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Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level

Colonel Kelly D. Wheaton[1]

On the morning of 8 April 2003, Task Force 4-64 of the 2d Brigade Combat Team, 3d Infantry Division (Mechanized), was engaged in fierce fighting in the center of Baghdad near the Republican Palace, Al Rashid Hotel, and Al Jumhuriya Bridge, which is across the Tigris River from the Palestine Hotel.[2] By a stroke of luck, Task Force 4-64 captured a two-way Motorola radio set on a frequency still being used by the enemy and intercepted radio transmissions from an enemy forward observer thought to be located in a high-rise building across the Tigris River.[3] The Soldiers already receiving indirect fire were informed of the existence of the forward observer and began a search to find him.[4] Task Force Soldiers observed a tripod and "some kind of optics" in a high-rise building approximately 1700 meters to the south—perhaps a ground or vehicular laser locater designator (a tripod-mounted laser targeting device).[5] After obtaining permission to engage, the Soldiers fired a High Explosive Anti-Tank (HEAT) round into the Palestine Hotel.[6] Occupying the Palestine Hotel were approximately 100 reporters and cameramen observing and filming the battle occurring across the river.[7] Spanish cameraman Jose Couso was wounded in the explosion and subsequently died of his wounds.[8]

On 21 April 2003, Secretary of State Colin Powell forwarded a letter to the Foreign Minister of Spain stating that the United States "share[s] your sorrow over Mr. Couso's death" and adding that "Mr. Couso's death occurred in a war zone during an ongoing battle. . . . our forces responded to hostile fire appearing to come from a location later identified as the Palestine Hotel."[9] In May 2003, Mr. Couso's next-of-kin filed a complaint in Spanish criminal court.[10] On 14 October 2003, the Spanish federal criminal court accepted the complaint, and on 19 October 2005 the court issued international arrest warrants for three U.S. Soldiers, including the company and battalion task force commander under the circumstances.[11] The prosecutor for the court filed an appeal of the warrant, arguing that the court lacked jurisdiction.[12] Nonetheless, the Interior Ministry of Spain will inform Interpol of the arrest warrants.[13] Under tough questioning about the court's action the next day, the U.S. Ambassador to Spain stated that bilateral relations between the United States and Spain had "not been negatively affected" by the court's decision.[14]

This single military action in the early days of Operation Iraqi Freedom almost immediately embroiled the U.S. military and its legal advisors in foreign courts defending complaints against U.S. Soldiers and, two years later, resulted in criminal indictments, Interpol referrals, and potential negative impact on international relations. This incident, and countless others like it, illustrate how the war on terrorism places increasingly complex demands on lawyers advising warfighters at the tactical, operational, and strategic level. Because the variety and import of legal issues at the strategic level are continuously increasing, it is necessary to examine how the spectrum of legal advice and advocacy that is required at the strategic level (strategic lawyering) must change to more effectively support the war on terrorism. While strategic lawyering would not

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[2] David Zucchino, *Thunder Run*, ATLANTIC MONTHLY PRESS, Apr. 2004, at 285.

[3] *Id.* at 294-95.

[4] *Id.* at 295.

[5] *Id.* at 296.

[6] *Id.* When the Task Force 4-64 Soldiers fired, they did not know that they were firing into the Palestine Hotel.

[7] Joel Campagna & Rhonda Roumani, *Permission to Fire*, May 27, 2003, http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_ hotel.html.

[8] Zucchino, *supra* note 2, at 297-98.

[9] *Powell Letter: Force was Justified,* N.Y. TIMES, Apr. 25, 2003, at A13.

[10] Tito Drago, *Spain: U.S. Soldiers to Be Tried for Reporter's Death in Iraq*, GLOBAL INFO. NETWORK, Oct. 20, 2003, at 1 (on file with author).

[11] *Killing the Witness: Spanish Judge Orders Arrest & Extradition of U.S. Soldiers in Death of Spanish Journalist Jose Couso in Iraq*, 20 Oct. 2005, *available at* http://www.indybay.org/newsitems/2005/10/20/17762271.php.

[12] Vince Crawley, *Spanish Judge Orders Arrest of U.S. Soldiers Cleared in 2003*, Oct. 20, 2005, http://usinfo.state.gov/eur/Archive/2005/Oct/20-448501.html.

[13] *U.S. Ambassador 'Respects' Judge's Demand for Extradition*, SPAIN HERALD, Oct. 21, 2005.

[14] *Id.*

have saved Mr. Couso or necessarily changed any of the decisions leading to the action that caused his death, strategic lawyering is vital when incidents Mr. Couso's death occur.

Strategic lawyering requires both proactive and responsive legal advice and support in "lawfare"—the use of law as a weapon of war. Many strategists suggest that winning the war on terrorism will require winning a war of ideology including the use of effective international collective action. Lawyers, who receive specialized schooling and training with emphasis on effective analysis, reasoning, advice, and advocacy, must play both direct and indirect roles in winning this war of ideology. This article analyzes the capabilities of military legal advisors at the strategic level to support the war on terrorism using their specialized legal training, education, and experience and considers how commanders at the strategic and operational level may use this legal support best. The article reviews examples of strategic issues in which military lawyers could have played a larger role and contributed to better issue resolution and argues that the military should employ legal support more aggressively when addressing strategic-level concerns. Finally, this article offers recommendations for improving the role and functions of Army legal advisors.

The Strategic Level of War and Strategy

Three levels of war are described in current Army doctrine: strategic, operational, and tactical.[15] These levels are to be used as doctrinal perspectives to clarify the relationships between strategic objectives and tactical actions.[16] The strategic level is "that level at which a nation . . . determines national and multinational security objectives and guidance and develops and uses national resources to accomplish them."[17] Strategy recently has been defined as "the use that is made of force and the threat of force for the ends of policy."[18] This definition is similar to the model espoused at the U.S. Army War College, which analogizes strategy as a three-legged stool balancing ends, ways, and means.[19] Use of the military instrument of power to achieve the U.S. National Security Strategy is addressed in the National Defense Strategy and National Military Strategy.[20] The transformation of national level strategy and policy into theater strategy occurs at the strategic level of war.[21] Combatant commanders are central in the process of translating strategic direction into operational plans and execution.[22] Planning and execution of campaigns is the transition point between the strategic and operational level of war.[23]

Thus, the strategic level of war is executed at the combatant command level. Higher and within the Department of Defense (DOD) the roles, missions, and functions of the combatant commands, defense agencies, Military Departments, Service Chiefs, the Office of the Chairman, Joint Chiefs of Staff (and Joint Staff), and the Secretary of Defense (and Office

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[15] U.S. DEPARTMENT OF THE ARMY, FIELD MANUAL 3-0, OPERATIONS 2-2 to 2-3 (14 June 2001) [hereinafter FM 3-0].

[16] *See, e.g. id.* at 3-0, 2-2.

[17] *Id.*

[18] COLIN S. GRAY, MODERN STRATEGY 17 (Oxford Univ. Press, 1999). This definition is comparable to that of the famous military theorist, Carl von Clausewitz, who defined strategy as "the use of engagements for the object of the war." CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret, eds. & trans., Princeton U. Press 1984) (1832). Clausewitz, however, wrote at a time when war was intensely personal, when commanders could—for perhaps the last time—see all the troops under their command during battle because effective weapon ranges were less than what a car can drive on the highway in one minute and operational plans were constrained by the distance man and animal carrying a load could march in one day. Clausewitz could not envision the destructiveness of today's weapons; the ability of twenty men to kill over 3,000 civilians in a few minutes time, the shrinking of time and space, and the increasingly phenomenal ability to communicate across distance and with multiple persons. Nonetheless, Clausewitz wrote about war in a way that is still relevant. He provides insights that are still worth considering.

[19] H. Richard Yarger, *Toward a Theory of Strategy: Art Lykke and the Army War College Strategy Model*, *in* I THEORY OF WAR AND STRATEGY 3 (James A. Helis ed. 2005). Under joint doctrine, a national security strategy is the "art and science of developing, applying, and coordinating the instruments of national power . . . to achieve objectives that contribute to national security." JOINT CHIEFS OF STAFF, JOINT PUB. 0-2, UNIFIED ACTION ARMED FORCES I-2 to I-3 (2001) [hereinafter JOINT PUB. 0-2].

[20] *Id.*

[21] FM 3-0, *supra* note 15, at 2-3.

[22] *Id.* at I-6, II-2. The President exercises his Constitutional authority as commander-in-chief to direct the U.S. armed forces. The Secretary of Defense, heading the Department of Defense, is responsible to the President for creating, supporting, and employing military capabilities. The Department of Defense is a Cabinet-level organization with three military departments, four armed services, seven field activities, sixteen defense agencies, and nine combatant commands reporting directly to it. The four armed services are subordinate to their military departments. The armed services are responsible for recruiting, training and equipping their forces; operational control of those forces is assigned to one of the combatant commands. Department of Defense, DOD at a Glance, http://www.defenselink.mil/pubs/almanac (last visited May 16, 2006). The President and the Secretary of Defense exercise their authority over the armed forces communicating through the Chairman, Joint Chiefs of Staff, through the combatant commanders, Secretaries of the Military Departments and the Service Chiefs. *See* JOINT PUB. 0-2, *supra* note 19, at I-1–I-5.

[23] FM 3-0, *supra* note 15, at 2-2 to 2-3. Campaigns are the related series of military operations aimed at accomplishing strategic or operational objectives.

of the Secretary of Defense) are carried out. Lawyers are assigned and provide legal support throughout these many and varied strategic-level organizations.[24]

Current Army Doctrine on Legal Support to Operations

Current Army doctrine establishes that legal support to operations falls into three functional areas: command and control, sustainment, and personnel service support.[25] The practice of operational law involves providing those legal services that directly affect the sustainment and command and control of an operation.[26] There are six core legal disciplines: administrative law, civil law (including contract, fiscal, and environmental law), claims, international law, legal assistance, and military justice.[27] By doctrine, Army judge advocates have three fundamental objectives: supporting the mission (protecting and promoting command authority); providing service (meeting the legal needs—of commanders, staffs, personnel, and family members); and enhancing legitimacy (engendering public respect and support for military operations, by, among other things, promoting justice and ethical behavior).[28]

Doctrine recognizes that judge advocates in the 21st century will be challenged in accomplishing their objectives. In particular, to accomplish missions, Army judge advocates must thoroughly understand the military mission to better forestall and resolve legal issues affecting the mission and "must become more involved in the military decision-making process in critical planning cells, and at lower levels of command."[29] In accomplishing their objective of enhancing legitimacy, judge advocates will have to transmit their thorough understanding of U.S. values and constitutional and international law to assist commanders in integrating these laws and values into military operations.[30]

Current Army doctrine does an excellent job of articulating legal support at the tactical and operational levels of war, describing legal disciplines and providing an overview of Army judge advocate roles, functions, and challenges. Current Army doctrine, however, fails to adequately address how Army judge advocates specifically, and military legal advisors to senior strategic leaders generally, should operate at the strategic level in the current, legally-intensive security environment, including the ongoing war on terrorism.[31] Current doctrine does not describe the uses of Army lawyers' trained and ready minds when providing candid advice not only on the law but also on "moral, economic, social, and political factors."[32] Finally, doctrine does not effectively use military lawyers' ability to operate across the levels of war and to interact with and provide advice to all elements of a command and staff, working both laterally and horizontally within the organization

Increase in Legal Issues

It is apparent after any cursory review of national news that legal issues related to military operations are increasing. Within the last few months, the popular media have exhaustively discussed and dissected issues as disparate as prosecution of military personnel for abuses at Abu Ghraib, the legal status of detainees, the legal status of terrorists, the legality of pre-emptive war, and the prosecution of alleged war crimes perpetrators before the International Criminal Court (ICC). Part of

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[24] A review of *JAGC Personnel and Activity Directory and Personnel Policies* demonstrates that there are Army personnel at almost all of these strategic-level organizations. U.S. DEP'T OF ARMY, JAG PUB 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (1 Oct. 2005). A staff judge advocate is a member of the commander's personal staff. As such, the staff judge advocate works under the immediate control of the commander and has direct access to him. A staff judge advocate also works under the supervision of the chief of staff as a member of the special staff, providing legal services to the staff and throughout the command. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES figs. C-2, D-46 (11 Aug. 2003).

[25] U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS vii (1 Mar. 2000).

[26] *Id.*

[27] *Id.* at viii. In general, some elements of all the core legal disciplines are present in each of the legal functional areas.

[28] *Id.* para. 1-1.

[29] *Id.* para. 1-8.

[30] *Id.*

[31] For purposes of this article, the "war on terrorism" is used to describe all military operations aimed at defeating terrorist groups—those that employ the calculated use of unlawful violence or threat of unlawful violence to inculcate fear with the intent to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious or ideological. *See* CHAIRMAN, JOINT CHIEFS OF STAFF, NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM 37 (2006) [hereinafter NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM].

[32] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYER 19 (1 May 1992). This regulation provides comprehensive rules governing the ethical conduct of Army lawyers. *See infra* note 133 and accompanying text for a discussion of lawyers' ethical responsibilities to render legal advice tempered by practical judgment.

the increasing pace of legal issues affecting the military can be attributed to the steady increase of substantive international law after World War II, starting with the foundation of the United Nations (UN) and the issuance of the Geneva Conventions of 1949, and continuing through the numerous arms control and human rights treaties and conventions more recently.[33] The U.S. military is subject to heightened expectations and considerable regulatory guidance as a result of increasingly demanding international legal constraints and domestic concerns.[34] Globalization—the ever-increasing interdependent nature of life throughout the globe—also naturally increases the amount and impact of international law because of the need for effective regulation of commerce and information flow for commerce to flourish.[35]

Also, current U.S. national security strategy is inextricably intertwined with legal issues and lawyering. One of three goals of the President's National Security Strategy (NSS) is "respect for human dignity."[36] In championing human dignity, the United States must stand for liberty and justice, the rule of law, and the limit of absolute power of the state.[37] To achieve the goals of the NSS, the United States will "champion aspirations for human dignity" and "develop agendas for cooperative action with other main centers of global power."[38] In developing agendas for cooperative action, consultation and common action are necessary to "sustain the supremacy of . . . common principles."[39]

The National Defense Strategy (NDS)—the Secretary of Defense's implementation of the NSS—states that the United States has "a strong interest in protecting the sovereignty of nation states."[40] The NDS, however, also says that nations must "exercise their sovereignty responsibly, in conformity with customary principles of international law."[41] The NDS finds that international partnerships are "a principal source" of the strength of the United States and that the United States will play a leading role on "issues of common international concern."[42] Of the four strategic objectives of the NDS, two relate to international relations: the United States must "strengthen alliances and partnerships" and establish conditions "conducive to a favorable international system. . ."[43] The NDS outlines an approach that "seeks to create conditions conducive to respect for the sovereignty of nations and a secure international order."[44] This strategy is designed to secure and improve the international order; nations must "exercise their sovereignty responsibly, in conformity with international law. . . ."[45] The United States must use international partnerships as a "principal source" of strength, act collectively, and play leading roles in international fora and on international issues.[46] To meet strategic challenges, the NDS requires the military to transform the global defense posture by modifying old alliances and forming new alliances and partnerships and ensuring international agreements reflect the current strategic circumstances and support the greatest possible operational flexibility.[47] This

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[33] *See, e.g,*, Adam Roberts, *Law and the Use of Force After Iraq*, SURVIVAL, Summer 2003, at 34.

