar to the NDAA authority, the FY2012 Consolidated Appropriations Act (CAA), the original appropriations authority, designated an amount of Air Force Operations & Maintenance (O&M) funds "to support United States Government transition activities in Iraq by funding the operations and activities of the Office of Security Cooperation in Iraq and security assistance teams, including life support, transportation, and personal security, and facilities renovation and construction."<sup>120</sup>

Additionally, the FY2013 CAA tracked the NDAA language,<sup>121</sup> but the FY2014 CAA added "and site closeout activities prior to returning sites to the Government of Iraq," so that portion of the provision from FY2014–FY2017 CAA reads: "to support United States Government transition activities in Iraq by funding the operations and activities of the Office of Security Cooperation in Iraq and security assistance teams, including life support, transportation, and personal security, and facilities renovation and construction, and site closeout activities prior to returning sites to the Government of Iraq."<sup>122</sup>

However, while the NDAA training language was updated in section 1237(a) of the FY2015 NDAA to remove "non-operational," and replace "in an institutional environment" with "at a base or facility of the Government of Iraq," section 9011 of the FY2015 was not updated to reflect the change, and it remained unchanged in section 9011 of the FY2016 and FY2017 CAAs.<sup>123</sup>

Neither the FY2018<sup>124</sup> nor the FY2019<sup>125</sup> CAA mentions OSC-I specifically. That said, the FY2019 CAA does mention Iraq and has made funds available for international SA.<sup>126</sup>

### ***Status of Office of Security Cooperation – Iraq Personnel***

Military members assigned or attached to OSC-I are Title 10 personnel operating under Title 22 Chief of Mission Authority. The United States of America – Government of Iraq Status of Forces Agreement (SOFA) of 2008 expired on 31 December 2011. As OSC-I was in the process of standing up and the expiration of the SOFA drew near, DoS engaged the GOI regarding status of OSC-I personnel, with the result that OSC-I personnel are accorded the privileges and immunities of Members of Administrative and Technical Staff.<sup>127</sup> Those privileges include: no arrest or detention; inviolability and protection of private residence, papers, correspondence, and personal property; and within the course of duty, immunity from criminal jurisdiction and certain civil and administrative jurisdiction.<sup>128</sup> Importantly, members of OSC-I, operating under Title 22 Chief of Mission Authority, must continue to abide by the guidance and policies of the Title 10 geographic combatant commander while also abiding by the guidance and policies of the U.S. Mission–Iraq.

### ***Office of Security Cooperation – Iraq Legal Advisor Role & Functions***

The mission of the OSC-I Legal Advisor, as outlined in the 2017 OSC-I legal section standard operating procedure, is to serve as the primary Legal Advisor to the Chief, OSC-I. This encompasses similar roles to a staff judge advocate (SJA) but also includes building and fostering professional relationships with senior Iraqi legal counterparts in the GOI, as well as coordinating all legal actions with USCENCOM, DSCA, DoS, and all other Federal agencies.

### ***Military Justice***

While the Legal Advisor is the primary advisor to the OSC-I Chief on matters concerning implementation of military justice within OSC-I, the Chief is not a court-martial convening authority, and all

UCMJ actions must be coordinated through USCENTCOM Command Judge Advocate (CCJA). Headquarters Service Element Commands exercise disposition authority over OSC-I personnel.

That said, the Chief of OSC-I can conduct investigations, to include Army Regulation 15-6 investigations and informal inquiries. The Chief of OSC-I can execute non-substantive administrative actions consistent with their official positions as supervisors against a uniformed member of OSC-I, such as verbal counseling. All substantive administrative actions under the UCMJ must be coordinated with CCJA prior to execution.

Ultimately, if a crime is committed by a member assigned to OSC-I, every attempt should be made to have the service member reassigned to a location where the respective element commander has operational control.

### **Ethics**

As an appointed ethics counselor by CCJA, OSC-I Legal Advisor is responsible for OSC-I's ethics program. This includes annual ethics training, legal reviews of foreign gifts, ethics opinions as required or requested, and management of OGE-278 and OGE-450 financial disclosure requirements. While the vast majority of foreign gifts received by OSC-I are of a de minimis value, it is important for the legal advisor to check the personal retention limit, which is currently \$390 and updated every three years.<sup>129</sup>

### **Legal Assistance**

Legal assistance services are limited to notaries and powers of attorney for authorized patrons. This prevents potential conflicts of interest and conserves resources of the SCO's small legal office. However, even these limited services provide an outsized benefit to OSC-I, as obtaining notary services through the Embassy can cost \$50.<sup>130</sup>

### **Foreign Claims**

Presently, OSC-I does not adjudicate foreign claims. The legal office provides the information on any claims it receives, to the SJA office of CJTF-OIR. The CJTF-OIR Claims Attorney is an appointed Foreign Area Claims Officer by the U.S. Army Claims Service.

### **Administrative & Fiscal Law**

The administrative and fiscal roles of the OSC-I legal office are similar to those of any legal office. Advice is provided on investigations and legal reviews, opinions are provided regarding the expenditure of government funds, a digital library of resources is maintained, and participation in working groups designed to shape future missions and policies is encouraged.

### **International & Operational Law**

The Legal Advisor forwards requests to negotiate or conclude an international agreement to the CCJA, as OSC-I personnel may not negotiate or conclude an international agreement without the appropriate delegation of authority from CCJA and Commander, USCENTCOM. The OSC-I legal advisors face a variety of interesting issues involving Iraq law.

For example, contractors have raised the issue of taxation by the GOI on multiple occasions to both the Embassy and to OSC-I since the expiration of the SOFA in 2011. While the tax law in Iraq has not changed substantially since that time, it is an issue that each iteration of legal advisors becomes familiar with due to its recurrence. In summary, for the most part, contractors were exempt from Iraq taxes from 16 April 2003 through 31 December 2008.<sup>131</sup> Effective 1 January 2009, the SOFA exempted taxes on goods and services purchased by or on behalf of the U.S. Forces in Iraq.<sup>132</sup> Since 1 January 2012, following the expiration of the SOFA, Iraq tax laws apply unless an exemption is specifically granted.<sup>133</sup>

### **Preventive Law**

The OSC-I personnel must quickly gain familiarity with organizational and local Mission policies. This may be the first joint assignment for some personnel, and a first staff assignment as well. As a result, there is a mix of service-specific, joint, inter-agency, intra-agency, Iraq-specific, and international policy, regulation, and law that must be considered in daily work.

Moreover, violating a Mission Policy could result in the OSC-I member being sent home. As such, through group and individual newcomer's briefings, a preventive law training program highlighting ethics

and DSCA guidance on interacting with contractors, and by providing information to personnel on topics like authorities and personnel status, the legal office attempts to foster an environment where all personnel are keenly aware of the authorities and legal framework within which they operate.

Congress is clearly becoming more interested in SC, as evidenced by the recent interest of CRS and GAO and by the reorganization of Title 10 SC authorities under Chapter 16 – Security Cooperation, in Title 10.<sup>134</sup> Even with this reorganization, SC authorities remain a patchwork pulled from Title 10, Title 22, and various other appropriations.<sup>135</sup> As a result, judge advocates in SCOs often help to inform and shape conversations on proposed operations and activities by ensuring SCOs clearly identify the target audience for the desired training activity or action in order to determine the applicable authorities.

Individuals with an interest or need to gain further insight into SCOs are encouraged to explore DSCA's materials. The DSCA offers a number of other publications,<sup>136</sup> as well as online and resident courses through the Defense Institute of Security Cooperation Studies.<sup>137</sup> At a minimum, any judge advocate assigned to work in an SCO should first become familiar with "The Management of Security Cooperation"—referred to as the DSCA "Green Book,"<sup>138</sup>—as well as the Security Assistance Management Manual (SAMM),<sup>139</sup> and depending on the level of interaction on SCO budgets, the DSCA T-20 Administrative Budget Policy Handbook may also be instructive.<sup>140</sup> **TAL**

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*Contributing authors include past and present Chief and Deputy Legal Advisors to the Office of Security Cooperation-Iraq.*

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## **Appendix I**

### **INFORMATION PAPER**

**SUBJECT: OSC-I Interaction with FMS Contractors**

1. BLUF. OSC-I personnel may not favor one U.S. contractor over another, but may facilitate their interaction with GOI. SCOs support the marketing efforts of U.S. companies while maintaining strict neutrality between U.S. competitors.

