

THE NATIONAL SECURITY LAW QUARTERLY



CENTER FOR LAW AND MILITARY OPERATIONS

30 July 2024

Volume 24-3

The Center for Law and Military Operations (CLAMO) has published the *National Security Law Quarterly* since 2015. Prior to the 20-3 issue, CLAMO published *NSLQ* as the *Operational Law Quarterly*.

As opposed to a traditional, academically focused law review, the *NSLQ* publishes articles of practical application for military legal professionals.

This issue is **UNCLASSIFIED**. The designating agency is the Center for Law and Military Operations. Direct all classification questions to the Security Manager of The Judge Advocate General's Legal Center and School, (434) 971-3208.

THE NATIONAL SECURITY LAW QUARTERLY

30 July 2024

Volume 24-3

CLAMO publishes the *National Security Law Quarterly (NSLQ)* in four issues per year at The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, VA 22903. These issues are published digitally in the months of January, April, July, and October. CLAMO does not publish print copies of the issues. The NSLQ is available on CLAMO's website and by email list. If you would like to receive issues via email when they are published, please subscribe at <https://tjaglcs.army.mil/clamo> by selecting the "Subscribe to the NSL Quarterly" link.

SUBMISSIONS:

The *NSLQ* welcomes submissions from every branch of the U.S. Armed Forces and international partners. Submissions may be in the form of a first-person account, law review, after-action review, or an account of lessons learned. Each submission must be a Microsoft Word file, single-spaced, and in 12-point Arial font. Authors should submit articles ranging from 1,500 to 3,000 words, but exceptions will be considered on an individual basis. The editors prefer that submissions adhere to *The Bluebook: A Uniform System of Citation* (21st ed. 2020), but understand that judge advocates and other legal personnel may have constraints on their time that prevent strict adherence. As such, any submission that faithfully cites its sources will be accepted regardless of format. Submissions should include a title, the author's command, and a short description of the submission. Submissions must be submitted via email to the editor-in-chief or to the CLAMO email at usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@army.mil.

CONTENT:

The opinions expressed by the authors in the articles do not necessarily reflect the view of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps, The Judge Advocate General's Legal Center and School, or any other governmental or non-governmental agency. Information presented in the National Security Law Quarterly does not change or supersede information presented in other official Army publications.

Cite as: NAT'L SEC. L. Q

THE NATIONAL SECURITY LAW QUARTERLY

30 July 2024

Volume 24-3

Managing Publication Editor

LTC Michael H. Lamphier
U.S. Army

Editors-in-Chief

Captain Mitchell R. McCulley
U.S. Marine Corps

LCDR Anthony Rodrigues
U.S. Coast Guard

Executive Editors

MAJ Elijah Beaver
U.S. Army National Guard

MAJ Jason Johnson
U.S. Army

LCDR Brigham B. Fugal
U.S. Navy

Mr. Norman Vogt
German Armed Forces Legal Service

Lt Col Grzegorz Janiszewski
Polish Army

LTC Paul Robson
U.S. Army Reserve

SFC Trey Angle
NCOIC, U.S. Army

ARTICLES

CLAMO Director Introduction

LTC Michael H. Lamphier USA
Director, CLAMO

Temporary Procurement Flexibilities for the Department of Defense, Ukraine, Taiwan and Israel

Mr. Adam Caudle

New approaches and attitudes toward acquisitions are essential to ensure that U.S. warfighters and our allies and partner nations have access to the arms, ammunition, and supporting systems at the quantity and speed they need to ensure the primacy of American interests and democratic values.

Policy Changes to Using Unmanned Aerial Systems for Immediate Domestic Response

MAJ Aaron Pool, USA

In October 2023, the Secretary of Defense updated the DoD policy on domestic UAS use and authorized the Awareness, Search and Rescue, and DoD approved DSCA missions down to Colonel or the installation commander. This new policy dramatically changes how the DoD can use UAS for Defense Support of Civil Authorities (DSCA) missions, and Judge Advocates need to be aware of the legal and technical considerations.

Command Post Survivability Approaches in Archipelagic and Jungle Environments

MAJ Nick Allen, USA

An innovative approach for command post survivability at 25th Infantry Division may provide the likely way forward in a jungle-based conflict. There, the 2nd Infantry Brigade Combat Team, 25th Infantry Division went small and distributed through multiple exercises in 2022 and 2023. Instead of housing the brigade command in one or two forward-located posts, the brigade headquarters focused on “employing the capability instead of deploying the capability.” It split into five different nodes with some located on the battlefield and some in a distanced “sanctuary” support location.

Winning With Fires: A guide to Advising a Modern DIVARTY

CPT Edward Callahan, USA

Future DIVARTY Brigade Judge Advocates (BJA) need to be prepared to handle the legacy issues that their predecessors faced, and some additional challenges from the restructure. Amongst them is understanding the dynamic and deliberate targeting cycles, conducting law of armed conflict (LOAC) analyses in the fast moving counterfire fight, managing battalion paralegals who will be shifting from general support to the division to direct support to the brigades, advising a brigade commander who is also a

division staff officer, recognizing when the DIVARTY has division level engagement authority and when they are operating as a brigade level authority, among many others.

Paralegal Utilization: Best Practices and Lessons Learned

SFC Eric Tuel, USA

This paper contends that embedding paralegals within the S-3 section's mobile command post offers Battalion Commanders a strategic advantage. By integrating these legal experts into mobile units, commanders can harness their abilities to identify and address operational and legal concerns swiftly, fulfil higher echelon reporting obligations, and prepare reports in adherence to the Department of Defense's policies on civilian harm mitigation and response planning.

Jumping into interoperability: Polish-American Military Cooperation on Legal Issues

LTC Grzegorz Janiszewski, POL

One of the primary tasks exchange officers is to strengthen interoperability on legal issues in preparation for joint operations. Part of this process is participation in multinational exercises. In recent years both exchange officers observed a series of exercises to assess, and then increase, the degree of legal interoperability between Polish and American armed forces.

Courses and Conferences Calendar

CLAMO Points of Contact

The fastest way to get you in touch with the CLAMO representative you need.

CLAMO Director Introduction

LTC Michael H. Lamphier, USA
Director, CLAMO

Welcome to 2024's third National Security Law Quarterly, Volume 24-3. The following contributors realize that "supporting the warfighter" through relevant articles is one way we all can steward the profession.

Mr. Adam Caudle from the Army's Contracting Command discusses the shift toward a more dynamic temporary flexibility to award "covered contracts," which allows the DoD to acquire critical munitions, defense articles, and material for foreign partners and allies.

MAJ Aaron Pool highlights the new policy changes for UAS use under the Immediate Response Authority and what Judge Advocates must be aware of.

MAJ Nick Allen continues the discussion on command post emplacement and provides pragmatic approaches to command post survivability in archipelagic and jungle environments.

CPT Edward Callahan provides a robust targeting guide for judge advocates operating in a modern Division Artillery.



SFC Eric Tuel discusses modern paralegal employment, possible solutions, best practices, and lessons learned all aimed at minimizing risk for commanders and maximizing efficiency in operations.

LTC Grzegorz Janiszewski highlights the importance of building and strengthening legal interoperability between Poland and the United States.

Continue to expand your toolkit! Upcoming courses and conferences can be found at the end of this issue.

Need a resource?

If you can't find something on our sharepoint, reach out to us directly.
<https://intelshare.intelink.gov/sites/clamo/layouts/15/start.aspx#/>

Remember to always Support the Warfighter.
Publishing is "A" way.

Temporary Procurement Flexibilities for the Department of Defense, Ukraine, Taiwan and Israel

Mr. Adam Caudle

I. Introduction¹

Government acquisitions can be especially slow and laborious affairs. In the forty years since the creation of the Federal Acquisition Regulation (FAR), the unhurried acquisition schedule has generally been adequate to fulfill the needs of the Department of Defense (DoD) in a single-polar world dominated by the unrivaled power of the United States military and a dearth of near-peer threats. However, as the strategic environment has shifted toward a dynamic, multi-polar world, great power conflict is re-emerging as the primary national security threat to the U.S. and its allies and partners, with increasing near-peer threats from China, Russia, and other countries. As amply illustrated in the ongoing Russian-Ukrainian war, great power conflict compels the prodigious expenditure of munitions and results in the destruction of defense materiel at a rate that languid peacetime acquisitions cannot sustain. New approaches and attitudes toward acquisitions are essential to ensure that U.S. warfighters and our allies and partner nations have access to the arms, ammunition, and supporting systems at the quantity and speed they need to ensure the primacy of American interests and democratic values.



One approach that partially addresses the lethargic acquisition schedule is the new temporary flexibility to award “covered contracts” using other than full and open competition. This exception was granted to the DoD for the acquisitions of critical munitions and defense articles, materiel for foreign partners and allies who have supported the governments of Ukraine, Taiwan, and Israel, and materiel for the governments of Ukraine, Taiwan, and Israel in Section 1244 of the James M. Inhofe National Defense Authorization Act for 2023 (FY23 NDAA),^{2 3} as modified by Section 1242 of the National Defense Authorization Act for 2024 (FY24 NDAA)⁴. These statutory authorities permit the use of 41 C.F.R. §6.302-7 (Public Interest Determinations

¹ The views expressed in this article are the personal views of the author and do not represent the views of the United States Department of Defense or the United States Army. The author would like to thank Mr. Eugene Kim for his mentorship and support in the writing of this article.

² P.L. 117-347, enacted on 23 December 2022.

³ Section 1244 of the FY23 NDAA also included revisions to the Stratton Amendment controlling the transfer of technical data on large caliber artillery to international partners, modified cooperative logistic support agreements with NATO countries, and authorized multi-year contracts for specified munitions. This article does not discuss those changes. Some of these authorities were modified by in the FY24 NDAA.

⁴ P.L. 118-31, enacted on 22 December 2023.

and Findings) to award “covered contracts” using other than full and open competition until September 30, 2028.⁵

This article outlines the contours of this new authority, defines its key concepts, and shares best practices learned during the first year of implementation. When effectively utilized, temporary flexibility can significantly reduce acquisition times, substantially reduce the risk of bid protests, and ensure that the armed forces of the United States, Ukraine, Taiwan, Israel and our foreign allies and partners timely receive the quantities of munitions and materiel needed to sustain democracy around the world and preserve freedom from tyranny. However, Army acquisition officials and their supporting legal counsel must also guard against misuse of the authority, which can inadvertently harm the DoD’s ability to efficiently and timely procure cost-effective systems.

II. Covered Contracts

Federal agencies are generally required to utilize full and open competition for all acquisitions which use appropriated funds and are subject to the FAR.⁶ The Competition in Contracting Act and the FAR require that prospective contracts be publicly advertised for a defined minimum period, that agencies accept bids or proposals from any interested party, and that selection of awardee(s) uses competitive procedures (i.e., sealed bids

or negotiated procurements, etc.).⁷ The purpose of competition is to ensure that the Government fulfills its requirements efficiently and receives a fair and reasonable price.⁸ While the DoD and other agencies are authorized to enter into agreements for prototypes and procurement outside of the FAR, agreements that utilize other transaction authority (OTA) must nonetheless utilize competition “to the maximum extent practicable.”⁹

There are seven exceptions to the requirement to utilize full and open competition for FAR-based contracts.¹⁰ Section 1244 of the FY23 NDAA, as modified, temporarily expanded the 48 C.F.R. §6.302-7 Public Interest exception to include any “covered agreement.” A “covered agreement” is:

a contract, subcontract, transaction, or modification of a contract, subcontract, transaction awarded by the Department of Defense –

- A) to build or replenish the stocks of critical munitions and other defense articles of the Department;
- B) to provide materiel and related services to foreign allies and partners that have provided support to Ukraine, Taiwan, or Israel; or
- C) to provide materiel and related services to Ukraine, Taiwan, or Israel.¹¹

⁵ The Section 1244(a)(7) of the FY23 NDAA (P.L. 117-347) originally sunset the temporary authority on 30 September 2024. Section 1242(2)(E) of the FY24 NDAA (P.L. 118-31) extended the expiration date by four years to 30 September 2028.

⁶ See 10 U.S.C. §3204, 41 U.S.C. § 253, and 48 C.F.R. § 6.101 and 6.302.

⁷ See 41 U.S.C. § 253, and 48 C.F.R. Subpart 6.1.

⁸ See 10 U.S.C. § 3201 and 41 U.S.C. § 3301.

⁹ 10 U.S.C. § 4022.

¹⁰ See 41 U.S.C. § 253 and 48 C.F.R. 6.302.

¹¹ See P.L. 117-347 Sec. 1244(a) and P.L. 118-31 Sec. 1242(2).

The Principal Director, Defense Pricing and Contracting (DPC), implemented the FY23 NDAA via the “Class Deviation – Temporary Authorizations for Covered Contracts Related to Ukraine” on 23 December 2022¹² and subsequently revised it on 2 August 2023¹³ and 18 September 2023 (“2023 Class Deviation”).¹⁴ The Principal Director, DPC, implemented the FY24 NDAA modifications via “Class Deviation – Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel” on 8 January 2024¹⁵ (“Class Deviation” or “2024 Class Deviation”).

The 2023 and 2024 Class Deviations redefined the statutory “covered agreement” definition to a potentially more limited “covered contract” that

means a contract or modification of a contract awarded by DoD, or a subcontract or modification of a subcontract under a contract awarded by DoD, to—

- (1) Build or replenish the stocks of critical munitions and other defense articles of DoD;
- (2) Provide materiel and related services to foreign allies and partners that have provided

support to the governments of Ukraine, Taiwan, or Israel; or
(3) Provide materiel and related services to the governments of Ukraine, Taiwan, or Israel.¹⁶

Notably, the Class Deviation changed the description from a “covered agreement” to a “covered contract.” This alteration also removed the word “transaction” from the definition. While the DoD enters into many different types of agreements that fall within the common law definition of a contract (i.e., offer, acceptance, and consideration by both parties), DoD acquisitions generally reserve the term “contract” to refer only to FAR-based¹⁷ or non-appropriated fund contracts.¹⁸ Other types of contracts use different terms such as cooperative agreement,¹⁹ cooperative research and development agreement (CRADA),²⁰ or OTAs.²¹ These changes may indicate that the DoD intended to restrict the Class Deviation to FAR-based contracts notwithstanding the potential application to OTAs.²²

There are three categories of “covered contracts.” The first category has two components. First, the acquisition must be for the purpose of building or replenishing DoD stocks.²³ This is a minor but noteworthy limitation

¹² DARS No. 2023-00003. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002482-22-DPC.pdf>

¹³ DARS No. 2023-00003, Revision 1. <https://www.acq.osd.mil/dpap/policy/policyvault/USA001393-23-DPC.pdf>

¹⁴ DARS No. 2023-00003, Revision 2. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002011-23-DPC.pdf>

¹⁵ DARS No. 2024-00005. <https://www.acq.osd.mil/dpap/policy/policyvault/USA002011-23-DPC.pdf>

¹⁶ *Id.* at para. (A).

¹⁷ See “Other Transaction Guide,” Office of the Under Secretary of Defense for Acquisition and Sustainment, ver. 2.0, July 2023.

https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/TAB%20A1%20-%20DoD%20OT%20Guide%20JUL%202023_final.pdf (accessed 9 January 2024).

¹⁸ Nonappropriated fund contracts are highly unlikely to be for items within the scope of the Class Deviation.

¹⁹ See 32 C.F.R. Part 21.

²⁰ See 15 U.S.C. §3710a.

²¹ See 10 U.S.C. § 4022.

²² See 10 U.S.C. § 4022 which permits the DoD to use its other transaction authority (OTA) to non-FAR production contracts. There are no statutory or regulatory provisions which specifically prohibit the DoD from using an OTA to acquire critical munitions or defense articles. However, the Class Deviation revisions appears to forestall the application of this temporary flexibility to OTAs.

²³ See P.L. 117-347 Sec. 1244(a)(1)(A) and P.L. 118-31 Sec. 1242(2)(A)(i).

as it prohibits the use of this authority for many types of service contracts such as research and development, prototyping, testing and evaluation, demilitarization, or any other contracting activity which does not result in a net increase in the DoD's stock of that item.²⁴ It is also most likely not permissible to utilize this authority for regular maintenance service contracts of existing, usable stock. However, it is arguably permitted for overhaul and repair service contracts which increase the DoD's stock by repairing and returning existing but non-functioning stock to a usable condition even if that condition is substantially different or improved from the original parameters. It is also arguably permissible to use this authority for contracts which merge existing, useable inventory into a new product, such as the combination of the GBU-39 Small Diameter Bomb with the M26 rocket which increases the DoD's stock of Ground Launched Small Diameter Bombs. Non-severable services integral to the acquisition such as contractor logistics support or training on new systems are also arguably within the intent of the FY23 NDAA, as modified.