[34] Department of Defense policy and joint doctrine establish that legal support is to be pervasive throughout the length and breadth of military operations. All operations plans and orders, rules of engagement, and policies and directives must receive a legal review to ensure compliance with domestic and international law and the DOD Law of War program. Also, DOD policy requires legal advisers to provide advice addressing law of war compliance, *including* legal constraints on operations and legal rights to use force. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM 2, A-3 (2002). Some have criticized the integral relationship between lawyers and operations. *See, e.g.*, Harvey M. Sapolsky, *War Needs a Warning Label*, *Breakthroughs*, Spring 2003, at 3, 12 ("It's getting so that the American military does not even loads (sic) its weapons these days without consulting its lawyers.").

[35] *See generally* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS (2004) (noting a dramatic increase in the scope of issues in international law since World War II driven by economic, regulatory, and social globalization); DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 24 (2006) [hereinafter 2006 QDR] ("Globalization enables many positive developments such as the free movements of capital, goods, and services, information, people and technology, but it is also accelerating the transmission of disease, the transfer of advanced weapons, the spread of extremist ideologies, the movement of terrorists and the vulnerability of major economic segments.").

[36] OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002) [hereinafter NATIONAL SECURITY STRATEGY].

[37] *Id.* at 3.

[38] *Id.* at 1-2.

[39] *Id.* at 28.

[40] U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2005) [hereinafter NATIONAL DEFENSE STRATEGY].

[41] *Id.* The National Defense Strategy outlines the Secretary of Defense's approach to addressing likely DOD challenges. *Id.* at iii.

[42] *Id.* at 4-5.

[43] *Id.* at 6-7.

[44] *Id.* at iv.

[45] *Id.* at 1.

[46] *Id.* at 4-5, 7.

[47] *Id.* at 18-19.

> Many of the current legal arrangements that govern overseas posture date from an earlier era. Today, challenges are more diverse and complex, our prospective contingencies are more widely dispersed, and our international partners are more numerous. International

approach is echoed in the most recent strategy document for the defense of the nation, the 2006 Quadrennial Defense Review Report (QDR).[48] Among other things, the QDR states that "building and leveraging partner capacity" will be absolutely essential and that "[w]orking indirectly with and through others, and thereby denying popular support to the enemy, will help transform the character" of the war on terrorism.[49] These are only a few examples from the NDS and QDR that demonstrate how legal issues and legal efforts are significantly intertwined with national strategy.

Lawfare: The Use of Law as a Weapon of War

This increase in legal issues impacting warfare and the military has spawned a new term: "lawfare." First discussed by Major General (Maj Gen) Charles J. Dunlap[50] in a seminal paper he released in 2002, the term has several meanings. Major General Dunlap defined lawfare as simply the use of law as a weapon of war—a means of realizing a military objective.[51] In his paper he raises the question of whether the growth of substantive international law, including the increase in international agreements and organizations, is undercutting the U.S. military's ability to conduct effective military interventions.[52] In particular, he examines whether international law and the law of armed conflict (LOAC)[53] is being used by America's adversaries to constrain America's power.[54] For example, use of lawfare against the United States would include cynically manipulating the LOAC to undermine United States and international support for a military operation, potentially restricting or completely stopping the military effort.[55] He examines the International Criminal Tribunal for Yugoslavia (ICTY) review of the North Atlantic Treaty Organisation (NATO) airstrike on 23 April 1999 against Radio Television Serbia (RTS) as a potential violation of the LOAC and the lawsuit before the European Court of Human Rights regarding the same airstrike as an example of the use of the legal process that potentially constrains military decision-makers.[56] Ultimately, Maj Gen

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> agreements relevant to our posture must reflect these circumstances and support greater operational flexibility. They must help, not hinder, the rapid deployment and employment of U.S. and coalition forces worldwide in a crisis. Consistent with our partners' sovereign considerations, we will seek new legal arrangements that maximize our freedom to: deploy our forces as needed; conduct essential training with partners in the host nation; and, support deployed forces around the world. Finally, legal arrangements should encourage responsibility-sharing between us and our partners, and provide legal protections for our personnel through Status of Forces Agreements and protections against transfers of U.S. personnel to the International Criminal Court.

Id.

[48] *See* 2006 QDR, *supra* note 35.

[49] *Id.* at 23. The QDR is not a programmatic or budget document. *Id.* at vi. The QDR "represents a snapshot in time of the Department's strategy for defense of the Nation and the capabilities needed to effectively execute that defense." *Id.* at ix.

[50] Major General Dunlap is currently serving as the Deputy Judge Advocate General , Headquarters, U.S. Air Force. Biography, U.S. Air Force, Major General Charles J. Dunlap, http://www.af.mil/bios/bio_print.asp?bioID=5293&page=1 (last visited Aug. 30, 2006) [hereinafter Dunlap].

[51] Colonel Charles J. Dunlap, Jr., Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflict, *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf, at 5 (last visited May 18, 2006) (prepared for the Humanitarian Challenges in Military Intervention conference, Carr Center for Human Rights Policy, Kennedy School of Government, Harvard University). Major General Dunlap states that the term "lawfare" first appeared in a 1975 article. *Id.* n.5.

[52] *Id.* at 4.

[53] Modern Law of Armed Conflict is generally considered to have its inception in the 1863 "Lieber Code." The Lieber Code, named after its author Dr. Francis Lieber, was published as U.S. War Department, General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field, 24 April, 1863, during the American Civil War. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, (Apr. 24, 1863), reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Tomas eds., 3d ed., 1988). Analysis of the LOAC continued for the next half century, culminating in the Hague Conventions of 1899 and 1907 relating to the conduct of warfare on land, sea, and air. The original Geneva Convention, relating to the treatment of wounded in the field, was adopted in 1864, revised and replaced in 1906 and 1929 and then, after the trauma of World War II, completely superseded by four Geneva Conventions in 1949. These Conventions address the wounded and sick in the field (Convention I), wounded and sick at sea (Convention II), prisoners of war (Convention III), and protection of non-combatants (Convention IV). The Cold War made further changes or additions to the codified LOAC more difficult, but in 1977 the Additional Protocols 1 and 2 to the Geneva Conventions (Protocols) were codified. Protocol I addresses international armed conflicts and Protocol II non-international armed conflicts. The United States has not ratified the Protocols; it recognizes and conforms to the Protocols to the extent they represent customary international law. These various documents form the core of the LOAC. There are, however, numerous other treaties regulating hostilities. Many of the treaties address weapons or weapon use. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 9-12 (2004).

[54] Dunlap, *supra* note 51, at 4–6.

[55] Specific examples would include using civilians as involuntary or voluntary "human shields" of legitimate military targets and placing military assets in otherwise noncombatant facilities (e.g., churches, hospitals). *Id.* at 13.

[56] *Id.* at 13-14. The RTS was the state-run media station in central Belgrade and was used as a tool for propaganda dissemination. The airstrike resulted in the death of sixteen people and injured sixteen more. Human Rights Watch criticized the strike as violative of the Law of Armed Conflict because the strike did not directly contribute to the military operation and because the risks to noncombatants greatly outweighed any military benefit. Human Rights Watch, Civilian Deaths in NATO Air Campaign, Vol. 12, No. 1 (Feb. 2000), http://www.hrw.org/reports/2000/ nato/index.htm#TopOfPage. The ICTY accepted NATO's defense of the airstrike based on RTS's broadcast of military communications, but observed in its decision that a broadcast station merely being used for propaganda purposes would unlikely be a legitimate military objective. Dunlap, *supra* note 51, at 14 (citing Bankovic v. Belgium and 16 NATO Contracting States, Application No. 52207/99 European Court of Human Rights, *available at* http://www.echr.coe.int/NR/rdonlyres/028CA52C-12A7-

Dunlap concludes that while the role of the law and lawyers in the U.S. military exists for practical and altruistic reasons, "there is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself."[57]

Since Maj Gen Dunlap's paper, the term lawfare has seen increasing use. It has been used generally to indicate the "ill-intentioned use of international law and the courts to harm American interests."[58] Lawfare also has been defined as "the pursuit of strategic aims, the traditional domain of warfare, through aggressive legal maneuvers."[59] Lawfare has been sufficiently recognized to be the subject of two roundtable discussions held by the Council on Foreign Relations (CFR). The CFR roundtables made the following conclusions: lawfare results from the intersection of globalization and the emergence of international law, lawfare is defined as the strategy of using or misusing law as a substitute for traditional military means to achieve military objectives, and the use of lawfare is expanding.[60]

Lawfare includes use of asymmetrical methods of warfare that violate the LOAC, for example the use of human shields and attacks from protected places.[61] Lawfare also includes actions in peacetime by nations, international groups, and service organizations to restrict the activities of the U.S. military through international treaties, conventions, and other applications of international law.[62] Traditional international relations theory holds that states will balance against concentrations of power.[63] Thus, lawfare includes the long-used tactic of nations collectively acting to create restrictive international conventions and then pressuring hegemonic nations to be bound by those restrictions as a means of limiting the hegemon's power[64] Significant scholars today argue that because the United States is so strong that this balancing of power must occur not through direct challenges to the United States but rather through use of nonmilitary tools "to delay, frustrate, and undermine aggressive unilateral U.S. military policies" using international institutions, economic statecraft, and diplomatic arrangements.[65] Although the issue of the so-called "soft balancing" is strongly disputed, there appears to be a consensus that weaker states consistently act together, including acting through the use of international organizations and conventions and, for a variety of reasons, acting to constrain stronger states.[66] As the sole global hegemon,[67] the United States must be concerned with lawfare in this form.

Major General Dunlap's concern that the law is being "hijacked" is echoed by other commentators. One legal scholar finds "a rising trend in the frequency and severity of adversary violations of [the law of armed conflict] and humanitarian

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4B7F-A327-0823819AC378/0/Alphaeng.pdf); *see also* Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 65 (2005).

[57] Dunlap, *supra* note 51, at 6.

[58] *The Pentagon and "Lawfare,"* WASH. TIMES, Mar. 24, 2005, *available at* http://www.washtimes.com/op-ed/20050323-091218-7514r.htm.

[59] Jeremy Rabkin, *"Lawfare,"* OPINION J., July 17, 2004, *available at* http://www.opinionjournal.com/extra/?id=110005366.

[60] Council on Foreign Relations, Lawfare, the Latest in Asymmetries (March 18, 2003), http://www.cfr.org/publication.html?id=5772 [hereinafter Lawfare, the Latest in Asymmetries].

[61] *Id.*

[62] Council on Foreign Relations, Lawfare, the Latest in Asymmetries – Part Two (May 22, 2003), http://www.cfr.org/publication/6191/lawfare_the_latest_asymmetries_ part_two.html; *see also* David B. Rivkin, Jr. & Lee A. Casey, *Friend or Foe?* WALL ST. J., Apr. 11, 2005 (stating that the ICRC "has become the leading practitioner of 'lawfare' – a form of asymmetrical warfare that aims to constrain American power using the law.").

[63] Keir A. Lieber & Gerard Alexander, *Waiting for Balancing: Why the World Is Not Pushing Back*, INT'L SECURITY, Summer 2005, at 111. There are many variations on this theory, including, among others, that states balance only against perceived threats and that geography qualifies the balancing theory (e.g., the United States is separated by two oceans from other possible great powers). *Id.* at 111-12.

[64] An example frequently cited of collective action attempting to limit a great power is the creation of the ICC under the Rome Statute and international pressure for the United States to become a party to the ICC. *See infra* note 94 and accompanying text (providing a discussion of the ICC and argument for U.S. participation in the ICC as supportive of the war on terrorism despite concerns about politically motivated prosecutions of U.S. servicemembers).

[65] Robert A. Pape, *Soft Balancing Against the United States*, INT'L SECURITY, Summer 2005, at 9.

[66] *Compare e.g.*, *id.* at 36-38 (noting that Bismarck created a "web of international cooperation" to isolate and balance France's power by removing capabilities available to France), *with* Lieber & Alexander, *supra* note 63, at 130-132 ("routine diplomatic friction" and "diplomatic maneuvering by U.S. allies and nonaligned countries against the United States in international institutions").

[67] *See* John O'Sullivan, *The Reluctant Empire*, NAT'L REV., May 19, 2003 (providing a discussion of the United States as a global hegemon).

> The U.S. is, of course, militarily stronger than any previous power, whether imperial or national. It also has a greater share of the world's productive capacity than any previous "hegemon." And its dominance in everything from technology to popular culture dwarfs the combined efforts of most other major nations. All these forms of superiority would enable it to get its way in most matters if it were determined to do so.

Id.

principles to gain a strategic advantage."[68] Another warns that "lurking in the back of the minds of commanders is the threat of international condemnation and possible calls for prosecution when errors are made, as they inevitably will be in the confusion of battle."[69] The CFR roundtable expressed a similar concern.[70] Other commentators pose the possibility of a legal "decapitation strike" against the President or military commander—using a personal lawsuit to harass and distract the leader.[71] Ultimately, concern about the misuse of the law by our enemies to achieve their objectives has made its way into U.S. strategy documents. The NDS notes that a significant strategic vulnerability for the United States is states using international fora and judicial processes to challenge the United States in order to further their objectives.[72]

Other commentators dispute that lawfare is a risk to military operations. They argue that conducting military operations in a manner fully consistent with international law and the LOAC does not constrain the military and actually helps the United States win its conflicts.[73] This line of analysis dismisses concerns about constraints on U.S. military force imposed through international law, sovereignty-constraining treaties, or "soft balancing" and, more importantly, maintains that concerns about lawfare have eroded the United States' respect for international law with negative consequences in the war against terrorism.[74] Because the United States is a democracy founded under the rule of law, some commentators assert that the United States must act in accordance with the law, even when confronted with serious threats, or risk losing its foundation in values.[75] Additionally, as the United States often functions in, or desires to function in, a military coalition, commentators point out that the United States cannot afford to be viewed by the international community as completely disregarding international law and the LOAC.[76]

Fundamentally, lawfare in its broadest meaning represents both risk and opportunity for the U.S. military. Substantive international law is becoming increasingly more complex. Application of the LOAC, particularly given the increasing accuracy of many weapons in the U.S. inventory and the urban nature of counter-insurgency warfare, is becoming more and more nuanced. These increasing challenges provide opportunities for U.S. opponents to challenge and obstruct U.S. policies and operations in legal fora and the "court of world opinion." In today's complex, interrelated, and well-publicized environment, law has inexorably become a tool of war. Like most tools of war, the use of law in war is neither inherently right nor wrong. It is how the law is used that defines its nature and value.

Thus, military attorneys cannot cede to the enemy the use of law as a weapon of war. Military attorneys must embrace the concept of lawfare, recognizing that the use of law as a weapon of war is a permanent part of military operations. In today's environment, lawfare encompasses the actions that U.S. military attorneys take and advise their clients to take to maintain legitimacy, ensure the greatest freedom of action consistent with domestic and international law, and fight and win the nation's wars.

Strategic Lawyering and Proactive Defensive Lawfare

Lawyers at the strategic level, at a minimum, must be able to recognize lawfare when it occurs and react appropriately. Optimally, military lawyers should address lawfare that may damage U.S. defense interests before the damage occurs. Legal issues are decided by application of the law to the particular facts in question. Proactive lawfare, therefore, is working in advance of issues to shape the law and facts in such a way that the military attorney's clients' interests will be adequately supported once the issues arise.

In addressing defensive lawfare, one first must realize that *non-enemies* can successfully execute lawfare that strategically impacts the United States. For example, some scholars assert that the International Committee of the Red Cross

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[68] Reynolds, *supra* note 56, at 2.

[69] Sapolsky, *supra* note 34, at 4.

[70] Lawfare, the Latest in Asymmetries, *supra* note 60.

[71] Phillip Carter, *Legal Combat, Are Enemies Waging War in our Courts?*, SLATE, Apr. 4, 2004, *available at* http://www.slate.com/id/2116169.

[72] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 5.

[73] David Scheffer is the most articulate of several legal commentators in making this argument. *See, e.g.*, David Scheffer, *The Legal Double Standards of Bush's War*,, FIN. TIMES (London, U.K.), May 6, 2004.

