

MILITARY LAW REVIEW

Volume 228
Issue 1

**BUILDING A HOME AWAY FROM HOME: ESTABLISHING
OPERATIONAL CONTROL IN A FOREIGN COUNTRY**

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PROVIDE COMFORT started as a fast-moving train. No one knew in advance that they were getting on, how far they were going, or when they would get off. Only a few tasks were well defined, and many were supported with difficulty. None of the units that deployed to Turkey had doctrine, plans, or procedures designed specifically for relief operations. But throughout the world the nature of the crisis had captured everyone's attention. Refugees were suffering and dying, and the situation would worsen if quick action were not taken. The train was accelerating, but no one hesitated to get on.¹

I. Introduction

In early 1991, Turkish and international relief agencies found themselves confronted with a large-scale refugee relief effort, one larger than anyone had anticipated, leaving the world unprepared to respond.² Nearly one million Kurdish refugees huddled in the mountains on the Iraqi

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¹ GORDON W. RUDD, HUMANITARIAN INTERVENTION 56 (2004).

² *Id.* at 36.

side of its border with Turkey, sustaining themselves on only what they could carry when they fled their homes.³ The Gulf War had just ended, and a majority of Americans wanted their troops home as soon as possible.⁴ However, as they witnessed the human suffering broadcast over the airways, they wanted to help these refugees, even if it meant the troops had to stay to assist.⁵

What followed in response was *Operation Provide Comfort*, a humanitarian relief operation initiated by the United States that relied heavily on support from the military forces of thirteen countries.⁶ The timing of the operation, its complexity, its use of military forces, and its proximity to the end of the first Gulf War led to many legal issues, including how to define operational control for purposes of military construction.⁷

Even considering the tragic, unexpected circumstances facing the Kurds, some of the first legal questions and most pressing concerns in the operation dealt with funding—the United States knew it wanted to help, but how would it pay for its activities, such as building a camp for the refugees?⁸ To further complicate that fiscal issue, “[m]ost of the funding questions arose in the early days of the operations before firm guidance was received and additional sources of funds other than [operations and maintenance funds (O&M)] were available.”⁹ Like the Turkish government and the international relief agencies, commanders and their judge advocates did not yet have the answers for the issues posed by this situation.¹⁰

One specific concern was whether certain spending limitations applied to construction projects due to the U.S. military’s participation in Operation Provide Comfort.¹¹ The operation required the construction of

³ *Id.* See also Philip A. Meek, *Operation Provide Comfort: A Case Study in Humanitarian Relief and Foreign Assistance*, 37 A.F. L. Rev. 225 (1994).

⁴ Meek, *supra* note 3, at 225–26.

⁵ *Id.*

⁶ *Id.* at 226.

⁷ *Id.* at 226, 233.

⁸ *Id.* at 228.

⁹ *Id.*

¹⁰ See RUDD, *supra* note 1, at 36.

¹¹ Meek, *supra* note 3, at 232. See also 10 U.S.C. § 2805(d)(1) (1990). At the time, \$200,000 was the O&M limit for unspecified minor military construction. 10 U.S.C. § 2805(d)(1).

housing for Kurdish refugees and allied forces.¹² Military leaders questioned whether this construction constituted “military construction,” which would be subject to spending limitations.¹³ Headquarters for the United States Air Forces in Europe (HQ USAFE) believed that this housing did constitute military construction, which meant a \$200,000 limit per project would apply to using O&M funds.¹⁴ In arriving at this conclusion, HQ USAFE relied on the definition of “military installation” found in 10 U.S.C. § 2801:

“Military installation” means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of a Secretary of a military department or the Secretary of Defense.¹⁵

HQ USAFE’s opinion focused heavily on the physical presence of the U.S. military and the physical control it provided in the camps.¹⁶ One judge advocate reviewing the situation after the fact adamantly agreed with HQ USAFE, stating:

It seems beyond any doubt that these foreign refugee camps and U.S. camps were at a minimum under the operational control of the United States, particularly because U.S. military command structures were in place, U.S. military forces patrolled and ensured security at the camps, and U.S. forces controlled the daily lives of the refugees and all other persons in those camps.¹⁷

On the other hand, United States European Command (EUCOM), hoping to avoid the statutory \$200,000 project limit, asserted that the camps were “strictly humanitarian relief centers, not military facilities and not military installations under U.S. operational control.”¹⁸ Yet, EUCOM did not dispute that the military physically controlled the area but asserted instead that “control over the camps would be exercised in conjunction with the displaced persons themselves” and the U.S. military was waiting

¹² Meek, *supra* note 3, at 232.