Second, an acquisition to build or replenish DoD's stock must be for either a "critical munition" or an "other defense article."²⁵ There is remarkably little guidance to assist the acquisition

attorney, program manager, or contracting officer in determining what constitutes a "critical munition" or even who makes the determination. The term itself is regularly used by members of Congress speaking on the floor,²⁶ in committee reports,²⁷ and congressional bills and amendments.²⁸ However, it is not defined or used in statute or regulation other than in Section 1244 of the FY23 NDAA.²⁹ The services provide a partial list of critical munitions in their respective annual budget requests, but this is only of limited assistance as the overview documentation gives some examples of critical munitions programs but the accompanying *Justification Books*³⁰ do not utilize the label consistently internally and are not aligned with the examples given in the overview documentation.

For example, the U.S. Army's Fiscal Year Budget Overview for 2024 "includes" Patriot and Tomahawk missiles, Guided Multiple Launched Rocket Systems, 155MM Artillery rounds, and Next Generation Squad Weapon-Ammunition under the heading of "critical munitions."³¹ However, the *Army FY 2024 Missile Procurement*

²⁴ This eliminates most non-FAR based contracts such as cooperative agreements and CRADAs from consideration as they are for research and development purposes. It also eliminates development and prototyping OTAs but does not eliminate production OTAs. However, production OTAs are often awarded without competition and are not subject to CICA. See 10 U.S.C. § 4022(f).

²⁵ See P.L. 117-347 Sec. 1244(a)(1)(A) and P.L. 118-31 Sec. 1242(2)(A)(i).

²⁶ See e.g., Michael J. Gallagher (WI). "Department of Defense Appropriations Act of 2019, H.R. 6157" *Congressional Record* 164 (2019) p. 5795.

²⁷ See e.g., "National Defense Authorization Act for Fiscal Year 2018," House Report 115-200, 6 July 2017.

²⁸ See e.g., "Joint Explanation Statement Accompanying the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023", P.L. 117-347, Book 2 of 2, page 2121 (passed 23 December 2022) detailing four proposed amendments relating to critical munitions which were not included in the FY23 NDAA including reporting requirements, pilot programs, minimal reserves and establishing a critical munition acquisition fund.

²⁹ P.L. 117-347 Sec. 1244.

³⁰ See DoD Financial Management Regulation, Vol. 2A, Ch. 1, Sec. 4.0.

³¹ <https://www.asafm.army.mil/Portals/72/Documents/BudgetMaterial/2024/pbr/Army%20FY%202024%20Budget%20Overview%20Briefing.pdf> (accessed 9 Dec 2023).

*Justification Book*³² refers to various missile programs as having critical “components,”³³ “technology,”³⁴ and “capability,”³⁵ it does not refer to any of the missile programs, including the Patriot and HIMARS programs, as being “critical munitions.” The *Army FY 2024 Ammunition Procurement Justification Book*³⁶ states that the Next Generation Squad Weapon Ammunition supports “critical Army Title 10 war reserve/operational, training and test requirements,”³⁷ but likewise does not refer to the ammunition as a “critical munition” even though it was designated as such in the Budget Overview. The only reference in the Ammunition Justification book to a “critical munition” is to the M982 Excalibur 155MM Extended Range munition.³⁸ The inconsistency between the Overview and the Justification Books and the use of the word “includes” in the Overview strongly suggests that the Overview list is illustrative and not exclusive, as the Army would most likely consider unmentioned but high-profile programs such as the FIM-92 Stinger, FGM-148 Javelin or M142 High Mobility Artillery Rocket System missiles to be “critical munitions.”

Internal DoD policy also does not provide any substantive assistance in

resolving this question. The *CJCSM Manual 3150.14C Joint Reporting Structure – Logistics* directs that the Joint Staff or Combatant Commanders initiate a Munitions Status Report (MUREP) “to monitor critical munitions worldwide that affect the warfighting capabilities during hostilities, emergencies and exercises.”³⁹ However, the CJCSM Manual circularly defines critical munitions as “items critical to operation plan execution.”⁴⁰ While this indicates that Combatant Commanders and the Service Chiefs have authority to designate a particular munition as “critical” (and presumably do so during operational planning), the program managers, contracting officers and supporting counsel at the Program Executive Offices, Army Contracting Command and Army Materiel Command attempting to utilize this authority during acquisition planning will most likely not have access to the Combatant Commanders, Service Chiefs, MUREPs, or their critical munition designation documents. Nor is it clear from the CJCSM Manual whether other DoD officials may be authorized to designate “critical munitions.”

The absence of clear guidance is particularly acute in emerging types of weapons such as loitering munitions,⁴¹

³² *Department of Defense Fiscal Year 2024 Budget Estimates, Army Justification Book Volume 1 of 1, Missile Procurement, Army* at <https://www.asafm.army.mil/Portals/72/Documents/BudgetMaterial/2024/Base%20Budget/Procurement/Missile%20Procurement%20Army.pdf> (accessed 9 Dec 2023).

³³ *Id.* at pg. 33.

³⁴ *Id.*

³⁵ *Id.* at pg. 159.

³⁶ *Department of Defense Fiscal Year 2024 Budget Estimates, Army Justification Book Volume 1 of 1, Ammunition Procurement, Army* at <https://www.asafm.army.mil/Portals/72/Documents/BudgetMaterial/2024/Base%20Budget/Procurement/Procurement%20of%20Ammunition%20Army.pdf> (accessed 9 Dec 2023).

³⁷ *Id.* at pg. 83.

³⁸ *Id.* at pg. 420.

³⁹ CJCSM 3150.14C, issued 22 Sept. 2022, Encl. C, para. 1, pg. C-1.

⁴⁰ *Id.* at Encl. C, para. 4(a), pg. C-3.

⁴¹ A loitering munition is a semi-autonomous (humans-in-the-loop) or autonomous, unmanned, armed aerial system capable of loitering in the target area until directed by its human operator to physically impact into a designated target and detonate its warhead. Both Ukraine and Russia have made rapid strides in the development and fielding of loitering munitions in their ongoing

directed energy weapons,⁴² or hypersonic missiles.⁴³ Many of these programs are transitioning from development and prototyping into production but do not yet have established programs of record. If the traditional critical munition designation model is followed (i.e., by the Combatant Commanders after fielding has occurred), acquisition offices most likely cannot take advantage of this authority to field a rapidly developed munition since the designation will not occur until significant time (potentially years or decades) has elapsed since the need for the munition was first identified and the time of designation. This belated designation (if it occurs at all) is insufficient in a rapidly evolving battle space with acute need for the expedited acquisition, evaluation, and fielding of emergent technologies, including munitions, in a compressed timeframe of weeks and months.

Compounding this issue is the question of whether the “critical munition” authority can be expanded beyond the munition itself to include related items such as delivery systems, spare parts, integrated reconnaissance, surveillance, and target acquisition (RSTA) assets, training, and spare parts sustainment. The CJCSM Manual 3150.14C requires that MUREPs use

“complete round equivalents.”⁴⁴ This suggests that a critical munition is only the round itself. However, all critical munitions require a system of systems to maximize effectiveness. Without training on how to use and maintain the munition (often performed by a contractor), effective RSTA utilized for target acquisition (often integrated into the system through sensors or unmanned aerial vehicles), a delivery system capable of putting the munition on target, and spare parts to maintain the munition and supporting systems, a munition, no matter how critical, is merely an expensive (and potentially dangerous) paperweight. Because only some, but not all, of these limitations can be addressed by the application of the “other defense articles” condition (see discussion below), practitioners should carefully consider these limitations during acquisition planning.

However, the paucity of references indicates that the concept of “critical munition” has not entered DoD’s operational or acquisition lexicon to the extent that it is a standard operating procedure in directed requirements or similar requirements documents. A statutory or regulatory definition of “critical munition” would substantially assist program managers and contracting offices to more effectively

conflict. See e.g., Deveraux, Brennan, “Loitering Munitions in Ukraine and Beyond,” *War on the Rocks*, published 22 April 2022, <https://warontherocks.com/2022/04/loitering-munitions-in-ukraine-and-beyond/> (accessed 9 Dec 2023); Cook, Ellie, “‘Critical’ Tank-Killer Switchblades with Boost Ukraine’s Stocks,” *Newsweek*, published 11 Oct 2023, <https://www.newsweek.com/ukraine-russia-switchblade-drones-loitering-munitions-shahed-1833837> (accessed 9 Dec 2023). Hamas innovatively used homemade loitering munitions during its 7 October 2023 attack on Israel. See Chávez, Kerry and Ori Swed, “How Hamas innovated with drones to operate like an army,” *Bulletin of the Atomic Scientists*, published 1 November 2023, <https://thebulletin.org/2023/11/how-hamas-innovated-with-drones-to-operate-like-an-army/> (accessed 9 January 2024).

⁴² A directed energy weapon uses highly focused energy in the form of lasers, microwaves, or other electromagnetic radiation to target and deny, degrade, damage or destroy enemy personnel, missiles, loitering munitions and other drones, vehicles and optical devices. See e.g., GAO Science and Tech Spotlight: Directed Energy Weapons”, GAO-23-106717, published 25 May 2023, <https://www.gao.gov/products/gao-23-106717> (accessed 9 Dec 2023).

⁴³ A hypersonic missile travels between 5 and 25 times the speed of sound, or about 1 to 5 miles a second. See e.g., Wright, David and Tracy, Cameron L., “Drag race: hypersonic weapons are slow enough for US missile defense”, *C4ISRNet*, published 8 Dec 2023, <https://www.c4isrnet.com/opinion/2023/12/08/drag-race-hypersonic-threats-are-slow-enough-for-us-missile-defenses/> (accessed 9 Dec 2023).

⁴⁴ Encl. C, Paras. 2(d) and 4(a).

utilize this or similar future acquisition flexibilities. Such a definition could identify the offices which are authorized to designate critical munitions, such as the Secretaries of the Military Departments, Service Chiefs, and/or Combatant Commanders. The definition could also require requirements documents to identify which munitions are critical.

Within the Army, logical delegations would be to the U.S. Army Futures Command (AFC), which was “established ... to ensure the Army and its Soldiers remain at the forefront of technological innovation and warfighting ability”⁴⁵) and the Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology) (ASA(ALT)), which directs the work of the Army’s Program Executive Offices. These organizations are key in closing the designation delay and identifying appropriate parameters of an acquisition program under this authority. The AFC and ASA(ALT) are in the unique position of identifying not only the munitions critical to the success of today’s operations but also those munitions (some of which may not have been invented yet) which are critical to the success of the Army’s operations in the 2030s and beyond.

Acquisition programs will find substantially clearer guidance when

determining whether an item qualifies as an “other defense article.” The Arms Export Control Act of 1976 authorizes the President to designate certain articles and services as “defense articles” and “defense services” for controlling imports or exports.⁴⁶ The President has delegated this authority to the Secretary of State.⁴⁷ The items designated by the Secretary of State constitute the United States Munitions List (USML).⁴⁸ Specifically, a “defense article” of the Department of Defense is any “item or technical data” found at 22 C.F.R. Subpart 121.1.⁴⁹ The USML comprises 21 categories of articles ranging from individual wearables such as night vision goggles⁵⁰ and body armor⁵¹ to large systems such as submarines⁵² and air defense systems.⁵³ Each category begins with a list or description of complete items included in the category, followed by descriptions of parts, components, and accessories to the complete items. The extensive nature of the USML obviates some of the uncertainty surrounding critical munitions as many of their support systems are included in the USML. However, this is only a partial solution as the USML does not include dual-use items which have military applications⁵⁴ or commercial items.

The second category of covered contracts authorizes the acquisition of “materiel⁵⁵ and related services” for

⁴⁵ See <https://www.army.mil/futures> (accessed 9 Dec. 2023).

⁴⁶ 22 U.S.C. § 2751 *et. seq.*

⁴⁷ See Executive Order 11958 (as amended).

⁴⁸ Despite its name, only six of the twenty-one categories on the USML include items which can reasonably be considered “munitions” of any type.

⁴⁹ See 22 C.F.R. § 120.3(a).

⁵⁰ See 22 C.F.R. § 121.1 Category XII(c)(i) and (e)(4).

⁵¹ See *id.* at Category X(a)(i).

⁵² See *id.* at Category XX(a)(i).

⁵³ See *id.* at Category IV(a)(iii).

⁵⁴ *i.e.*, Items found on the Commerce Control List at 15 C.F.R. § 774.

⁵⁵ Materiel is “equipment, apparatus, and supplies used by an organization or institution.” Merriam-Webster Dictionary. <https://www.merriam-webster.com/dictionary/mat%C3%A9riel> (accessed 9 Dec 2023).

countries which have provided support to Ukraine, Taiwan, or Israel.⁵⁶ Notably, the FY23 NDAA, as modified, and the Class Deviation do not limit the application of this provision to “defense articles,” i.e., items on the U.S. Munitions List. Accordingly, “materiel” can include dual-use items on the Commerce Control List⁵⁷ or commercial items which are prohibited under the first category. However, this can lead to incongruous situations in which, for example, the DoD can utilize this authority to acquire commercial generators⁵⁸ to provide electrical power to Dutch or German air defense systems but cannot use this authority to acquire the same generators to provide electrical power to identical U.S. Army air defense systems.⁵⁹

Acquisition personnel should also exercise caution using this category as the services must be “related to” the materiel being provided in the same contract.⁶⁰ This phrase prohibits purely services contracts under this category and suggests that the authority would generally be unsuitable for a contract in which the majority of costs are for services even if the acquisition of materiel is included.⁶¹ However, as with the first category, it is arguably permitted for service contracts which

repair non-functioning materiel to a usable condition or combine existing inventory into new products and deliver that materiel to a qualifying foreign country.

The materiel deliveries should be traceable to the destination country.⁶² It is most likely not within the scope of congressional intent to utilize this authority for a contract when the program office can only guess or speculate as to whether the acquisition is for foreign allies and partners. It is also most likely not within the scope of this authority for covered contracts to include deliveries to countries which have not provided support to Ukraine, Taiwan, or Israel.⁶³ This is especially problematic for Indefinite Quantity/Indefinite Delivery (IDIQ) contracts in which the program office cannot identify all intended delivery destinations at the time of contract award.⁶⁴

Notably, neither the FY23 NDAA, as modified, nor the Class Deviation define “support” or require that the covered contract be for like items. For example, a foreign military sale of M1126 Stryker armored fighting vehicles would qualify even if the country purchasing the vehicles had only

⁵⁶ See P.L. 117-347 Sec. 1244(a)(1)(B) and P.L. 118-31 Sec. 1242(2)(A)(ii)(I).

⁵⁷ See 15 C.F.R. §774.

⁵⁸ <https://sam.gov/opp/cc0643b9b3b24f7aaaa47e4f2a07dfcd/view>. (accessed 10 Dec. 2023).

⁵⁹ <https://asc.army.mil/web/portfolio-item/cs-css-advanced-medium-mobile-power-source-ammps/>. (accessed 10 Dec. 2023).

⁶⁰ See P.L. 117-347 Sec. 1244(a)(1)(B).

⁶¹ Acquisition personnel should carefully consider the potential perspective of and reaction from Congress and the Director of Defense Pricing and Contracts if this authority were to be utilized for a primarily services contract.

⁶² Federal contracting officials seeking to utilize other than full and open competition must provide “clear and convincing” evidence in support of their determination. See *infra*. Covered contracts for the second category will struggle to meet this burden of proof if the supporting documentation cannot identify the destination countries and affirmatively state that the destination countries have provided support to Ukraine, Taiwan, or Israel.

⁶³ As of 31 Oct 2023, 42 countries have provided support to Ukraine. See “Kiel Institute for World Economy” <https://www.ifw-kiel.de/topics/war-against-ukraine/ukraine-support-tracker/> (accessed 10 Dec 2023). There are not similar trackers for support to Taiwan or Israel.