2. Background. OSC-I personnel should be familiar with the rules for dealing with FMS contractors. These rules permit SCO personnel to support the marketing efforts of U.S. companies while maintaining strict neutrality between U.S. competitors.

3. References. The Security Assistance Management Manual (SAMM) provides guidance. SAMM C2.1.8 addresses SCO support to industry, but other provisions also apply.

4. Discussion.

- a. DoD prefers that countries friendly to the United States fill defense requirements with U.S. origin items. Unless an item is "FMS Only," DoD is generally neutral as to whether a country purchases U.S.-origin defense articles or services commercially or through FMS channels. Unless the host country requests the purchase be made through FMS, the DoD tries to accommodate the U.S. contractor if its preference is for DCS. The SCO assists a broad spectrum of U.S. defense industry marketing efforts and the SCO is expected to provide adequate support to vendors regardless of the complexity or price of the item. SAMM C2.1.8.6; SAMM C4.3.4.
- b. The SCO is the principal point of contact in U.S. missions for most U.S. defense industry representatives marketing defense equipment. SCOs support the marketing efforts of U.S. companies while maintaining strict neutrality between U.S. competitors. The SCO facilitates the flow of U.S. systems information, subject to releasability and export licensing considerations, while avoiding advocacy of a program with a specific U.S. producer. SAMM C2.1.8.1.
- c. Neutrality. SCO personnel may not favor the merits of one U.S. proposal over another. U.S. advocacy must be generic. When more than one U.S. competitor is involved, the SCO should explain to host country personnel why a U.S. system would be to the country's advantage—the U.S. proposals are combat proven, interoperable with many nations, technologically superior, worldwide supportable, etc. SAMM C2.1.8.5; SAMM Table C4.T4.

d. This neutral stance extends to OSC-I presence in meetings with foreign officials. If OSC-I personnel are present for one U.S. contractor presentation, every effort must be made to be present for all briefings on other U.S. offerings. Only when one MILDEP or contractor team remains in the competition can the OSC-I advocate one U.S. offering. SAMM Table C4.T4.

e. Information. Upon request, but subject to factors such as availability of resources and country sensitivity to release of specific data, the SCO provides industry representatives the following types of unclassified information:

- (1) Data on the defense budget cycle in the host country including the share of the budget devoted to procurement. Industry representatives may also be informed of the country's current FMS, FMF, and defense budgets. SAMM C2.1.8.2.1.
- (2) Information on the national decision making process, both formal and informal, and on decision makers in the MOD and MILDEPs. SAMM C2.1.8.2.2.
- (3) Information on the national procurement process, to include bidding procedures, legal or policy impediments to procure from U.S. sources, and other information needed for the U.S. commercial competitor to work with the country. SAMM C2.1.8.2.3.
- (4) Information on current and future partner nation defense requirements and, when appropriate, procurement plans for equipment. SAMM C2.1.8.2.4.
- (5) Information on the marketing efforts of foreign competitors. SAMM C2.1.8.2.5.
- (6) Information on the major in-country defense firms and their products. This can assist U.S. firms with identifying possible subcontract support services, or teaming, licensing, and other cooperative arrangements. SAMM C2.1.8.2.6.

- f. Appointments. The SCO should assist industry representatives with visit appointments in the Embassy and, as time and circumstances permit, with host country MOD and services. Industry representatives make appointments with country officials to avoid the impression of SCO endorsement of a given item or service. The SCO makes the appointment only if the host country desires that appointments be made through the SCO. The SCO may attend key meetings to help assess defense requirements and the extent of U.S. industries' ability to meet those requirements, if requested by the industry representatives and the host government. To help ensure program continuity, industry representatives should also brief SCOs before departing the host country. SAMM C2.1.8.4.
- g. The SCO Chief should encourage visiting U.S. contractors to debrief the SCO Chief and other relevant members of the mission staff on their experiences in country. The SCO Chief responds to follow-up inquiries from industry representatives with respect to any reactions from host country officials or subsequent marketing efforts by foreign competitors. The SCO Chief alerts embassy staff to observe reactions of the host country officials on U.S. defense industry marketing efforts. As appropriate, the SCO Chief can pass these reactions to the U.S. industry representatives. SAMM C2.1.8.7.
- h. The DoD lead (not the SCO) ensures MILDEP and/or contractor teams submit proposals that are consistent with internal U.S. decisions, are as responsive as possible to the requirements of the foreign solicitation, and meet the solicitation's schedule. In cases of multiple U.S. offerings, the DoD lead must facilitate all U.S. proposals impartially so that there is no perception that one offering is preferred over another and there is no biased interpretation of policy. SAMM C4.3.1.3.



DEPUTY SECRETARY OF DEFENSE  
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WASHINGTON, DC 20301-1010

MAR - 2 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
CHIEF MANAGEMENT OFFICER  
COMMANDERS OF THE COMBATANT COMMANDS  
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR OF COST ASSESSMENT AND PROGRAM  
EVALUATION  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
DIRECTOR OF OPERATIONAL TEST AND EVALUATION  
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF  
DEFENSE  
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE  
AFFAIRS  
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC  
AFFAIRS  
DIRECTOR OF NET ASSESSMENT  
DIRECTORS OF DEFENSE AGENCIES  
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Engaging with Industry

Our National Defense Strategy (NDS) directs our intentional engagement with industry to harness and protect the National Security Innovation Base as well as modernize key capabilities. Cultivating a competitive mindset requires that we optimize our relationships with industry to drive higher performance while always remaining within the letter and spirit of ethics and procurement regulations. This policy updates Deputy Secretary of Defense memorandum, Subject: Policy for Communications with Industry, dated June 21, 2010, to achieve the objectives of the NDS and reiterates the guidance in the Secretary of Defense memorandum, Subject: Dialogue with Industry, dated April 24, 2017.

The Department relies upon thousands of contractors spanning a wide array of industry segments and supporting a multitude of mission requirements. Industry is often the best source of information concerning market conditions and technological capabilities. This information is crucial to determining whether and how industry can support the Department's mission and goals. Conducting effective, responsible, and efficient procurement of supplies and services while properly managing the resultant contracts requires Department personnel to engage in early, frequent, and clear communications with suppliers. As the NDS makes clear, dialogue helps industry make informed investment and business decisions necessary to meet near- and long-term requirements of the Department. Proactive engagement will maximize support to the

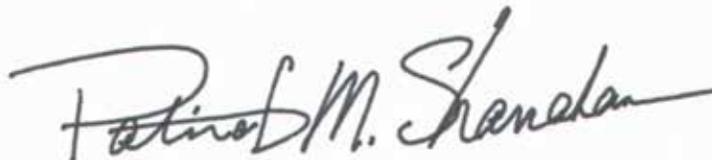


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Warfighter; set realistic expectations and technologically achievable requirements; enhance the ability of organizations to meet cost, schedule, and performance objectives; and establish policies and business practices that promote the long-term viability and competitiveness of the industrial base supporting defense.

We must always comply with the ethics and procurement laws and rules governing interactions with industry. They should not, however, cause officials to be reluctant to engage in exchanges with industry. While we must always be mindful of our legal obligations, they do not prevent us from carrying out our critical responsibility to engage with industry. There is a broad range of opportunities for communications with industry in a fair, impartial, and transparent manner that fall well within the parameters of the ethics and procurement laws. For example, events hosted by industry associations may provide opportunities to efficiently, effectively, and ethically connect the DoD with leaders from across a particular industry or segment.

The Department's policy continues to be that representatives at all levels of the Department have frequent, fair, even, and transparent dialogue with industry on matters of mutual interest, as appropriate, in a manner that protects sensitive information, operations, sources, methods, and technologies. Leaders must talk with personnel about the importance of having dialogue with industry and help them understand the parameters for doing so. To assist personnel, attached are DoD Myth-Busters on Communications with Industry, which are intended to update and supplement the "Myth-Busting" memoranda previously issued by the Office of Federal Procurement Policy. Also attached is a synopsis prepared by the DoD Standards of Conduct Office of applicable ethics and procurement laws that form the boundaries within which personnel must operate in their communications with industry.