¹³ *Id.*

¹⁴ *Id.* at 233.

¹⁵ Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (current version at 10 U.S.C. § 2801 (2012)). *See also* Meek, *supra* note 3, at 233.

¹⁶ Meek, *supra* note 3, at 233.

¹⁷ *Id.*

¹⁸ *Id.*

to be replaced in its function by “the United Nations or other international relief organizations as soon as possible.”¹⁹ EUCOM's position reflected the fact that “[a]lthough the U.S. military has conducted humanitarian relief operations abroad throughout history, the Department of State has primary responsibility for foreign humanitarian relief.”²⁰

In the end, the Office of the Secretary of Defense sided with EUCOM, determining that 10 U.S.C. § 2801 did not apply to the refugee camps because the camps “were not military installations under the jurisdiction of [the Department of Defense (DoD)].”²¹ However, was that the correct decision? HQ USAFE and EUCOM, each with its own set of legal advisors, approached operational control from different angles and came to opposite conclusions. Each cited facts that supported their conclusions, with HQ USAFE focusing on the physical presence and police power provided by the U.S. military and EUCOM keying in on the humanitarian relief purpose of the mission.²² Almost twenty years later, the phrase “operational control” remains unclear.

Regardless of whether this exact scenario could repeat itself, operational control needs a clearer definition. With a better definition of operational control, commanders and the legal advisors supporting them will be better prepared to take action toward mission accomplishment instead of arguing about definitions within definitions and which pots of money to use. In an effort to define the phrase “operational control,” Section II will trace back the roots of this requirement and look for guidance in the statute and its legislative history. Section III will then address insights gained from challenges to control over military installations in case law, specifically *United States v. Phisterer*.²³ Finally, Section IV will provide recommended practices to help commanders and their judge advocates determine when operational control exists in both permissive and non-permissive environments.

In the end, the analysis and review will show that judge advocates and commanders should define operational control consistent with 10 U.S.C. § 2801's plain language and Supreme Court case law dealing with military installations, meaning (1) there is a defined geographic area, (2) which the

¹⁹ *Id.*

²⁰ *Id.* at 226.

²¹ *Id.* at 233.

²² *Id.*

²³ *United States v. Phisterer*, 94 U.S. 219 (1876); *See also United States v. Apel*, 571 U.S. 359 (2014).

military intends to use, possess, or control for military purposes, (3) regardless of the duration of that use, possession, or control. By using these criteria to assess whether operational control exists, judge advocates will be ready to take quick action.

II. Congressional Intent — Operational Control

When approaching a fiscal law issue—such as whether operational control exists for military construction purposes—analysis begins with due deference to Congress. After all, “[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” one of the primary constitutional powers given to the legislature.²⁴ Congress requires that the funds it provides be used only for the purposes for which they were appropriated.²⁵ Therefore, judge advocates owe careful attention to any information or clues received from Congress when evaluating expenditures.

It follows that government agents spending on construction, even during military operations or for humanitarian reasons, must obligate funds in a way that Congress approves. When it comes to the military, Congress has given specific rules for funding military construction.²⁶ It defines military construction as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road.”²⁷ In the same statute, Congress also provides a definition for what constitutes a military installation:

The term “military installation” means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.²⁸

²⁴ U.S. CONST. art. I § 9, cl 7.

²⁵ 31 U.S.C. § 1301(a) (2012).

²⁶ 10 U.S.C. § 2801(a) (2012).

²⁷ *Id.*

²⁸ 10 U.S.C. § 2801(c)(4).

Congress has included the term “operational control” as a requirement for military construction in foreign countries ever since 10 U.S.C. § 2801 became law.²⁹ However, the statute does not define “operational control.”³⁰ This lack of a definition has left judge advocates and commanders struggling to pinpoint how operational control fits in, as exemplified by the disagreement between EUCOM and HQ USAFE during the Kurdish refugee camp situation.³¹

Even though Congress has not specifically defined “operational control,” the intent found in legislative history can help fill this definitional void. Where a term or phrase in a statute is undefined, judge advocates can search for meaning in the materials that Congress created when it formed the law, such as recordings, transcripts, and records from legislative hearings. If those materials contain no such clues, then judge advocates may turn to other legal sources, such as judicial review of similar statutes for guidance. Reviewing the history of 10 U.S.C. § 2801 provides some, although minimal, insight into how “operational control” should be defined.