[74] *Id.*

[75] David J. Scheffer, *Recent Books on International Law Review Essay: Delusions About Leadership, Terrorism, and War:* Warrior Politics: Why Leadership Demands a Pagan Ethos, 97 AM. J. INT'L L. 209, 211 (2003).

[76] *Id.*

(ICRC) has employed lawfare against the United States, working through legal fora to constrain U.S. power.[77] The first step in addressing lawfare by non-enemies is becoming knowledgeable about their efforts. The strategic-level attorney must maintain familiarity with the arguments and efforts that are being made in international fora that can negatively impact U.S. security and military operations. By maintaining familiarity with these efforts, the strategic-level attorney can either deploy resources under his control or, more likely, interface with higher headquarters attorneys or attorneys at other U.S. government agencies and assist those attorneys in working to shape the future.

Along with knowledge, which enables the strategic level attorney to "spot the issue," the DOD must devote sufficient personnel and resources to adequately address the concerns raised. That is, is the DOD devoting sufficient resources to advocating U.S. interests before the various international organizations that consider issues that may result in legal limitations and have negative impacts on U.S. security and military operations? Active participation has the benefit of defending the United States from unmanageable restrictions and shaping the nature of the discussion and resolution of issues. Additionally, active participation demonstrates that the United States is taking a leadership role in the international community and supports the NSS's objectives of engagement and use of coalitions.

An example of proactive lawfare in the area of international convention and treaties would be the United States initiating a review of and suggesting changes to current international treaties and conventions concerning status of combatants who do not comply with the LOAC.[78] Working towards, and ultimately obtaining, international consensus on this contentious issue would demonstrate U.S. respect for international law and would be a proactive measure to improve U.S. stature in the international community. It would be a means of "taking the fight" to the international community that endlessly criticizes the U.S. policy regarding unlawful combatants.[79] Successful resolution of this issue would also benefit the U.S. military by ensuring the continuance of the absolute status protection currently granted under the LOAC to military personnel operating in conformity with the LOAC requirements.[80] Proactive lawfare, of course, requires a careful weighing of risks and benefits. Thus, proactively seeking international consensus on the status of unlawful combatants has risks that must be weighed against the potential gains. The point for strategic level lawyers, however, is that they should aggressively seek possible proactive courses of action and actively assess the risks of such proactive actions. The mere existence of risk, however, should not nullify a proactive action. If the potential benefits outweigh the risks, the proactive action should be pursued following coordination with other pertinent actors, including commanders or other senior officials.

A more commonly accepted concept is that *enemies* use lawfare to constrain U.S. options. Placing voluntary or involuntary human shields near important targets and emplacing valuable military assets near places protected under the LOAC (e.g., near mosques) are common examples. Other examples include adversaries killing civilians near a U.S. strike and asserting that the civilian casualties were the result of the strike or captured enemy combatants making false allegations to the ICRC and others of abuse by United States and coalition troops. Major General Dunlap observed in his seminal article that when an enemy during armed conflict employs lawfare the enemy generally is aiming to diminish the strength of U.S. and coalition troops' will and support for the military effort.[81] Actual violations of the LOAC may not be necessary to have a detrimental effect—perceived violations can have just as deleterious effects on U.S. and coalition troops' will to fight.

In addressing adversary-initiated lawfare, the strategic-level attorney must work aggressively to ensure that the correct legal analysis is presented in the public domain. A predicate to successfully defending against this form of lawfare is

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[77] David B. Rivkin & Lee A. Casey, "Friend or Foe," WALL ST. J. (11 Apr. 2005). An example of this would be the ICRC efforts to impose through the LOAC a zero collateral damage approach.

[78] The author gratefully acknowledges Lieutenant Colonel Thomas E. Ayres' contributions to this proposal. Thomas E. Ayres, *"Six Floors" of Detainee Operations in the Post-9/11 World*, PARAMETERS, Fall 2005, at 39. For one of the first published uses of the term "unlawful combatant" in the context of the U.S. war on terror, see Memorandum, George. W. Bush, to Vice President, et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf. This memorandum also states that captured Taliban fighters were unlawful combatants and, therefore, did not qualify to be considered prisoners of war under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. This memorandum also state that al Qaeda operatives would not qualify as prisoners of war under the Geneva Conventions because the Geneva Convention Relative to the Treatment of Prisoners of War was not applicable to the conflict. *See id.*

[79] One commentator asserts, for example, that U.S. detention of unlawful combatants at Guantanamo has resulted in: "angry foreign allies, a tarnishing of America's image, and declining cooperation in the Global War on Terrorism." Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, PARAMETERS, Winter 2005 – 2006, at 62.

[80] Among other categories, captured personnel of a force that abides by the LOAC and wears a uniform openly during combat are prisoners of war and accorded all privileges specified in Geneva III. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, *available a*t http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/ 6fef854a3517b75ac125641e004a9e68.

[81] Dunlap, *supra* note 51, at 11-12. Clausewitz stated that "[w]ar is . . . an act of force to compel our enemy to do our will." Clausewitz, in defining war, stated that to overcome an enemy the opponent must match his efforts to the opponent's power of resistance, "which can be expressed as the product of two inseparable factors, viz. *the total means at his disposal* and *the strength of his will*." CARL VON CLAUSEWITZ, ON WAR 75, 92-93 (Michael Howard & Peter Paret eds. & trans., Princeton U. Press 1976) (1832).

ensuring that the command has an accurate understanding of the facts and has adequately documented these facts. Without this understanding and documentation to back up that understanding, lies can be made believable and good faith misunderstandings are much more likely to occur. Assuming the command has a good grasp of the facts, the next step is ensuring that these facts and the applicable law are effectively communicated to the public and other interested parties. Ultimately, where groups "challenge a prudent command decision that involves civilians, well-prepared, thorough, fact-based arguments should be made aggressively and swiftly to defend command action, to maintain the initiative, and prevent operational degradation."[82] Effective communication involves not only well-trained military attorneys, but well-trained public affairs officers, command spokespersons, and information operations officers. Strategic-level attorneys must ensure that these personnel are educated in the LOAC and application of the LOAC to the situation at issue so that precise, accurate, and pertinent information is provided. To defeat lawfare of this type, however, military attorneys also must convince command spokespersons that an aggressive public education campaign about what the LOAC requires is necessary..[83] Ultimately, military attorneys also may have to shed their normal reticence and engage the media themselves on behalf of their command.

The War on Terrorism, the War of Ideologies, and the Strategic Legal Advisor: Using Lawfare to our Advantage?

Our national strategies recognize that the war on terror is a war of ideas.[84] It is a clash of U.S. values, which are being spread through globalization, against the reactionary beliefs of radical Islamists who desire to replace the globalization of western beliefs with a radical Islamist world order. Such is inevitable given that the United States is a values-based country with a values-based government.[85] The NSS states that unparalleled responsibilities and opportunities come with America's current unprecedented strength and influence.[86] United States strategic precepts are based on an American internationalism reflecting U.S. values combined with U.S. national interests in a globe that is increasingly united by common values and interests. That the war on terrorism is a war of ideas is frequently the subject of scholarly and popular writing.[87] Henry Kissinger, former Secretary of State, for example, has written that the phenomenon of radical Islam "is an ideological outpouring by which Islam's radical wing seeks to sweep away secularism, pluralistic values and Western institutions wherever Muslims live."[88] Numerous analysts have emphasized the importance of ideas to defeat an ideology. For example, one analyst states that Al Qaeda is an insurgency appealing to the Islamic world with the revolutionary vision of strict Islamist governments replacing current moderate or secular Islamic regimes.[89] Accordingly, to win the war against terrorism the United States must offer more appealing opportunities than Al Qaeda.[90] Although the United States possesses such great military and economic power, it is at a disadvantage in the war of ideas because its very power is threatening. Fundamentally, to someone outside the United States, the scope of U.S. power makes it difficult to determine if the U.S. rhetoric of democracy and freedom is only that—rhetoric.[91] Thus, it can be difficult to determine how the United States should undertake to win the war of ideas. While much attention has been paid to the impact of information operations or strategic communications, the actual actions of the United States speak volumes.[92] For example, a strong case can be made that the teachings of the radical Islamists are significantly strengthened by the large number of authoritarian regimes in the mostly Muslim countries of the world, U.S. support for those regimes, and the perception of the imbalance of global distribution of power as exemplified in recent U.S. actions.[93] One way that the United States can positively influence this

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[82] Reynolds, *supra* note 56, at 108. Major Reynolds's article presents several well-thought out and sound recommendations for addressing allegations of improper targeting, specifically, and lawfare, generally.

[83] *See id.* at 104-05 n.409 (providing an example during Operation Iraqi Freedom of a missed opportunity to educate the public about the LOAC).

[84] *See* NATIONAL MILITARY STRATEGIC PLAN FOR THE WAR ON TERRORISM, *supra* note 31, at 7 (stating that the enemy's "strategic center of gravity" is "extremist ideology"); 2006 QDR, *supra* note 35, at 22 (stating that war on terrorist networks is ". . . both a battle of arms and a battle of ideas—a fight against terrorist networks and against their murderous ideology"); THE OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATING TERRORISM 23 (2003) [hereinafter NATIONAL STRATEGY FOR COMBATING TERRORISM].

[85] ANTHONY E. HARTLE, MORAL ISSUES IN MILITARY DECISION MAKING 45-46, 132 (2004).

[86] NATIONAL SECURITY STRATEGY, *supra* note 36, at 1.

[87] *See, e.g.*, Zeyno Baran, *Fighting the War of Ideas*, FOREIGN AFFAIRS, Nov.-Dec. 2005, at 68.

[88] Henry A. Kissinger, *How to Exit Iraq*, WASH. POST, Dec. 18, 2005, at B7.

[89] Michael F. Morris, *Al Qaeda as Insurgency*, JOINT FORCES Q., Autumn 2005, at 45.

[90] *Id.*

[91] James Page, *The U.S. Is Suffering a Chronic Deficit of Legitimacy*, NEW STATESMAN, Dec. 2004, at 34.

[92] Baran, *supra* note 87, at 76 (stating that more and more Muslims believe United States "'freedom and democracy agenda' is a trick"; U.S. strategy must stress "justice and dignity").

[93] Mohammed Ayoob, *The Future of Political Islam: The Importance of External Variables*, 81 INT'L AFFAIRS 960-61 (2005).

war of ideology is by its choices relating to the international order. Examination of the U.S. policy regarding the Rome Statute of the ICC (Rome Statute),[94] of which the United States is not a party, is exemplary.

The ICC is a permanent, treaty-based criminal court with international jurisdiction.[95] The ICC was established by the Rome Statute on 17 July 1998 and went into force on 1 July 2002.[96] Unlike the existing International Criminal Tribunals for Yugoslavia and Rwanda, which are ad hoc organizations established within the framework of the UN, the ICC is independent of the UN.[97]

State parties to the Rome Statute and the UN Security Council may refer situations to the ICC for investigation.[98] Absent referral, the ICC prosecutor may initiate an investigation based on reliable information. Under this circumstance, the prosecutor must obtain judicial review and approval by two judges of a three-judge panel before issuing an arrest warrant for the suspect.[99] The Rome Statute also establishes the Assembly of States Parties, which includes all parties to the Rome Statute and provides oversight to the Court.[100] The ICC has jurisdiction over all crimes that are recognized under the Rome Statute and occur in a state party's territory or are committed by a state party national.[101] Thus, the ICC has jurisdiction over accused nationals from nations that are *not* parties to the Rome Statute if the alleged crime occurs in the territory of a state party. By the terms of the Rome Statute, the ICC will investigate and prosecute only if a state is unwilling or unable to effectively prosecute.[102] Under Article 98 of the Rome Statute, the ICC may not request the surrender of a person if doing so would require the requested state to violate an international agreement.[103]

The United States participated in the development of the Rome Statute. President Clinton signed the treaty on 31 December 2000, but, in a letter to the UN dated 6 May 2002, the United States formally notified the UN that the United States did not intend to become a party to the Rome Statute.[104] The U.S. decision to not become a party to the Rome Statute is based on several perceived "fundamental flaws."[105] Ultimately, the United States contends that accountability for war crimes should be obtained primarily by relying on national judicial systems and international tribunals appropriately established by the UN Security Council within the UN framework.[106] The United States does not intend to become a party to the ICC and continues to maintain its objections to the ICC because the ICC's jurisdiction over non-party state nationals

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[94] Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (2002), *available at* http://www.un.org/law/icc/statute/rome fra.htm [hereinafter Rome Statute].

[95] *See id.* art. 4-5.

[96] *See* United Nations Treaty Collection, Rome Statute of the International Criminal Court, http://untreaty.un.org/ENGLISH/bible/englishinternetbibl/partI /chapterXVIII/treaty11.asp (last visited July 12, 2006). As of 14 November 2005, 100 countries are state parties to the Rome Statute. The Rome Statute and ICC have an intellectual lineage dating back to the war crime tribunals occurring after World War II. Between 1949 and 1954, at the request of the UN, the UN International Law Commission prepared several draft statutes for an international criminal court. Work on the statute then ceased for 35 years. In 1989 the International Law Commission resumed work on draft statutes resulting in the adoption of the Statute in 1989. *See* International Criminal Court, Chronology of the International Criminal Court, http://www.icc-cpi.int/about/ataglance/chronology.html (last visited July 12, 2006).

[97] International Criminal Court, Historical Information, http://www.icc-cpi.int/about/ataglance/history.html (last visited July 12, 2006). The relationship between the UN and the ICC is established by a memorandum of agreement, which went into effect on 4 October 2004.

[98] International Criminal Court, How does the Court work?, http://www.icc-cpi.int/about/ataglance/howdoesthecourtwork.html (last visited July 12, 2006).

[99] *See* Rome Statute, *supra* note 94, art. 15.

[100] International Criminal Court, How does the Court work?, http://www.icc-cpi.int/about/ataglance/howdoesthecourtwork.html (last visited July 12, 2006) (noting that state parties are also required to cooperate with ICC investigations).

[101] Rome Statute, *supra* note 94, art. 5; *see also* International Criminal Court, Jurisdiction, http://www.icc-cpi.int/about/ataglance/ jurisdiction.html (last visited July 12, 2006). Crimes over which the ICC has jurisdiction include genocide, crimes against humanity, war crimes and aggression. The ICC will not exercise jurisdiction over the crime of aggression until the crime is adequately defined. *See* Rome Statute, *supra* note 94, art. 5.

[102] *See* Rome Statute, *supra* note 94, art. 17.

[103] *Id.* art. 18.

[104] Press Statement, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), http://www.state.gov/r/pa/prs/ps/2002/0068. htm.