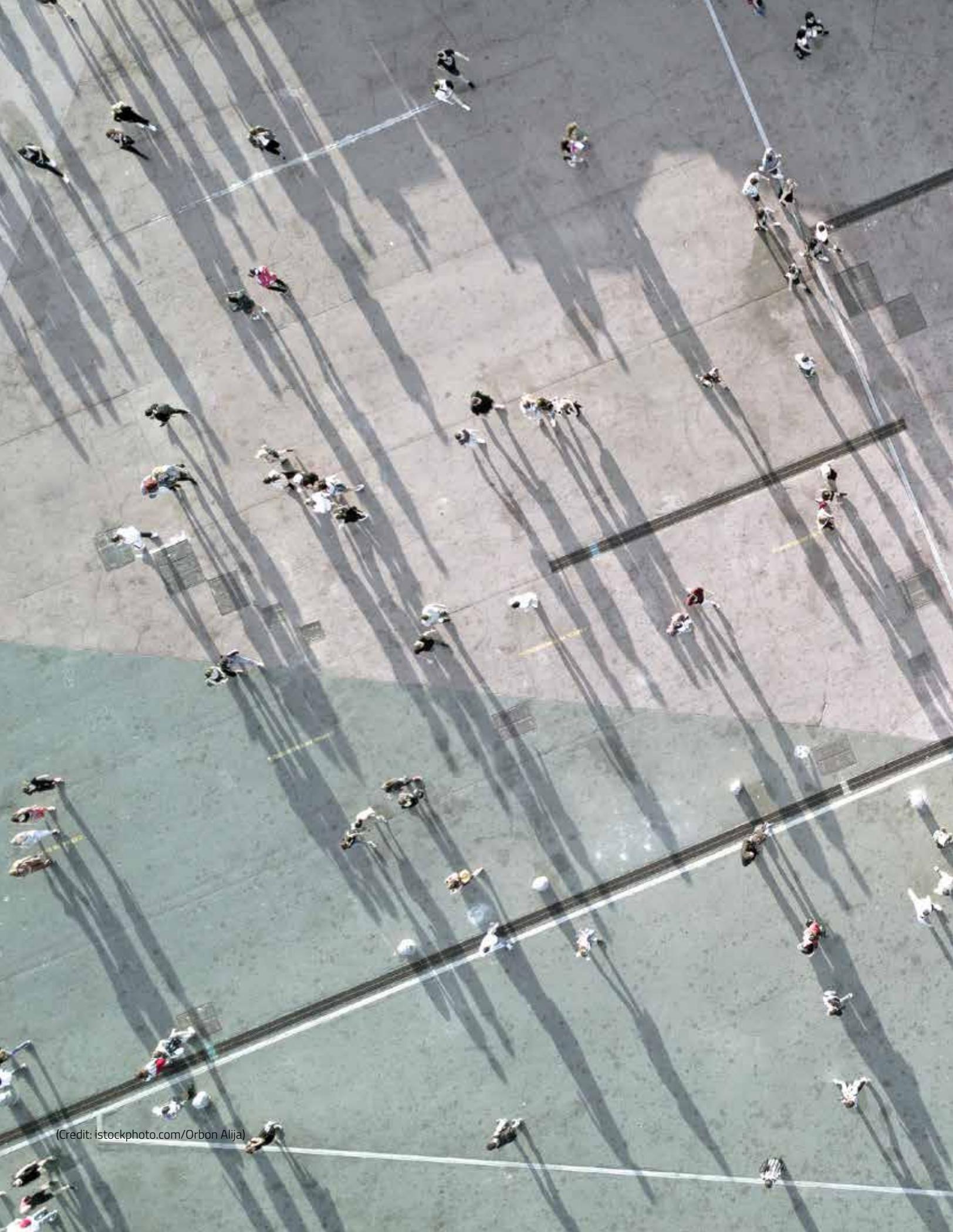
A handwritten signature in black ink, reading "Patrick M. Shanahan". The signature is written in a cursive style with a prominent initial "P" and a long, sweeping underline.