⁶⁴ Contracting officers and supporting counsel should ensure that the contract file clearly documents that the contract is only authorized for supporting countries and should request that the program office verify the supporting country status prior to awarding any foreign military sales delivery orders.

provided non-lethal aid to Ukraine, Taiwan, or Israel, such as generators, rescue equipment, pre-packaged food, first aid equipment, or financial aid. Support could also arguably extend to more esoteric forms such as loan forgiveness, purchasing military or domestic exports, maintaining diplomatic relations, passing resolutions of support in the national legislative body, or voting for favorable resolutions at the United Nations General Assembly. There is also not a temporal proximity requirement in the FY23 NDAA, as modified, or the Class Deviation, so arguably a country which provided a small amount of “support” to Ukraine following the initial 2014 Russian invasion but has not since the 2022 Russian escalation may continue to qualify.

The third category of covered contract is the easiest to identify as the program office will know if Ukraine, Taiwan, or Israel is the intended recipient. As with the second category, purely services contracts are generally prohibited⁶⁵ while contracts in which a majority of costs will be for services are likely also not authorized, unless those contracts result in materiel being provided to Ukraine, Taiwan, or Israel.

A potential limitation is that the FY23 NDAA, as modified, and the Class Deviation refer to the second and third types of covered contracts in the

present tense, i.e., “to provide.”⁶⁶ This is notable because it implies that covered contracts should be for acquiring materiel which will be provided to Ukraine or foreign allies and partners at a future date. However, restricting this authority to prospective support ignores the fast-paced reality of foreign military aid. As of 27 December 2023, the United States has provided more than \$44.2 billion in aid to Ukraine since 24 February 2022.⁶⁷ While some of the supplies are still inbound, the overwhelming majority of the materiel was delivered from existing stockpiles.⁶⁸ In addition to prodigious quantities of lethal aid (most or all of which are critical munitions or other defense articles), this aid has also included non-lethal aid such as generators and first aid supplies which do not fall within the first type of covered contract.⁶⁹ A strict interpretation of the “to provide” provision would prohibit the DoD from utilizing this authority to rapidly replenish its depleted non-lethal stocks. This is arguably contrary to the intent of the FY23 NDAA, as modified, which was to permit the DoD to rapidly acquire materiel for allies, partners, Ukraine, Taiwan, and Israel.⁷⁰ Including contracts to replenish stocks of the provided supplies (regardless of status as a critical munition, defense article, dual-use or commercial product) more closely aligns with the congressional intent as it permits the DoD to quickly

⁶⁵ See P.L. 117-347 Sec. 1244(a)(1)(B) and P.L. 118-31 Sec. 1242(2)(A)(iii).

⁶⁶ *Id.* at (B) and (C).

⁶⁷ See U.S. State Department. 6 Dec. 2023. <https://www.state.gov/u-s-security-cooperation-with-ukraine/> (accessed 10 Dec 2023). The State Department does not maintain similar lists for aid to Taiwan or Israel. However, media reports indicate that materiel is arriving on a near-daily basis to these countries. See “Most of Israel’s weapons imports come from the US. Now Biden is rushing even more arms.” published 18 Nov. 2023. <https://www.vox.com/world-politics/2023/11/18/23966137/us-weapons-israel-biden-package-explained> (accessed 10 Dec 2023).

⁶⁸ <https://www.defense.gov/News/News-Stories/Article/Article/3547168/continued-support-to-ukraine-replenishing-military-stocks-priorities-for-depart/> (accessed 10 Dec. 2023)

⁶⁹ <https://www.state.gov/u-s-security-cooperation-with-ukraine/> (accessed 10 Dec. 2023).

⁷⁰ See “Conference Report to Accompany H.R. 2670 National Defense Authorization Act for Fiscal Year 2024.” Pg 2671.

surge support to those countries at a future date.

Attorneys, program offices and contracting officers should exercise caution when considering acquisitions which are not wholly within one or more of the three conditions. The purpose of the authority is to provide temporary flexibilities to increase DoD stocks of vital materiel and to provide rapid support to Ukraine, Taiwan, Israel, and allies and partners who support them.⁷¹ Acquisitions which are questionable or include substantial materiel outside of this limited scope may be considered an abuse of the temporary authority and may result in congressional or OSD restrictions.⁷² Because of the competition-limiting nature of this authority, acquisition officials should carefully consider the congressional intent and ensure that the covered contracts are aligned with that intent.

III. Public Interest Determinations and Findings

A “covered agreement” or “covered contract” is presumed to be in public interest for purposes of competition under 10 U.S.C. §3204(a)(7) Public Interest.⁷³ This authority may be used even if a different authority in 48 C.F.R. §6.302 applies.

In accordance with 48 C.F.R. §1.107, a Determination and Findings (D&F) must provide sufficient “facts and circumstances to clearly and

convincingly justify the specific determination made.”⁷⁴ At a minimum, the D&F must include:

- (a) Identification of the agency, the contracting activity, and specific identifications of the document as a Determination and Findings.
- (b) Nature and/or description of the action.
- (c) Citation of the appropriate statute and/or regulation upon which the D&F is based.
- (d) Findings that detail the particular circumstances, facts, or reasoning essential to support the determination. Necessary supporting documentation shall be obtained from appropriate requirements and technical personnel.
- (e) A determination, based on the findings, that the proposed action is justified under the applicable statute or regulation.
- (f) Expiration date of the D&F, if required.
- (g) The signature of the official authorized to sign the D&F and the date signed.⁷⁵

The Army template for this authority is found at 48 C.F.R. §5153.303-11 and includes the minimum D&F provisions.

Although the courts will grant considerable discretion to the use of this

⁷¹ See “Joint Explanatory Statement to Accompany H.R. 7776 James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.” Pg. 2051.

⁷² Revision 1 to the 2023 Class Deviation issued on deleted the “other defense articles” language from the Class Deviation due to concerns that the authority was being used beyond the limited scope that Congress intended. Revision 2 to the 2023 Class Deviation returned the deleted language.

⁷³ See P.L. 117-347 Sec. 1244(a)(2)(A).

⁷⁴ See also *CliniComp Int’l, Inc. v. U.S.*, 134 Fed. Cl. 736, 747 (2017).

⁷⁵ See *id.* and 48 C.F.R. §1.107.

authority, practitioners should exercise care to ensure that these requirements are met, as the award of a contract or contract modification under this authority is still subject to protest.⁷⁶ While courts will not second guess Congress's determination that a "covered agreement" is in the public interest, they will consider whether the facts and circumstances provided in the D&F "clearly and convincingly" support the D&F.⁷⁷ As with any challenge to a contract award, mere disagreement with the agency's position is insufficient for the protestor to prevail.⁷⁸ Instead, the protestor must demonstrate that the D&F relied upon "facts that have no relation to the stated public interest" or that it relied upon "materially inaccurate information."⁷⁹

Consistent with 10 U.S.C. §3204(e)(4)(C), the FY23 NDAA, as modified, exempts covered contracts from any requirement to prepare a Justification and Approval (J&A).⁸⁰ To minimize the risk of a successful protest, a D&F utilizing this authority should nonetheless incorporate some of the justification typically provided by the J&A to include sufficient facts to clearly and convincingly demonstrate that the acquisition meets the definition of a covered contract. This may include specifying whether it is a critical munition and, if not apparent, the official who made the designation. Acquisitions for "other defense articles" should

include a citation to and consider using brief quotes from the applicable provision(s) of the USML. If the materiel is being provided to foreign allies and partners, it should identify the specific countries and state that the country has provided support to Ukraine, Taiwan, or Israel. If the material is being provided to Ukraine, Taiwan, or Israel, the D&F should state that.

48 C.F.R. §6.302-7(b) limits the use of the public interest exception only to acquisitions which no other exception to full and open competition identified in 48 C.F.R. §6.302 applies. As discussed below, each exception to full and open competition has its own distinct limitations⁸¹ that would not apply if the Public Interest exception to competition were utilized. The Class Deviation exempts covered contracts from this limitation and permits the use of the Public Interest exception to competition even if one or more of the other exceptions to competition in 48 C.F.R. §6.302 applies.⁸²

Approval of a D&F utilizing the Public Interest exception to competition is generally restricted to the Secretary of Defense or service secretaries on a nondelegable basis.⁸³ However, the FY23 NDAA, as modified, authorizes the services to delegate the authority to approve D&Fs for covered contracts to an officer in the Armed Forces serving in a grade at or above brigadier general or

⁷⁶ See *Varicon Int'l v. OPM*, 934 F.Supp. 440 (1996).

⁷⁷ See *Spherix v. U.S.*, 48 Fed. Cl. 351 (2003), *Spherix v. U.S.*, 58 Fed. Cl. 514, 515 (2003), *CliniComp Int'l, Inc. v. U.S.*, 134 Fed. Cl. 736 (2017), and *Sikorsky Aircraft Corp. B-403471*, 2010.

⁷⁸ *CliniComp Int'l, Inc. v. U.S.*, 134 Fed. Cl. 736 (2017).

⁷⁹ *Sikorsky Aircraft Corp. B-403471*, 2010.

⁸⁰ See P.L. 117-347 Sec. 1244(a)(2)(D).

⁸¹ See *supra* V. Benefits and Drawbacks to Using the Temporary Flexibilities.

⁸² "Class Deviation—Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel" DARS No. 2024-O0005, 8 January 2024, para. (B)(1).

⁸³ See 10 U.S.C. § 3204(a)(7) and 48 C.F.R. §6.302-7(c).

read admiral (lower half).⁸⁴ This authority may also be delegated to a civilian employee serving in a position with a grade under any schedule “equivalent to or higher” than the grade of a brigadier general or read admiral (lower half).⁸⁵ The Army has delegated this authority to the Senior Contracting Official (SCO) at each Army Contracting Command center.⁸⁶

Contracting officers who intend to award a contract pursuant to the Public Interest exception to competition are generally required to notify Congress not less than 30 days prior to award.⁸⁷ The 2023 Class Deviation reduced the notification requirement to not less than seven days prior to contract award.⁸⁸ Congress appears to have disfavored this reduction in notification time as the FY24 NDAA requires that the congressional defense committees be notified no later than seven days after the “exercise of authority,” i.e., no later than seven days after the D&F is signed.⁸⁹ However, the 2024 Class Deviation did not conform to this new requirement and kept the notification period at seven days prior to contract award.⁹⁰ Whether this was an oversight or intentional is unclear from the Class Deviation. While the difference between the FY24 NDAA notification requirement and the 2024 Class Deviation will most likely be immaterial for contract modifications which can be quickly executed after the D&F is signed, there

will most likely be a substantial interval between D&F signature and a new contract award, leaving contracting officers in a predicament.

This revision may have substantial consequences for new contract awards. By moving the notification from just before contract award⁹¹ to just after the use of the Class Deviation is exercised, contracting officers must provide schedule representations to Congress before any significant contracting activities have occurred and many factors driving the schedule are beyond their control. For example, while a contracting officer can have an RFP or draft contract prepared and readied to be issued immediately after D&F signature, they cannot foresee every issue can arise during negotiations, such as intended awardees who refuse timely negotiation of terms or who propose unreasonably high prices. Similarly, program budgets are subject to frequent revisions, and funds are not guaranteed to arrive when and in the amount anticipated. A forward-leaning contracting officer may easily find themselves in the position of having issued an RFP and negotiated a contract only to find that the award must be substantially delayed or even canceled due to the unavailability of promised funding or the prohibition on new starts in an unanticipated continuing resolution. Any of these situations can result in the unfortunate

⁸⁴ See P.L. 117-347 Sec. 1244(a)(2)(B)(i)(I).

⁸⁵ See P.L. 117-347 Sec. 1244(a)(2)(B)(i)(II).

⁸⁶ See 48 C.F.R. § 5153 Appendix GG.

⁸⁷ See 48 C.F.R. § 6.302-7(c)(2).

⁸⁸ “Class Deviation—Temporary Authorizations for Covered Contracts Related to Ukraine,” DARS No. 2023-O0003, Rev. 2, issued 18 Sept 2023, para. (B)(3).

⁸⁹ P.L. 118-31 Sec. 1242(2)(G).

⁹⁰ “Class Deviation – Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel,” DARS No. 2024-O0005, 8 January 2024, para. (B)(3).

⁹¹ At this point, the draft contract has been provided to the awardee and negotiations are close to completion. There are very few issues that are likely to arise that would meaningfully delay the award.

situation where contracting officers may be required to withdraw or modify the notification if the intended award is canceled or modified in a way that affects the represented reduction in schedule.

The FY24 NDAA also requires that the congressional notification include an “estimated reduction in schedule.”⁹² This is admittedly a difficult task as it requires the program office, counsel and contracting to collaboratively model an acquisition which utilized the Class Deviation and an identical acquisition which did not. Acquisition personnel should carefully consider these and all other likely risks to contract award to minimize the probability of revising or withdrawing the congressional notification.

The Army’s instructions for use of this authority and the template for congressional notification are found at 48 C.F.R. § 5153.206-93, 5153.217-90, 5153.303-11 and 5153.303-12.

IV. Other Modifications of Acquisitions Regulations for Covered Contracts

The FY23 NDAA, as modified, temporarily changed several other areas of acquisition regulations pertaining to covered agreements.⁹³ First, it authorized DoD’s use of the Special Emergency Procurement Authority (SEPA) in 41 U.S.C. § 1903 for covered agreements.⁹⁴ This authority is typically

used for the procurement of property or services in support of contingency operations, to facilitate the defense against or recovery from a cyber, nuclear, biological, chemical, or radiological attack against the United States, international disaster assistance, or emergency or major disasters in the United States.⁹⁵

The Class Deviation interpreted this authorization by raising the SEPA thresholds for covered contracts. It raised the SEPA micro-purchase threshold for covered contracts from \$15,000 to \$20,000 for covered contracts awarded and performed, or supplies purchased inside the United States, and from \$25,000 to \$35,000 for covered contracts awarded and performed, or supplies purchased outside of the United States.⁹⁶ It also raised the simplified acquisition threshold from \$750,000 to \$800,000 for covered contracts awarded and performed, or supplies purchased inside the United States.⁹⁷ It did not modify the current \$1,500,000 simplified acquisition threshold for contracts awarded and performed, or supplies purchased in the United States. Simplified acquisition procedures may be used for the procurement of covered contracts up to \$15,000,000 if the contracting officer expects, based on the nature of the acquisition and market research, that the proposals or offers will only include commercial products or commercial services.⁹⁸

⁹² *Id.*

⁹³ See P.L. 117-347 Sec. 1244(a).

⁹⁴ See P.L. 117-347 Sec. 1244(a)(3).

⁹⁵ See 41 U.S.C. § 1903(a).

⁹⁶ “Class Deviation—Temporary Authorizations for Covered Contracts Related to Ukraine,” DARS No. 2023-O0003, Rev. 2, issued 18 Sept 2023, para. (C)(1).

⁹⁷ See *id.* at para. (C)(2).

⁹⁸ See *id.* at para. (C)(3).

In an unusual change not included in the NDAA, the Class Deviation also authorizes the head of the agency procuring a sole-source covered contract under the SEPA to “treat the product or service as a commercial product or services.”⁹⁹ This provision authorizes heads of agencies to utilize FAR Part 12 procedures for all SEPA covered contracts regardless of dollar value.¹⁰⁰ However, the Class Deviation also states that, notwithstanding 48 C.F.R. § 12.214, any sole-source award of a SEPA covered contract over \$20,000,000 treated as commercial product or service is not exempt from the Cost Accounting Standards (CAS) or certified cost or pricing data requirements.¹⁰¹ This is unusual because FAR-based contracts for commercial products or services¹⁰² are explicitly exempt from CAS coverage.¹⁰³ Additionally, the \$20,000,000 threshold is misaligned with the \$50,000,000 threshold which triggers full CAS coverage¹⁰⁴ and the \$7,500,000 threshold which triggers modified¹⁰⁵ CAS coverage.

It is also problematic because there are eight other exemptions to the CAS which must be considered independent of the exemption for commercial products and commercial services. For example, the CAS exempts any contract (regardless of contract value) that is firm-fixed-price (FFP) and awarded based on adequate price competition¹⁰⁶ without the submission of certified cost or pricing data.¹⁰⁷ Adequate price competition exists when two or more responsible offerors compete independently and submit priced offers that satisfy the Government’s requirement, the award will be based on a best value determination where price is a substantial factor, and the intended awardee’s price is reasonable.¹⁰⁸ All FAR Part 12 contracts for supplies are required to use FFP or FFP with economic price adjustment.¹⁰⁹ A sole-source, multiple award IDIQ contract would most likely provide adequate price competition through the fair opportunity process.¹¹⁰ Accordingly, and notwithstanding Class Deviation paragraph (C)(4), a covered contract under the SEPA using a multiple award

⁹⁹ Id. at para. (C)(4).