[105] *See* U.S. Dep't of State, Fact Sheet, Frequently Asked Questions About the U.S. Government's Policy Regarding the International Criminal Court (July 30, 2003), http://www.state.gov/t/pm/rls/fs/23428.htm. In short, the U.S. position is that the jurisdiction of the ICC is too broad because the ICC has jurisdiction over nationals of non-party States, including U.S. servicemembers. In addition, the existing checks and balances over the power of the ICC prosecutor, who can proceed with investigation and prosecution with only judicial review and approval, are insufficient. The ICC also has too much discretion in determining whether a State is "unable or unwilling" to prosecute its national. The United States believes that these last two flaws create a significant risk of politically motivated prosecutions. Finally, the United States is concerned that State parties can opt out of jurisdiction of certain crimes, while non-state parties cannot, and that the ICC has jurisdiction over an undefined crime—aggression. *See id.*

[106] *See id.*

"strikes at the essence of the nature of sovereignty."[107] Additionally, U.S. policy maintains that military members must be protected from prosecution before the ICC absent express consent from the United States or a referral from the UN Security Council.[108]

Responding to significant concerns about the Rome Statute and the ICC, Congress passed the American Servicemembers' Protection Act (ASPA) as part of the 2002 Emergency Supplemental Appropriations Act.[109] The ASPA, among other things, prohibits U.S. military assistance to countries that are parties to the ICC and have not signed Article 98 agreements.[110] Countries that are not a party to the Rome Statute are not affected by the ASPA.[111]

The U.S. decision not to become a party to the Rome Statute runs counter to the NSS's approach of cooperative action and sustaining common principles.[112] Failure to become a party is also inconsistent with the NDS's conclusion that international partnerships are "a principal source" of U.S. strength.[113] Additionally, non-membership is contrary to the NDS objectives of "strengthen[ing] alliances and partnerships" and establishing conditions "conducive to a favorable international system."[114] Non-participation results in U.S. failure to lead a growing international body—failure to exploit a U.S. strength. Additionally, the U.S. policy appears to run counter to the NSS goal of respect for human dignity, including championing justice and the rule of law.[115] Finally, non-participation exposes the United States to international criticism as "unilateralist," hypocritical for decrying war crimes but then acting parochially to protect its nationals, and oppressive for "bullying" diplomacy by pushing for Article 98 agreements to protect the U.S. military.[116] Because the war on terrorism is a war of ideologies, the United States must make a significant effort, if not its main effort, in convincing moderate Muslims that Western liberal democratic institutions, ideals, and values provide a better future than radical Islam. The United States must act consistently from a values basis and cannot appear to act hypocritically or parochially. Anything that adversely affects perceptions about the U.S. goals in the war on terrorism will weaken U.S. global legitimacy, and, therefore, adversely affect U.S. ability to successfully prosecute the war on terrorism.[117] In short, not being a party to the Rome Statute is a strategic mistake in the war on terrorism.

The NSS and the NDS explicitly and implicitly state that the United States has the right to act outside of a coalition or international organization to defend against a sufficient threat to U.S. national security.[118] The authority and necessity to use preemptive or preventive war to defend the United States does not negate the inconsistency between the national strategies and the current U.S. policy towards the ICC. Although the NSS and the NDS display a willingness to "go it alone," they clearly and repetitively articulate that a cooperative environment is the preferred course. Additionally, the NDS identifies that the United States will be challenged by the use of "international fora, judicial processes, and terrorism."[119] This statement recognizes the reality of terrorist tactics. If terrorists are using "judicial processes" and "international fora" against the United States, the United States should not absent itself from this part of the theater strategic environment of the war on

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[107] Press Release, Explanation of Vote on the Sudan Accountability Resolution (March 31,2005), http://www.state.gov/p/io/44388.htm; *see* U.S. Dep't of State, International Criminal Court, http://www.state.gov/p/io/c10836.htm (last visited July 12, 2006).

[108] *Id.*

[109] *See* American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (2002) (codified at 22 U.S.C. S. §§ 7421-7433) (LEXIS 2006).

[110] 22 U.S.C. S. § 7426(a) and (c).

[111] *Id.* If the foreign country is party to the Rome Statute and an agreement is not signed, the following types of assistance are suspended: International Military Education and Training, Foreign Military Financing, and Excess Defense Articles. Other types of aid, such as counternarcotics funding, is not affected. As of 3 May 2005, 100 countries had signed bilateral agreements with the United States under Article 98 of the Rome Statute. These agreements protect against the possibility of transfer or surrender of United States nationals to the ICC. Press Statement, U.S. Signs 100th Article 98 Agreement (May 3, 2005), http://www.state.gov/r/pa/prs/ps/2005/ 45573.htm.

[112] NATIONAL SECURITY STRATEGY, *supra* note 36.

[113] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 4-5.

[114] *Id.* 6-7.

[115] NATIONAL SECURITY STRATEGY, *supra* note 36, at 3.

[116] *See* Nicholas D. Kristof, *Schoolyard Bully Diplomacy*, N.Y. TIMES, Oct. 16, 2005. Additionally, the ASPA's limitations on security cooperation are hampering U.S. security cooperation efforts, particularly in South America. *See* Juan Forero, *Bush's Aid Cuts on Court Issue Roils Latin America*, N.Y. TIMES, Aug. 19, 2005.

[117] *See, e.g.*, Andrew Harvey, Ian Sullivan, & Ralph Groves, *A Clash of Systems: An Analytical Framework to Demystify the Radical Islamist Threat*, PARAMETERS, Autumn 2005, at 73. From this viewpoint, it is important that the United States champion and demonstrate justice as well as freedom and democracy. George Perkovich, *Giving Justice Its Due*, FOREIGN AFFAIRS, July/Aug. 2005, at 80.

[118] NATIONAL SECURITY STRATEGY, *supra* note 36, at 6, 15; NATIONAL DEFENSE STRATEGY, *supra* note 40, at 1-2.

[119] NATIONAL DEFENSE STRATEGY, *supra* note 40, at 5.

terrorism.[120] As long as the United States is not a party to the ICC, it will have great difficulty in influencing ICC rules, policies, or application.

In light of national strategy and best practices in prosecuting the war on terror, the United States should consider revoking its non-party notification, becoming a party to the Rome Statute, and invoking Article 124 of the Rome Statute. Article 124 provides that a State on becoming a party to the Rome Statute may declare that it does not accept the jurisdiction of the ICC for crimes committed by its nationals for seven years after entry.[121] Under Article 127, a State may withdraw from the Rome Statute after written notification and a one-year delay.[122] Thus, the United States would become a party but would not have any risk of prosecution of U.S. nationals for seven years after becoming a party.[123] During that seven-year period, the United States could work to make necessary changes to the Rome Statute and obtain sufficient support from Congress for modification of the ASPA. If the United States is unable to secure any changes to the Rome Statute within a six-year period, the United States could notify the UN Secretary-General of its withdrawal and not suffer from any of its fundamental concerns about the ICC. The United States would receive significant credit internationally for adopting this policy and this course of action supports the NSS, the NDS, and the prosecution of the war on terror.

This example demonstrates how what may be considered a legal issue can be of strategic concern and how lawyers at the strategic level need to address legal issues in terms of national security strategy. United States military attorneys must always be cognizant that advice on the law and legal issues may move the United States closer to or farther away from realizing national strategic goals. Military lawyers must not only look at narrow legal issues but at the impact of how those issues are addressed to assure that legal, moral, *and* strategically enhancing decisions are reached. Furthermore, strategic leaders must be attuned to the strategic impact legal issues may have.

Military Legal Advisor Capabilities

Military attorneys at the strategic level must work to address, both defensively and proactively, the increase in legal issues impacting military operations and national strategy. Military lawyers must react effectively to lawfare, be proactive, and consider how decisions within a legal context can be used to support the national security strategy. Military lawyers, because of training and experience, however, can also provide practical judgment on almost any issue. At the strategic level, the common sense and sharp analysis that lawyers bring to the table should be fully utilized.

For most lawyers, legal education begins in law school. Despite what many non-lawyers think, legal education does not teach students law. This is because "law" is not a finite thing that can be learned. Although law students certainly read cases, statutes, and administrative rules, law students soon find that "law is rarely bounded, is often ambiguous, and sometimes practiced in great variance from how it is written."[124] Law students are taught the process by which law is created, why laws are made and how they evolve, values and ethics, legal research skills, and managing interpersonal relationships, among other things. An effective lawyer must be able to creatively handle novel situations because, in general, no two situations confronting a professional are ever precisely the same. Law schools, therefore, exist to prepare students to be effective practitioners of the legal profession, which requires law schools to teach their students "how to think like a lawyer."[125] Thus, a legal professional not only must be well-versed in the field of law but also must be able to exercise appropriate practical judgment while drawing on their knowledge in succeeding unique circumstances.[126]

Among the many characteristics required of competent lawyers, good practical judgment is the "key faculty needed when lawyers seek to identify, assess, and propose concrete solutions in particular and often complex social

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[120] The "theater strategic environment" is the composite of the conditions, circumstances, and influences in the theater that describe the diplomatic-military situation, affect the employment of military forces, and affect the decisions of the operational chain of command. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 539 (12 Apr. 2001).

[121] *See* Rome Statute, *supra* note 94, art. 124 ("Transitional Provision," states in pertinent part: "a State, on becoming a party to this Statute, may declare that, for a period of seven years after entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court. . . ."). Note that Article 126, "Entry into Force," states that" "[f]or each State ratifying, accepting, approving, or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month of the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval, or accession." *Id.* art. 126.

[122] *Id.* art. 127.

[123] *See id.*

[124] Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y. L. SCH. L. REV. 465, 467 (2004).

[125] D. Don Welch, *"What's Going On?" In the Law School Curriculum*, 41 HOUS. L. REV. 1607, 1607 (2005).

[126] *Id.* at 1611.

circumstances."[127] Legal education contributes to developing good practical judgment in a variety of ways, for example, through the casebook methodology of teaching the law[128] and the use of the Socratic teaching method.[129] Practical judgment is a combination of sound deliberation, including exercising the intellect and considering moral values, and prudent decision making.[130] Competent lawyers are able to see the big picture, taking into account opposing and varied perspectives and being able to articulate likely viewpoints and concerns of multiple participants in a process.[131] Judgment, for lawyers, means to "invoke and apply knowledge responsively when there are competing concerns and discrete decisions" that need to be made.[132]

Once a student leaves law school, passes the bar exam, and becomes an attorney, the requirement to apply judgment while drawing on the knowledge of the law only increases. One could argue that the exercise of practical judgment within a legal context is the *primary* activity of senior military attorneys. The ever-present need for lawyers to apply practical judgment is so widely understood within the legal profession that the legal rules of ethics formally endorse lawyers contemplating nonlegal considerations on behalf of their clients. For example, the Army *Rules of Professional Conduct for Lawyers* states in Rule 2.1 that "a lawyer shall exercise independent professional judgment and render candid legal advice. In rendering advice a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant. . . ."[133] The commentary to Rule 2.1 states that narrow legal advice may be of little value, especially where "practical considerations, such as cost or effects on other people, are predominant."[134] In addition to the strictures of Rule 2.1, Army legal ethics regulations require Army attorneys to improve the law and the legal system and take a special responsibility for the quality of justice.[135] Legal scholars generally agree that non-legal counseling should be encouraged—it is not only permissible, but desirable, in certain circumstances.[136] Additionally, as a practical matter given the growing complexity of life, lawyers are increasingly required to provide advice on issues that would not be considered legal by traditional standards.[137]

Through education, training, and life-long experience, lawyers become experts at analyzing facts and issues from a great mass of data, determining the import of this information, applying good practical judgment including consideration of non-legal factors, and ultimately, synthesizing and articulating this information in a helpful way within the context of the law.

The Strategic Lawyer and Candid Military Legal Advice Referring to "Moral, Economic, Social, and Political Factors"

With the nation in a long-term war on terrorism, it is increasingly important that all available tools are used to their fullest effect. Use of military lawyers' practical judgment, particularly at the strategic level, is a significant tool in this war. In this war of ideologies, democracy against radical, fundamentalist Islamism, the law, lawyers, and good judgment are

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[127] Mark Neal Aronson, *We Ask You to Consider Learning About Practical Judgment in Lawyering*, 4 CLINICAL L. REV. 247, 249 (1998).

[128] Welch, *supra* note 125, at 1614. Law school textbooks contain numerous cases from throughout U.S. jurisprudence. There is often little, if any, explanation contained in the textbook concerning the meaning of the case. Determining that meaning is left to the student. Pertinent facts and court holdings are often buried in large amounts of irrelevant or non-pertinent information. The student, however, learns from this experience to sort the important from the unimportant.

[129] *Id.* at 1616 (providing that under the Socratic method a law professor calls upon a student to recite the facts, issues, and holdings of a case. The questioning then moves beyond the case under review and the questions expand to application of the case to other hypotheticals. Although under significant attack as demeaning and demoralizing, the Socratic method does teach law students to analyze under stress the impact of changing circumstances.).

[130] Aronson, *supra* note 127, at 256.

[131] *Id.* at 251-53.

[132] *Id.* at 264. Judgment encompasses qualities such as soundness, logic, discrimination, discernment, imagination, sympathy, detachment, impartiality, and integrity. *Id.* at 273.

[133] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 2.1 (1 May 1992) [hereinafter AR 27-26]. Pursuant to Rule 1.13, except when representing an individual client, an Army lawyer represents the Department of the Army. *Id.* R. 1.13. The American Bar Association's *Model Rules of Professional Conduct*, Rule 2.1 reads virtually identical to the Army's rule: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." *See* MODEL RULES OF PROF. CONDUCT R. 2.1 (2003).

[134] AR 27-26, *supra* note 133, at R. 2.1.

[135] *Id.* at 1, para. 6. Note that Army lawyers are ethically prescribed to owe allegiance not to any immediate group, but to the Department of the Army acting through its authorized officials. *Id.* at R.1.13.

[136] Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 367-69 (2005) (providing that nonlegal counseling should be encouraged, but standards on when, how much, and impact are unsettled).

[137] *Id.* at 365.

crucial. Commanders' decisions must be considered in light of legal considerations to ensure that the enemy is not given ammunition to destroy the will of the people (defensive lawfare). Furthermore, legal decisions must be considered in light of national strategy to ensure that they support that strategy (offensive lawfare). Additionally, to win the war on terrorism, military decisions must be sound and derive from U.S. values. While it is recognized that the fundamental values of American society are consistent with the role of the American military professional,[138] military adherence to and spreading of the fundamental values of American society also are necessary to win the war on terrorism. Every time the actions of the United States and its military are seen as incompatible with the values the military espouses, the United States hands radical Islamism a round of ammunition.

An example of how lawyers' excellence in practical judgment can be used to further sound decision-making and adherence to American values occurs in Irving Janis's studies into the group decision-making failure he termed "groupthink." Janis introduced the concept of groupthink in his 1972 article, *Groupthink: The Desperate Drive for Consensus at Any Cost*.[139] In this article, Janis argued that significant policy decision fiascos were the result of a group dynamic he called "groupthink." Janis used as his example the decision by President John F. Kennedy to authorize the Bay of Pigs operation, noting that the lack of intelligence of the decision-maker and his advisors was not the cause for this notably bad decision.[140] Janis noted that one of the "key characteristics of groupthink" is that members of the group remain loyal to the group by sticking to the policies to which the group has already committed itself.[141] Groupthink arises among groups in which the members avoid being too harsh in their judgments of their leaders' or colleagues' ideas—the members adopt a "soft line" of criticism.[142] Although pressure from within the group to conform to the group's consensus is not unknown, self-censorship of thought is more prevalent. In groupthink, when addressing personal, lingering uncertainties the members tend to give the benefit of the doubt to the group consensus. Groupthink tends to increase, Janis stated, as group cohesiveness increases because "[i]n a cohesive group, the danger is not so much that each individual will fail to reveal his objections to what the others propose but that he will think the proposal is a good one, *without attempting to carry out a careful, critical scrutiny of the pros and cons of the alternatives.*"[143] Group members participating in a group of respected colleagues can fall into consensual validation of beliefs, vice individual, personal critical thinking. In a remarkably counter-intuitive manner, high group cohesion can work against a group and be a negative factor to making good decisions. Groupthink occurs as a "mutual effort among the group members to maintain self-esteem and emotional equanimity by providing social support to each other" especially during times of decision making under stress.[144] Since Janis's initial article was published, the concept of groupthink has grown in popularity, becoming a "standard item in textbooks in social psychology, organization and management, and public policy-making."[145]

Janis prescribed remedies for the groupthink trap. Groups "whose members have properly defined roles, with traditions concerning the procedures to follow in pursuing a critical inquiry," probably make better decisions than any lone decision-maker.[146] Policy leaders should stress that each member of a policy-forming group should act as a "critical evaluator";

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[138] HARTLE, *supra* note 85, at 150.