Although the phrase “operational control” has been part of the statute since Congress passed it into law,³² that particular phrase did not appear until after Congress had considered the bill for several months.³³ The Senate bill³⁴ and an identical House bill³⁵ introduced in December 1981 said nothing about operational control, and neither did a second Senate bill introduced for consideration in February 1982.³⁶

However, in a subsequent House bill introduced for consideration by the Committee on Armed Services in May 1982, the term “operational control” became part of the proposed law for the first time as part of the definition for “military installation.”³⁷ The “military installation” definition in the May 1982 bill is identical to the definition passed into law

²⁹ Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. § 2801 (2012)).

³⁰ 10 U.S.C. § 2801(c)(4).

³¹ Meek, *supra* note 3, at 233.

³² Military Construction Codification Act, ch. 169, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. § 2801 (2012)) [hereinafter Military Construction Codification Act].

³³ S. 1990, 97th Cong. (1981).

³⁴ *Id.*

³⁵ H.R. 5241, 97th Cong. (1981).

³⁶ S. 1990, 97th Cong. (Feb. 2 (legislative day, Jan. 25), 1982).

³⁷ H.R. 6451, 97th Cong. (1982).

in July 1982.³⁸ In 2003, a subsequent amendment added the phrase “without regard to the duration of operational control” at the end of the definition of “military installation.”³⁹

The fact that the operational control requirement appeared in the May 1982 version of the bill after Congress omitted it in prior drafts suggests that something triggered that change as different committees worked on the proposed legislation. Unfortunately, the legislative hearings do not explain why Congress added the term “operational control” to the definition of “military installation.” However, the legislative history hints at one possible reason: mission purpose and responsibility drive who has operational control.⁴⁰

James P. Wade, Jr., then-Acting Under Secretary of Defense, raised this concept—that mission purpose and responsibility are linked to operational control—when he explained why the Air Force was “the focal point for launch and orbital support for space systems.”⁴¹ During hearings on the proposed law, Secretary Wade wrote a letter addressing concerns about the allocation of funding for space operations.⁴² Even though there is no explicit connection between the concern about space operations and Congress requiring that operational control be established in a foreign country for military construction, the points Secretary Wade raised highlight how operational control should be viewed.⁴³

The letter provided by Secretary Wade responded to concerns from the Comptroller General of the United States that the DoD’s Consolidated Space Operations Center lacked adequate planning.⁴⁴ That letter included the following:

We fully recognize that space does have unique aspects and that the support structure is large and expensive to operate. For this reason,

³⁸ Military Construction Codification Act, *supra* note 32.

³⁹ National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

⁴⁰ See *Military Construction Authorization and Appropriation Fiscal Year 1983 Military Construction Codification Bill: Joint Hearings on S. 2205 and S. 1990 Before the Subcomm. on Military Constr. of the Comm. on Armed Services and the Subcomm. on Military Constr. of the Comm. on Appropriations*, 97th Cong. 457 (1982) [hereinafter *Hearings*] (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

the Air Force, through Space Division, is the focal point for launch and orbital support for space systems. This “single manager” approach for common support functions is efficient and has been implemented; operational control of space systems is vested in those organizations having direct mission responsibility.

Until such time as a new mission in space mandates the designation of an organization to accomplish that mission, we believe that our present functional approach to management and operation of space systems is appropriate.⁴⁵

In addition to being the only time operational control was mentioned during the hearings,⁴⁶ these two paragraphs provide an example of the DoD’s view of operational control at the time. Per the letter, “operational control” was “vested in those organizations having direct mission responsibility.”⁴⁷ Furthermore, operational control could change whenever a new mission required a new organization for it to function.⁴⁸ In other words, operational control should be determined based on the mission to be accomplished, and operational control should only change if the mission changes first. Purpose—which fundamentally drives the mission—matters, and it directly relates to who has operational control.

Applied to circumstances of Operation Provide Comfort, this purpose-driven, mission-centric view of operational control extracted from the legislative history tends to support EUCOM’s conclusion over HQ USAFE’s when funding the Kurdish refugee camps’ construction. In finding that no military operational control existed, EUCOM focused on why the camps were being built—for humanitarian relief—over who built them and provided physical control in the area at any given time.⁴⁹ EUCOM acknowledge that the military was present, but it characterized the military as a placeholder for those who should be in control: the United Nations or other relief organizations.⁵⁰ In other words, EUCOM let the mission govern operational control.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Meek, *supra* note 3, at 233.