¹⁰⁰ See id. at para. (C)(4).

¹⁰¹ See id. at para. (C)(4).

¹⁰² The CAS still uses the now-obsolete term “commercial items.” Cf. 48 C.F.R. § 9903.201-1(b)(6) and 48 C.F.R. § 9903.201-5(a)(1) with 48 C.F.R. § 2.101.

¹⁰³ See 48 C.F.R. § 9903.201-1(b)(6). But see 48 C.F.R. § 12.214 which only exempts from the CAS contracts and subcontracts for the acquisition of commercial products or commercial services when they are firm-fixed-price (FFP) or FFP with economic price adjustment (EPA) provided that the EPA is not based on actual costs incurred, i.e., a public index or other metric. As most contracts for commercial products or commercial services are required to use FFP or FFP with economic price adjustments, this is largely a distinction without a difference. See 48 C.F.R. § 12.207(a).

¹⁰⁴ Full CAS coverage (i.e., compliance with all 19 CAS standards) is triggered when a business unit receives either a single CAS-covered contract award greater than \$50 million or receives \$50 million or more in CAS-covered awards during the preceding accounting period. See 48 C.F.R. 9903.201-2(a). Full CAS coverage requires that the business unit comply with all 19 CAS standards. Modified CAS coverage requires that the business unit comply with CAS 401, 402, 405 and 406.

¹⁰⁵ Modified CAS-coverage (i.e., compliance with CAS 401, 402, 405 and 406) is triggered when a business unit receives a single CAS-covered contract greater than \$7.5 million but less than \$50 million during the current accounting period. See 48 C.F.R. 9903.201-2(b).

¹⁰⁶ See 48 C.F.R. § 15.403-1(c)(1).

¹⁰⁷ See 48 C.F.R. § 9903.201-1(b)(15).

¹⁰⁸ See 48 C.F.R. § 15.403-1(c)(1). Adequate price competition is also an exemption from the requirement to submit certified cost or pricing data. See 48 C.F.R. § 15.403-1(b)(1).

¹⁰⁹ See 48 C.F.R. § 12.207(a).

¹¹⁰ See 48 C.F.R. § 16.505(b)(1).

IDIQ would nonetheless still be exempt from the CAS. This example illustrates the complexity of determining CAS coverage in this area and practitioners should exercise an unusual degree of caution when making that determination. As the authority to utilize FAR Part 12 for SEPA contracts has only been delegated to the Head of the Contracting Activity without further delegation, contracting officers, program officials and acquisition attorneys should closely coordinate any such efforts with the appropriate headquarters subject matter experts.

Section 1244 also authorized DoD to waive certain statutory limitations associated with undefinitized contracting actions (UCA) established at 10 U.S.C. § 3372(a) and (c) for covered contracts.¹¹¹ The Class Deviation interprets this by authorizing the HCA, on a nondelegable basis, to waive the limitations in 48 C.F.R. § 217.7404(a) (Foreign military sales contracts), § 217.7404-3 (Definitization schedule), and § 217.7404-4 (Limitations on obligations).¹¹² This waiver permits the contracting officer to enter into covered contract UCAs for more than 180 days and/or to expend more than 50% of the overall ceiling price before definitization. It also permits the contracting officer to enter into a covered contract UCA for foreign military sales without requiring the UCA to be definitized within 180 days.

Section 1244 also authorizes the DoD to exempt certain covered contracts from the certified cost or pricing data requirements in 10 U.S.C. § 3702 (aka Truthful Cost or Pricing Data Act, formerly known as the Truth in Negotiations Act). The FY23 NDAA authorized the HCA, on a nondelegable basis, to waive the certified cost and pricing data requirements for a Fixed Price Incentive Firm Target covered contract when the target price is equal to the ceiling price, the Government underrun share ratio is a minimum of 60% and the negotiated profit cap is 15% of target cost.¹¹³ The FY24 NDAA scrapped this formula and authorized the Secretary of Defense to waive the cost or pricing data requirements in 10 U.S.C. § 3702 for any covered contract.¹¹⁴

V. Benefits and Drawbacks to Utilizing the Temporary Flexibilities

Federal acquisitions are frequently long, laborious affairs that require high-level approval and support, even for mission-critical systems such as the Mine-Resistant Ambush Protected vehicles.¹¹⁵ Congress recognized in the Joint Explanatory Statement to the FY23 NDAA that DoD would benefit from relaxing certain acquisition rules to reduce the time needed for certain types of acquisitions.¹¹⁶ When used effectively,

¹¹¹ See P.L. 117-347 Sec. 1244(a)(6).

¹¹² See “Class Deviation—Temporary Authorizations for Covered Contracts Related to Ukraine, Taiwan, and Israel” DARS No. 2024-00005, 8 January 2024, para. (D).

¹¹³ See P.L. 117-347 Sec. 1244(a)(4).

¹¹⁴ P.L. 118-31 Sec. 1242(2)(D).

¹¹⁵ <https://federalnewsnetwork.com/defense-main/2023/12/army-futures-command-to-focus-more-on-rapid-acquisition-with-an-eye-toward-potential-pitfalls/> (accessed 27 December 2023).

¹¹⁶ See “Joint Explanatory Statement to Accompany H.R. 7776 James M. Inhofe National Defense Authorization Act for Fiscal Year 2023.” Pg. 2051.

this authority can reduce the acquisition schedule in three ways.

First, approval for the use of this temporary flexibility has been delegated to a relatively low level with substantially simplified documentation requirements. For many Army programs, the use of this authority lowers the approval level from the ASA(ALT) to the SCO. This eliminates several layers of staffing review and substantially expedites approval. The authority also permits the use of a relatively simple D&F (often 4-5 pages) instead of a more complex J&A (typically 12-15 pages) that requires extensive research and supporting documentation, thereby saving research, drafting, and approval time.

Second, this authority reduces the need for new contracts and simplifies the selection of new awardees. Many DoD acquisitions are follow-on contracts to existing contracts which have reached the contract ceiling. Typically, a new contract is required at this point unless the contracting activity can justify a scope change (often requiring ASA(ALT) approval of a J&A) utilizing one of the other 48 C.F.R. §6.302 exceptions to competition. This authority can be used to authorize, at a relatively low-level, the approval of a contract modification in lieu of a J&A or new contract, thereby providing significant time savings.

Even if a new contract is required, this authority substantially simplifies and accelerates the selection of the awardees. Source selections using full and open competition rarely

take less than six months from RFP issuance to contract award, with more complex acquisitions frequently exceeding a year. The use of this authority eliminates the need for a complex source selection process to identify the vendor that provides the best value to the Government,¹¹⁷ thereby providing considerable time savings. It also improves the quality of the Government's contractors and reduces the risk of delivery delays or contract default as the contracting activity can select only those vendors who will provide the best outcomes for the Government and have the lowest risk.

Third, the use of this authority reduces the possibility of successful bid protests and the resultant delays. As discussed previously, the D&F only needs to provide a "clear and convincing" rationale that the contract is in the public interest.¹¹⁸ Congress has statutorily determined that any covered contract "may be presumed to be in the public interest."¹¹⁹ This substantially reduces the burden of proof on the agency as a D&F only needs to explain how the contract meets one of the three identified categories and articulates a reasonable basis to conclude that the awardee can meet the terms and conditions of the contract. If it is for a critical munition, a citation to the applicable budget documents or to the designating authority may be sufficient. To justify building stock of defense articles, a D&F should cite to and quote from the applicable provisions of the USML. Materiel being provided to foreign allies and partners should

¹¹⁷ See 48 C.F.R. §215.3 – Source Selection Procedures, Guidance and Information (PGI) – Department of Defense Source Selection Procedures. This 81-page PGI, while beneficial, is also illustrative of the complexity of DoD source selections.

¹¹⁸ See *infra* III. Public Interest Determinations and Findings.

¹¹⁹ P.L. 117-347 Sec. 1244(a)(2)(A).

identify the allies and partners and state that the recipient countries have provided support to Ukraine, Taiwan, or Israel. D&Fs in support of Ukraine, Taiwan, or Israel only need to state that the materiel being ordered is going to one or more of those countries.

Assuming that it meets all other requirements, a protestor is unlikely to succeed given the clear congressional determination that covered contracts under Section 1244 are in the public interest.

The use of this authority is also beneficial as it avoids many of the restrictions which apply to other exceptions to full and open competition in 48 C.F.R. §6.302. One of the most used Part 6.302 exceptions is 48 C.F.R. §6.302-1, “Only one responsible source and no other supplies or services will satisfy agency requirements.” To use this exception, agencies must either have conducted sufficient market research to demonstrate that the award is being made to all responsible vendors who are capable of performing the contract, or demonstrate that the awardee fits within one of the three limited subcategories.¹²⁰ Agencies frequently identify more responsible vendors capable of performing the contract than can be awarded contracts (even under a multiple award IDIQ contract scenario) due to funding or personnel limitations. Absent some other authority, an agency that encounters this situation must utilize full and open competition to select the best value to the Government with the accompanying delays in award. The Class Deviation offers a solution to this

situation as it permits the DoD to award one or more covered contract to any responsible vendor who is capable of performing the contract, even if there are other responsible vendors capable of performing.

Another frequently used Part 6.302 exception is 48 C.F.R. §6.302-2, “Unusual and compelling urgency.” An award made under this exception cannot exceed one year (including options) unless the head of the agency determines in writing that exceptional circumstances apply.¹²¹ The Class Deviation does not include a temporal restriction and contract durations follow the standard approval procedures.

Despite these benefits, there are nonetheless risks to utilizing this authority. Because Congress and the DoD have not clearly defined key terms, there is the potential for inadvertent misuse. For example, as discussed, there is substantial ambiguity regarding the types of and authority to designation critical munitions.¹²² A program office may sincerely but mistakenly believe that their munition is critical to future Army operations, or a contracting officer may inadvertently include substantial quantities of materiel or supplies which are not within the scope of a covered contract. Likewise, contracts which do not carefully manage foreign military sales may inadvertently procure materiel for countries which have not supported Ukraine, Taiwan, or Israel.¹²³ However well-meaning these decisions are, they nonetheless increase the risk of successful bid protests on the grounds that the contract is not a “covered

¹²⁰ See 48 C.F.R. § 6.302-1(a)(2).

¹²¹ See 48 C.F.R. § 6.302-2(d)(1)(ii).

¹²² See *infra*. II. Covered Contracts.

¹²³ This can be especially problematic as there are no publicly available trackers for support to Israel or Taiwan.

contract.” Acquisition personnel utilizing this authority and their legal advisors should vigilantly ensure that the entirety of the contract is squarely within the four corners of the Class Deviation in order to avoid the appearance of misuse.

Awarding sole source contracts under any authority trades speed for competitive pressures. Acquisition personnel operating in a fiscally constrained environment while supporting multiple conflicts may feel that they must make a Hobbesian choice of lowering costs versus timely delivering equipment to the battlefield. This is especially worrisome because this temporary authority does not eliminate the contracting officer’s duty to ensure that the Government receives fair and reasonable prices.¹²⁴ One potential tool to slice this Gordian knot is to utilize a multiple award IDIQ contract and maintain competition using the fair opportunity process.¹²⁵ Although utilizing fair opportunity requires additional work during contract administration, this acquisition method enables the Government to rapidly award contracts while maintaining competitive pressure to reduce pricing. To mitigate the risk of vendors dropping out during the life of the contract or the Government missing out on new vendors entering the marketplace, contracts can include a bespoke Section H clause which permits the Government to on-ramp new

vendors at any point during the life of the contract, potentially with this same authority.

Although the Government is not required to select the most qualified vendor when utilizing this authority, the contracting officer should nonetheless make every effort to ensure that the awardees represent the best value to the Government. This can require substantial market research which may delay the acquisition. While this is regrettable, failure to conduct adequate market research may result in the Government inadvertently passing over more capable and/or less expensive vendors.

VI. Conclusion

In the ever-changing world of great power competition, the continued primacy of American interests relies upon the comprehensive application of all available acquisition tools, including this temporary authority. While Section 1244 has limitations, it is nonetheless a broad authority that has widespread potential application across the Department of Defense, and Army officials should carefully consider how it can accelerate and enhance acquisitions.

¹²⁴ See 48 C.F.R. § 15.404-1(a).

¹²⁵ See 48 C.F.R. § 16.505(b)(1). This also allows the Government to further reduce the risk of a bid protest. Any vendor which protests can be offered a contract award if they are able to perform. To reduce risks of nonperformance, all vendors can be required to pass First Article Testing to be considered for a Fair Opportunity.

Policy Changes to Using Unmanned Aerial Systems for Immediate Domestic Response

MAJ Aaron Pool, USA

Introduction

The most basic and altruistic domestic Department of Defense (DoD) mission is responding to emergencies, usually natural or manmade disasters, to save lives, mitigate suffering, or avert great property damage.¹ Throughout American history, military commanders have often been called upon to respond to emergencies that overwhelm local or regional civilian authorities.² When every other resource has been exhausted, the federal government, which usually means the Army, is called to bring the resources and manpower necessary to save lives. DoD's ability to bring overwhelming resources to almost any problem has been critical to recovery efforts in some of the most significant disasters in our nation's history.³ Today there is a patchwork of statutes and policies governing federal and DoD response to disasters.⁴

One underutilized policy is a commander's Immediate Response Authority (IRA) to provide emergency response absent orders from the President or the Secretary of Defense,



when the commander determines the emergency warrants their aid.⁵ Traditionally, installation commanders could employ all available units to accomplish the mission as best as they saw fit.⁶ However, the introduction of Unmanned Aerial Systems (UAS) has led to stringent restrictions which often require the President or Secretary of Defense to approve any domestic use of UAS.⁷ In October 2023, the Secretary of Defense updated the DoD policy on domestic UAS use and authorized the Awareness, Search and Rescue, and DoD approved DSCA missions down to Colonel or the installation commander.⁸ This new policy dramatically changes

¹ U.S. DEP'T OF DEF., DIRECTIVE 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES 18 (Mar. 19, 2018) [hereinafter DoDD 3025.18].

² Emergency Management: Principles and Practice for Local Government 3-29 (Thomas E. Drabek & Gerard J. Hoetmer eds., 1991) [hereinafter Drabek & Hoetmer].

³ Major General Adolphus W. Greely, Earthquake in California, Special Report of MAJ. GEN. Adolphus W. Greely, U.S.A. Commanding the Pacific Division, on relief operations conducted by military authorities of U.S. at San Francisco and other points, with accompanying documents 94 (1906) [hereinafter MG Greely Report]. (describing the critical role the Army played in providing relief to San Francisco in the immediate aftermath of the devastating 1906 earthquake).

⁴ Stafford Disaster Relief and Emergency Assistance Act 42 U.S.C. § 5121 et seq. (governing federal support to states during emergencies); Economy Act 31 U.S.C. § 1535 (governing federal agencies providing support to each other); Insurrection Act 10 U.S.C. § 251-55 (governing federal response to an insurrection within a state).

⁵ DoDD 3025.18, *supra* note 2, ¶ 4.i.

⁶ MG Greely Report, *supra* note 4, at 91.

⁷ Memorandum from Sec. of Def. to Senior Pentagon Leadership et. al., subject: Guidance for the Use of Unmanned Aircraft Systems in the U.S. National Airspace (Oct. 31, 2023) [hereinafter DoD UAS Memo].