[139] Irving L. Janis, *Groupthink: The Desperate Drive for Consensus at Any Cost*, 5 PSYCHOL. TODAY 43 (1971), *reprinted in* U.S. ARMY WAR COLLEGE, SELECTED READINGS, AY 2006, STRATEGIC LEADERSHIP COURSE 224 (Charles R. Oman, ed., 2005). Janis followed this seminal work with several others, but he never deviated significantly from his analysis in this 1971 article. In 1972, Janis published *Victims of Groupthink: A Psychological Study of Foreign Policy Decisions and Fiascos.* In 1982, he expanded and refined his concept in *Groupthink: Psychological Studies of Policy Decisions and Fiascos*. In 1989 he used groupthink as a basis to analyze a theory of executive decision making in *Crucial Decisions: Leadership in Policy-making and Crisis Management*.

[140] *Id.* at 224 ("Stupidity certainly is not the explanation. The men who participated in the Bay of Pigs decision, for instance, comprised one of the greatest arrays of intellectual talent in the history of the American Government. . . .").

[141] *Id.* at 225.

[142] *Id.*

[143] *Id.* (emphasis added).

[144] *Id.* at 229.

[145] PAUL 'T HART, ERIC K. STERN, & BENGT SUNDELIUS, BEYOND GROUPTHINK: POLITICAL GROUP DYNAMICS AND FOREIGN POLICY-MAKING 11 (1997). Analysis of the small group as a unit of decision in foreign policy has been mainly guided by Janis' work on groupthink. *Id.* at 7. Note, however, that the groupthink model has been criticized on several grounds. It is difficult to determine how often groupthink actually drives a group decision. Janis's work, was primarily the result of analyzing a very small number of policy decisions. Research is scant on how national or cultural differences affect groupthink. In the area of foreign-policy decision making, Janis's primary source of analytical material, there are an enormous variety of groups and group processes that play into the decision making. Moreover, there are other aspects of small group behavior that are relevant when analyzing policy-making by small groups. Additionally, policy making and advisory groups are generally embedded in larger institutions and experience other constraints that impact the small group's performance. Ultimately, executive decision making is characterized by difficult trade-offs, including trade-offs between competing priorities, policy quality versus obtaining support for implementation, and determining how much decision making resources (including the decision maker's own time) to devote to determining the best option. Nonetheless, Janis's theory is worth considering in the context of strategic-level decision-making.

[146] Janis, *supra* note 139, at 226.

experts and evaluation groups outside the policy-making group should work on the same policy issues and challenge views of the core group; all members should be encouraged to air any residual doubts; and, finally, whenever an evaluation of policy alternatives is required, "at least one member should play *devil's advocate*, functioning as a good lawyer in challenging . . . those who advocate the majority opinion."[147]

Senior military lawyers, through education, training, and experience, are an excellent choice to mitigate groupthink during decision-making at the strategic level by acting as Janis's "devil's advocate" and as a "good lawyer" to challenge the majority position.[148] Lawyers' lack of specific information relevant to the group's decision under review does not detract from their capability to perform this role. Groups are frequently formed from those who know about the problem and the group members are expected to bring problem-specific expertise, information, and analysis to the group's problem-solving process. Groupthink can be mitigated, however, by the participation of members from outside the group or by having a participant responsible for challenging the majority position. A lawyer with little or no knowledge of the specific issue under discussion, because of training and experience, can fulfill the role of majority challenger. A senior military attorney is educated and trained to ask the right questions, rapidly assess and assimilate facts, consider their import, and articulate positions, with the expectation that non-legal concerns will be integrated into the analysis.

Pulling It All Together—the Role of the Strategic Legal Advisor

Senior military attorneys operating at the strategic level will understand the law and will provide the advice necessary to avoid violations of it. It must be recognized, however, that at the strategic level the law is often at its most flexible. At the strategic level there is the greatest capability to shape the law to meet a commander's or other decision-maker's needs. For example, the senior attorneys' direct clients may be the writers of the regulations under interpretation. In those circumstance, modifying the limiting regulation may be a viable solution to solving a particular issue. In the field, attempting to modify a governing regulation is a remote and time-consuming solution. Similarly, access to the Congressional legislative cycle is significantly greater at the strategic level and attempting to change a troublesome statute is always an option that should be considered. Finally, "precedential" interpretations or policies that drive field attorneys' opinions are published at the strategic level. Thus, an attorney at the strategic level must always consider how the law can be shaped or how interpretations can be changed as a possible answer to an issue with legal concerns.

In analyzing how the law can be shaped, the attorney must consider the effect of the interpretation or change and provide advice on the strategic and policy implications of the interpretations or possible changes to the current law. All too often, clients of senior attorneys are interested in what the law says and what the law permits or prohibits and are not interested enough in the possible or likely *results* of interpreting the law to permit or prohibit the activity in question or the time and effort required to change or obtain an exception to the current law. Without all the information, the client is not sufficiently informed to decide the better course of action. Experienced lawyers, through training and experience, are expert information synthesizers. Additionally, lawyers are ethically required to exercise independent judgment and, in so doing, consider more than just the law. Attorneys can take information from disparate substantive disciplines, make useful correlations, and reach useful conclusions.

Ultimately, military attorneys at the strategic level must view legal action and advice as a weapon of warfare. Given America's current long-term struggle against terrorism, U.S. national strategies for security, and the skills that military attorneys bring to the table, senior military attorneys must be prepared and encouraged to respond to attacks that use law as the weapon; to think about how the United States can actively use legal actions to win the war on terrorism; and to use their training and experience in synthetic thinking to assist commanders to make sound policy decisions.

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[147] *Id.* at 230 (emphasis added).

[148] *Id.* One should note the value of attorneys to the group, even outside of the groupthink phenomenon. In analyzing Enron's collapse, a recent author has stated that the directors of Enron lacked "vigilant attention" when making far-reaching decisions.

> Company directors, the Senate investigation revealed, also fell short in acquiring the essential information for making the vigilant decisions required by their oversight role. In 2001, for example, the board's compensation committee approved pay plans that gave 65 Enron executives a total of $750 million for their work in 2000, a year in which Enron's total net income was only $975 million. When directors were later asked by a Senate investigator why they had approved such exceedingly generous packages - an average of $11.5 million for each of the more than five dozen executives - they confessed that the $750 million had come from several distinct incentive programs and that nobody on the compensation committee had thought to add up the numbers before approving the programs.

Michael Useem, *The Essence of Leading and Governing is Deciding*, *in* LEADERSHIP AND GOVERNANCE FROM THE INSIDE OUT 65, 68-69 (Robert Gandossy & Jeffrey Sonnenfeld eds., 2004). Army attorneys, with their education, training, and ethical duty to the Army as their client, if appropriately empowered by strategic leaders, can be effective in assuring that policy making bodies pay necessary "vigilant attention."

Recommendations

Army doctrine fails to address adequately the role of the strategic legal advisor. It is a well-known fact that many senior military attorneys and Staff Judge Advocates have had and currently have excellent personal relationships with commanders and clients and that once a solid relationship is developed discussions become far ranging and cover a breadth of topics. This oral tradition needs to be formally addressed in doctrine. Doctrine should also address the use of judge advocates at all levels as "devil's advocates." Formal recognition of this role in doctrine would enhance the capability of judge advocates to perform this role. Additionally, the increasing importance of law as a weapon of warfare, particularly in the war on terrorism, needs to be addressed. Doctrine should recognize the significant importance that legal decisions can have on the strategic situation and direct military lawyers to address policy implications of otherwise legal courses of action. *Field Manual 27-10*, should be reviewed and changed to address comprehensively the role of military lawyers at the strategic level and the expanded spectrum of legal advice needed at all levels to more effectively fight the war on terrorism.

Additionally, the military legal establishment, both at DOD and Service levels, should consider establishing a joint legal office at the national level responsible for analyzing legal trends and issues, making recommendations to senior legal personnel responsible for advising strategic leaders, and working to keep the larger legal community informed of these trends and the ongoing analysis. This organization would be chartered to recognize legal threats and propose responses with a constant view towards their impact on strategic operations. It would also provide advice on how to address recurrent issues (e.g., common targeting issues) and be responsible for publishing articles and information throughout the military legal community.

Current Problems with Multiple Award Indefinite Delivery/Indefinite Quantity Contracts: A Primer

Major Michael C. Wong[*]

Much of the Department of Defense (DOD) spending is on service contracts through task orders issued under multiple-award contracts, allowing for a streamlined, flexible acquisition process.[1] This primer discusses the fundamentals of multiple award indefinite delivery/indefinite quantity (ID/IQ) contracting and current problems associated with the multiple award ID/IQ system. The article focuses specifically on problems in the area of competition, including the lack of fair opportunity to compete, out of scope orders, lack of adequate supervision, and other miscellaneous problems with the multiple award ID/IQ system. The first section discusses the basic terminology and legal requirements of the multiple award ID/IQ system. The second section deals with additional legal requirements resulting from congressional modifications designed to strengthen and encourage competition within the multiple award system. The third section outlines problems in multiple award ID/IQ contracting. Multiple award ID/IQ contracting has become an increasingly important focus area for the U.S. Army and is a challenging area for acquisition professionals.[2]

I. Definitions

Multiple award ID/IQ contracts (also called "task and delivery order contracts"[3]) are open-ended contracts. Instead of creating a contract for a definite amount of goods or services, the government announces that it will have certain needs in the future. Contractors respond with information regarding their ability to meet those needs. Thereafter, the government awards several contractors the opportunity to sell those goods and services to the government in the future. When the contract is created, the government agency does not have to order any goods or services immediately. Rather, the agency can place orders as the agency's needs arise.

A. Task and Delivery Orders

Task and delivery order contracts are contracts for either services (task) or for supplies (delivery) that do not specify a firm quantity.[4] The *Federal Acquisition Regulation* (*FAR*)[5] defines "task order contract"[6] and "delivery order contract"[7] in subpart 16.5.[8] Task and delivery order contracts can take the form of either requirements contracts or indefinite quantity

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> The Department of Defense (DOD) spends billions of dollars each year for services—ranging from the maintenance of military installations to managing information systems. Much of this spending is through task orders issued under multiple-award contracts or the General Services Administration's (GSA) federal supply schedule program. These contract vehicles permit federal agencies to acquire services in a streamlined manner, but both require ordering agencies to follow procedures designed to promote competition for individual orders.

GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-04-874, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, at 1 (July 2004) (internal citations omitted), *available at* http://www.gao.gov/new.items/d04874.pdf [hereinafter *Guidance Needed*].

2 Ralph C. Nash & John Cibinic, *Competition for Task Orders: the Exception or the Rule?*, 18 NASH & CIBINIC REP. ¶ 42 (Oct. 2004).

3 The terms "indefinite delivery/indefinite quantity contracts" and "task and delivery order contracts" refer to the same types of contracts—a base contract describing the goods or services, followed by later ordering of goods or services. Task and delivery order contracts could technically also take the form of requirements contracts. This paper uses the terms synonymously. *See generally* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 16 (July 2004) [hereinafter FAR].

4 *Id.* subpt. 16.501-1; *see also* RALPH C. NASH & JOHN CIBINIC, FORMATION OF GOVERNMENT CONTRACTS 308 (3d ed. 1998).

5 The *FAR* is codified at 48 C.F.R and is available at http://www.arnet.gov/far/.

6 FAR, *supra* note 3, subpt. 16.501-1 ("'Task order contract' means a contract for services that does not procure or specify a firm quantity of services . . . and that provides for the issuance of orders for the performance of tasks during the period of the contract.").

7 *Id.* subpt. 16.501-1("'Delivery order contract' means a contract for supplies that does not procure or specify a firm quantity of supplies . . . and that provides for the issuance of orders for the delivery of supplies during the period of the contract.").

8 *Id.* subpt. 16.501-1.

contracts.[9] Once the government awards an ID/IQ contract, the contracting officer can place orders in varying amounts and at varying times without additional procurement notices and without "full and open"[10] competition.[11] The government, however, must give each awardee or contractor a "fair opportunity to be considered" [12] for each order unless an exception applies. Subpart 16.505(b)(2) of the *FAR* lists four statutory exceptions to the fair opportunity requirement.[13] Those exceptions are discussed further in section IV.

Once the government has awarded the base contract, a government agency can place a specific task or delivery order whenever requirements arise. The task order or delivery order is for the specific goods or services (detailed specifics are found in the order, but the order must conform to the base contract descriptions).[14] Thus, the government can obtain needed goods or services without creating a new contract each time. Although the government is not required to hold a formal competition procedure for each order, contracting officers should consider[15] (i.e., think about and give "fair opportunity to be considered" to[16]) each awardee under a multiple award contract before deciding to place an order with any one specific contractor.[17]

B. Statement of Work

The statement of work describes the types of goods or services that the government wants the contract to cover.[18] Each service or supply ordered must be of the type specified in the original contract.[19] "A task or delivery order may not 'increase the scope, period or maximum value' of the contract. Such increases may only be accomplished 'by modification of the contract.'"[20] If the requirement is for services or supplies that the original ID/IQ contract did not envision, the agency should procure the requirement anew[21] using regular procurement methods to create a new contract, instead of placing an order

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[9] *Id.* subpt. 16.501-2; *see also* NASH & CIBINIC, *supra* note 4, at 308. In a requirements contract, the government agrees to order all of its needs from a vendor for a period of time. In an indefinite quantity contract, the government specifies a minimum and a maximum order amount but cannot identify exact quantities until a later date.

[10] The normal standard of competition for government contracting is "full and open."

> (a) 10 U.S.C. 2304 and 41 U.S.C. 253 require, with certain limited exceptions (see Subparts 6.2 and 6.3), that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts.
>
> (b) Contracting officers shall provide for full and open competition through use of the competitive procedure(s) contained in this subpart that are best suited to the circumstances of the contract action and consistent with the need to fulfill the Government's requirements efficiently (10 U.S.C. 2304 and 41 U.S.C. 253).

FAR, *supra* note 3, subpt. 6.101.

[11] NASH & CIBINIC, *supra* note 4, at 308.

[12] FAR, *supra* note 3, subpt. 16.505(b).

[13] *Id.* subpt. 16.505(b)(2).

[14] The question of whether the goods or services ordered are within the contract is a question of fact. The *FAR* says that the base contract must have a description (statement of work) and that orders must be within the scope of the statement of work. *Id.* subpt. 16-504(a)(4)(iii) and 16-505(a)(2).

[15] The word "considered" is in the statute and does not have any connection to the legal term of "consideration" as used in contract law generally. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804(b)(2)(B), 113 Stat. 512 (2000); FAR, *supra* note 3, subpt. 16.505(b)(1).

[16] Contracting officers would be well advised to document the basis for choosing an awardee and to document that the other awardees were considered. This area is receiving increasing scrutiny. *See* Nash & Cibinic, *supra* note 2; *Guidance Needed supra* note 1, at 3-4.

[17] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 803(b)(2)(B), 115 Stat. 1012 (2002) (requiring orders to be made on a "competitive basis"); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804(b)(2)(B), 113 Stat. 512 (2000) ("fair opportunity to be considered").

[18] 10 U.S.C.S. § 2304a(b)(3) (LEXIS 2006); 41 U.S.C.S. § 253h(b)(3) (LEXIS 2006).

[19] *See* FAR, *supra* note 3, subpt. 16.505(a)(2).

> Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.

Id.

[20] NASH & CIBINIC, *supra* note 4, at 308 (quoting 10 U.S.C.S. § 2304a(e) and 41 U.S.C.S. § 253h(e)).