Attachments:  
As stated

## Notes

1. President Donald Trump, America First Foreign Policy, <https://blogs.state.gov/stories/2017/01/20/en/america-first-foreign-policy> (last visited Feb. 20, 2019).
2. David E. Thaler et al., Rand Corporation, From Patchwork to Framework: A Review of Title 10 Authorities for Security Cooperation at 8, 89–105 (Feb. 23, 2016), [http://www.rand.org/pubs/research\\_reports/RR1438.html](http://www.rand.org/pubs/research_reports/RR1438.html).
3. The updates, listed by date of release with newest release first: DEP'T OF DEF., INSTR. 5132.13, STAFFING OF SECURITY COOPERATION ORGANIZATIONS (SCOs) AND THE SELECTION AND TRAINING OF SECURITY COOPERATION PERSONNEL (9 Jan. 2009) (C1, 6 June 2017) [hereinafter DoDI 5132.13]; JOINT CHIEFS OF STAFF, DoD DICTIONARY OF MILITARY TERMS (Sept. 2018); JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, SECURITY COOPERATION (23 May 2017) [hereinafter JP 3-20]; DEP'T OF DEF., DIR. 5205.75, DoD OPERATIONS AT U.S. EMBASSIES (4 Dec. 2013)(C1, 22 May 2017) [hereinafter DoDD 5205.75]; DEP'T OF DEF., DIR. 5205.82, DEFENSE INSTITUTION BUILDING (27 Jan. 2016)(C1, 4 May 2017); JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (17 Jan. 2017) [hereinafter JP 3-0]; and DEP'T OF DEF., INST. 5132.14, ASSESSMENT, MONITORING, AND EVALUATION POLICY FOR THE SECURITY COOPERATION ENTERPRISE (13 Jan. 2017). See also DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION (29 Dec. 2016).
4. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-255R, BUILDING PARTNER CAPACITY: INVENTORY OF DEPARTMENT OF DEFENSE SECURITY COOPERATION AND DEPARTMENT OF STATE SECURITY ASSISTANCE EFFORTS (2017) [hereinafter GAO REPORT]. See Enclosure 2 of the report for the full list.
5. Nat'l Def. Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). For more information on the workforce reform initiative, see Nicole Stomper Davis, *Security Cooperation Workforce Reform: The Path to Effectively Including the Acquisition Community*, DEFENSE INSTITUTE OF SECURITY COOPERATION STUDIES, [http://www.discs.dscs.mil/documents/articles\\_of\\_interest/Security\\_Cooperation\\_Workforce\\_Reform.pdf](http://www.discs.dscs.mil/documents/articles_of_interest/Security_Cooperation_Workforce_Reform.pdf).
6. DEF. INST. OF SEC. COOPERATION STUDIES, THE MANAGEMENT OF SECURITY COOPERATION, at 1-1 (38th ed. 2018), [http://www.discs.dscs.mil/documents/green-book/01\\_Chapter.pdf](http://www.discs.dscs.mil/documents/green-book/01_Chapter.pdf) [hereinafter GREEN BOOK].
7. *Id.*
8. *Id.*
9. 10 U.S.C. § 342 authorizes the DoD to “administer the Department of Defense Regional Centers for Security Studies as international venues for bilateral and multilateral research, communication, exchange of ideas, and training involving military and civilian participants.”
10. 22 U.S.C. § 2304(d)(2) provides the full definition of security assistance.
11. JP 3-20, *supra* note 3.
12. JP 3-20, *supra* note 3.
13. Green Book, *supra* note 6, at 1-1.
14. *Id.*
15. Green Book, *supra* note 6.
16. 10 U.S.C. ch. 16, § 301.
17. *Mission, Vision, Values*, DoD DEF. SEC. COOPERATION AGENCY, <http://www.dscs.mil/about-us/mission-vision-values> (last visited Feb. 20, 2019).
18. *Electronic Security Assistance Management Manual (eSAMM)*, ch. 2, DoD DEF. SEC. COOPERATION AGENCY, <http://www.samm.dscs.mil/chapter/chapter-2>.
19. DoDI 5132.13, *supra* note 3.
20. UNITED STATES MILITARY TRAINING MISSION, <http://www.usmtm.org/> (last visited Feb. 20, 2019).
21. *Office of Military Cooperation, Sections & Offices*, U.S. EMBASSY & CONSULATE IN EGYPT, <https://eg.usembassy.gov/embassy-consulate/cairo/sections-offices/> (last visited Feb. 20, 2019).
22. *Office of Defense Cooperation in India, Sections & Offices*, U.S. EMBASSY & CONSULATES IN INDIA, <https://in.usembassy.gov/embassy-consulates/new-delhi/sections-offices/office-of-defense-cooperation/> (last visited Feb. 20, 2019).
23. *Office of Defense Representative – Pakistan, Sections & Offices*, U.S. EMBASSY & CONSULATE IN PAKISTAN, <https://pk.usembassy.gov/embassy-consulates/islamabad/sections-offices/> (last visited Feb. 20, 2019).
24. *Electronic Security Assistance Management Manual (eSAMM)*, C2.1.10.2.1., DoD DEF. SEC. COOPERATION AGENCY, C2.1.10.2.1., Establishment and Manning of SCOs, <http://www.samm.dscs.mil/chapter/chapter-2>.
25. 22 U.S.C. § 3927.
26. 22 U.S.C. § 3927(b), Chief of Mission – Duties of agencies with employees in foreign countries.
27. *Id.* at (a)(2). The other exception is Voice of America correspondents on official assignment.
28. *Id.* at (c). See also Appendix I for an information paper on the SAMM guidance for dealing with U.S. industry.
29. Presidential Policy Directive List, American Federation of Scientists (Apr. 5, 2013), <https://fas.org/irp/offdocs/ppd/> (last visited Feb. 20, 2019).
30. Presidential Policy Directive 23, *Fact Sheet: U.S. Security Sector Assistance Policy* (Apr. 5, 2013) at 3, <https://fas.org/irp/offdocs/ppd/ssa.pdf>.
31. JP 3-20, *supra* note 3, at II-1-9.
32. *Id.* at II-3. It also states: “When directed, DOD can also support appropriate PN civilian authorities to strengthen civil sector capacity at the local and national levels. . . . Building partner capacity requires a long-term, mutual commitment to improve capacity, interoperability, and when necessary, the employment of that PN capacity in support of USG strategic objectives.” *Id.*
33. JP 3-20, *supra* note 2, at II-3.
34. *Id.* at II-4.
35. *Id.* at II-6.
36. *Id.* at II-5.
37. *Id.* at II-6.
38. *Id.*
39. *Id.*
40. 10 U.S.C. § 342(a).
41. *Id.* at (b)(2).
42. Thaler, *supra* note 2, at 8, 89–105.
43. See CONG. RESEARCH SERV., DoD SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES (2016).
44. GAO REPORT, *supra* note 4.
45. Thaler, *supra* note 2, at 8, 89–105.
46. See CONG. RESEARCH SERV., DoD SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES 6 (2016).
47. Jennifer D.P. Moroney, David E. Thaler, Joe Hogler, *Review of Security Cooperation Mechanisms Combatant Commanders Utilize to Build Partner Capacity*, RAND CORPORATION (2013), [http://www.rand.org/pubs/research\\_reports/RR413.html](http://www.rand.org/pubs/research_reports/RR413.html).
48. See CONG. RESEARCH SERV., DoD SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES 6 (2016).
49. GAO REPORT, *supra* note 4. See Enclosure 2 of the report for the full list.
50. *Id.*
51. *Id.* at 55.
52. *Id.* at 55–56.
53. In the letter, DASD-SC identified the following provisions as having been repealed or modified in Title 10 of the U.S. Code: 168, 184, 1050, 105a, 1051, 1051a, 1051c, 2010, 2249c, 2282, 4344, 4345, 4345a, 4681, 6957, 6957a, 6957b, 9344, 9345, 9345a, and 9681. See GAO REPORT, *supra* note 4, at 55.
54. Thaler, *supra* note 2, at 8, 89–105.
55. *Id.* at 126–27.
56. *Id.* at 89–97.
57. *Id.* at 98–102.
58. *Id.* at 102–04.
59. 10 U.S.C. § 301(7). See also DoDD 5132.03, *supra* note 3.
60. See generally, Major Timothy Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 1, 1–26.
61. Thaler, *supra* note 2; CONG. RESEARCH SERV., DoD SECURITY COOPERATION: AN OVERVIEW OF AUTHORITIES AND ISSUES (2016); GAO REPORT, *supra* note 4.
62. Authorities: 22 U.S.C. § 2347, International Military Education and Training; 22 U.S.C. § 2761, Sales from Stocks – allows for the FMS of items from current military stocks; 22 U.S.C. § 2762, Procurement for cash sales – allows for the FMS of items through U.S. contracting mechanisms; 22 U.S.C. § 2763, Credit sales – allows for FMF utilizing U.S. funds with terms for repayment.
63. Foreign Assistance Act of 1961, 22 U.S.C. ch. 32 § 2151, as amended by Pub. L. No. 115-31, 131 Stat. 135 (2017).
64. Arms Export Control Act (AECA) of 1976, 22 U.S.C. ch. 39 § 2751.
65. Green Book, *supra* note 6, at 7–10.
66. The DSCA Transparency Handbook provides guidance on structuring information exchanges with host countries to develop Letters of Request for major procurements. DoD DEF. SEC. COOPERATION AGENCY, TRANSPARENCY HANDBOOK (2017), <https://dscs.mil/dscs-transparency-handbook>.
67. 10 U.S.C. § 342(a).

68. *Id.* at § 342(b)(2).
69. *Course Offerings to International Students*, TJAGLCS, <https://www.tjaglcspublic.army.mil>.
70. The Office of Security Assistance directs over \$6 billion annually in U.S. military grant assistance to allies and friends through policy development, budget formulation, and program oversight. <https://www.state.gov/t/pm/sa/> (last visited Feb. 20, 2019).
71. Green Book, *supra* note 6, 1-1 – 1-16.
72. *Id.* at 1-2.
73. *Id.*
74. *Id.*
75. *Id.* at 1-3.
76. *Id.*
77. *Id.* at 1-4.
78. *Id.* at 1-5.
79. *Id.*
80. *Id.*
81. *Id.* at 1-6.
82. *Id.*
83. *Id.*
84. DoD DEFENSE SECURITY COOPERATION AGENCY, SECURITY ASSISTANCE ADMINISTRATIVE TRUST FUND (T-20) BUDGET POLICY HANDBOOK (DSCA 01-19), App. A (2001), <http://www.samm.dsca.mil/policy-memoranda/dsca-01-19> [hereinafter T-20].
85. Title 20 of the U.S. Code is “Education” and has no bearing on security assistance.
86. Green Book, *supra* note 6, at 5-14.
87. T-20, *supra* note 84.
88. Remarks of President Barack Obama (as prepared for delivery), Responsibly Ending the War in Iraq, Feb. 27, 2009, <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-barack-obama-dash-responsibly-ending-war-iraq>. The speech outlined the strategy and phased approach for the responsible drawdown of U.S. Armed Forces in Iraq and development of an enduring strategic partnership with Iraq.
89. Inspector Gen., U.S. Dep’t of Def., No. DODIG-2012-063, Assessment of the DoD Establishment of the Office of Security Cooperation – Iraq (Mar. 16, 2012), at 6 n.5 [hereinafter DODIG-2012-063].
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(Credit: istockphoto.com/Orbon Alija)

## No. 4

# Creativity and Diversity Strengthen the National Security Law Workforce

By Mr. Alan W. Wehbé

*I [expletive omitted] shot Bin Laden!*

Robert Allen Riggle Jr., 26 May 2011<sup>1</sup>

On 2 May 2011, the President of the United States of America announced that a military operation killed Osama Bin Laden.<sup>2</sup> At the President's direction, "the United States launched a targeted operation against [a] compound in Abbottabad, Pakistan," in which "a small team of Americans carried out the operation with extraordinary courage and capability."<sup>3</sup> The President went on to praise the "tireless and heroic work of our military and our counterterrorism experts."<sup>4</sup> This event highlighted the critically important work of the national security workforce. The President's remarks also allude to the stressful conditions facing the national security workforce.

National security work occurs in dynamic and regulated environments populated by some of the nation's oldest, largest, and most developed bureaucracies. National security work supports military operations, informs foreign relations, attempts to thwart terrorist attacks, and counters political and economic espionage. National security practitioners often work in isolated and stressful environments.<sup>5</sup> Cultivating creativity and diversity can increase the collective efficacy and welfare of the national security workforce.<sup>6</sup> This article surveys the scope of

the national security law workforce, highlights the demanding legal environment in which national security law operates, and provides recommendations to strengthen the national security law workforce.