⁸ *Id.* attachment 2 at 8.

how the DoD can use UAS for Defense Support of Civil Authorities (DSCA) missions, and Judge Advocates need to be aware of the legal and technical considerations.⁹

Unmanned Aerial Systems

Unmanned Aerial Systems include the entire collection of components, networks, and personnel necessary to control an unmanned aircraft.¹⁰ DoD categorizes unmanned aircraft into five categories based on weight, normal operating altitude, and speed.¹¹

UA Category	Maximum Gross Takeoff Weight (lbs)	Normal Operating Altitude (ft)	Speed (KIAS)	Representative UAS
Group 1	0-20	< 1200 AGL	100 kts	WASP III, TACMAV RQ-14A/B, Buster, Nighthawk, RQ-11B, FPASS, RQ16A, Pointer, Aqua/Terra Puma
Group 2	21-55	< 3500 AGL	< 250	ScanEagle, Silver Fox, Aerosonde
Group 3	< 1320	< 18,000 MSL	< 250	RQ-7B Shadow, RQ-15 Neptune, XPV-1 Tern, XPV-2 Mako
Group 4	> 1320	< 18,000 MSL	Any Airspeed	MQ-5B Hunter, MQ-8B Fire Scout, MQ-1C Gray Eagle, MQ-1A/B/C Predator
Group 5	> 1320	> 18,000 MSL	Any Airspeed	MQ-9 Reaper, RQ-4 Global Hawk, RQ-4N Triton

AGL	above ground level	lbs	pounds
FPASS	force protection aerial surveillance system	MSL	mean sea level
ft	feet	TACMAV	tactical micro air vehicle
KIAS	knots indicated airspeed	UA	unmanned aircraft
kts	knots	UAS	unmanned aircraft system

The Army typically uses UAS in categories 1-4, with the MQ-1C Gray Eagle being the largest and most capable.¹² Groups 1-3 are often called “small UAS” whereas groups 4-5 are “large UAS.” The primary advantage of UAS is that their cameras, sensors, and flight time far outstrip most manned aircraft.¹³ These advantages make UAS valuable to commanders conducting Incident Assessment and Awareness and Search and Rescue missions.

Defense Support of Civil Authorities

Consistent with the separation of powers within our federalist system, local and state governments traditionally manage disaster response.¹⁴ The federal government typically refrains from involvement unless a state requests assistance.¹⁵ The DoD’s role in disaster response is called Defense Support of Civil Authorities.¹⁶ This is a DoD mission where federal military forces, DoD civilians, DoD contract personnel, DoD component assets, and the National Guard in a Title 32 status (when the National Guard is commanded by the federal government and not the state) are used to support civil authorities during domestic emergencies, law enforcement support, and other special events.¹⁷ In contrast to traditional military warfighting, DSCA operations use combined arms constructively, as opposed to

⁹ FED. AVIATION ADMIN., INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS IN THE NATIONAL AIRSPACE SYSTEM ROADMAP 25-28 (2018).

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 3-30, JOINT AIR OPERATIONS GL-7 (Sept. 2021) [hereinafter JOINT PUB. 3-30].

¹¹ *Id.* at III-31.

¹² DEPT. OF DEF., UNMANNED AIRCRAFT SYSTEM AIRSPACE INTEGRATION PLAN D-3 (2011) [hereinafter UAS Plan].

¹³ JOHN R. HOEHN & PAUL K. KERR, CONG. RSCH. SERV., R47067, UNMANNED AIRCRAFT SYSTEMS: CURRENT AND POTENTIAL PROGRAMS 2 (2022).

¹⁴ FRANCES FRAGOS TOWNSEND, THE FEDERAL RESPONSE TO HURRICANE KATRINA LESSONS LEARNED 12 (2006) [hereinafter Katrina Response].

¹⁵ *Id.* at 11.

¹⁶ DoDD 3025.18, *supra* note 2, at 18.

¹⁷ *Id.* Law enforcement support includes training and logistical support. Examples of special events are inaugurations, the Super Bowl, or the Olympics.

destructively, to increase the effectiveness of units supporting civilian authorities.¹⁸

The basis for support falls into two broad categories: suppressing civil disorder and disaster response.¹⁹ In most cases, DSCA missions are ordered pursuant to a request from civilian authorities to the President for support when local and state authorities are overwhelmed. The President, Secretary of Homeland Security, or Secretary of Defense then task appropriate DoD units for support.²⁰ Requests must be written and include a commitment to reimburse the DoD in accordance with the Economy²¹ and Stafford Acts.²² Military commanders then evaluate how to provide support using their resources and considering factors such as: Cost, Appropriateness, Risk, Readiness, Legality, and Lethality.²³

However, when an unexpected emergency overwhelms local authorities and there is not time to make a formal request to the President, a local military commander may be the closest resource available. The authority to act as a stop-gap in the emergency response system for DSCA operations has been granted to installation commanders by executive policy as

Immediate Response Authority.²⁴ In these situations, local civilian authorities may request emergency response directly from a nearby military commander without going through the formal processes under the Stafford Act.²⁵ This allows civilian authorities to request support from local DoD units to save lives, prevent human suffering, or mitigate great property damage.²⁶ In contrast to normal DSCA requests, IRA requests may be an oral request directly to the installation commander, but must eventually be followed by a written request with an intent to reimburse the DoD for expenses incurred.²⁷ However, IRA support will not be denied due to an inability or unwillingness for civil authorities to reimburse the DoD.²⁸ The installation commander is authorized to, “employ the resources under their control, subject to any supplemental direction,” but is prohibited from subjecting civilians to regulatory, prescriptive, proscriptive, or compulsory military power.²⁹ The intent is for IRA powers to be used as an emergency ability to save lives when there is insufficient time to work through the formal processes under the Stafford and Economy Acts.

The value of IRA is particularly acute for small-scale emergencies, and these are where UAS provide some of

¹⁸ U.S. DEP'T OF ARMY, ARMY DOCTRINE PUBL'N 3-0, OPERATIONS ¶ 3-52 (2019) [hereinafter ADP 3-0].

¹⁹ NAT'L ACAD. OF PUB. ADMIN., COPING WITH CATASTROPHE: BUILDING AN EMERGENCY MANAGEMENT SYSTEM TO MEET PEOPLE'S NEEDS IN NATURAL AND MANMADE DISASTERS 10 (1993) [hereinafter NAPA].

²⁰ DoDD 3025.18, *supra* note 2, ¶ 4.c.

²¹ 31 U.S.C. § 1535.

²² 42 U.S.C. § 5121 et seq.

²³ DoDD 3025.18, *supra* note 2, ¶ 4.e.

²⁴ *Id.* ¶ 4.i.

²⁵ *Id.* (The formal process requires the Governor to request assistance from the President in writing. The President, then directs the Department of Homeland Security to provide aid, and in coordination with the Secretary of Defense, some support may be ordered to come from the Department of Defense. This can happen rapidly, but still may take a few days.)

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* ¶ 4.i.(6).

²⁹ *Id.* ¶ 4.i.

the greatest benefits to commanders and local authorities. For example, suppose a new small to medium wildfire near a DoD installation threatens a civilian housing community. In that case, the local mayor or incident commander may request incident assessment and awareness from the military commander to determine whether to evacuate the civilian population. Giving commanders the authority to launch UAS when one person is missing, or a few houses are in danger is exactly the sort of IRA mission to which commanders are otherwise empowered to provide aid with all of their other organic assets. Beyond the improved ability to save lives, the increased responsiveness promotes goodwill and trust in the military from the surrounding civilian population at a time in our history when trust in government institutions is falling.³⁰

The Legal, Technical, and Policy Considerations

A. The Law and Policy

DoD employment of UAS for disaster response attempts to balance the robust capabilities of these systems with the Constitutional and statutory restrictions on domestic DoD operations. When presented with a mission to fly a DoD UAS off a military

installation, Judge Advocates need to be aware of the statutes and policies from both the Federal Aviation Administration and the Department of Defense. Congress has authorized the FAA to manage the national airspace and promulgate implementing regulations.³¹ On the other hand, DoD has a doctrinal DSCA mission which may require use of the national airspace.³² The interaction between DoD and the FAA is governed by a Memorandum of Agreement (MOA).³³ The MOA grants the DoD authority to operate its aircraft within designated zones without adhering to the FAA safety standards required in the rest of the national airspace.³⁴ The MOA also describes the procedure for DoD UAS to gain FAA approval to operate within the NAS, which would be necessary for any DSCA use.³⁵ The big takeaway is the recent DoD policy change is only half of the puzzle. The unit must still receive approval from the FAA to fly off the installation or outside a pre-approved flight path.

The FAA began civil UAS specific rules in 2015.³⁶ These were expanded with what is known as the Part 107 regulations in 2016 and applies to all commercial UAS operations.³⁷ The FAA has also explored special UAS rules for first responders to use UAS for emergencies through the Special Governmental Interest process.³⁸ Long

³⁰ Mohamed Younis, Confidence in U.S. Military Lowest in Over Two Decades, GALLUP (July 31, 2023), <https://news.gallup.com/poll/509189/confidence-military-lowest-two-decades.aspx>.

³¹ 49 U.S.C. § 44701.

³² DoDD 3025.18, *supra* note 2, ¶ 4.

³³ Memorandum of Agreement between Dept. of Def. and Fed. Aviation Admin., subject: Concerning the Operation of Department of Defense Unmanned Aircraft Systems in the National Airspace System (2013) [hereinafter DoD & FAA MOA].

³⁴ *Id.* at 1.

³⁵ *Id.* at 2.

³⁶ Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78594 (Dec. 16, 2015) (codified at 14 C.F.R. 1, 375, 45, 47, 48, 91).

³⁷ Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42063 (June 28, 2016) (codified at 14 C.F.R. pt. 107).

³⁸ FED. AVIATION ADMIN, ORDER JO 7200.23D, PROCESSING OF UNMANNED AIRCRAFT SYSTEMS REQUESTS (2021); *see also* https://www.faa.gov/uas/advanced_operations/emergency_situations.

term, the FAA is working towards full integration of UAS into the national airspace.³⁹

The DoD policies on UAS domestic use balance the competing needs of the DoD to accomplish DSCA missions while at the same time maintaining its access to the national airspace for traditional DoD missions such as training for armed conflict.⁴⁰ The FAA has delegated all of the training areas at DoD installations to DoD oversight where DoD manned and unmanned aviation may fly without standard FAA approvals.⁴¹ There are additional authorized corridors where the DoD may fly UAS in order to reach DoD use airspace, but those are carefully negotiated between the DoD and FAA and are not active at all times.⁴²

Underlying all DoD policies and procedures to conduct DSCA missions are the restrictions imposed upon the federal armed forces to perform law enforcement functions by the Posse Comitatus Act (PCA).⁴³ The National Guard is exempt from the PCA when operating in a state capacity because they are commanded by their Governor, and any UAS use there would also be exempt.⁴⁴ The PCA applies when Title 10 UAS are being used for a law

enforcement functions, such as surveillance of suspected criminal activity, because this is a task not ordinarily assigned to the DoD.⁴⁵ The PCA would not apply to DoD using UAS for DSCA that was primarily disaster relief or search and rescue.⁴⁶ Any incidental discovery of criminal activity during an authorized use could be referred to law enforcement without violating the PCA.

B. Technological Issues

The restrictions on UAS in the national airspace from the FAA are largely due to the safety and technological issues presented by UAS as an emerging technology. Although the DoD has experimented with UAS for almost 100 years, the widespread civilian use of UAS is a more recent phenomenon. Due to the rapid proliferation of cheap, off-the-shelf, commercial UAS systems which can be flown with minimal training, the FAA is seeing a massive increase in UAS interactions with manned aviation and citizens on the ground.⁴⁷ The primary safety concerns are UAS interacting and avoiding manned aviation, and risk to people on the ground due to crashes.⁴⁸

Unlike hobby UAS pilots, military UAS operators are trained specifically to

³⁹ FED. AVIATION ADMIN., INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP (July 2018) [hereinafter FAA UAS Roadmap].

⁴⁰ DoD & FAA MOA, *supra* note 34.

⁴¹ *Id.*

⁴² *Id.* at 3-6.

⁴³ Posse Comitatus Act, 18 U.S.C. § 1385 (2021) "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both" [hereinafter PCA].

⁴⁴ JENNIFER K. ELSEA, CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 62 (2018).

⁴⁵ *Id.* at 56.

⁴⁶ *Id.* at 30.

⁴⁷ FAA UAS Roadmap, *supra* note 40, at 4-5.

⁴⁸ *Id.*

fly UAS and the military UAS have similar safety metrics to military manned aircraft. The most common metric for military aircraft safety are “Class A” mishaps which are events that cause at least \$2.5 million in damage to an aircraft, the total destruction of the aircraft, or results in a fatality.⁴⁹ The data shows that the Gray Eagle in particular has mishap rates comparable to many manned aircraft used by the DoD and the Shadow has mishap rates much higher than manned aviation. Most Army UAS mishaps occur during takeoff or landing so the risk in flight or to civilians on the ground is much lower.⁵⁰ This indicates that a commander, and by extension the Army and DoD is not taking significantly greater risk by flying UAS compared to manned aircraft.

C. Privacy Concerns

The other broad category of constraints arises from the balance between the duty to protect and defend American citizens without infringing on constitutionally protected civil liberties.⁵¹ Intelligence in this context is using a component of the Intelligence Community, such as military intelligence Soldiers, in their traditional capacity.⁵² Using UAS to collect imagery and then military intelligence personnel to analyze

that imagery normally implicates intelligence oversight rules.⁵³ However, DCSA missions are specifically excepted from the normal intelligence oversight rules.⁵⁴ This is because the mission is not to collect intelligence on US persons, but to give the commander situational awareness in order to save lives, mitigate suffering, or prevent great property damage.⁵⁵

Separate from the regulatory and physical safety concerns, anytime the military is operating within the United States there are likely to be personal privacy concerns implicating American civil liberties. Past Supreme Court Cases have granted the government broad authority to use the national airspace for observation⁵⁶ and image capture using commercially available equipment.⁵⁷ By policy, armed UAS are specifically prohibited from being used domestically.⁵⁸ The privacy concern is primarily over the type, quality, and quantity of imagery UAS is capable of capturing.⁵⁹ Compared to the past cases, modern UAS can be equipped with cameras capable of seeing things the naked eye cannot through thermal optics, infra-red, x-ray, or even just advanced zoom and stabilization. There is a reasonable argument that the capabilities today are of a caliber not considered when the Supreme Court

⁴⁹DEPT. OF DEF., INSTRUCTION 6055.07, MISHAP NOTIFICATION, INVESTIGATION, REPORTING, AND RECORD KEEPING 45 (2011) [hereinafter DoDI 6055.07].

⁵⁰ U.S. Army Combat Readiness Ctr., UAS Mishap Rates, at slide 1 (Oct. 2023) (unpublished PowerPoint presentation) (on file with author) [hereinafter CRC Mishap Rates].

⁵¹ See Exec. Order No. 12333; U.S. DEP'T OF DEF., MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DoD INTELLIGENCE ACTIVITIES (Aug. 8, 2016) [hereinafter DoDM 5240.01]; U.S. DEP'T OF DEF., DIRECTIVE 5148.13, INTELLIGENCE OVERSIGHT (Apr. 26, 2017).

⁵² JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE I-26 (Oct. 22, 2013).

⁵³ *Id.*

⁵⁴ DoDM 5240.01, *supra* note 52 at 5.

⁵⁵ *Id.* at 8.

⁵⁶ *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

⁵⁷ *Dow Chemical v. United States*, 476 U.S. 227, 239 (1986).

⁵⁸ DoDD 3025.18, *supra* note 2, ¶ 4.q.2.

⁵⁹ AM. CIV. LIBERTIES UNION, PROTECTING PRIVACY FROM AERIAL SURVEILLANCE: RECOMMENDATIONS FOR GOVERNMENT USE OF DRONE AIRCRAFT 5 (2011) [hereinafter ACLU].

decided the aerial surveillance cases in the 1980's. As a result, any UAS use potentially offers the government vastly greater amounts of intrusion into citizens' private spaces.

To mitigate perceived or actual misuse, units still must submit a Proper Use Memorandum (PUM) to the Secretary of Defense for approval to ensure military intelligence personnel are not violating intelligence oversight rules.⁶⁰ The PUM confirms the operation does not violate any statutes or policies and reiterates the activity falls within the DSCA authorities. These procedures would apply no matter the category of UAS used. Once the operation is complete, the unit must still comply with all statutes and policies on the proper retention and use of any U.S. Person's data. Commanders and Judge Advocates still should consider intelligence oversight rules to ensure legitimate UAS use will not be used as a justification for illegitimate purposes.⁶¹

While the capability exists for DoD UAS to stray into any of those impermissible territories commanders ultimately are responsible for their decisions relating to using their assets for immediate response. A commander who abuses that authority may be admonished, relieved, or even held criminally responsible.⁶² Additionally, although DSCA is a doctrinal mission, by historical practice the military is the last resource to be used and the first

resource to leave the area once stability has been achieved. Using UAS will help mitigate the cost, improve the capability, and ultimately allow the military to leave the area more rapidly than using manned assets. The risks of mission creep are far more likely from local police or sheriffs using UAS because their primary role is law enforcement.⁶³ Their persistent presence and mission over a local area would be more likely to lead to consistent UAS use compared to the Army responding to an acute emergency situation and then returning to the nearby post. As long as DoD is narrowly tailoring its domestic use of UAS to legitimate DSCA missions, the risk to American civil liberties is low.