[21] *Id.*

under the ID/IQ contract.[22] The Federal Acquisition Streamlining Act of 1994 (FASA)[23] specifically permits contracts using "[a] statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract."[24] Accordingly, a statement of work can potentially cover a "broad spectrum" of supplies or tasks depending on how the statement is drafted.[25] A broad statement of work offers the government agency the advantage of flexibility[26] but also may cause a host of potential problems in contract administration.[27]

C. Indefinite Delivery/Indefinite Quantity

Variable quantity contracts can take the form of requirements contracts or ID/IQ contracts.[28] In an ID/IQ contract, the government does not know (or does not want to commit to) exactly how many items it needs or when exactly the items are needed. This uncertainty causes the government to only agree to purchase a minimum amount of goods or services from the contractor.[29] Subpart 16.504(a) of the *FAR* describes indefinite quantity contracts as contracts for an unspecified amount "of supplies or services during a fixed period."[30] The indefinite quantity contract does not specify the exact amount of goods and services to be ordered, but the contract will state a minimum and maximum order amount,[31] expressed as either the number of units or the dollar value.[32] The minimum quantity identified in the contract can be any amount, but should be "more than nominal" for the contract to be legally binding.[33] To establish a reasonable maximum quantity prior to contract formation, contracting officers should evaluate the current market using market research, user surveys, timely contracting trends, experience, and any other relevant information.[34]

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[22] In that case, the government needs to create a new contract instead of placing an order under the existing contract. An interesting practice is to draft broad statements of work. If the contracting officer drafts a statement of work covering many types of goods and services, the contract becomes more flexible allowing the government to order under the existing contract.

[23] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[24] NASH & CIBINIC, *supra* note 4, at 309 (quoting 10 U.S.C.S. § 2304a(b)(3) and 41 U.S.C.S. § 253h(b)(3)).

[25] *Id.* at 308.

[26] The flexibility is an advantage to the government in ordering goods or services. If desired goods or services are not within the scope of the statement of work, a new contract has to be created. If the goods or services are reasonably related to the scope of the statement of work, the government agency orders the goods or services simply and quickly under the existing ID/IQ contract. *See, e.g.*, Anteon Corp., Comp Gen. B-293523;B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51 (agency could not order needed supplies and services since the order was not within the scope of the statement of work); Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78 (stating that the GAO upheld government's two page statement of objectives as a broad, generalized statement of work, so agency could order services that were not specifically described in statement of work).

[27] *See, e.g.*, Steven L. Schooner, Iraq Contracting: Predictable Lessons Learned, Statement of Professor Steven L. Schooner before the United States Senate Democratic Policy Committee (Sept. 10, 2004) (transcript available at the George Washington University Law School) ("The worst-case scenario arises where the a[sic] contractor performs work under an open-ended contract (e.g., with a vague or ambiguous statement of work) without guidance or management from a responsible government official (e.g., in the absence of an administrative contracting officer or contracting officer's representative).").

[28] FAR, *supra* note 3, subpt. 16.501-2. Subpart 16.501-2 also discusses definite quantity contracts, which are similar to ID/IQ contracts except that the quantity of supplies or services is specified. *See id.*

[29] *Id.* subpt. 16.501-2(b)(3); *see also* NASH & CIBINIC, *supra* note 4, at 1238.

[30] Even though the amounts and delivery times are indefinite, the ID/IQ contract must have a definite duration. FAR, *supra* note 3, subpt. 16.504 (a)(4) ("A solicitation and contract for an indefinite quantity must—(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option"). Subpart 16.504(a)(4) suggests that the contract should be written as base year contracts with options or as a stated minimum followed by additional quantities subject to the availability of appropriated funds. NASH & CIBINIC, *supra* note 4, at 1245. When using a base year with options, apply *FAR* cls. 52.217-6 (Option for Increased Quantity), 52.217-8 (Option to Extend Services), or 52.217-9 (Option to Extend the Term of the Contract). NASH & CIBINIC, *supra* note 4, at 1246. If the contract is for longer than a year, then apply *FAR* clause 52.216-18 with specific dates that indicate the last date for issuing orders under the contract. NASH & CIBINIC, *supra* note 4, at 1246-47.

[31] FAR, *supra* note 3, subpts. 16.504(a)(1), 16.504(a)(3).

[32] *Id.* subpt. 16.504(a) ("Quantity limits may be stated as number of units or as dollar values.").

[33] *Id.* subpt. 16.504(a)(2) ("To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity . . .").

[34] *Id.* subpt. 16.504(a)(1) ("The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.").

The government does not have to place any order for goods and services at the time of contract award. As long as the agency obligates itself to a "more than nominal"[35] minimum amount[36] the contract is binding.[37] The *FAR* only directs that the minimum amount be specific[38] and "fairly certain to order."[39] The way the ID/IQ system is set up, government contracting officers may use a low minimum to avoid potential government liability in the event the government's needs turn out to be lower than estimated. The only theoretical advantage to stating a higher minimum amount is that the government might benefit in the form of lower prices since the contractor could potentially offer lower prices if the government were willing to guarantee it will order a larger quantity.[40] This theoretical advantage, however, is somewhat negated in multiple award contracting. In the multiple award system, the government creates competition between awardees when ordering over time, so that the ordering process and competition between awardees should control prices to a greater degree.[41] In reality, government agencies have not been taking advantage of competition to reduce prices, but instead, as discussed in section IV, agencies have been using the flexibility of the multiple award ID/IQ system to obtain their needs quickly, with little competition.[42]

D. Multiple Award

Instead of awarding an ID/IQ contract to only one source, an agency can (and should)[43] award to multiple vendors, giving the government more flexibility and substantial benefits.[44] Indeed, the *FAR* incorporates the statutory preference for multiple award task order and delivery order contracts[45] at *FAR* 16.504(c).[46]

The advent of the multiple award system was the FASA.[47] Since FASA's enactment in 1994, multiple award task and delivery orders have become more attractive and hence more popular.[48]

> There has been an explosion in multiple award task and delivery order transactions since the enactment of task and delivery order contracting authority under the Federal Acquisition Streamlining Act of 1994. FASA gave broad authority to the agencies to use task and delivery order contracts and made them very attractive - permitting award on the basis of general work statements, not requiring procurement notices or new solicitations for awards of orders, and exempting orders from protests.[49]

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[35] *Id.* subpt. 16.504(a)(2).

[36] *See* NASH & CIBINIC, *supra* note 4, at 1238-39 (discussing adequate minimum amounts).

[37] *Id.* at 1244.

[38] FAR, *supra* note 3, subpt. 16.504(a)(1) ("The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services.").

[39] *Id.* subpt. 16.504(a)(2).

[40] NASH & CIBINIC, *supra* note 4, at 1244-45.

[41] *Id.* at 1245 ("Although higher minimum quantities may result in short-term price benefits, in the long run, contractors will offer competitive prices so that the government will order from them under the contract; so price will necessarily reflect such competition, negating some of the disadvantages of using low minimum quantities.").

[42] *See, e.g.*, Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78; *Guidance Needed*, *supra* note 1, at 1 and 17; GEN. ACCT. OFF., REP. NO. GAO-04-605, *Rebuilding Iraq: Fiscal Year 2003 Contract Award Procedures and Management Challenges*, at 4-5 and 11-12 (June 2004), *available at* http://www.gao.gov/new.items/d04605.pdf [hereinafter *Rebuilding Iraq*].

[43] There is a statutory preference for using multiple award contracts. *See* FAR, *supra* note 3, subpt. 16.504(c).

[44] NASH & CIBINIC, *supra* note 4, at 1243.

[45] *Id*. at 1242.

[46] FAR, *supra* note 3, subpt. 16.504(c)(1)(i) ("[T]he contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.").

[47] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[48] Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Great Concept, Poor Implementation*, 12 NASH & CIBINIC REP. ¶ 30 (May 1998).

[49] *Id*.

The intent of FASA was to make task and delivery order contracting more efficient, while recognizing that the process could be abused to avoid competition.[50] "But efficiency has its costs" and may come at the expense of competition.[51] "In the world of [multiple award contracting] ordering, competition is the exception rather than the rule."[52] Nevertheless, multiple award contracting is the statutory preference, and government agencies take full advantage of this flexible procurement vehicle.[53]

To use this method, the contracting officer first has to decide if multiple awards are appropriate.[54] The *FAR* instructs contracting officers to avoid situations where only one awardee is able to perform under the contract or only one awardee has the required expertise.[55] To figure out how many contractors should be given an award under a multiple award contract, contracting officers must consider the following: the scope and complexity of the requirement,[56] the expected duration and ordering frequency,[57] the contractor's mix of resources,[58] and the agency's ability to maintain competition among awardees.[59]

Multiple awards are not appropriate in all cases. The *FAR* states that the multiple award approach is not appropriate if:

> (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
>
> (2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
>
> (3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;
>
> (4) The projected task orders are so integrally related that only a single contractor can reasonably perform the work;
>
> (5) The total estimated value of the contract is less than the simplified acquisition threshold; or
>
> (6) Multiple awards would not be in the best interests of the Government.[60]

Even though the *FAR* gives statutory reasons for not using the multiple award system, contracting officers have considerable discretion within the *FAR* criteria.[61] Ideally, the multiple award system should provide substantial benefits: an agency using the multiple award system has better control over prices of individual task and delivery orders due to continuous competition between vendors; an agency can compare performance of the contractors before placing further orders; and an agency can place different orders with contractors of varying skill, giving the agency "access to a broader range of competence than would be possible with only a single contract."[62] Theoretically, government agencies should be attracted to the multiple award system's greater speed and flexibility. If those incentives were not reason enough, government agencies should use multiple awards whenever possible since Congress has mandated maximum use of the multiple award system.[63]

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[50] S. REP. NO. 258 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2561, 2576.

[51] Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L.J. NO. 3, 429, 452 (2002).

[52] *Id*. at 453-54.

[53] *See, e.g.*, *Guidance Needed*, *supra* note 1, at 1 ("The Department of Defense (DOD) spends billions of dollars each year for services—ranging from the maintenance of military installations to managing information systems. Much of this spending is through task orders issued under multiple-award contracts. . . .").

[54] FAR, *supra* note 3, subpt. 16.504(c)(1)(ii)(A).

[55] *Id.* subpt. 16.504(c)(1)(ii)(A).

[56] *Id.* subpt. 16.504(c)(1)(ii)(A)(1).

[57] *Id.* subpt. 16.504(c)(1)(ii)(A)(2).

[58] *Id.* subpt. 16.504(c)(1)(ii)(A)(3).

[59] *Id.* subpt. 16.504(c)(1)(ii)(A)(4).

[60] *Id.* subpt. 16.504(c)(1)(ii)(B).

[61] NASH & CIBINIC, *supra* note 4, at 1243.

[62] *Id.* at 1244.

[63] FAR, *supra* note 3, subpt. 16.504(c).

E. Fair Opportunity to be Considered

Congress provided additional guidance on the use of task order and deliver order contracts in section 804 of the National Defense Authorization Act for Fiscal Year 2000.[64] More specifically, the Act required changes to the *FAR*[65] "to ensure that all contractors are afforded a fair opportunity to be considered for the award of task orders and delivery orders"[66] and to ensure each task order or delivery order had a statement of work "that clearly specifies all tasks to be performed or property to be delivered under the order."[67] The fair opportunity requirement is found in the *FAR* at subpart 16.505(b)(1)[68] and the exceptions to the fair opportunity requirement are found at *FAR* subpart 16.505(b)(2).[69] The specific statement of work requirement is found in the *FAR* at subpart 16.505(a)(2).[70]

F. Competitive Basis

In 2002, Congress further changed Department of Defense (DOD) procurement in the National Defense Authorization Act for Fiscal Year 2002.[71] Congress specifically addressed competition with a DOD requirement that "each individual purchase of services in excess of $100,000 that is made under a multiple award contract shall be made on a competitive basis . . ."[72] Section 803 further defined "competitive basis" to mean purchases made under procedures providing "fair notice . . . to all contractors offering such services under the multiple award contract"[73] and "a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase."[74] The competitive basis requirements under Section 803 apply to all DOD task orders under the Federal Supply Schedules (FSS), Blanket Purchase Agreements (BPA) and other multiple award contracts.[75] This DOD-specific guidance requiring "competitive basis" is implemented in the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) at section 216.505-70.[76]

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[64] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 804, 113 Stat. 512, 704-05 (1999).

[65] *See* FAR, *supra* note 3, subpt. 16.505 (implementing these changes).

[66] *See* National Defense Authorization Act for Fiscal Year 2000 § 804(b)(2)(B).

[67] *Id.* § 804(b)(2)(C).

[68] FAR, *supra* note 3, subpt. 16.505(b)(1) ("The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding $2,500 issued under multiple delivery-order contracts or multiple task-order contracts . . . .").

[69] The FAR states:

> The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding $2,500 unless one of the following statutory exceptions applies:
>
> (i) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.
>
> (ii) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.
>
> (iii) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.
>
> (iv) It is necessary to place an order to satisfy a minimum guarantee.

Id. subpt. 16.505(b)(2).

[70] *Id.* subpt. 16.505(a)(2) ("Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed.").

[71] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

[72] *Id.* § 803(b)(1).

[73] *Id.* § 803(b)(2)(A).

[74] *Id.* § 803(b)(2)(B).

[75] Susan Tonner, *Section 803 Goes Final: Implementing Regulations Establish "Competitive Basis" for Service Orders Under Federal Supply Schedules and Multiple Award Contracts*, ACQUISITION DIRECTIONS UPDATE, Oct. 2002, at 1, *available at* http://www.acqsolinc.com/docs/upd02-10.pdf.

[76] U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 216.505-70 (July 2004) [hereinafter DFARS]. The *DFARS* is available online at http://farsite.hill.af.mil/.

II. Lack of Competition and Other Problems with Multiple Award ID/IQ

The multiple award ID/IQ system is not without problems. Some problems result from a lack of competition, and other problems from other aspects of the system.

> One of the major problems with the multiple award ID/IQ system is the prevalent practice of drafting overly-broad statements of work that cover the sun, the moon and the stars. This causes problems of competition, when orders can be placed for just about any service or product without going through normal contract award channels, and can lead to potential fiscal law problems, since the purpose of the money may not match the type of funds available, even though the order fits within the original broad statement of work.[77]

Despite Congress's concern with reduced competition, the *FAR* has a stated preference for using the multiple award approach, and government agencies are using multiple awards.[78] The problem is that with less restriction and less oversight, agencies that have experience with a particular contractor or set of contractors can select the contractors they know or like without recompeting each award and without guarantying low price or best value. Agencies can select favorite contractors by issuing additional orders without any real competition. In the multiple award system, competition necessarily suffers since the whole point of using multiple awards is "to provide a simplified process and to permit flexibility in issuing task orders."[79] Increased flexibility and improved efficiency sometimes come at the cost of competition.[80] In 2000, at least one *FAR* case reemphasized the need to maintain competition[81] and use performance-based statements of work. Unfortunately, the *FAR* Council's guidance was not very helpful to the government contracting community.[82] The main instruction, which discussed the factors the contracting officer should consider when planning for and placing orders under multiple award contracts, simply reiterated the factors listed in *FAR* subpart 16.504(c)(1)(ii).[83] When examining competition in multiple award contracting, the legal analysis should begin with the required competition standard of "fair opportunity."[84]

A. Fair Opportunity

The standard of competition in multiple award ID/IQ contracts is "fair opportunity."[85] Fair opportunity "to be considered," as described in *FAR* subpart 16.505(b)(2) means that the contracting officer must give every awardee a chance to be considered for an order of supplies or services under the contract.[86] Fair opportunity is not merely guidance but is required for every contract over $2,500, unless a statutory exception applies.[87] The exceptions are listed in *FAR* subpart 16.505(b)(2), which reiterates the fair opportunity requirement and then lists the exceptions.[88] The statutory exceptions to fair opportunity are as follows: urgent need,[89] one capable awardee due to unique or specialized supplies or services,[90] logical follow-on to an already issued order,[91] and orders placed to fulfill minimum requirements under an existing contract.[92] In addition, for DOD contracts over $100,000, agencies must use "competitive basis" procedures, which require agencies to provide fair notice of the agency's intent to make a purchase and "afford all contractors responding to the notice a fair

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[77] Interview with Major Gregory Bockin, Trial Attorney, Contract Appeals Division, U.S. Army Litigation Division, in Charlottesville, Va. (Dec. 9, 2004).