### **The Scope of National Security, National Security Law, and the National Security Law Workforce**

*We gotta stop CIA from stealing the credit on this . . . and if al Qaeda really is plotting something, we should stop that too.*  
- Carly Ambrose<sup>7</sup>

Defining "national security" is no small feat, but a baseline understanding is necessary for this discussion.<sup>8</sup> The U.S. Constitution, laws passed by Congress, dictionaries, and academics offer input toward a definition. The Preamble to the U.S. Constitution sets forth ideals related to national security such as to "insure domestic Tranquility . . . provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty."<sup>9</sup> The Constitution also contemplates providing for the military,

the authority to declare war and engage in foreign relations, and the power to tax to “provide for the common defense.”<sup>10</sup>

The Espionage Act of 1917 prohibits the improper handling of “information relating to the national defense.”<sup>11</sup> As an appellate court noted in 2018, “[t]he phrase ‘information relating to the national defense’ is not defined” in the Espionage Act.<sup>12</sup> The court went on to note, “[n]onetheless, courts have held that ‘national defense’ had acquired a well-known meaning ‘as a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.’”<sup>13</sup>

Merriam-Webster does not have a definition for “national security,” but its definition for “security” includes “freedom from danger . . . [or] anxiety.”<sup>14</sup> The *Department of Defense Dictionary* defines “national security” by noting that it includes “both national defense and foreign relations” and a “defense posture capable of successfully resisting hostile or destructive action from within or without.”<sup>15</sup>

Turning to national security law, academia has concluded it is a broad and multidisciplinary body of law. One scholar explained, “[t]here is not a single legal academy, practitioner, or public definition of ‘national security law.’”<sup>16</sup> In 2007, a review of national security law textbooks revealed, “the subject matter encompasses everything from constitutional distribution of war powers to international human rights.”<sup>17</sup> Another scholar noted, “The objective here is not to agree on a particular definition, but rather, in sampling definitions, to expose four points: (1) multiplicity of subjects, (2) integration of disciplines, (3) breadth of courses, and (4) fluidity of the national security field.”<sup>18</sup>

This final concept will be the foundation for discussion on the national security law workforce, which is a subset of the national security workforce. It includes administrative professionals, paralegals, and attorneys.<sup>19</sup> It also includes national security practitioners such as analysts, agents, case officers, and operators from law enforcement, military, and intelligence agencies.<sup>20</sup> Finally, it includes academics and members of the private sector.

## National Security Law Is . . .

Carly: *There’s a terrorist plot so we need to—*

Fenton: *Carly, there’s always a terrorist plot, if there wasn’t, we wouldn’t have a National Counterterrorism Center.*<sup>21</sup>

When it comes to the practice of law, national security is exceptional, multidisciplinary, sometimes non-adversarial, and on the cutting edge. National security law combines traditional areas of law (criminal justice, contracts, and torts), developing or emerging areas of law (cyber and space law), innovative technologies (artificial intelligence, deep fakes, and autonomous warfare), and some of humanity’s oldest problems (warfare and international relations).<sup>22</sup>

### . . . Exceptional

In numerous cases, courts have not addressed questions of national security in their analysis of larger constitutional issues, making national security cases exceptional. In *Katz v. United States*, the Supreme Court examined whether police needed a warrant to wiretap a public telephone booth.<sup>23</sup> The Court noted, “[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”<sup>24</sup> The Court took a similar approach a few years later in *United States v. United States District Court for the Eastern District of Michigan (The Keith Case)*, when it noted, “the instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.”<sup>25</sup> The Court again excepted national security in *Carpenter v. United States*, when it explained, “[o]ur decision today is a narrow one . . . Further, our opinion does not consider other collection techniques involving foreign affairs or national security.”<sup>26</sup>

One Congressional Research Service (CRS) report further highlighted the disparity between national security law and traditional criminal law when it noted law enforcement “tend(s) to give higher priority to tactical information (e.g., a tip that a specific cargo vessel is scheduled to

off-load a shipment of cocaine at a specific dock in Miami on the night of August 4).”<sup>27</sup> On the other hand, the intelligence community and national security apparatus have a different priority where, “the need for intelligence is more important than the need for dealing with a particular incident; thus, it may be advantageous to support a covert intelligence source for years (even if the source is publicly identified as anti-American or involved in illegal activities).”<sup>28</sup> These decisions and the subsequent CRS report highlight the exceptional nature of national security law. Which in turn reveals an added level of complexity for the national security law workforce.

### . . . Multidisciplinary

Common criminal law and civil laws often entangle with intelligence law, the law of armed conflict, and foreign relations law during the course of litigation. For example, the Supreme Court addressed whether the government could control information during civil litigation in 1875.<sup>29</sup> In *Totten v. United States*, the Court considered whether a spy—allegedly employed by President Abraham Lincoln during the Civil War—could sustain a claim against the President for secret services rendered during the war.<sup>30</sup> In determining the plaintiff could not sustain a claim against the President, the Court noted, “public policy forbids the maintenance of any suit . . . the trial of which would inevitably lead to disclosure of matters which the law itself regards as confidential” and, “greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.”<sup>31</sup> This is known as the *Totten* bar.<sup>32</sup>

The Supreme Court later found an executive privilege in *United States v. Reynolds*.<sup>33</sup> The widows of three civilians sued the United States after their spouses died when an Air Force aircraft, which was testing secret electronic equipment, crashed.<sup>34</sup> The district court ordered the government to produce certain materials and the government declined, claiming the information was privileged.<sup>35</sup> The district court entered a finding of liability,

which the court of appeals later upheld.<sup>36</sup> In reversing and remanding, the Supreme Court examined the history of the executive privilege that “protects military and state secrets.”<sup>37</sup> The Court then set forth a detailed test noting the privilege belongs to the government and “the head of the department which has control over the matter” must personally and formally assert the privilege.<sup>38</sup> The Court added the privilege was subject to judicial review, but the information was not subject to mandatory disclosure.<sup>39</sup> This is known as the *Reynolds* privilege.<sup>40</sup> Both the *Totten* bar and *Reynolds* privilege can end litigation—including in cases where the government is not a party—creating situations in which the national security law workforce struggle to make critical decisions of whether to assert a privilege that could prevent a litigant from having all or part of their day in court.

### ... Non-Adversarial

Intelligence law, a subset of national security law, can also depart from the adversarial practice common in other areas of law. The adversarial nature of criminal justice is a safeguard against abuse, but in non-adversarial situations, a different safeguard is used—oversight. For example, the oversight regime in the Foreign Intelligence Surveillance Act (FISA) includes all three branches of government.<sup>41</sup> Congress established the Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Surveillance Court of Review (FISCR).<sup>42</sup> Congress added personal accountability of executive branch officials.<sup>43</sup> The form of requesting certain authorities under FISA include features such as the application of a federal officer, certification of certain purposes by a senior executive branch official, and approval of the Attorney General (as defined in the statute) prior to filing.<sup>44</sup> Another oversight mechanism includes reporting requirements to Congress or the public.<sup>45</sup> Whereas an adversarial process allows for two (or more) parties to fully consider and advocate for their side of an issue, these oversight regimes require something different—they require the national security law workforce to essentially advocate for both sides, imposing an additional (ethical) burden not found in other areas of the law.<sup>46</sup>

### ... Cutting Edge

New technology sometimes complicates existing national security law. Consider deep fakes, the technology for “altering images, video, or audio (or even creating them from scratch).”<sup>47</sup> As Professors Robert Chesney and Danielle Keats Citron point out in *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, this technology would permit “a disturbing array of malicious uses” which could include “interposing the faces of celebrities into sex videos,” but “will migrate far beyond the porn context, with great potential for harm.”<sup>48</sup> Professors Chesney and Citron discuss the threat to national security this could pose, including the effects of such videos on elections, combat operations, foreign relations, or the democratic process.<sup>49</sup> This technology could affect the national security law workforce by influencing inputs into their work (as discussed above), but a hostile actor could also use it to create additional opportunities to exert coercive influence against individual national security practitioners.