⁵⁰ *Id.*

On the other hand, HQ USAFE applied a rigid, action-centered interpretation of operational control.⁵¹ The purpose and scope of the mission did not carry much weight in HQ USAFE's calculus; because it fell to the U.S. military to build the housing and maintain peace in the area, HQ USAFE concluded that the U.S. military had operational control, even if mission responsibility was actually vested in some other organization, such as the Department of State, the United Nations, or international relief organizations.⁵² Its approach, if followed, would have imposed limitations meant for the military on an operation with a humanitarian relief purpose simply because the military was there and providing support that was immediately required. From its action-centered standpoint, HQ USAFE would have imposed unnecessary limitations on the relief effort by limiting the use of O&M funds to \$200,000 per project.⁵³

In addition to this mission-driven view of operational control, the fact that Congress included the phrase “operational control” within its definition for “military installation” is insightful.⁵⁴ The placement of “operational control” in the definition for “military installation” suggests that military installations in the United States and areas considered under operational control in foreign countries are more similar than different.⁵⁵ These hints from the legislative history and structure of 10 U.S.C. § 2801, however insightful and persuasive, are small and not explicitly linked to why Congress included operational control in the statutory language.⁵⁶ Furthermore, there is no way to know the extent of consideration Congress gave to Secretary Wade’s letter. However, the idea of mission-focused operational control, especially as it relates to military installations, is not solely a factor in legislative history; it is a theme that emerges in judicial rulings as well. With this in mind, the judicial treatment of the operational control of military installations generally provides a solid framework for understanding operational control for purposes of the statute.

III. Judicial Guidance — Military Installations

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 232.

⁵⁴ 10 U.S.C. § 2801(c)(4) (2012).

⁵⁵ *See id.*

⁵⁶ *Hearings, supra* note 40, at 457 (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

In the absence of clear, unambiguous legislative intent in defining operational control, case law involving the treatment of the operational control of military installations provides helpful insight into how judge advocates should interpret operational control. Although the phrase “operational control” found in 10 U.S.C. § 2801 has not been directly addressed, Courts have had occasion to address authority over military installations in the United States when reviewing other statutes.⁵⁷ Such cases help refine the scope of what operational control means for purposes of analysis under 10 U.S.C. § 2801.⁵⁸

A. *Phisterer* — A Geographic Area with a Military Purpose

Phisterer is an 1876 Supreme Court case that delves into the concept of military purpose and further examines when a geographic area should be considered under the military’s operational control.⁵⁹ It supports the conclusion that operational control must involve a certain geographic area that will be used for a military purpose.⁶⁰

The named party in that case, Frederick Phisterer, served as a captain in the United States Army infantry during the 1870s.⁶¹ He received orders to leave his post in Fort Bridger, Wyoming Territory, and return to his home in New York City.⁶² Once there, he was to await orders.⁶³ The captain complied, reporting to the Army that he had arrived in New York and notifying the Army when he later moved to New Jersey.⁶⁴

After his move to New Jersey, the captain sought reimbursement for his mileage from when he travelled from Wyoming to New York.⁶⁵ The Court of Claims paid Captain Phisterer for his mileage, as well as for a separate claim he made relating to quarters.⁶⁶ Captain Phisterer received \$585.20; the Government appealed the decision to the United States Supreme Court.⁶⁷

⁵⁷ See e.g. *United States v. Apel*, 571 U.S. 359 (2014).

⁵⁸ See *id.*; *United States v. Phisterer*, 94 U.S. 219, 220 (1876).

⁵⁹ See *Phisterer*, 94 U.S. at 219.

⁶⁰ See *id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Phisterer v. United States*, 1876 U.S. Ct. Cl. LEXIS 40, 40 (U.S. Ct. Cl. 1876).

⁶⁷ *Id.*

On appeal, the Government argued that the Army was justified in denying reimbursement for the mileage.⁶⁸ The Government supported its appeal by citing section 1117 of the Army Regulations existing at the time, which provided the following: “When officers are permitted to exchange stations or are transferred at their own request from one regiment or company to another, the public will not be put to the expense of their transportation. They must bear it themselves.”⁶⁹ Although the Court did not address how the Government argued this section of regulation, it appears that the Government argued that Captain Phisterer’s home should be considered a military station because that is where the Army sent him while he awaited orders.⁷⁰

Whether or not the Government made that argument, the Court addressed the cited regulation and explained why a military station does not include an individual’s home.⁷¹ In rejecting the overly expansive definition put forth by the Government, the Court stated the following:

[W]e are of the opinion that Captain Phisterer did not make an exchange of stations within the meaning of this regulation. In other words, although he left a military station at Fort Bridger, his home at New York, to which he went, did not become, and is not to be deemed, a military station. In the broadest use of language, no doubt the word “station” means a place or position; and it may be said that wherever a man, in pursuance of orders, stays or remains, he is stationed, and that if he is a military man, such place becomes a military station. This word (station) has a recognized and a different meaning under different circumstances. It is a technical word in church regulations, in the science of ecclesiology, in the civil law, in surveying, in railroad language, and in military science. . . .