[78] FAR, *supra* note 3, subpt. 16.504(c). *But see* One Source Mech. Servs., Kane Constr., Comp. Gen. B-293692, B-293802, June 1, 2004, 2004 CPD ¶ 112.

[79] *Id.* (quoting S. REP. NO. 103-258, at 16 (1994)).

[80] Benjamin, *supra* note 51, at 452-54.

[81] FAR Case 1999-014, 65 Fed. Reg. 24,316.

[82] Benjamin, *supra* note 51, at 419.

[83] FAR Case 1999-014, 65 Fed. Reg. 24316 (Apr. 25, 2000); *see also* FAR, *supra* note 3, subpt. 16.504(c)(1)(ii).

[84] FAR, *supra* note 3, subpt. 16.505(b).

[85] *Id.* subpt. 16.505(b)(2).

[86] *Id.*

[87] *Id.* subpt. 16.505(b)(1)(i).

[88] *Id.* subpt. 16.505(b)(2).

[89] *Id.* subpt. 16.505(b)(2)(i).

[90] *Id.* subpt. 16.505(b)(2)(ii).

[91] *Id.* subpt. 16.505(b)(2)(iii).

[92] *Id.* subpt. 16.505(b)(2)(iv).

opportunity to make an offer and have that offer fairly considered by the official making the purchase."[93] The question therefore becomes: are agencies following the fair opportunity standard?

How can the fair opportunity standard be enforced if agencies simply use an exception each time? In July 2004, the Government Accountability Office (GAO) reported to Congress that in nearly half of the DOD cases reviewed, competition requirements were simply waived.[94]

> For the most part, competition was waived based on determinations that only one source could provide the service or that the work was a follow-on to a previously competed order. Although these are permitted exceptions to the competition requirements of section 803, the use of these competition waivers generally reflected the desire of program offices to retain the services of contractors currently performing the work. When contracting officers addressed requests from program offices for waivers, safeguards to ensure that waivers were granted only under appropriate circumstances were lacking . . . As a result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value.[95]

The GAO determined that the DOD guidance on granting waivers of competition requirements was poor and did not sufficiently describe the circumstances under which a waiver of competition could be used.[96] When competition was used, the GAO determined that its use was limited.[97] Importantly, when an agency does not give fair opportunity and instead uses a statutory exception, the agency must document the factual basis for using the exception.[98] When ordering under multiple award ID/IQ contracts, agencies must apply the fair opportunity standard. The DOD must apply and document the competitive basis procedures.

The Internal Revenue Service (IRS) Treasury Information Processing Support Services (TIPSS-2) multiple award ID/IQ contract provides a recent example of the use of the fair opportunity standard. Since 1998, the IRS has been reorganizing its structure and technology.[99] Part of this reorganization involves services ordered under the TIPSS-2 contract.[100] For the first four years, the IRS ordered services under TIPSS-2, and the predecessor contract TIPSS-1, avoiding the fair opportunity requirement based on an exception.[101] In July 2002, the IRS sent all eighteen TIPSS-2 awardees a request for information (RFI) soliciting technical and labor rate information for four major task areas.[102] There were no statements of work for any of the four task areas, but the RFI asked for project profiles in response to general statements of need describing support services.[103] Based on the information received in response to the RFI, the IRS selected one contractor to perform the work in two task areas and two contractors to perform the work for the remaining two task areas.[104] From July 2002 until July 2004, the IRS issued thirty-seven task orders worth $38 million.[105] Thirty-six of the task orders were to one contractor.[106] In July 2004, the GAO decided the IRS's issuance of the TIPSS-2 task orders violated the fair opportunity requirement of FASA.[107] The report specifically stated that despite the availability of eighteen eligible awardees, the IRS was selecting only certain

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[93] National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 803(b)(2)(B), 115 Stat. 1012, 1179 (2001).

[94] *Guidance Needed*, *supra* note 1, at 3.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 3. Of the forty orders available for competition, sixteen orders were made after receiving only one response to agency solicitation, fifteen orders were made after two responses, and for the remaining nine, no solicitation was used—the order was made based on previously submitted data in a manner that did not maximize competition.

[98] FAR, *supra* note 3, subpt. 16.505(b)(4) ("The contract file shall also identify the basis for using an exception to the fair opportunity process.").

[99] The Federal Acquisition Streamlining Act of 1994—Fair Opportunity Procedures Under Multiple Award Task Order Contracts, Comp. Gen. B-302499, July 21, 2004, 2004 U.S. Comp. Gen. LEXIS 148.

[100] *Id*. at *2.

[101] *Id*.

[102] *Id*.

[103] *Id*. at *2-3.

[104] *Id*.

[105] *Id*. at *3.

[106] *Id*.

[107] *Id*. at *8.

contractors to perform virtually all task orders without giving other contractors fair opportunity.[108] The IRS considered these task orders competitive rather than sole-source because of the RFI contractor selection.[109] The GAO concluded that the IRS system of using an RFI to pre-select a single contractor for an area of expected work instead of opening each requirement to all of the multiple-award contractors did not provide fair opportunity to all multiple award contractors.[110] The GAO recommended issuing future task orders in compliance with FASA's fair opportunity requirement and if feasible, terminating current task orders and replacing them using fair opportunity procedures.[111] Simply issuing an RFI does not relieve the agency of its continuing obligations to provide fair opportunity. The IRS attempted to streamline their ordering procedure; however, the GAO determined that it did not meet FASA's fair opportunity requirement. Task and delivery orders made without fair opportunity before issuing *each individual order* do not fulfill the fair opportunity requirement. Every time the agency places an order under the existing contract, it must give every awardee fair opportunity to be considered.[112]

B. Out of Scope Orders and Broad Statements of Work

Another potential problem area in multiple award ID/IQ contracts is the problem of out of scope orders—when the goods or services are not of the type specified under the contract. The opposite problem occurs when contracts have overly-broad statements of work that allow an agency to order any type of goods or services.

What makes an order out of scope? Scope determination for an order is fact specific.[113] If a statement of work is narrowly drafted, the goods and services may be easily identified; however, if the government requires a similar item or service and the statement of work is written too narrowly, the agency may be prevented from ordering the desired item.[114] To take advantage of the multiple award ID/IQ system's flexibility and efficiency, statements of work will necessarily be broadly drafted, but where is the line drawn? The FASA envisioned that detailed statements of work may not be possible at contract formation, and so "awards with broad work statements are permitted with specific work statements to be provided at the time orders are placed."[115]

So what happens when the government drafts a contract with a detailed statement of work and later decides that it needs something different from what the contract, and statement of work, originally envisioned? This was the issue the GAO confronted in the *Anteon* case.[116] In March 2004, the GAO sustained Anteon Corporation's protest that a task order for electronic passport covers was outside the scope of the General Services Administration's (GSA) multiple award ID/IQ contract for "Smart Identification Cards" (Smart Cards).[117] The contract covered identifications cards with an embedded integrated chip that would combine a traditional identification card with an electronic access card.[118] The Smart Card contract also included services such as providing card security and inventory control systems, program integration and management, and cardholder services.[119] In November 2003, GSA issued a task order for passport covers with embedded integrated chips.[120] The GSA's theory was that passport covers with integrated chips served the same function as identification cards with integrated chips and that the items were similar enough to be encompassed under the existing

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[108] *Id*. at *3, 8.

[109] *Id*. at *3.

[110] *Id*. at *5.

[111] *Id*. at *8.

[112] Note that in the DOD, awarding on a competitive basis, by giving fair notice and fair opportunity to offer, would also fulfill the fair opportunity to be considered requirement. The IRS issued an RFI once, then ordered based on that information. Had the IRS issued another RFI and allowed for competition each time a requirement arose, the case may have been decided differently. Of course, that would also defeat the IRS's apparent purpose of being finished with competition requirements prior to placing any orders.

[113] Anteon Corp., Comp. Gen. B-293523, B-293523.2, Mar. 29, 2004, 2004 CPD ¶ 51, at 5 ("GAO looks to whether there is a material difference between the [task or delivery order] and the original contract.").

[114] *See, e.g.*, *Anteon Corp.*, 2004 CPD ¶ 51, at 6-7.

[115] Ralph C. Nash & John Cibinic, *Task and Delivery Order Contracting: Unique Multiple Award Arrangements*, 10 NASH & CIBINIC REP. ¶ 17 (Apr. 1996).

[116] *Anteon Corp.*, 2004 CPD ¶ 51, at 5.

[117] *Id*.

[118] *Id.* at 2.

[119] *Id*.

[120] *Id*. at 3.

contract.[121] The GAO did not agree.[122] The GAO concluded that the passport covers were significantly different from the Smart Cards originally contemplated in the contract, and were, thus, out of scope.[123] The GAO recommended that the GSA cancel the task order and compete the new requirements.[124] The *Anteon* case shows how even similar items can be out of scope of the original contract. Ordinarily, the GAO will not review task and delivery orders under multiple award contracts;[125] however, in *Anteon*, the protest was reviewable because it involved an out of scope order.[126]

If the statement of work is too narrow, the government agency may have difficulty placing an order if the desired goods or services are not as originally envisioned. If the statement of work is overbroad, contractors cannot fairly compete for the initial contract.[127] Generally, the broader the statement of work, the more flexibility the agency has in utilizing its contract. The contract with a broad statement of work becomes an easy mechanism to acquire goods and services. If the statement of work is overly-broad, however, the contract enables an agency to order additional work without providing fair notice or fair opportunity. When the multiple award system was first implemented, there was concern within the DOD that the authority to award contracts with a general work statement might be abused.[128] The FASA addressed this concern and implemented certain restrictions on statements of work.[129]

Contracting officers must choose a middle ground between narrowly-focused or overly-broad statements of work. Where is the line drawn? In the case of *Computers Universal*, the GAO upheld broad statements of objectives that reasonably encompassed the services at issue.[130] In that case, the Army obtained non-destructive inspection (NDI) and non-destructive testing (NDT) services under an Air Force multiple award ID/IQ contract.[131] Although the FASA generally precludes the GAO from reviewing task orders, the GAO used the same reasoning as in *Anteon* and reviewed the protest in *Computers Universal* because the protester claimed that the services ordered were outside the scope of the contract.[132] In *Computers Universal*, there was no traditional statement of work.[133] Instead, attached to the request for proposals was a two-page statement of objectives that set forth one program objective, nine contract objectives, and one management objective.[134] All of the objectives were "quite general."[135] Despite expressing concern, the GAO concluded that the objectives served the purpose of the statement of work and that the services ordered were of the type that potential offerors reasonably could have anticipated and were covered by the contract.[136] Interestingly, the GAO noted that they were statutorily prohibited from deciding whether the specifications in the delivery order were inadequate.[137]

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[121] *Id*. at 5.

[122] *Id*.

[123] *Id*. at 6.

[124] *Id.* at 7 ("[C]ancel the [task order] and either hold a competition for these services, or prepare the appropriate justification required by [the Competition in Contracting Act] for other than full and open competition.").

[125] *Id.* at 4 (citing 41 U.S.C. § 253j(d) (LEXIS 2005)); *see also* Corel Corp., B-283862, Nov. 18, 1999, 99-2 CPD ¶ 90, at 1.

[126] *Id*.

[127] If the statement of work is overbroad, it might provide insufficient information to potential offerors. Logically, a statement of work that does not adequately describe the government's needs will not adequately tell offerors exactly what goods or services are desired. This lack of information can cause other problems in contract administration , which will be further analyzed *infra*.

[128] Nash & Cibinic, *supra* note 48, at ¶ 30.

[129] *Id.*; *see also* FAR, *supra* note 3, subpt. 16.504(a)(4). (Statements of work should reasonably describe the general scope, nature, complexity, and purpose of the supplies or services.).

[130] Computers Universal, Inc., Comp. Gen. B-293548, Apr. 9, 2004, 2004 CPD ¶ 78.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 2. For example, the single program objective was as follows:

> The objective of this program is for the offeror to provide supplemental on-site Organizational, Intermediate, and Depot level maintenance support for modification, maintenance, and repair of various DoD [Department of Defense] weapons systems and associated support equipment for any Federal Agency at locations both in CONUS [continental United States] and OCONUS [outside of continental United States] at an affordable cost.

[136] *Id.* at 3-4.

[137] *Id.* at 4 n.7.

These cases do not lend themselves to a bright-line rule for drafting statements of work. On one end of the spectrum is the narrow statement of work, where products similar to those described under a contract, but not described by the statement of work, are considered out of scope. On the other end of the spectrum is the situation where the statement of work is so broad as to encompass every type of service that could possibly be anticipated; in those cases, any goods or services would be considered in scope. This dilemma will continue to pose a problem in the future. If government agencies draft broad statements of work, the agencies will avoid successful protests on the scope basis. If nothing is out of scope, however, how will potential contractors understand the agency's true intent behind the contract and be able to craft their offer accordingly? What is clear is that broad statements of work assist agencies in circumventing competition.

In addition to unfairly avoiding competition, overbroad statements of work create problems in contract administration.[138] One publicly recognized example of contract failure is prisoner abuse by contractors at Abu Ghraib prison in Iraq.[139] Major General George R. Fay investigated the use of contract interrogators under a contract originally calling for translators.[140] The contract called for translation services and did not mention interrogation.[141] The problem of ordering work beyond the scope of the contract was compounded by inadequate oversight over the contracting process, especially in the area of contract administration.[142] Inadequate oversight in contract administration resulted in the following failures: lack of proper training for contractors on interrogation rules of engagement, lack of oversight to ensure intelligence gathering by contractors complied with the law, lack of a clear chain of command, lack of management of contractor personnel, and lack of performance monitoring.[143]

Problems with overly-broad statements of work are not easily resolved. Statements of work are highly fact specific and will be drafted necessarily without much specific instruction since the facts of each contract will dictate the wording. Broad statements of work often benefit the government in ordering, so contracting officers do not have much incentive to draft narrow statements of work.[144] Compounding the problem, if the statement of work is broad enough, the GAO will not review the case. The only realistic basis for a GAO protest review occurs when the order is beyond the scope of the contract.[145] As long as the statement of work is broad enough, any order conceivably will be within scope and unreviewable.[146]

C. Other Problems

Other problems with the multiple award ID/IQ system concern: contract administration, management, oversight, and dispute resolution. These problems have not gone unnoticed:

> I would like to address two matters that cry out for Congressional attention and intervention. First, the federal government must devote more resources to contract administration, management, and oversight. This investment is an urgent priority given the combination of the 1990's Congressionally-mandated acquisition workforce reductions and the Bush administration's relentless pressure to accelerate the outsourcing trend. Second, the proliferation of interagency indefinite-delivery contract vehicles, and the

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[138] *See, e.g.*, Schooner Statement, *supra* note 27 ("The worst-case scenario arises where the a [sic] contractor performs work under an open-ended contract (e.g., with a vague or ambiguous statement of work) without guidance or management from a responsible government official (e.g., in the absence of an administrative contracting officer or contracting officer's representative).").

[139] *Id*.

[140] LTG Anthony R. Jones & MG George R. Fay, Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 48 (Aug. 23, 2004), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf [hereinafter Fay Report].