Other Considerations and the Current Process

The cost savings when using UAS compared to manned aviation is shocking. For FY2023, a single hour of flight time for a UH-60 Black Hawk cost the Army between \$2,500 and \$3,500, depending on the model flown.⁶⁴ On average, a single hour of flight time for a CH-47 Chinook cost the Army \$5,450.⁶⁵ A single hour of MQ-1C Gray Eagle flight time costs the Army \$10.62.⁶⁶ An RQ-7B Shadow costs just \$3.51 per hour.⁶⁷ Because IRA missions require the civilian requesting authority to at least acknowledge an attempt to reimburse the government, this barrier is much easier to cross when the cost is from a UAS compared to manned

⁶⁰ See generally Memorandum from Secretary of Defense to Governor Doug Burgum, subject: North Dakota Military Department Airborne Imagery Proper Use Memorandum (July 17, 2023) (on file with author).

⁶¹ ACLU, *supra* note 60, at 11.

⁶² ELSEA, *supra* note 45, at 66-70.

⁶³ ACLU, *supra* note 60, at 12.

⁶⁴ U.S. Army Combat Readiness Ctr., PB 22 Cost Factors GND-AIR (Oct. 2023) (unpublished Excel Spreadsheet) (on file with author).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

aviation. From a cost perspective, it is almost irresponsible not to use UAS.

A typical Army aviation unit will have sufficient UAS to conduct continuous, 24-hour operations. Gray Eagles can remain in the air for up to 25 hours, depending on payload and conditions.⁶⁸ A smaller UAS, such as a Shadow, can remain in the air for up to 8 hours.⁶⁹ Meanwhile, a Black Hawk or Chinook can only fly for 2-3 hours before refueling.⁷⁰ If the mission is incident assessment and awareness, then UAS will provide the commander with reliable, continuous eyes over the incident, compared to much less regular visibility from manned aircraft. This has the added benefit of focusing manned aircraft on missions such as delivering emergency supplies or rescuing stranded civilians.

Commanders must always evaluate risks to the mission, risks to their personnel, and risks to their equipment. As vast and powerful as DoD is, its resources are limited, and every commander must manage risk in almost every decision they make. Manned aircraft are expensive to fly, maintenance-heavy, and put aircrews' lives at risk each time they take off. The recent series of aircraft crashes during training missions shows the steep cost

the DoD incurs when things go wrong.⁷¹ The risk calculation when using UAS is drastically simpler for commanders. The commander is only risking the value of the UAS rather than the lives of pilots and crew, and all Army UAS cost significantly less than manned aircraft.

To use a category 1-3 UAS for IRA today, an installation commander must have a current approved PUM signed by the Secretary of Defense for approval to use the UAS domestically and outside the designated DoD airspace.⁷² A standing PUM can be staffed by a higher headquarters, such as Army North, or a special one for the particular operation. The commander would also need authorization from the FAA to fly a DoD UAS into the national airspace through emergency approval or a pre-planned airworthiness authorization.⁷³ While this process can happen fairly rapidly, full approval will likely take at least several hours to days.⁷⁴ In addition to the other requirements, the Secretary of Defense must approve a Title 10 commander to use category 4-5 UAS.⁷⁵ Understandably, this withholding means commanders rarely seek approval when they do not need additional approvals to fly their manned aviation assets instead.

⁶⁸ GENERAL ATOMICS, <https://www.ga-asi.com/remotely-piloted-aircraft/gray-eagle-extended-range> (last visited Mar. 13, 2024).

⁶⁹ TEXTRON SYSTEMS, <https://www.textronsystems.com/products/improved-shadow-tactical-unmanned-aircraft-systems> (last visited Mar. 14, 2024).

⁷⁰ LOCKHEED MARTIN, <https://www.lockheedmartin.com/content/dam/lockheed-martin/rms/documents/black-hawk/sikorsky-UH60M-brochure.pdf> (last visited Mar. 14, 2024).; BOEING, <https://www.boeing.com/defense/ch-47-chinook/> (last visited Mar. 14, 2024).

⁷¹ DEP'T OF DEF., DOD IDENTIFIES ARMY CASUALTIES (Nov. 13, 2023), <https://www.defense.gov/News/Releases/Release/Article/3586557/dod-identifies-army-soldiers-killed-in-helicopter-crash/>; Sharon Johnson, *9 killed in Army Black Hawk helicopter crash in Kentucky*, ASSOCIATED PRESS (Mar. 30, 2023), *The Army identifies 3 soldiers killed in Alaska helicopter crash*, ASSOCIATED PRESS (Apr. 29, 2023), <https://apnews.com/article/us-military-helicopters-crash-kentucky-89c9dbcd035b3cc7c637c2b1f0a037a2>; <https://www.npr.org/2023/04/28/1172725134/alaska-army-helicopters-crash-deaths>.

⁷² DoD UAS Memo, *supra* note 8, attachment 2, at 8.

⁷³ DoD & FAA MOA, *supra* note 34, at 3-5.

⁷⁴ *Id.* at 2-3.

⁷⁵ DoD UAS Memo, *supra* note 8, attachment 2, at 8.

Conclusion

The recent policy change truly opens up options for commanders to use small UAS to provide immediate response to local civil authorities. With an understanding of the legal and policy balance between the FAA and DoD, Judge Advocates can better advise their commanders on domestic UAS use so

we can save more lives during emergencies. In the future, and as the FAA continues to develop a more robust UAS regulatory framework, we can hope to see greater DoD delegations for Immediate Response Authorities to utilize both small and large UAS for domestic missions.

Command Post Survivability Approaches in Archipelagic and Jungle Environments

MAJ Nick Allen, USA

On a modern battlefield, perhaps the most vexing paradox regardless of environment is how to keep an active modern command post both alive and functioning. Of all the lessons learned in the ongoing war in Ukraine, one of the most searing relates to command post vulnerability. Due to deadly-accurate long-range fires platforms, low-cost, high-impact recon drone capabilities, and the enormous electromagnetic profile of operating in a modern-day environment, today's "ponderous" command posts are easy to find and strike.¹

Recent U.S. military training exercises tend to show that survivability would be just as difficult to solve if not more so in a jungle environment. Exercises in Hawaii in recent years, including Joint Pacific Multinational Readiness Center rotations and a 2022 Pacific-based Warfighter Exercise, all of which the author personally experienced, constantly stressed commands' ability to survive and conduct follow-on operations in a manner that would not re-threaten their survival.

Solutions do not come easy. Command posts produce a large, bright multidomain signature – a fact leading one 25th Infantry Division command team to describe them as the "largest



entity on the battlefield.”² Thick jungle foliage may help mask visual signature but will not sufficiently mask electromagnetic signature. Additionally, here too roads can be underdeveloped and terrain too challenging to provide sufficient maneuver space to fit an entire headquarters in a pinch. In an archipelagic environment, different islands even within one country may have different qualities of infrastructure.

Mobility is also not easy to solve. The challenge is in finding a balance between size, noise, collapsibility, connectivity, and capability. Some commands still use tent-based command posts and experiment with various models such as aluminum-ribbed Alaska tents, inflatable Airbeams, and scalable Drash tents. These options maximize capability by putting multiple

¹ Lieutenant General Milford Beagle et al., *The Graveyard of Command Posts: What Chornobaivka Should Teach Us About Command and Control in Large Scale Operations*, MIL. REV. 10, 11-12 (May-Jun. ed., 2023); see also Jeffrey Lewis et al., *China's Growing Missile Arsenal and the Risk of a "Taiwan Missile Crisis"*, NUCLEAR THREAT INITIATIVE (Nov. 18, 2020), <https://www.nti.org/analysis/articles/chinas-growing-missile-arsenal-and-the-risk-of-a-taiwan-missile-crisis/>.

² Colonel Graham R. White, Major Justin E. James, & Major Richard Eaton, *IBCT Distributed Command and Control: Where I Command is Not Where I Control*, INFANTRY (Fall 2023).

command sections into as little as 1-2 tents, keeping the entire command post together. However, these tents can still take hours to construct, hours to deconstruct, and produce massive electromagnetic profiles – setting conditions for a catastrophic kill.

The Army's Command Post Integrated Infrastructure (CPI2) program meanwhile has experimented for years with vehicle-based options. Expandable Light Medium Tactical Vehicles (LMTVs) also known as Expando-Vans, feature a LMTV-mounted expandable workspace container which can grow while stationary to maximize workspace and shrink in a few minutes to be ready to move. Units have seen some success with them in exercises in Thailand and the Philippines,³ but their use is not ubiquitous, and their bunching can still make them easy to spot, harass, jam, and strike.

An innovative approach at 25th Infantry Division may provide the likely way forward in a jungle-based conflict. There, the 2nd Infantry Brigade Combat Team, 25th Infantry Division went small and distributed through multiple exercises in 2022 and 2023.⁴ Instead of housing the brigade command in one or two forward-located posts, the brigade headquarters focused on “employing the capability instead of deploying the capability.”⁵ It split into five different nodes with some located on the battlefield and some in a distanced “sanctuary” support location.⁶ The command tried to counter the loss of

functionality through distributing personnel by using systems to replicate their functions in the forward posts and maximizing “all-domain camouflage” to reduce particularly their communications-based profile in the optical, thermal, electronic, and acoustic realms.⁷ This had the ultimate effect of reducing command post signature, increasing survivability, and maintaining mission command.

For judge advocates, however, this approach may result in distributed legal operations and fewer legal personnel being in the fight. In the 2IBCT exercises, the brigade judge advocate remained with the 2IBCT commander, and targeting judge advocates remained with other cells while battalion paralegals remained with their even further distributed battalion command posts. As the author observed while working in the HICOM for one such exercise, often getting real-time information could be challenging and the brigade judge advocate could sometimes become the last to know about legal issues happening elsewhere in the battlespace. This was not a reflection of the legal team's performance but a reflection of the realities of highly distributed mission command. And this is in a unit that chose to keep its legal team close by.

While this approach may have helped reduce command post profiles, continued observations from Ukraine

³ See Staff Sergeant Samuel Northrop, *New Army Vehicles Being Developed to Counter Modern Threats*, U.S. ARMY, https://www.army.mil/article/219567/new_army_vehicles_being_developed_to_counter_modern_threats (Apr. 3, 2019).

⁴ See White, *supra* note 2 at 15.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 16.

and more recently Gaza⁸ show an old-is-new trend that units are also working to apply in archipelagic and jungle conditions: the use of civilian buildings as command posts. The benefit to this tactic is that it enables a command post to blend its signature in with the surrounding community, potentially making it invisible on the electromagnetic spectrum.

The risks, however, are steep and complicated. Generally speaking, international law protects civilian structures from targeted attacks. When a military force occupies a civilian structure, that military force turns the protected civilian structure into a lawful military target. Should an enemy target the civilian structure to hit the military force, the targeted military force could become liable for resulting damage to the civilian structure or protected persons inside it.

Some civilian structures, such as hospitals, have heightened protections under international law which strictly prohibits any military use of those structures and requires advanced warning by a belligerent before attacking

the structures once they've been unlawfully converted to military use.⁹ Article 147 of the Fourth Geneva Convention also explicitly declares that the “destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a grave breach of the Geneva Conventions, bestowing universal jurisdiction for prosecution.¹⁰

Additionally, such tactics can become self-defeating and a public relations nightmare if not well-conceived. For example, Hamas and Hezbollah use of civilian structures and areas as command posts and firing positions have engendered allegations that such tactics constitute not only grave breaches of the protection of civilian structures but also equate to the use of human shields,¹¹ an act which also qualifies as a grave breach of the Geneva Conventions. The Fourth Geneva Convention adjusts legal abilities and obligations if a military force procures a civilian structure during a period of occupation,¹² but this is not available in areas of active combat.

⁸ As of the date of this article, open-source reporting appears to show only that Hamas fighters have used civilian buildings as military command posts. This includes their use of the al-Shifa Hospital, Gaza's largest hospital, which became the site of a tense siege in November 2023 after Israeli forces located Hamas tunnels, weapons stockpiles, and a command post with communication equipment in and under the hospital. Observers note that such is a human-shield tactic used by Hamas in various ways since 2007 to bait Israeli forces into striking Hamas-occupied civilian structures and neighborhoods with the motive of providing Hamas the simultaneous ability to claim that Israel unlawfully targets civilians. Whether Israel Defense Forces have also used civilian structures as command posts or shelters during their offensive into Gaza is unclear and at the very least under-reported. See e.g. Shira Rubin, et al., *Civilian Buildings Increasingly at Center of Israeli Operation in Gaza*, WASH. POST, <https://www.washingtonpost.com/world/2023/11/13/israel-hamas-gaza-hospitals-un/> (Nov. 13, 2023 at 5:14 PM); James Pamment, et al., *Hybrid Threats: Hamas' Use of Human Shields in Gaza*, NATO STRAT. COMM. CENTER EXCELLENCE, [chrome-extension://efaidnbmnnnibpcajpcgclefindmkaj/https://stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf](https://efaidnbmnnnibpcajpcgclefindmkaj/https://stratcomcoe.org/cuploads/pfiles/hamas_human_shields.pdf) (Jun. 6, 2019).

⁹ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 18, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter “GC IV”).

¹⁰ *Id.* at art. 147; for discussions on the effective reach of Geneva Convention-born universal jurisdiction, compare, e.g., Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. J. 811 (2009) (arguing that universal jurisdiction only applies in those circumstances when no other country has made a proper claim to jurisdiction), with Arrest Warrant of 11 Apr. 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 1, 24-25, § 59 (Feb. 14) (finding that universal jurisdiction and the “customary international law” which informs it permits one country's court to have jurisdiction to issue arrest warrants and another country's court to have jurisdiction to afford immunity).

¹¹ See Rubin, *supra* note 8.

¹² See GC IV, *supra* note 9 at Part III.

Certainly, agreement with the local nation for use of certain civilian structures would be most effective for avoiding these perceptions and legal liabilities. However, the local nation – if friendly – may not agree to permit the use of the most desired locations as those locations, in order to be effective, might inordinately endanger civilian communities. There is also an open question about whether the acquisition of a civilian structure in jungle combat would mask a command post's electromagnetic profile at all as the activity emanating from it would still make it the biggest entity in a rural

battlefield. Legal practitioners should expect that in a large-scale combat operation where U.S. command posts are under a moment's threat from long-range, hypersonic missiles, commanders will ultimately maximize the temptation to minimize personnel. Unless judge advocates and paralegals can demonstrate additional, non-legal benefits, they may return to their pre-1990s stationing away from the front line even at the risk of unassisted commanders and targeting staff experiencing problems with LOAC and ROE compliance.

Winning With Fires: A Guide to Advising a Modern DIVARTY

CPT Edward Callahan, USA

The Army of 2030 is going to change the way the United States Army fights, moving the tactical point to the Division.¹ This is particularly relevant to the Division Artillery Brigade, (DIVARTY). After the formation of the Brigade Combat Team (BCT) the DIVARTY was split up to assist BCT's in being able to deploy as a self-sustaining lethal element in support of operations without the deployment of the whole Division. The Field Artillery Battalions (FA BNs) that were once consolidated under the DIVARTY were divided.² The Army is now returning those FA BNs to the DIVARTY, as well as standing up additional batteries needed to fill capability gaps.³ As an example, the DIVARTY of 1st Cavalry Division is going from no FA battalions to six battalions.

Future DIVARTY Brigade Judge Advocates (BJA) need to be prepared to handle the legacy issues that their predecessors faced, and some additional challenges from the restructure. Amongst them is understanding the dynamic and deliberate targeting cycles, conducting law of armed conflict (LOAC) analyses in the fast-moving counterfire fight, managing battalion paralegals who will be shifting from general support to the division to direct support to the brigades, advising a brigade commander who is also a division staff officer, recognizing when the DIVARTY has division level engagement authority and when they



are operating as a brigade-level authority, among many others.