Another example of how national security law is on the cutting edge is how it keeps pace with the rapidly changing cyber landscape. Developments in computer and internet technology led to a collaborative attempt by international law experts to articulate the international law related to cyber warfare in 2013 (the “Tallin Manual”).<sup>50</sup> Cyber technology (and law) moved so quickly that they repeated the effort just four years later, resulting in a second version of the manual (“Tallin Manual 2.0”).<sup>51</sup> Two similar efforts are underway to examine the international law related to military space operations.<sup>52</sup> These efforts underscore the dynamic nature of national security law. The national security law workforce should strive to be included in these conversations, along with academic and international experts.

### Recommendations

Business schools and private industry spend countless hours and dollars in studying organizational behavior, but the body of research on the national security law workforce appears less prolific.<sup>53</sup> Research has shown that having too many choices

can impede performance, so the goal of this article is to identify two recommendations and suggest avenues for additional research.<sup>54</sup>

### Creativity

In his second annual message to Congress, President Abraham Lincoln said:

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty. As our case is new, so we must think anew and act anew. We must disenthrall ourselves and then we shall save our country.<sup>55</sup>

Even at such a fraught time, President Lincoln appreciated the value of creativity. James Baker echoed the importance of creativity in claiming, “[i]f we do prevent a catastrophic attack, it will be through effective, hard, and creative use of national security tools—intelligence, the military, law enforcement, and diplomacy.”<sup>56</sup> In an environment with strict timelines, robust processes, and the urgency of national security, it can be tempting to default to the comfort of known repetitive bureaucratic processes. After all, some types of success stem from, “becoming an expert in a niche and performing a set of behaviors repeatedly.”<sup>57</sup> However, as the CEO of JPMorgan Chase put it, bureaucracy is “a disease.”<sup>58</sup> According to Sir Ken Robinson, an expert in education and innovation, although “[c]reativity is sometimes associated with free expression . . . creativity is also about working in a highly focused way on ideas and projects, crafting them in their best forms and making critical judgments.”<sup>59</sup>

Making room for creativity may not be a large government organization’s strength, but it can be done. Methods include exercises such as encouraging individualism within teamwork, using acting exercises such as in improvisation classes, or establishing diversity (discussed more below).<sup>60</sup> Other methods include avoiding micromanagement, encouraging experimentation, underwriting failure (when able), and moving from strict order toward a little more chaos (within reason).<sup>61</sup>

## Diversity

Diversity supports problem solving, innovation, and resilience. In fact, it is “critical for an organization’s ability to innovate and adapt in a fast-changing environment.”<sup>62</sup> A positive link has been shown between organizational diversity and resilience.<sup>63</sup> A study of organizational problem solving determined a “high degree of cognitive diversity could generate accelerated learning and performance in the face of new, uncertain, and complex situations.”<sup>64</sup> The study defined cognitive diversity as, “differences in perspective or information processing styles . . . not predicted by factors such as gender, ethnicity, or age.”<sup>65</sup> A subsequent study added, “groups that performed well treated mistakes with curiosity and shared responsibility for the outcomes,” which created “psychological safety,” for the members.<sup>66</sup>

There are myriad ways for an organization within the national security law workforce to achieve the desired diversity outside of hiring practices. Organizations can offer fellowships or details where employees work at other, related organizations for a term (such as a military officer performing a detail at another executive branch agency or private corporation).<sup>67</sup> Other options might include attending continuing legal education programs offered by the military law schools, or conferences and workshops with the private sector or academia.<sup>68</sup>

## Conclusion

The stressors placed on the national security law workforce are immense.<sup>69</sup> Taking care of each member of the workforce is vital, as is promoting the welfare of the collective organizations. Adding creativity to the process in a controlled fashion should allow the national security law workforce to find increasingly effective ways to solve problems. Encouraging diversity (such as cognitive diversity discussed above) should stimulate innovation and likewise build a more efficient and resilient workforce. These are only two recommendations to stimulate innovation, efficiency, and resilience in the national security law workforce. National security organizations should be open to trying something new, studying processes within their own and

other organizations, and continue to grow for the security of our nation. **TAL**

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## Notes

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44. *Id.*
45. *Id.* §§ 1802, 1807, 1808, 1826, 1862, & 1864.
46. This is likely oversimplified. For example, congress added a provision to FISA allowing for the FISC to utilize amici. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, § 401, 129 Stat. 268, 279 (2015) (codified as amended at 50 U.S.C. § 1803(i)).
47. Chesney & Citron, *supra* note 22.
48. *Id.* at 4–5.
49. *Id.*
50. NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALLIN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt, et al. eds., 2013).
51. NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALLIN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, (Michael N. Schmitt, et al. eds., 2017) ; *see also* NATO COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, TALLIN MANUAL: RESEARCH, <https://ccdcoe.org/research.html> (last visited on Nov. 24, 2018).
52. THE UNIVERSITY OF ADELAIDE: THE WOOMERA MANUAL, <https://law.adelaide.edu.au/woomera/home> (last visited on Nov. 24, 2018); MCGILL UNIVERSITY: MANUAL ON INTERNATIONAL LAW APPLICABLE TO MILITARY USES OF OUTER SPACE, <https://www.mcgill.ca/milamos/> (last visited on Nov. 24, 2018).
53. *See, e.g.*, Martin Parker, *Why We Should Bulldoze the Business School*, THE GUARDIAN: THE LONG READ (Apr. 27, 2018), <https://www.theguardian.com/news/2018/apr/27/bulldoze-the-business-school>; *but cf.* NAVY WARFARE DEVELOPMENT COMMAND, *Navy Lessons Learned Information System Upgraded* (Sept. 16, 2013), [https://www.navy.mil/submit/display.asp?story\\_id=76611](https://www.navy.mil/submit/display.asp?story_id=76611); UNITED STATES ARMY COMBINED ARMS CENTER, CENTER FOR ARMY LESSONS LEARNED, <https://usacac.army.mil/organizations/mccoe/call/> (last visited Nov. 25, 2018).
54. *See generally*, Louise Lee, *Research: Too Many Choices Can Derail Success*, STANFORD GRADUATE SCHOOL OF BUSINESS: INSIGHTS BY STANFORD BUSINESS (Nov. 26, 2013), <https://www.gsb.stanford.edu/insights/research-too-many-choices-can-derail-success>.
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56. JAMES E. BAKER, IN THE COMMON DEFENSE loc. 793 (Cambridge U. Press 2007).
57. Alice Boyes, *5 Ways Smart People Sabotage Their Success*, HARVARD BUSINESS REVIEW (Nov. 13, 2018), <https://hbr.org/2018/11/5-ways-smart-people-sabotage-their-success>.
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59. KEN ROBINSON, OUT OF OUR MINDS: LEARNING TO BE CREATIVE, loc. 389 (Capstone Publishing 2001).
60. *See generally*, ALAN ALDA, IF I UNDERSTOOD YOU, WOULD I HAVE THIS LOOK ON MY FACE? (Random House 2017); Alison A. Quirk, *Fostering a Culture of Creativity in the Workplace*, HUFFINGTON POST (June 18, 2015), [https://www.huffingtonpost.com/alison-a-quirk/fostering-a-culture-of-cr\\_b\\_7615498.html](https://www.huffingtonpost.com/alison-a-quirk/fostering-a-culture-of-cr_b_7615498.html); Forbes Coaches Council, *15 Ways Leaders Can Promote Creativity in the Workplace*, FORBES (Dec. 21, 2017) <https://www.forbes.com/sites/forbes-coachescouncil/2017/12/21/15-ways-leaders-can-promote-creativity-in-the-workplace/#663730f258ef>.
61. *See 15 Ways Leaders Can Promote Creativity in the Workplace, supra* note 53 (explaining: “Imagine a continuum with control and chaos anchoring the ends. A leader who wants to increase creativity should rate self and use behaviors to describe current rating and ones to move incrementally toward chaos. A system is at its most creative on the ‘cusp of chaos’ because all ideas will be considered. No leader wants to go all the way to the cusp, the goal is to move slightly beyond comfort”).
62. Ekaterina Walter, *Reaping the Benefits of Diversity for Modern Business Innovation*, FORBES (Jan. 14, 2014), <https://www.forbes.com/sites/ekaterinawalter/2014/01/14/reaping-the-benefits-of-diversity-for-modern-business-innovation/#42f027d52a8f>.
63. *See generally* Patrick Reinmoeller & Nicole van Baardwijk, *The Link Between Diversity and Resilience*, MITSLOAN MANAGEMENT REVIEW (July 15, 2005), <https://sloanreview.mit.edu/article/the-link-between-diversity-and-resilience/>; Cally Jordan & Ankoor Jain, *Diversity and Resilience: Lessons from the Financial Crisis*, 32 U.N.S.W.L.J. 416 (2009).
64. Alison Reynolds & David Lewis, *Teams Solve Problems Faster When They’re More Cognitively Diverse*, HARVARD BUS. REV. (Mar. 30, 2017), <https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse>.
65. *Id.*
66. Alison Reynolds & David Lewis, *The Two Traits of the Best Problem-Solving Teams*, HARVARD BUS. REV. (Apr. 2, 2018), <https://hbr.org/2018/04/the-two-traits-of-the-best-problem-solving-teams>.
67. *See e.g.*, RAND ARMY RESEARCH DIVISION, ARMY FELLOWSHIP PROGRAM, <https://www.rand.org/ard/fellows.html> (last visited Nov. 24, 2018); Michelle Tan, *FBI, CIA, NSA seek Army officers for fellowships: Apply Now*, FED. TIMES: HR (Dec. 17, 2015), <https://www.federaltimes.com/management/hr/2015/12/17/fbi-cia-nsa-seek-army-officers-for-fellowships-apply-now/>.
68. *See, e.g.*, Robert Chesney, *Announcing the 9th National Security Law Workshop*, LAWFARE (July 23, 2018), <https://www.lawfareblog.com/announcing-9th-national-security-law-workshop>; American Bar Association, National Security Law, Events & CLE, [https://www.americanbar.org/groups/public\\_services/law\\_national\\_security/events\\_cle/](https://www.americanbar.org/groups/public_services/law_national_security/events_cle/) (last visited Nov. 24, 2018); *Student Services*, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, <https://tjaglc-public.army.mil/student-services> (last visited Nov. 24, 2018); *Naval Justice School Curriculum*, U.S. NAVY JUDGE ADVOCATE GENERAL’S CORPS, NAVAL JUSTICE SCHOOL, [http://www.jag.navy.mil/njs\\_curriculum.htm](http://www.jag.navy.mil/njs_curriculum.htm) (last visited Nov. 24, 2018).
69. *See, e.g.*, Wehbé, *supra* note 5.