A “military station” is merely synonymous with the term “military post,” and means a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded, -- where something,

⁶⁸ *Phisterer*, 94 U.S. at 221.

⁶⁹ *Id.*

⁷⁰ *See id.* at 222.

⁷¹ *Id.*

in short, more or less closely connected with arms or war is kept or is to be done.⁷²

This indicates that a military station, or military installation, is a geographic location that the military intends to use, possess, or control for military purposes, or “something . . . more or less closely connected with arms or war.”⁷³ The physical location of Captain Phisterer’s home and its purpose as a civilian residence separated it from military purposes to the point that it could not qualify as part of a military installation. A civilian home in New York was sufficiently removed from anything “closely connected with arms or war” to distinguish it from being part of a military installation. The fact that it became the ordered residence of “a military man” did not convert it from a non-military area into an area under military control.⁷⁴

The Supreme Court’s ruling in this case squares with EUCOM’s view of the refugee camps. A military connection is not enough—the overall connection to the area needs to be “closely connected with arms or war.”⁷⁵ A civilian residence housing a military member or a refugee camp, even one where military members help temporarily provide police-like security, are simply not sufficiently “connected with arms or war” to be considered military installations or subject to the operational control of the armed forces.⁷⁶ However, what this case does not address is the element of consistency of control, or, in other words, whether a certain duration of control, use, or possession must be established before an area becomes under operational control.

B. *Apel* — Purpose Trumps Duration or Persistence of Control

Phisterer sets the stage and indicates that both control of a military base and operational control of an area in a foreign country require a geographic area that the military intends to use, possess, or control for military purposes.⁷⁷ Another Supreme Court case, *Apel*, expounds further on the need for a clearly defined geographic space and also delves into the

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

interrelation of purpose and the duration or persistence of control.⁷⁸ Providing more insight to what it means to have operational control, *Apel* also supports the idea that the purpose an area serves matters more than how that area is physically controlled.⁷⁹

Where *Phisterer* deals with a captain seeking reimbursement for moving costs,⁸⁰ *Apel* deals with a blood-throwing, antiwar activist named John Dennis Apel.⁸¹ During a protest at Vandenberg Air Force Base, California, in March 2003, Mr. Apel, in protest, elected to throw blood on the sign for the base, which was located outside of an area on the base specifically opened up to allow protesting.⁸² Due to his actions, he received a criminal conviction and a three-year bar from the installation.⁸³ In May 2007, he returned to Vandenberg, trespassed again, received another conviction, and was permanently barred from the base.⁸⁴ As an exception to the barment, Mr. Apel could still traverse the base through Highway 1 and Highway 246, roads over which the Air Force had granted easements to allow the public to traverse the installation.⁸⁵

Despite his criminal convictions, Mr. Apel continued to ignore the commander's order barring him from the installation.⁸⁶ After he continued to violate the barment order, a Magistrate Judge convicted him for trespasses and ordered him to pay \$355.00.⁸⁷ Mr. Apel appealed, eventually obtaining a hearing with the Supreme Court.⁸⁸

At that hearing, Mr. Apel argued that the military had relinquished control over portions of the installation by granting easements to the county, referring to access permitted via Highway 1 and Highway 246.⁸⁹ In support of his argument, he asserted that "military places [such as installations, posts, forts, and yards] have historically been defined as land withdrawn from public use."⁹⁰ He essentially argued that the military's

⁷⁸ *United States v. Apel*, 571 U.S. 359, 364–65 (2014).

⁷⁹ *Id.*

⁸⁰ *Phisterer*, 94 U.S. at 220.

⁸¹ *Apel*, 571 U.S. at 364.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 362, 364.

⁸⁶ *Id.* at 364.

⁸⁷ *Id.*

⁸⁸ *Id.* at 364–65.

⁸⁹ *Id.* at 367.