I will discuss some of the issues that I have seen through several command post exercises (CPX) and field training exercises (FTX), a warfighter (WFX), assisting in writing the tactical standard operating procedures (TACSOP) for a DIVARTY operations center, and planning for the consolidation of FA battalions. I will discuss some of the unique aspects of being a DIVARTY BJA that are not faced by our counterparts in the BCT. Finally, I will make some suggestions on a way forward.

DIVARTY Issues

Some of the continual and unique issues that the DIVARTY legal advisor is facing on the battlefield include counterfire, cross-boundary fires, organic targeting, support relationships, and the Commander's dual roles as FSCoord and Brigade Commander.

¹ Post-CAS Update: "How the Division Fights", COL Michael Whitney, Director, TPO-EAB, et al., pg. 3, August 2023.

² <https://www.defense.gov/Multimedia/Experience/Military-Units/army/#army>

³ Post-CAS Update: "How the Division Fights", COL Michael Whitney, Director, TPO-EAB, et al., pg. 11, August 2023.

The Role of the Commander

The Brigade Commander for the DIVARTY is also a staff officer for the Division known as the Fire Support Coordinator (FSCOORD).⁴ As a Brigade Commander, he acts as a downtrace commander to the CG for capabilities and strategies of his Brigade elements, as the FSCOORD he is the advisor and execution authority for the division-level targeting decisions. This also creates two staff for the DIVARTY Commander. As a Brigade Commander, they will have their “Staff” shops, and critically to our concerns, a BJA.⁵ As the FSCOORD they are going to have the division “G Staff” as well as legal advisors from the Division OSJA. The Division targeting cell consists of targeting officers; a DFSCOORD, or deputy FSCOORD; the JAGIC officers, etc. All different and distinct personnel who do not fall under the DIVARTY Brigade. There may be some redundancy (DIVARTY and Division have Targeting Officers) and they must and do work closely together, but they are distinct offices. If the division TOC and the DIVARTY TOC are not co-located, this is going to create some real difficulties in the management and advising of the DIVARTY Commander.

Anticipate this problem by coordinating with your OSJA. Make sure roles are clear within the legal channels so they can be made clear to the operational channels. Commanders do not like having to chase down a new lawyer every time they have a question,

so briefing them ahead of time is crucial. Begin advising the staff early. The BJA will not have the face time with the commander that they are used to, the biggest way to mitigate risk for the commander is to make sure that the rest of the staff officers, as well as the fire support elements and battle majors, all know the ROE withholdings and what authorities they are allowed to work under. The legal support to the army competency includes all legal support provided to the Army as an institution, including commanders and staff of individual organizations.⁶

The Counterfire Fight

Counterfire is fire intended to destroy or neutralize enemy weapons.⁷ This team is overseen by the targeting officer for the echelon that they exist and is able to identify the targets through radar acquisitions. “Weapons locating radar is a *continuous target acquisition* counterbattery system that detects in-flight projectiles and communicates *point of origin* and point of impact locations.”⁸ With that system the targeting officer will be able to rapidly identify the equipment and the point of origin for any incoming fire. The FSCOORD for the division is responsible for orchestrating the division counterfire effort.⁹ The counterfire fight exists as both proactive, specific targeting of enemy indirect fire systems,¹⁰ as well as reactive, immediate indirect and join fires to neutralize, destroy, and suppress

⁴ FM 3-09 para. 2-6.

⁵ FM 3-84, para. 3-4.

⁶ FM 3-84, para. 1-6.

⁷ JOINT PUB. 3-09, GL-6.

⁸ FM 3-09 para. 2-9 (emphasis added).

⁹ FM 3-09 para 3-25.

¹⁰ FM 3-09 para. 3-26.

enemy indirect fire weapons once acquired.¹¹

The counterfire fight will be the most rapid targeting process that the BJA will encounter. The reactive counterfire fight will be a significant emotional event that involves troops in contact and incoming fires. From calls of self-defense to arguments against the need to take collateral damage into account, the BJA needs to be prepared to be a voice of dissent in this process when it is necessary. Build trust with your targeting officer and discuss concerns with your commander before they arise to establish yourself as a value-added player in the process.

Organic Targeting

At division the targeting cell is known as the Joint Air-Ground Integration Center (JAGIC).¹² The DIVARTY Brigade has its own TOC, where it utilizes all of the resources of a JAGIC, without the air force assistance. The counterfire mission is wholly under the command of DIVARTY, and they have the capability to conduct the entire F2T2EA¹³ internally. The DIVARTY intelligence section has all of the resources to hunt targets. The S2 will be able to put together a target package that is ready for a legal review without ever having to send it to the division-level authority. That S2 can hand it to the Fires Support Element (FSE) who can engage that target. The DIVARTY BJA needs to assist with the validation of that target as well as the

proportionality analysis going into the munition used at the FSE. It is important to remember that the authority to engage organically lies with a Brigade Commander, and not that of the division FSCoord.

Support Relationships

Support relationships with FA BNs are fluid.¹⁴ When the division is together the battalions may remain in a general support (GS) relationship to the division. In this setup, they will be controlled and cleared through the DIVARTY TOC¹⁵ and receive their ROE and LOAC analysis from the DIVARTY BJA. Throughout the fight, however, they will be set on direct support (DS) relationship with maneuver brigades. While they are in that relationship, they will get their ROE and LOAC analysis from the BJA for that Brigade.¹⁶ It was not unusual for one battalion to be GS and then pass to DS to a BCT and then DS to a different BCT as they pass through objectives and then return to GS once the division catches up. As such, FA battalion commanders are often in a position of having a paralegal as their only constant legal representative through an operation.

Well trained and competent battalion paralegals are essential for the success of this system. The BJA should be involved in the orders writing and making sure that the support annex addresses the legal support that a battalion will receive, and from whom they will receive it. It will likely require

¹¹ FM 3-09, para. 3-27.

¹² U.S. DEP'T OF ARMY, TECHS. PUB. 3-91.1, THE JOINT AIR GROUND INTEGRATION CENTER (April 2019) [hereinafter ATP 3-91.1].

¹³ JOINT PUB. 3-09, IV-13

¹⁴ Post-CAS Update: "How the Division Fights", COL Michael Whitney, Director, TPO-EAB, et al., pg. 3, August 2023.

¹⁵ FM 3-09, para. 2-37.

¹⁶ FM 3-09, para. 4-51.

the paralegal to understand and issue spot missions that are covered in either the LOAC or ROE limitations and know to which BJA to send the issue.

Cross-Boundary Fires

Increasingly the artillery brigade, operating on behalf of the division or as a hunter-killer brigade themselves, are going to identify targets that are in the area of operations (AO) of another division. When this happens the DIVARTY will send them the target information to the neighboring Division for them to engage; and vice versa. This concept is referred to as “any sensor, best shooter.” Regardless of which DIVARTY identifies the target, both the receiving and sharing BJA should conduct LOAC analysis to ensure all factors remain to support target engagements.

Lessons Learned

Pick your seat in the TOC carefully (if you can!). The way our TOC was set up we were able to get the BJA between the target validation station, the counterfire chief, and the fire support officer. This allowed us to overhear the calls for fire, the questions they asked themselves, as well as whatever munition they wanted to fire. Additionally, sync up with the systems that the fire support officer uses. The Command Post Computing Environment (CPCE)¹⁷ was the system that allowed the advanced field artillery tactical data systems (AFATDS)¹⁸ to show the

targets as they were layered on top of the map, real-time with the shooters. This allowed us to visually screen for populated areas or proximity to No Strike Entities.

Attend schools and training certifications outside of the legal profession. Judge Advocates are expected to be the subject matter experts in our field. DIVARTY BJAs should consider attending courses at the Center for Army Lessons Learned¹⁹ and at Ft. Sill for the Army²⁰ and Dam Neck²¹ for joint operations specific to fires. In the rapid targeting environment, it is essential that the BJA recognize the difference between a M26 DPICM, ATACMS, and a FASCAM shot.²² All three of them will have wildly different problems within the LOAC and ROE analysis.

Prescreen the call for fire zones (CFFZ). A call for fire zone is a weapon locating radar search area from which the commander wants to attack hostile firing systems.²³ These will consist of precleared airspace, airspace in which we expect the enemy to be located and that we want to be able to engage with artillery without having to go through the whole clearance process each time. The BJA should be able to review these CFFZs ahead of time and identify any problem areas. The Commander will approve the CFFZs and you should be able to advise on the risk associated with them.

¹⁷ The Warfighers' Guide to CPCE, The Product Manager, Tactical Mission Command, V5 March 2023.

¹⁸ FM 3-09, para. 2-58.

¹⁹ <https://www.army.mil/call>

²⁰ <https://sill-www.army.mil/amtc/>

²¹ <https://www.jcs.mil/Doctrine/Joint-Training/Joint-Functional-Schools/JTS/>

²² FM 3-09, A-10; para. 2-74; and https://www.army.mil/article/169261/area_denial; respectively.

²³ FM 3-09, B-58.

Conduct internal battle drills to ensure LOAC and ROE are understood by every link in the kill chain. The one that I found most effective was to pick a past target. Convert the military grid reference system (MGRS) location to the latitude and longitude or pick a nearby landmark (both are easy to do if you are operating on CPCE). Take that vague information and go to the battle major with something right out of the daily news: “We have reports that we struck a hospital in the area of (your target description). Show me what the target was, what you shot it with, and was it successful.” This requires recordkeeping from the S2, FSE, targeting officer, and battle damage assessment (BDA) personnel. They should be able to come to you with all of the elements: how they identified and distinguished the target (S2); what they shot it with (FSE); and what the results were (BDA). It helped to make sure that they kept historical data and would be able to answer any actual

investigation without having to slow down the tempo.

Conclusion

Dynamic and specialized knowledge, as well as strong lines of support and communication with echelons above and below the division, makes the DIVARTY a complex and exciting brigade to advise. As it grows, so too must the support it is shown. While the military prepares for the next war, we need only look to Ukraine and Israel to see that LSCO consists largely of artillery battles, targeting repercussions, and live-streamed second-guessing of military decision-makers. When you add that to the fact that the future of warfare discussions on cyber-attacks, unmanned aerial vehicles, and space technology all have the roots of their discussions as “effects” in the targeting publications – the artillery brigades are at the cutting edge of the changing army in ways this paper hasn’t even begun to address.

Paralegal Utilization: Best Practices and Lessons Learned

SFC Eric Tuel, USA

Adaptability is crucial for the US Army's future success during the ground warfare of large-scale combat operations. As our armed forces pivot from counterterrorism endeavours to the complexities of large-scale combat, these adaptations will prove vital in securing victories against near-peer adversaries. Among these crucial adaptations lies the concept of command post mobility, focusing on minimizing the digital presence of the unit for improved efficiency and strategic advantage. The era of sprawling, Taj Mahal-sized Tactical Operations Centers (TOCs) and stationary Forward Operating Bases (FOBs) at the Battalion/Brigade level is fading, presenting a pressing challenge of prioritizing personnel within the limited space of these mobile command posts. While certain roles like the S3 and S2 naturally secure their seats at this minimalist table, the dilemma arises concerning personnel who play vital roles but could potentially operate from a rearward location. Battalion Commanders, particularly, face this dilemma during every rotation at the Joint Multinational Readiness Center (JMRC), often necessitating the relegation of certain personnel to rear command posts or excluding them from the exercise altogether.

This paper contends that embedding paralegals within the S-3 section's mobile command post offers Battalion Commanders a strategic advantage. By integrating these legal experts into mobile units, commanders can harness their abilities to identify and



address operational and legal concerns swiftly, fulfil higher echelon reporting obligations and prepare reports in adherence to the Department of Defense policies on civilian harm mitigation and response planning.

In accordance with FM 3-84 *Legal Support to Operations*, battalion paralegal Soldiers are assigned to the S-1 section of each battalion. Their assignment to the battalion S-1 section is designed to provide legal support to battalion commanders and Soldiers while acting under the direction and supervision of the BJA and brigade senior paralegal NCO. Paralegal Soldiers are expected to primarily perform duties of a legal nature. Despite the doctrine, assigning the paralegal to the S-3 during training and combat operations will ensure their duties remain legal in nature while adding significant value to the battalion fight during and after the conflict.

Identify and Address Operational and Legal Concerns: Issue Spot

Throughout every exercise rotation at the Joint Multi-National Readiness Center, one of the maneuver units encounters a significant complex legal dilemma, albeit at times they

themselves do not realize it is an issue. For example, a Recon platoon has been tasked with observing an enemy avenue of approach along the forward line of troops (FLOT). As they are approaching the objective a platoon of enemy surrenders to their force. The platoon now has taken 30 enemy prisoners of war, which places several obligations on their unit. The original tasking has not ended. The platoon does not realize there are legal obligations and plans to continue the mission. The report goes to the company and to the battalion but never makes it to the brigade. A paralegal within the operations cell will be able to spot issues similar to this. It is not enough to have them in the S1; embedding them with the S3 forces complex legal issues through a trusted source that commanders can count on to provide a safeguard. The paralegal can aid the commander on responsibilities they now have after taking EPWs and can properly report this to the higher echelon in order to protect the organization. Additionally, having an extra high-speed Soldier in the Operations Center can help with all aspects of the operation.

Reporting Requirements

Much like pop-up legal issues, every organization has Commander's Critical Information Requirements (CCIRs). These reporting requirements need a liaison or manager to ensure it is up to date, accurate, and reliable. Paralegals are perfectly suited to manage and track all the high echelons reporting requirements like fratricide, collateral damage, EPW issues, etc. They can do this much easier in the operations cell than at the ALOC or in the rear. When trained properly the

paralegal can add significant value to the battalion fight.

Civilian Harm Mitigation and Response Planning

Finally, the Department of Defense has adopted a new policy in order to prevent, report, and investigate civilian harm during combat operations. Units will be required to track collateral damage, preserve evidence, and report incidents to high echelons. Paralegals are squarely positioned and attuned to the intricacies of this type of work and with the proper supervision of their judge advocates can assist units throughout the operation. The Civilian Protection Center of Excellence (CP COE) provides specialized training and professional military education to certify personnel on key functions involving Civilian Harm Mitigation and Response (CHMR). As detailed in CHMR-AP (2022), operational plans should include the following: an assessment of the civilian environment as part of the operational environment, provide a clear articulation of objectives with respect to the civilian environment as part of the overall mission objective, anticipate the impact of operations on the civilian environment, and provide for the protection and restoration of the civilian environment if practicable. A certified CHMR paralegal working in the S3 can serve as a crucial advocate, ensuring command teams are doing their best to adhere CHMR objectives in their operational planning.

Implementation

Training and preparation are keys for paralegal success when integrating into the BN S3 shop. Divisions and

Brigades must shift training objectives to be more focused on the Law of War, LOAC principles, ROE, production of an OPOD, MDMP process, and developing a PACE plan to communicate amongst paralegals scattered in an operational environment with a limited digital footprint. The more repetitions a Soldier experiences in the field with their BN S3, the more comfortable the paralegal becomes with their assumed duties in the field. The BN paralegals, along with their Judge Advocate (JA), should schedule and conduct training on the Law of War, LOAC, and ROE with their BN CDR, BN SGM, Company CDR, 1SGs, and the BN S3 OIC and NCOIC. A paralegal's constant presence and participation in field exercises will provide the command team with a more vital understanding of the paralegal's role during CTC rotations or in the LSCO environment.

Conclusion

In conclusion, the strategic integration of paralegals into the mobile command posts of the battalion S-3 section represents a decisive leap forward in our preparedness for large-scale combat operations. Paralegals can provide crucial support in addressing operational and legal challenges, ensuring adherence to reporting requirements and civilian protection policies. This strategic integration highlights our commitment to adaptability and underscores the vital role paralegals play in maintaining mission efficiency and ethical standards. Through dedicated training and innovation, the JAG Corps will be prepared to leverage their contributions to help their units succeed on the battlefield.

Jumping into interoperability: Polish-American Military Cooperation on Legal Issues

LTC Grzegorz Janiszewski, POL, CLAMO

The development of mutual cooperation on legal matters between the Polish Military Legal Service and the U.S. Army Judge Advocate General Corps (hereinafter, "JAGC") resulted in 2021 in the dispatch of the first JAGC exchange officer to the General Command of the Polish Armed Forces. The following year, a Polish exchange officer arrived at the U.S. Army's Center for Law and Military Operations.