# Closing Argument

## Gimmie Five

### Why the Foundation of Five Actually Works

By Mr. Bradley J. Huestis and Colonel Sean T. McGarry

*The Foundation of Five concept was challenged recently in an opinion piece in The Army Lawyer (see Demolishing the Foundation of Five, Nov/Dec. 2018). What follows is a response to that piece:*

**The Foundation of Five concept may sometimes be confused with the function of the Chain of Command and noncommissioned officer (NCO) support channels.** This fundamental lack of understanding, if not clarified, can lead to a failure to appreciate what a powerful tool the Foundation actually represents. It enables the Staff Judge Advocate (SJA) to draw upon the diverse experiences and perspectives resident within every Office of the Staff Judge Advocate (OSJA). With proper understanding and utilization, the OSJA leadership can maximize informed decision making, ensure full representation of various demographics, and encourage broad consensus building and sense of ownership.

The Soldier's Training Manual—Paralegal Specialist (27D) states that the senior leadership of the OSJA:

[C]onsists of the SJA, the Deputy SJA, the Legal Administrator, Command and/or Chief Paralegal noncommissioned officer (NCO), and the Senior Civilian Advisor. Each senior leader has specific duties and responsibilities, but all five leaders (Foundation of Five) work together to ensure that the OSJA is led, trained, equipped, and supported in a manner to accomplish the mission.<sup>1</sup>

It also states that civilian attorneys:

[A]re assigned to the SJA office and perform legal duties, in one or more legal disciplines, under the supervision of the SJA, Division Chief, and Senior Civilian Advisor, with the notable exception of advocating before courts-martial. They regularly provide extensive expertise in a particular legal discipline. They also have supervisory responsibilities, which may include division chief's responsibilities.<sup>2</sup>

While the manual acknowledges the existence of the Senior Civilian Advisor (SCA) and broadly describes the attorney's supervisory responsibilities, it does not offer any specifics.

#### Origins of the Senior Civilian Advisor and the Foundation of Five

The Foundation is a relatively recent organizational construct. Lieutenant General (LTG) Scott Black designated Ms. Diane Nugent as the senior civilian attorney for the Judge Advocate General's Corps on 13 June 2007. The same day he published Special Announcement from The Judge Advocate General 37-12, stating:

Ms. Diane Nugent has been approved for promotion to the Senior Executive Service (SES) and will serve as the senior civilian attorney for the JAG Corps. . . . Ms. Nugent will be my primary advisor on all matters relating to our civilian employees.

Her primary emphasis will be on the professional development of the over 480 civilian attorneys in the Judge Advocate Legal Service. . . . We will greatly benefit from Ms. Nugent's leadership, experience, and judgment as she continues to serve our great Nation, Army, and Corps.<sup>3</sup>

Lieutenant General Dana Chipman, Lieutenant General Black's successor as The Judge Advocate General of the U.S. Army (TJAG), announced his vision of the Foundation at his first Worldwide Continuing Legal Education (WWCLE) Course, and discussed it further in seminar at the following year's WWCLE.<sup>4</sup> Approximately twenty-five percent of the attendees raised concerns about the concept. In response, LTG Chipman sent a follow-up message:

I owe you some thoughts here. As you already know, we have grown our civilian attorney population significantly over the last several years. With modularity and the maturing of installation management concepts, civilian attorneys occupy increasingly prominent roles in the provision of legal services. Of equal importance, they influence young judge advocates significantly in the critical first few years of practice. That is reality—and it means we need a civilian perspective in our leadership foundation. We have used the term "senior civilian" to date, but I am aging rapidly and am more sensitive to the use of "senior". Accordingly, a better term is "civilian advisor."<sup>5</sup>

Lieutenant General Dana Chipman continued:

The SJA alone is responsible and accountable for the OSJA. The SJA manages and leads with the help of key advisors: Deputy SJA, Legal Administrator, Chief Paralegal NCO, and Civilian Advisor—a Foundation of Five (FoF).

Inclusion of the civilian advisor in the FoF recognizes the key role of our civilian employees as mentors

and leaders in our formations. The civilian advisor helps improve office communication flow to all personnel, and gives the SJA a valuable civilian perspective regarding the delivery of legal services and office management.

The FoF is a flexible and dynamic concept—tailor the concept as it best fits your mission and structure. Each SJA has the flexibility to select the civilian advisor best-suited to provide advice and perspective regarding office issues.

Our civilians are indispensable to the success of Army legal operations—the evolution of a Foundation of Five simply acknowledges that truth.<sup>6</sup>

It is clear that the LTG Chipman wanted the Foundation to be flexible, and that it was a dynamic concept dependent upon the individual missions and the structure of each office. He also emphasized that including a civilian attorney in the Foundation would bring a much needed perspective to the group.

Lieutenant General Flora Darpino, our next TJAG, appointed Mr. Mortimer Shea to succeed Ms. Nugent as the JAG Corps' civilian member of the FoF.<sup>7</sup> Mr. Shea established an SCA forum on milBook and posted a message for SCAs serving throughout the JAG Corps. In the body of his message, Mr. Shea outlined several roles senior civilians should serve:

[T]he senior civilian should serve in two basic ways: first, as an informal mentor to junior members of the office, especially civilians; and second, as the foundation of five member who provides the civilian employee perspective, so it may be considered as office decisions are made. . . . [p]ractical speaking, the senior civilian leads by providing an example for junior civilians to emulate and from whom uniformed personnel can learn to appreciate civilian service.<sup>8</sup>

On the administrative side, Mr. Shea offered, "Where appropriate, the senior civilian also can offer to share some of the

warrant officer's administrative burden as it relates to civilian employees."<sup>9</sup> Mr. Shea concluded by encouraging his SCAs in the field to communicate vertically and horizontally. He advised:

Through this forum we also plan to provide you authoritative information on matters of general concern to civilians, such as furloughs, force structure changes, reorganizations that can help you and your SJA correct inaccurate information and dispel false rumors. The idea is that you be among the first to know about matters affecting civilians. And if we haven't pushed information down, you can always post questions on this restricted forum, to which only other senior civilians can subscribe.<sup>10</sup>

### Current Practices

When the function and value of the Foundation is recognized as a communication and decision support tool, it is clear that it does not confuse the NCO support channel or supervisory chain, but directly complements those established mechanisms by directly importing experience and perspective-based input. This facilitates greater positive impact for the entire organization. Army Regulation (AR) 600-20 identifies the NCO support channel as a vehicle that, "parallels and complements the chain of command."<sup>11</sup> The Foundation of Five is not inconsistent with that notion, but rather a similar complement that provides an integration function by bringing input from other leadership chains directly and efficiently to the decision maker. The Foundation is similarly consistent with Army doctrine. Field Manual (FM) 1-04, *Legal Support to the Operational Army*, identifies the SJA as the leader for the OSJA, doing so with the help of key advisors.<sup>12</sup> That doctrinal reference also acknowledges contemplated flexibility to account for situation requirements and other dynamics that may vary from office to office to include variations in mission structure. For example, at the 7th Army Training Center (ATC), SJAs have routinely expanded the Foundation to an informal Foundation of Six to include the Chief of Host Nation law to provide input on decisions that may affect the OSJA's

German employees. This flexibility is good because it highlights the adaptability of a tactic, technique, and procedure (TTP) that does not usurp or confuse other leadership chains.