⁹⁰ *Id.*

limited physical control over certain portions of the installation mattered more than the primary purpose for which the installation existed.⁹¹

The Supreme Court disagreed, indicating that military places have historically been open to the public while still maintaining operational control.⁹² In line with the Court's reasoning in *Phisterer*, the Court upheld the principle that a geographic space is under military control when the military intends to use, possess, or control the area for a military purpose, regardless of whether an easement has been granted or some other lessening of physical control has occurred.⁹³

Furthermore, the Court reasoned that the geographic space's purpose as a military installation mattered more than how the military maintained physical control over certain areas.⁹⁴ As stated by the Court:

The common feature of the places described in §1382 is not that they are used exclusively by the military, but that they have defined boundaries and are subject to the command authority of a military officer. That makes sense, because the Solicitor General has informed us that a military commander's authority is frequently defined by the boundaries of a particular place: When the Department of Defense establishes a base, military commanders assign a military unit to the base, and the commanding officer of the unit becomes the commander of the base.⁹⁵

The Court went on to say,

[W]e decline Apel's invitation to require civilian judges to examine U.S. military sites around the world, parcel by parcel, to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose. The use-it-or-lose-it rule that Apel proposes would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in military operations. And it would discourage commanders from opening portions of their bases for the convenience of the public.⁹⁶

⁹¹ *Id.* at 364–67.

⁹² *Id.* at 367.

⁹³ *Id.* at 371.

⁹⁴ *Id.* at 367–68.

⁹⁵ *Id.*

⁹⁶ *Id.* at 372.

In short, opening up certain areas for convenient public use or for protests did not dissolve the true purpose for the area: it was still a military installation with military missions. Purpose is extremely important, and the military's mission, not current or past physical control, determines the limits and bounds of its purposes for the area. As the Court indicated in *Apel*, it would be inappropriate to look into "which [military sites] have a sufficiently important, persistent military purpose."⁹⁷ That is a question for the DoD to decide. Therefore, when it comes to whether the military has operational control of a geographic area, what really counts is how the military intends to use the area and what mission will be accomplished.

Although *Apel* deals with the limiting of physical military control over an area and Operation Provide Comfort deals with an abundance of physical military control, the purpose for controlling the area trumps, not how much or how little physical control the military has exerted. When the United States military built relief camps for Kurdish refugees, "relief operations" best described the activity.⁹⁸ The camps served a humanitarian purpose, not a military mission. The convenient physical presence of troops did not dictate the refugee camps' purpose any more than the lack of physical control over the protest area and the easements granted to the public did in *Apel*. In both cases, the mission's purpose came first when determining whether the military had established operational control, regardless of the level of physical control.

In summary, *Phisterer* and *Apel* provide useful insight into the military's control over U.S. military installations. *Phisterer* establishes that a geographic area should be considered under the military's operational control when it is sufficiently "connected with arms or war."⁹⁹ *Apel* builds on the importance of geography and establishes that the purpose an area serves matters more than how that area is physically controlled.¹⁰⁰ Using these judicial principles, the language and organization of 10 U.S.C. § 2801, and the insight from the legislative history, judge advocates may more fully evaluate the term "operational control."

IV. Evaluating Operational Control

⁹⁷ *Id.*

⁹⁸ RUDD, *supra* note 1, at 56.

⁹⁹ United States v. Phisterer, 94 U.S. 219, 222 (1876).

¹⁰⁰ *Apel*, 571 U.S. at 364–65.

With the statute, the legislative history, and judicial considerations in mind, the definition of operational control becomes clearer. Based on these sources, the following definition seems appropriate: operational control consists of (1) a defined geographic area, (2) which the military intends to use, possess, or control for military purposes, (3) regardless of the duration of that use, possession, or control. Judge advocates should carefully consider each portion of this definition when confronted with whether the military has operational control of an area.

A. A Defined Geographic Area

The first step in determining whether an area is under the operational control of the military is to define the geographic area in question. In *Phisterer*, the Court focused on the location of Captain Phisterer's home, distinguishing it from a barracks or quarters at a military installation.¹⁰¹ In *Apel*, the Court carefully analyzed the boundaries of Vandenberg Air Force Base and the easements traversing the installation, and it even included maps of the installation to support its opinion.¹⁰² During Operation Provide Comfort, the location of the camps constructed by the military should not be overlooked: northern Iraq in proximity to suffering Kurdish refugees attempting to flee to Turkey.¹⁰³ This same level of analysis is crucial to future questions about areas potentially under military operational control.

When addressing whether an area is under operational control in future cases, judge advocates should seek to fully understand that particular geographic area. They should consider where it is located, what exists there, and what will be built there. Through careful attention to these issues, legal advisors will be better prepared to discuss whether the area's geography and its future use are "closely connected with arms or war" and to explain their impact on operational control.¹⁰⁴

B. Military Intent to Use, Possess, or Control for Military Purposes

¹⁰¹ *Phisterer*, 94 U.S. at 222.