One of the primary tasks of the exchange officers is to strengthen interoperability on legal issues in preparation for joint operations. Part of this process is participation in multinational exercises. In recent years both exchange officers observed a series of exercises to assess, and then increase, the degree of legal interoperability between Polish and American armed forces.

In the Fall of 2023, Lt. Col. Grzegorz Janiszewski¹, the Polish exchange officer from CLAMO, observed the U.S.-led exercise Saber Junction '23 in Hohenfels, Germany. The Polish 11th Armored Division participated as a part of over 4,000 soldiers from 14 different allied nations. In an effort to exercise the muscles of legal interoperability, 75 of the Polish



soldiers acted as part of the higher command for the U.S. 2nd Cavalry Regiment.

The next year included a series of NATO exercises which were collectively titled Steadfast Defender '24. These exercises were the largest series of NATO exercises since the Cold War era. One of the series of exercises was the air mobility exercise Swift Response '24. Lt. Col. Janiszewski from CLAMO and Maj. Jonathon Siegler, the JAGC exchange officer from the Polish General Command, were both on the ground for the exercise. Swift Response involved over 13,000 multinational airborne troops (including around 1,000 Polish troops) conducting large scale joint forceable entry airborne operations. During the exercise, multinational forces conducted air assaults, live-fires, and other interoperability training. The

¹ Lt. Col. Grzegorz Janiszewski is a member of the Polish Military Legal Service. A graduate of the Faculty of Law at Adam Mickiewicz University in Poznan and postgraduate studies in European Law, he has been involved in military law for more than 20 years - mainly international and operational. Among other things, he served in the Public Law Department of the General Command of the Polish Armed Forces, dealing with foreign cooperation, where he was responsible for maintaining contacts with the US Army JAG Corps. He was also Head of the Legal Office - legal advisor to the NATO Joint Force Training Center in Bydgoszcz. As a legal advisor, he participated in many international exercises at the operational and tactical levels. He took part in negotiating international agreements on both the Polish and North Atlantic Alliance sides. He was also serving abroad. In 2022, he was appointed as an exchange officer in CLAMO. Since then, he has been trying, with more and less success, to connect the Polish Military Legal Service with the JAG Corps with interoperability ties.

exchange Officers directly observed the work of Lt. Jerzy Urbas, legal advisor to the 6th Airborne Brigade in Krakow, Poland, with keen interest in the lieutenant's interactions with legal advisors from other countries participating in the exercise. The observation of legal advisors from different countries working through issues injected into the exercise was valuable to the effort of improving legal interoperability.

Organization and training of the Polish military legal service

The Polish military legal service consists of about 200 military legal advisors. They are soldiers in the rank of second lieutenant to colonel, serving in various positions. The positions of legal advisors occur starting at the brigade level where there are only one or two lawyers. The Polish armed forces are functionally divided into the General Command and the Operational Command. The General Command of the Armed Forces is responsible for the training and preparation of troops. The Operational Command of the Armed Forces is responsible for command during operations. Each of the commands has a separate legal service division, headed by Chiefs with the rank of colonel. There is no legal service unit in the General Staff that oversees both of these commands. There is also a Legal Service Department in the Ministry of Defense, but this department only exercises administrative supervision over all military legal advisors mainly for personnel matters.

Every soldier in the Polish military legal service has completed higher, uniform five-year legal studies. Some of

them are qualified legal advisors. However, this is not required for all positions in the military legal service.

The five-year studies usually prepare candidates well for the legal profession. However, matters related to the law of armed conflict are rarely addressed during the course of study. Usually, the subject is provided in the form of optional lectures. During the Officer's course, which every candidate for military legal counsel undergoes, issues related to the law of armed conflict are conducted to a limited extent. There are no classes on operational law or the rules of engagement. This results in military legal advisors learning the subjects on the job.

Cooperation and interoperability

The first thing to realize in working with Polish military legal advisors is the issue of the language barrier. Many advisors of the older generation (including the author of this text) studied Russian as a compulsory language until high school, and only began to learn English in courses during their military service after Poland joined NATO in 1999. This can cause difficulties in communication, which, however, can usually--sometimes with hands or smartphone translator--be overcome. The younger generation of legal advisors usually speak English well.

The second thing that may surprise allies during joint exercises with Polish legal advisors is their limited number. While exercising with a U.S. Army brigade one can usually expect about 10 JAGC Officers, but a Polish

brigade (or even a division) will usually have one legal advisor. By Polish statute, there are two legal advisors in an Army division and brigade. However, one usually participates in exercises. This sometimes causes problems, especially during night shifts, during which only one legal advisor is on duty.

When armed forces from different countries conduct joint exercises, the primary task for the legal advisors of both sides is to ensure interoperability in operations. According to Army Regulation 34-1 there are four levels of interoperability: Not Legally Interoperable; Legally Deconflicted; Legally Compatible; and Legally Integrated. While the last two years have seen great efforts to increase the level of legal interoperability between the United States and Polish armed forces, this requires urgent efforts to continue improvement.

In practice, it is fundamental to understand the difference between the position of a military legal advisor in the continental and common law systems, especially the U.S. Army JAGC. In the U.S. Army, Judge Advocates have a special function, always having access to the commander and advising on virtually every relevant issue. In the continental law system, the legal advisor rather deals with specific problems that arise during service. While the JAGC is set up to also prevent fires, in the Continental law system the legal advisor deals with extinguishing those that have already broken out. Under Polish law, the legal advisor always reports directly to the commander and is independent when giving opinions, but often the advisor's involvement is limited to giving

opinions on administrative or contractual matters.

Another issue is the differences in applicable laws. Poland has signed and ratified several treaties to which the United States has not. Specifically, the United States has signed, but not ratified, Additional Protocols I and II to the Geneva Conventions and the Rome Statute. Additionally, although the United States does not use anti-personnel mines due to international stigma, they did not sign the 1997 Mine Ban convention. Poland is also a party to the European Convention on Human Rights, which imposes specific requirements for respecting human rights, including during armed conflict.

This makes it imperative that Polish and U.S. legal advisors work together, especially in the case of mutual subordination during operations. The countries must take these differences into account. Key here is the cooperation of legal advisors and Judge Advocates to ensure interoperability but also to avoid criminal and disciplinary liability by soldiers and the use of lawfare by the enemy. Notable practical and legal interoperability issues were encountered during the recent exercises.

Practical activities during the exercises

A typical problem is the differences in the armaments used which could raise legal implications. One example is the use of the XM204 mine. It is designed to destroy tanks and armored vehicles and is currently used by the U.S. Army. The Polish Army does not have a similar weapon on its

equipment roster. Thus, the question of the permissibility of its use arises. In the case of such a modern and recently introduced armament, the first issue is to get acquainted with its capabilities and mode of operation. Then there is a need for the Polish armed forces to assure its leaders that the use of this new mine does not violate international agreements to which Poland is a party.

The Rules of Engagement (ROE) is also an area where interoperability issues need to be ironed out. Polish military legal advisors usually participate in training for soldiers before an exercise. During this training, the laws of armed conflict are recalled, and soldiers are familiarized with the ROEs in effect during operations. Yet, not many Polish military legal advisors are properly trained in the application of ROE. This creates problems with their interpretation. During the exercise, an ROE charter was initially drawn up for the soldiers taking part in the exercise. It contained very detailed regulations, some of which were transcribed from the orders for the exercise. Such wording would be incomprehensible to individual soldiers and not very useful in practical operations. It would pay dividends for legal advisors from other countries to work with the ROE drafters to understand and interpret the ROE for the front-line soldier well ahead of any joint operation.

Another major challenge encountered during the targeting process. Polish doctrine normalizes the legal advisor's participation in this process to a limited extent. Thus, the basic document in the legal advisor's work is NATO AJP 3.9. This greatly facilitates the case when legal advisors

from other NATO countries also use this document, without significant changes resulting from national documents. This was the case, for example, with the subdivision from the Czech Republic, which was part of the Polish Brigade during the exercise. The Brigade's landing was to take place at the Polish training ground in Drawsko.

Reconnaissance was also carried out by Polish reconnaissance subunits.

Assessment for targeting was carried out based on the information thus gathered. The participation of the Czech legal advisor was limited in this process. The main role was played by the Polish military legal advisor, who, when taking part in the targeting process, also had to consider the limitations provided by Czech regulations and rules, which he did not know exactly. He therefore had to rely on the experience of Czech soldiers who, while not lawyers, had conducted similar activities in the past. This shows that there is a need for more national interoperability manuals to be developed and put into action as well as updating existing ones. These manuals can better reconcile different countries legal principles under which soldiers of allied countries operate.

Legal issues during the exercise

Several legal issues arose during the training, requiring interaction between legal advisors from different countries. These included logistical issues related to the Czech army's use of Polish combat assets. During the exercise, there was a risk that aircraft would not be able to fly out of the Czech Republic due to the weather. The aircraft's mission was to take some Czech soldiers to the Drawsko Pomorskie training ground. This created

the risk that the Czechs would find themselves there without ammunition for the main rifle used by Czech paratroopers. Doubts were raised by the provisions of the cooperation agreement, which stipulated that the Polish side would supply combat assets "remaining on the equipment" of the units taking part in the exercise. Meanwhile, the Polish 6th Brigade did not have such equipment. Some of the Czech paratroopers were supposed to jump from Polish aircraft, which in turn raised questions about the legal possibility of performing such jumps in Polish airspace - with Czech authorizations and equipment that had not been tested in Poland.

One of the major issues considered during the exercise was the location of its command post in a highly urbanized area, in the center of Krakow, which is one of the largest cities in Poland. On the one hand, this provided protection from detection by radio reconnaissance means, but on the other, it posed a threat to civilians living in close proximity to the barracks where the command post was located. The problem was solved by assuming that in the event of a real conflict, the population would be evacuated, at least from around the unit. This, of course, raises other problems, such as the resulting radio silence, or the impossibility of carrying out such an evacuation without drawing attention. This was to be included in the conclusions of the exercise as a problem to be solved in the future to include cooperation with administrative authorities.

The Drawsko training ground, where the paratroopers were to be

landed, is also used by the Polish State Forests--a government agency dedicated to the protection and use of Polish forest resources--and local hunters. During exercises, entry bans are issued for them. Hunters usually respect them, but it happens that the information does not reach them. Mushroom hunters also appear on the training grounds, even during exercises. The legal advisor took an active part in clarifying the legal status of the area and the rights of soldiers in relation to civilians residing in the area. He also checked with representatives of the State Forests and the local administration that everything had been prepared and warnings had been issued so that no outsiders would appear on the training ground during the exercise. His tasks also included explaining to the soldiers what authority they had over civilians staying in the military area, and what action should be taken in case they appeared there during the exercise. Czech soldiers were particularly interested in this. Polish soldiers, if they are not on guard duty, have very limited possibilities of intervening with civilians, even if they are on military territory. This is done in general under the provisions of the Code of Criminal Procedure. Any citizen can detain another person in the act of committing a crime. The question is whether this can also be done by citizens of other countries? The Polish Code of Criminal Procedure does not contain regulations in this regard, it was assumed that this was permissible. However, it was necessary to train Czech soldiers in the Polish law in force in this regard. Also of interest to them was the liability for trespassing on private land in case they landed outside the training area. The legal advisor explained to them that any damage from

this would be covered by the Polish state in accordance with the Status of Forces Agreement. In contrast, simply entering unfenced private land is not subject to criminal liability in Poland.

The targeting portion of the exercise proceeded without major problems. Since the landing was to take place according to the scenario on the territory of a military airfield, after the Vanguard Group had first scouted the area, there was no risk of exposing civilians or their property to hostilities. Thus, there were no restrictions in the targeting process. In application, however, it was assumed that operations could extend to the nearby village of Oleszno. For these reasons, a course of action was also planned in case hostilities there expanded. A plan was developed to deal with the civilian population and protect them from the direct consequences of the fighting.

One of the most unusual inquiries came from Polish soldiers training together with British soldiers from the 1st Military Working Dog Regiment in Estonia. In the British army, dogs are used not only for patrolling or detecting the enemy by smell, but also as non-lethal weapons. In Poland, the use of service dogs for such purposes is allowed only by the military police and military law enforcement agencies for the purpose of ensuring public order and peace. This raises the question of whether Polish soldiers are allowed to enter patrols together with dog handlers and transport the animals in their helicopters and vehicles.

Key Takeaways:

1. Interoperability between the Polish and U.S. armed forces needs improvement. Therefore, constant efforts should be made to increase it.
2. There is a need for joint training for Polish and American legal advisors.
3. There is a need to issue and update interoperability manuals, both Polish-American and those of other countries with which joint operations are conducted. The manuals should be updated on an ongoing basis using the experience gained especially during participation in exercises.
4. Some of the issues and questions that arose during the exercise should have been clarified at reconciliation conferences prior to the exercise. However, it happens that the parties' legal advisors do not participate in them. The legal advisors should participate in these conferences.
5. Legal advisors should also participate more in the planning of exercises. Their participation would allow the construction of various action plans that were intended to test interoperability. Lawyers' participation would also ensure greater emphasis on interoperability in a legal sense.

Participation in the exercise was a good opportunity to look at the interaction of subdivisions from different countries at a relatively low level and the work that a legal advisor at this level does in the process. It also showed that the exchange officers are useful in Polish-American cooperation on legal issues, and their participation in the

exercises can contribute to increasing interoperability not only between Poland and the US, but also between other NATO countries.

CONFERENCES AND COURSES CALENDAR

August 2024

12-16 Law of Naval Operations, Naval Justice School, San Diego, CA

12-16 Theater Special Operations Command Staff Preparation, JSOU, Tampa, FL

12-23 Joint Targeting Staff Course, JTS, Dam Neck, VA

19-23 20th Intel Law Course, TJAGLCS, Charlottesville, VA

2-29 Legal Aspects of Defense Support of Civil Authorities, DIILS, Newport, RI

September 2024

09-13 TSOC Cyber Planner Course, JSOU, Tampa, FL

30 Sep – 4 Oct NATO Joint Targeting Staff Course, Oberammergau, GER

30 Sep – 4 Oct Targeting Course, IIHL, San Remo, ITA

October 2024

7-11 NATO Legal Advisor Course, Oberammergau, GER

7-11 Naval Operations and the Law Course, IIHL, San Remo, ITA

7-11 Joint Targeting Staff Course, JTS, Dam Neck, VA

14-18 Rules of Engagement Course, IIHL, San Remo, ITA

21-25 NATO Operational Law Course, Oberammergau, GER

21-25 Joint Targeting Staff Course, JTS, Dam Neck, VA

21-25 Collateral Damage Estimation Course, JTS, Dam Neck, VA

22-25 Homeland Defense/Homeland Security Course, AFJAG, Montgomery, AL

CLAMO Points of Contact (DSN: 521)

<u>Director</u> LTC Michael Lamphier	micheal.h.lamphier.mil@army.mil (434) 971-3210
<u>National Guard Bureau Representative</u> MAJ Elijah Beaver	elijah.t.beaver.mil@army.mil (434) 971-3391
<u>Navy Representative</u> LCDR Brigham Fugal	brigham.b.fugal.mil@mail.mil (434) 971-3382
<u>Army Representative</u> MAJ Jason Johnson	jason.t.johnson76.mil@army.mil (434) 971-3201
<u>Coast Guard Representative</u> LCDR Anthony Rodrigues	anthony.m.rodrigues4.mil@army.mil (434) 971-3290
<u>Marine Corps Representative</u> Capt Mitchell McCulley	mitchell.r.mcculley.mil@army.mil (434) 971-3248
<u>German Exchange Officer</u> Mr. Norman Vogt	norman.v.vogt.fn@army.mil (434) 971-3132
<u>Polish Exchange Officer</u> Lt Col Grzegorz Janiszewski	grzegorz.r.janiszewski.fm@army.mil (434) 971-3158
<u>CLAMO NCOIC</u> SFC(P) Trey Angle	william.w.angle2.mil@army.mil (434) 971-3143
<u>Army Reserve Representative</u> LTC Paul Robson	paul.l.robson.mil@army.mil
<u>Organizational Email</u>	usarmy.pentagon.hqda-tjaglcs.mbx.clamo-tjaglcs@army.mil

SUPPORTING THE WARFIGHTER