In practice, SCAs provide critical continuity to the Foundation. The other four members rotate every two years, whereas the SCA is often a seasoned survivor of the good idea fairy. Due to longevity on station, the SCA also likely knows "where all the bodies are buried." This localized knowledge and experience allows the SCA to discretely talk to new SJAs about what has, or has not, worked well at the OSJA in the past.

Individual SJAs possess the independent flexibility "to select the civilian advisor best-suited to provide advice and perspective regarding office issues."<sup>13</sup> It is important to note that Foundation designation remains a TTP rather than something memorialized in manning documents. It is only after an SJA selects a civilian attorney as SCA that the civilian assumes a formal, OSJA-wide leadership role. It is this local TTP, applied unilaterally by the SJA, which brings OSJA leaders together to form the OSJA's Foundation of Five.

In most cases, inbound SJAs may reasonably rely on the incumbent to continue to fill the SCA role. When SJAs find themselves in the unusual position of selecting a new SCA, there are many factors that may drive an appropriate selection. To be an effective Foundation member, an SCA should be a technical expert in their legal discipline and be able to relate to the other Foundation members and the broad array of civilians employed by the OSJA. In evaluating suitability, SJAs should avoid using seniority alone as a litmus test. Whether precluded by overwhelming volume of other duties, lack of familiarity with Foundation areas of responsibility, or inability to foster the necessary interpersonal relationships, the most senior civilian attorney on staff might not be the best person to tap for SCA duties.

### Senior Civilian Advisor Duties

The duties of SCAs across the JAG Corps vary widely. All SCAs have a technical duty within the OSJA that is documented in their Position Description (PD). Many

are division chiefs in charge of supervising administrative law or client services operations. Others are labor counselors, international law attorneys, or ethics counselors. This article focuses on their roles as a member of the Foundation and mentor to members of the OSJA; roles which exceed the duties for which they were hired. Even though SCA functions may be included in PDs, SJAs do not hire SCAs; they hire civilian attorneys who accept the additional duty of serving as the OSJA's SCA. At the 7th ATC, the SCA is the Chief of Client Services. The duties relating to supervising legal assistance, Special Victim Counsel, tax and claims operations within Bavaria, and the SCA duties are all outlined in the PD. With regard to the SCA duties it states:<sup>14</sup>

Serves as the 7th ATC OSJA Senior Civilian Attorney and Special Assistant to the SJA, with respect to a wide range of highly technical and complex legal issues dealt with by the OSJA. Serves as principal advisor to the SJA regarding civilian personnel issues within OSJA as related to US and Local National civilian attorneys, as well as US and Local National paralegals, and legal assistants. Requires knowledge of professional responsibility rules related to US and Local National attorneys and support staff.<sup>15</sup>

In many respects, the 7th ATC SCA's duties are intertwined with traditional division chief duties. In practice, the addition of SCA duties simply broadens the supervisory role to include mentoring OSJA employees working outside of the Client Services Division. The PD uses language that at times squarely applies to Client Services only, and at other times includes the full range of OSJA operations.<sup>16</sup>

These duties are further spelled out in annual DPMAP support form and performance evaluations. Some of the stated goals and achievements captured in these documents relate to SCA duties: facilitating OSJA civilian personnel actions such as DAC/LN hiring; drafting civilian honorary, monetary and time-off awards; and spearheading the OSJA's efforts to promote CP-56 training opportunities. Other goals and achievements relate to Chief of Client

Services duties: supervising judge advocates, paralegals, and civilians working in legal assistance, claims, tax, and SVC billets; supervising the drafting and submission main and branch office applications for the Chief of Staff of the Army (CSA) legal assistance excellence award; and advising and supporting unit SRP and other preventive law programs. However it is spelled out within a particular OSJA, the important thing to remember is that it remains a purely local TTP. Staff Judge Advocates and their SCAs should take affirmative steps to shape the application of their local TTP to best suit the needs of their office.

The SCA is in a unique position to provide continuity and behind-the-scenes guidance to the SJA, DSJA, Legal Administrator, and Chief Legal NCO. A clear charter at the outset of the SJA-SCA relationship is a key starting point. Because there is scant formal JAG Corps guidance on how SCAs should fulfill their management roles, SJAs retain wide discretion in developing local TTPs. This is good, because one-size-fits-all guidance would limit the flexibility that allows the Foundation of Five to be so effective.

The Foundation was never designed to replace established leadership chains. It is instead a communication and decision support tool. Its value in promoting mentorship; development and dissemination of organizational communications; and an effective means to encourage collaboration and informed decision making is obvious. Elimination of the Foundation would be foolhardy, because LTG Chipman's observation continues to hold true, "Our civilians are indispensable to the success of Army legal operations—the evolution of a Foundation of Five simply acknowledges that truth."<sup>17</sup> **TAL**

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*COL McGarry and Mr. Huestis served together at the 7th Army Joint Multi-National Training Command, now re-flagged as the 7th Army Training Command. Mr. Huestis remains as the 7th Army Training Command's Chief of Client Services and Senior Civilian Advisor. COL McGarry is currently the 1st Armored Division's Staff Judge Advocate.*

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## Notes

1. U.S. DEP'T OF ARMY, SOLDIER'S TRAINING MANUAL – PARALEGAL SPECIALIST (27D) 3 (2011).
2. *Id.* at 5.
3. A Special Announcement from The Judge Advocate General, 37-12 (13 June 2007).
4. Email from Ms. Diane Nugent to Mr. Frederic Borch (04 Mar. 2015, 11:02 EST) (on file with author).
5. Email from COL Peter Cullen on behalf of LTG Dana Chipman to JAGC uniformed leaders (08 Nov. 2010, 16:59 EST) (on file with author) [hereinafter COL Cullen email].
6. *Id.*
7. Email from LTG Flora D. Darpino sent to the field via USARMY Pentagon HQDA OTJAG Mailbox (01 July 2015, 11:02 PM) (on file with author). The message reads in full:  
ANNOUNCEMENT OF MR. MORTIMER C. SHEA, Jr. AS THE NEW SENIOR CIVILIAN ADVISOR—It is my pleasure to announce Mr. Mortimer C. Shea, Jr., Director, Soldier and Family Legal Services as our new senior civilian advisor and the latest member of the JAG Corps' leadership Foundation of Five. Our Corps will greatly benefit from his leadership, experience, and judgment as he serves as the senior civilian attorney in The Judge Advocate General's Corps and my advisor on matters related to Judge Advocate General's Corps' civilian employees. Please join me in congratulating Mr. Shea as he assumes his new duties.
8. Mr. Mortimer Shea on milBook (11 May 2016, 21:31 EST) (on file with author) [hereinafter Mr. Shea milBook].
9. *Id.*
10. *Id.*
11. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014).
12. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-20 (18 Mar. 2013) [hereinafter FM 1-04].
13. COL Cullen email, *supra* note 5.
14. Position Description # JJ354042, Sequence # 2026816, Supervisory Attorney-Advisor (General) GS-0905-14 (23 Apr. 2010).
15. *Id.* para. I.1.
16. *Id.* para II.1.
17. COL Cullen email, *supra* note 5.



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