¹⁰² *Apel*, 571 U.S. at 359, 374.

¹⁰³ RUDD, *supra* note 1, at 36.

¹⁰⁴ *Phisterer*, 94 U.S. at 222.

After successfully defining the relevant geographic area, the next question is whether the area will be used, possessed, or controlled for military purposes. In other words, what mission is the area supporting? In *Phisterer*, the captain's home may have been an ordered place of residence, but the military had not expressed any intent to use, possess, or control his home.¹⁰⁵ There was nothing about his home that was sufficiently connected to warfighting. In *Apel*, the military's intent to use, possess, and control Vandenberg Air Force Base for military purposes allowed the installation commander to bar Mr. Apel, even though the civilian easements had been granted and certain areas on the installation had been designated as appropriate for protesters.¹⁰⁶ In Operation Provide Comfort, the camp was not under operational military control because the military did not intend to use, possess, or control the area for military purposes. The camp had always been intended for purposes of humanitarian relief.¹⁰⁷ In all these cases, the theme is the same: the intent of the mission drives the determination of operational control.

As future issues arise, legal advisors absolutely must understand the mission purpose. Although understanding the area in question is vital, whether the military has established operational control depends on the mission to be accomplished. As the Air Force highlighted in its brief about Space Operations, "operational control . . . is vested in those organizations having direct mission responsibility."¹⁰⁸ Operational control does not change without a change in the mission.¹⁰⁹

The principle that the mission drives control, and, in turn, that control drives funding, extends beyond just a military context. Per the U.S. Government Accountability Office:

We have dealt with the concept of "necessary expenses" in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item

¹⁰⁵ *Id.*

¹⁰⁶ *Apel*, 571 U.S. at 359.

¹⁰⁷ *Meek*, *supra* note 3, at 233.

¹⁰⁸ *Hearings*, *supra* note 40, at 457 (letter from James P. Wade, Jr., Acting Under Secretary of Defense).

¹⁰⁹ *Id.*

that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved.¹¹⁰

As stated above, a key to determining purpose is to assess “the relationship of the expenditure . . . to the specific program to be served.”¹¹¹

This focus on purpose is what made the difference between EUCOM and HQ USAFE’s conclusions in Operation Provide Comfort. EUCOM saw the mission for what it was: a humanitarian relief effort.¹¹² HQ USAFE classified the effort by who was involved: military members built the camps and provided security.¹¹³ However, the construction and operation of the camp was not “closely connected with arms or war,”¹¹⁴ making it more like Captain Phisterer’s residence in New York than an officer’s quarter at a fort. As a humanitarian relief effort, the Department of State or international relief organizations should have carried out the mission, not the Armed Forces of the United States.¹¹⁵ Therefore, operational control needed to be vested in those organizations as the effort served their purposes. Already in the area because of a separate, military mission, the U.S. military, in an effort to save lives and prevent terrible human suffering, simply stepped in and carried out those duties until they could be relieved.¹¹⁶ The military’s convenient presence there did not change the nature of the mission or make it military in nature.¹¹⁷ As the mission was not military in nature the appropriate source of funding was not military construction; therefore, military construction funding caps triggered by operational control did not apply.

C. Duration Is Legally Irrelevant, But Pragmatically Important

After carefully considering the location in question and the purpose for its use, the issue of whether operational control exists should be resolved. However, many legal advisors will feel the need to consider the duration of operational control when advising on potential military

¹¹⁰ Refreshments at Award Ceremonies, 65 Comp. Gen. 738, 740 (1986).

¹¹¹ *Id.*

¹¹² Meek, *supra* note 3, at 233.

¹¹³ *Id.*

¹¹⁴ United States v. Phisterer, 94 U.S. 219, 222 (1876).

¹¹⁵ Meek, *supra* note 3, at 226.

¹¹⁶ *Id.* at 233.

¹¹⁷ See United States v. Apel, 571 U.S. 359, 372 (2014).

construction in a foreign country. After all, the DoD includes guidance related to duration in its definition of operational control.¹¹⁸ Nevertheless, as this section will show, Congress does not impose any duration-based requirements when it comes to establishing operational control.¹¹⁹ Due to the difference between the statutory requirement and DoD policy constraints, legal advisors must remember to evaluate the concern of duration as a matter of DoD policy rather than as a congressionally mandated requirement.¹²⁰

When it comes to the duration of operational control, there is no legal requirement that an area be under the control of the U.S. military for a certain amount of time *before* military construction may commence. Congress has also not required that the U.S. military must maintain operational control of the area *after* military construction has already taken place. In fact, the statute defining “military installation” for purposes of military construction simply requires that the area must be “under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.”¹²¹

Furthermore, the historical context behind the addition of “without regard to the duration of operational control” to 10 U.S.C. § 2801 shows Congress’s desire to imbue the military with speed and flexibility. When President George W. Bush signed Congress’s 2003 amendment to 10 U.S.C. § 2801 into law, his remarks focused on the importance of being “fast and smart and agile” in response to the threats facing our nation.¹²² He highlighted that “threats can emerge suddenly, and so we must always

¹¹⁸ U.S. DEP’T OF DEF., INSTR. 3000.12, MANAGEMENT OF U.S. GLOBAL DEFENSE POSTURE (GDP) para. G.2 (6 May 2016) (C1, 8 May 2017).

¹¹⁹ 10 U.S.C. § 2801(c)(4) (2012).

¹²⁰ The need to better distinguish between law and policy is a current issue across legal disciplines in the military. *See e.g.* Matthew J. Aiesi, *The Jus in Bello of White Phosphorus: Getting the Law Correct*, LAWFARE (Nov. 26, 2019, 8:00 AM), <https://www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct> (discussing the need to understand restrictions on the use of white phosphorus “along a legal and policy spectrum”).

¹²¹ 10 U.S.C. § 2801(c)(4) (2012).

¹²² President George W. Bush, Remarks at signing of H.R. 1588, the National Defense Authorization Act for Fiscal Year 2004 (Nov. 24, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031124-11.html>. *See also* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

be ready.”¹²³ The plain language of the statute and President Bush’s remarks demonstrate that there is no legal requirement that operational control be maintained for a certain amount of time before military construction can take place or after it has been built, thereby providing the military legislative flexibility when it comes to construction.

That said, the concern about the duration of control persists and should not be ignored. Due to the permanence and cost of construction, the duration of the military’s use, possession, and control of the area and construction is a pragmatic consideration that must be accounted for from a policy standpoint—even though the duration of operational control is not a legal requirement. Reflecting this, current DoD military construction policy defines “operational control” as “long-term (i.e., both parties intend for U.S. forces to remain at the location for the foreseeable future). . . .”¹²⁴ Furthermore, concerns about duration could signify that there is an underlying question about purpose that should be carefully scrutinized by judge advocates and their commanders.

The concern about duration will be strongest when the time the U.S. military intends to possess, use, or control an area in a foreign country is short. In addition to going against current policy,¹²⁵ the scope of these concerns ranges from pragmatic considerations to the validity of military intent. The nature of these concerns depends on whether the operational control is in a permissive environment (i.e., with the permission of the host nation) or a non-permissive environment (i.e., the United States has established a presence in another sovereign without that sovereign’s permission).

When in a permissive environment, a short duration of intent to control should lead to additional assessment of the construction’s purpose. The reason for this is construction paid for by military construction funds should truly be for a U.S. military purpose, not as a means to provide a benefit for the host nation.

In the case of operational control in a non-permissive environment, the concern of duration is almost always going to be related to the question of pragmatism, not legality. If the United States has demonstrated the

¹²³ *Id.*

¹²⁴ U.S. DEP’T OF DEF., INSTR. 3000.12, MANAGEMENT OF U.S. GLOBAL DEFENSE POSTURE (GDP) para. G.2 (6 May 2016) (C1, 8 May 2017).

¹²⁵ *Id.*

intent to possess, use, or control a defined geographic area in another nation for military purposes without that sovereign's permission, operational control should be legally satisfied, regardless of the duration of operational control. If military need justifies military construction under those circumstances, the DoD must be ready to adjust its policy and use the flexibility Congress has provided.

V. Conclusion

In summary, the phrase "operational control" in 10 U.S.C. § 2801 needs to be viewed in terms of the mission to be accomplished. Whenever there is (1) a defined geographic area (2) which the military intends to use, possess, or control for a military mission, operational control exists within the military, (3) regardless of the duration of that use, possession, or control. Although military presence and support may be factors in determining whether operational control exists, the real test is mission-driven. If the mission does not maintain a sufficient military nexus, as was the case with the Kurdish relief camps during Operation Provide Comfort, then operational control vests in some other organization. This definition squares with Supreme Court rulings related to military installations. If judge advocates and commanders focus on the mission to be accomplished in a foreign country, they will better determine when operational control vests in the military and where funding for that mission should come from. They will not hesitate to jump into a mission and to help guide it to completion.