[141] *Id.*

[142] *Id.* at 48-52.

[143] *Id.*

[144] The *Anteon* case indicates that it is to the government's detriment to draft a narrow statement of work since the agency cannot order similar items without issuing a new contract.

[145] FAR, *supra* note 3, subpt. 16.505(a)(9) ("No protest under Subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except for a protest on the grounds that the order increases the scope, period, or maximum value of the contract (10 U.S.C. 2304c(d) and 41 U.S.C. 253j(d))."). Once the overbroad statement of work is drafted, protesters have no GAO recourse. Only the reverse is true – if the statement of work is narrowly drawn, and the order is outside the scope of the statement of work - then the protester would have a valid protest ground.

[146] Although it is not in the drafter's interest to narrowly-tailor the statement of work, overly-broad statements of work cause contract administration problems that ultimately circumvent competition requirements.

> perverse incentives that derive from these fee-based procurements, have prompted troubling pathologies that require correction and constraint.[147]

The Abu Ghraib prisoner abuse contract provides one example of the problems associated with contract administration and lack of oversight. "It is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib. . . . Proper oversight did not occur at Abu Ghraib due to a lack of training and inadequate contract management and monitoring."[148] The remote locations and sheer number of contractor employees posed a considerable challenge to contract administration.[149] As long as there are decreased numbers of government contract personnel to administer a growing number of contracts, lack of oversight will continue to be a problem.[150] Multiple award ID/IQ contracts, with less government control and less government oversight, are particularly prone to contract administration problems.

How are the different agencies changing their procedures to meet these difficulties? In July 2003, the U.S. Army announced that instead of Kellogg Brown and Root's non-competitively awarded emergency oil infrastructure contracts, future oil infrastructure contracts would be awarded competitively.[151] The GAO continues to review Iraq reconstruction contracts, finding that even when agencies followed the applicable laws and regulations, competition was still lacking. More acquisition personnel and resources are needed to address current problems.[152]

Is there a need for further statutory guidance? In September 2004, the DOD established the multiple award contract sole source approval threshold and emphasized the need for waiver justification.[153] Currently, every sole source award over $100,000 must be approved at higher levels than before, in a manner similar to new contract actions under *FAR* subpart 6.304.[154] This requirement should be codified to increase contract oversight at the formation stage. Statutory guidance should be added as well to address what factors to consider in approving waiver justifications.

Another problem with the multiple award ID/IQ system is the statutory system of resolving disputes. Dispute resolution is not easy under the multiple award ID/IQ system. When a contractor protests that it is not receiving the required fair opportunity to compete, the GAO may decline to review the case[155] in deference to the statutory scheme[156] providing for a task and delivery order ombudsman[157] who is "responsible for reviewing complaints from contractors, and for ensuring that all of the contractors are afforded a fair opportunity to be considered for task and delivery orders."[158] The question still remains, if the GAO declines review, will the Court of Federal Claims review the case after the task-order and delivery order

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[147] Schooner Statement, *supra* note 27, at 1.

[148] Fay Report, *supra* note 140, at 52.

[149] *Id.*

[150] Replacing government personnel with civilian contractors also creates the need for trained government personnel to supervise the contractor personnel. Schooner Statement, *supra* note 27, at 7.

[151] The Kellogg Brown and Root's ID/IQ contracts were broad in scope and reconstruction needs could be quickly acquired, but at the expense of competition. The Army decided to inject more competition into the process. *Corps to Competitively Award Iraqi Oil Infrastructure Contracts*, 45 GOV'T CONTRACTOR NO. 25, at 7 (2003).

[152] *GAO Continues to Review Iraq Reconstruction Contracts and Task Orders*, 46 GOV'T CONTRACTOR NO. 24, at 249 (2004).

[153] Memorandum, Deirdre A. Lee, Director, Defense Procurement and Acquisition Policy, to Senior Procurement Executives and Directors of Defense Agencies, subject: Approval Levels for Sole Source Orders Under Federal Supply Schedules (FSSs) and Multiple Award Contracts (MACs)(13 Sept. 2004) [hereinafter Lee Memorandum] ("Any determination waiving competition must solidly support the action. . . Contracting officers must ensure requirements offices provide adequate information to support determinations to waive competition, to include the results of market research and data to support why further competition is not in the Government's best interest.") (on file with author).

[154] *Id*. In new contract actions, justification for other than full and open competition has to be approved in writing. The amount of the contract determines the approval level. For example, for contracts under $500,000, the contracting officer can approve the justification. For contracts over $500,000 and under $1,000,000, the justification must be approved by the competition advocate for the procuring activity. FAR, *supra* note 3, subpt. 6-304(a).

[155] *Id*. subpt. 16.505(a)(9) (The ground on which one could protest is "that the order increases the scope, period, or maximum value of the contract. . ."). Note, however, the GAO will consider protests which involve use of an ID/IQ task or delivery order to acquire goods and services in violation of other *FAR* requirements. *See*, *e.g.*, LBM, Inc., Comp. Gen. B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, at 9 (The limitations on GAO's jurisdiction over protests of task and delivery orders do not apply when the protester was not challenging the proposed issuance of a task order but rather raising the question of whether work that had been previously set aside for small businesses could be transferred to Logistical Joint Administrative Management Support Services (LOGJAMSS) contracts, which are multiple award ID/IQ contracts, in violation of *FAR* requirements pertaining to small business set-asides.)

[156] FAR, *supra* note 3, subpt. 16.505(b)(5) ("The head of the agency shall designate a task-order and delivery order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract.").

[157] *Id.* ("The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.").

[158] Prof'l Performance Dev. Group, Inc., Comp. Gen. B-294054.3, Sept. 30, 2004, 2004 U.S. Comp. Gen. LEXIS 195, at n.3 (citing 41 U.S.C. § 253j(e) (LEXIS 2005)).

ombudsman makes a decision? On a more fundamental level: why is ID/IQ contracting exempt from the GAO review? If the idea is to make the process less formal and less protestable, then Congress succeeded. Congress did not have to exempt task and delivery orders from GAO review. As a result, contractors do not have a protest option, but instead will have to work within the current, and more difficult, ombudsman scheme.

III. Recommendations

In July 2004, the GAO recommended that the Secretary of Defense develop additional guidance on the use of fair opportunity waivers.[159] In addition, the GAO recommended that the DOD require the use of justifications for waivers and establish approval levels for waivers under multiple award contracts, similar to the sole source FSS orders.[160] The challenge for DOD is to find the right balance between promoting competition and retaining contractors that satisfy DOD customer needs.[161] Frequent use of competition waivers may indicate that end users are satisfied with current vendors, but the lack of competition may hinder newer, more innovative solutions and market forces. The government should require contracting officers to more thoroughly document waiver decisions and establish an approval process that would enhance oversight.[162] Contract professionals will continue to use competition waivers, especially if they are satisfied with a particular vendor and wish to continue using that vendor. Contract drafters must balance the advantage of ordering flexibility under broad statements of work with the disadvantage of potential contract administration problems under unclear and imprecise statements of work.

Agencies can and should also improve contract oversight at the formation and administration stages. Since establishment of the multiple award contract sole source approval threshold in September 2004,[163] every sole source decision over $100,000 receives substantial oversight. This oversight is a good start, but only time will tell if the added oversight will help. Until these thresholds become regulatory law, agencies can simply change the approval levels again when the political eye is off competition and agencies desire more efficiency. Hopefully, higher level officials will continue to monitor contract awards carefully, with an eye towards competition, but this type of supervision will depend on the leaders.[164] Statutory or regulatory authority should specify waiver justification, but enforcement still will be difficult. Practitioners should carefully document and justify waivers in appropriate situations.

Increasing the number of contracting professionals would allow for more management and oversight, as well as for enforcement.[165] Contracting personnel are asked to perform too many contract actions, especially in light of the time and cost of proper competition procedures.[166] In its report on Iraq reconstruction, the GAO recommended that the DOD improve the contract personnel situation in future operations.[167] Agencies may wish to increase contract personnel. This may be the right

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[159] *Guidance Needed*, *supra* note 1, at 3. The GAO specifically recommended that the Secretary of Defense: "develop additional guidance on the circumstances under which competition may be waived, require detailed documentation to support competition waivers, and establish approval levels above the contracting officer for waivers of competition on orders exceeding specified thresholds." *Id.* at 3-4.

[160] *DOD Task Orders Lack Competition*, 46 GOV'T CONTRACTOR NO. 29, at 298 (2004) (citing GEN. ACCT. OFF., REP NO. GAO-04-874, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, at 3 (July 2004), *available at* http://www.gao.

gov/new.items/d04874.pdf).

[161] *Guidance Needed*, *supra* note 1, at 3.

[162] *Id.*

[163] Lee Memorandum, *supra* note 153.

[164] In the case of Darleen Druyun, former Air Force procurement official, and the recent Boeing lease deal, using open negotiations and more traditional competition processes may have made it more difficult for a corrupt individual to taint the system. Steven L. Schooner, *Adding Up Efficiency's Cost*, LEGAL TIMES, Nov. 1, 2004. The level of official oversight depends on the amount and type of waiver, however, when the highest procurement official is corrupt, the system has to create more checks and balances to keep abuse in check.

[165] *Id.* ("[T]he federal government must devote more resources to contract management and oversight, particularly in the light of sustained pressure to outsource the government's work."); Fay Report, *supra* note 140, at 52 ("Meaningful contract administration and monitoring will not be possible if a small number of [contracting personnel] are asked to monitor the performance of one or more contractors who may have 100 or more employees in the theater, and . . .in several locations . . .").

[166] Nash & Cibinic, *supra* note 2, at 7 ("[O]ne of the reasons for avoiding competition is the time and cost of soliciting and evaluating proposals. . . Award of too many multiple award contracts and too elaborate selection procedures are to blame for much of the delay and cost involved with competition for task orders.).

[167] *Rebuilding Iraq*, *supra* note 42, at 30 ("To improve the delivery of acquisition support in future operations, we recommend that the Secretary of Defense. . . develop a strategy for assuring that adequate acquisition staff and other resources can be made available in a timely manner.").

time to inject much needed reform into the contract personnel situation. Because incidents such as Abu Ghraib and the Boeing lease situation have been brought to the public's attention, the U.S. government should place more resources and personnel in contracting positions and supervisory positions now while the nation is still shocked by these incidents and willing to make changes.

Book Review/Review Essay

THE LIMITS OF INTERNATIONAL LAW[1]

REVIEW-ESSAY BY LIEUTENANT COLONEL WALTER M. HUDSON[2]

The Limits of International Law by Jack Goldsmith, a law professor at Harvard, and Eric Posner, a law professor at the University of Chicago, is an interesting and stimulating book that has aroused a great deal of controversy and criticism in international law circles.[3] While *The Limits of International Law* (*Limits*) may appear to be most relevant only to legal scholars, the book is also relevant to judge advocates, especially in these turbulent times. This review provides a basic overview of the book and addresses several scholars' criticisms of it, including one particular criticism that is noteworthy for judge advocates. In addition, this article addresses the applicability of *Limits* to one field of international law, the law of military occupation, especially focusing on Eyal Benvenisti's comprehensive survey of that field of law, *The International Law of Occupation*.[4]

The authors of *Limits* rely on economic-based rational choice theory, using some modeling techniques derived from game theory, to advance their basic thesis.[5] Using this theory, Posner and Goldsmith argue that states act rationally to maximize their interests and that international law is little more than an expression of various state interests. "[International law] is not a check on state self-interest; it is a product of state self-interest."[6] As the authors assert, what practitioners perceive as international law is really "behaviorial regularit[y] that emerge[s] when states pursue their interests on the international stage."[7] There are four basic models that describe these regular international interactions: (1) coincidence of interest (a pattern of behavior that occurs when two states ignore the behavior of the other and pursue private interests);[8] (2) coercion (when one state forces another to serve its interests),[9] (3) cooperation (when states improve their relative positions by exchanging information);[10] and (4) coordination (when states' interests converge, but "each state's best move depends on the move of the other state").[11]

Limits applies these models to both customary international law and treaty-making. The authors contend the notion of a customary international law as a normative system that compels state behavior is false. Rather, state behaviors that appear to be customary international law are simply coincidences of interests between states or some form of bilateral transaction—of cooperation, coordination, or coercion—between states.[12] *Limits* also analyzes international treaties and agreements. Given

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[1] JACK L. GOLDSMITH & RICHARD A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

[2] Judge Advocate, U.S. Army. Presently assigned as Staff Judge Advocate, 2d Infantry Division, Camp Red Cloud, Republic of Korea.

[3] *See, e.g.*, Robert Cryer, *The Limits of Objective Interests*, 82 INT'L AFFAIRS 183-88 (2006); Peter Berkowitz, *Laws of Nations*, POL'Y REV., Apr. 2005; Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. (forthcoming 2006). For a positive review, see Sanford R. Silverburg, Review, *The Limits of International Law*, 15 L. & POLS. BOOK REV. 336 (2005). A series of articles published in a 2006 volume of the *Georgia Journal of International and Comparative Law* provide the most comprehensive treatment of the book. *See* Kenneth Anderson, *Remarks by an Idealist of the Realism of The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006); Daniel Bondansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285 (2006); Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305 (2006); Daniel M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333 (2006); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006); Margaret E. McGuinness, Exploring *the Limits of International Human Rights Law*, 34 GA. J. INT'L & COMP. L. 393 (2006); Kal Raustiala, *Refining the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423 (2006); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445 (2006). I am indebted to Ms. Rachel Saloom, the editor-in-chief of that journal, for providing me advanced copies of these articles.

[4] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2d ed. 2004). *The International Law of Occupation* was first published in 1993 and republished (including a new introduction) in 2004, following the invasion and occupation of Iraq.

[5] Game theory was principally developed in the early twentieth century by a mathematician, John von Neumann, and an economist, Oskar Morgenstern, when they noted that certain economic problems were highly similar to mathematical notions of game playing. Rational choice theory derives in part from game theory, in that it posits economic choices as "games" in which the actors are economic players who use certain strategies to obtain payoffs. The players always seek to obtain their payoffs; hence their play is always in their "interest" and always "rational." *See* MORTON O. DAVIS, GAME THEORY: A NONTECHNICAL INTRODUCTION (1970); JONATHAN CAVE, INTRODUCTION TO GAME THEORY (1986) (providing simple introductions to game theory).

[6] GOLDSMITH & POSNER, *supra* note 1, at 13.

[7] *Id*. at 26

[8] *Id*. at 27.

[9] *Id*. at 28-29.

[10] *Id*. at 29-22.

[11] *Id*. at 32-35.

[12] *Id*. at 12-13.

that rational choice theory seems most suited to contract law problems, in which two parties with presumably equal information exchange something of value, it is not surprising that the authors determine that treaties are the only truly effective form of international law, since in written form such treaties reduce ambiguities between the parties and specify the parameters of the coordination or cooperation "games" the states are "playing" (obviously, treaties are not necessary when states have coincident interests, and treaties are of less significance when one state is coercing another).[13] According to the rational choice theory propounded in *Limits*, multilateral agreements cannot work effectively using international law for a variety of reasons, to include monitoring and enforcement problems.[14] A far more effective tool (and perhaps the only effective tool) in international law is the bilateral treaty since it simplifies a problem of international relations to a contractual arrangement.[15]

The authors further contend that the reality of state power and state interests has been historically demonstrated. For example, they point out that most nations, to include the United States, held the principle of neutral rights at sea as customary international law. The Civil War, however, caused the United States quickly to abandon the principle outright and to violate it with impunity in order to defeat the Confederacy.[16] The United States reversion to neutrality during the much less consequential Spanish-American War was simply due to the shortness of the war and the decrepitude and incompetence of the Spanish Navy.[17] Customary international law in no way impeded the national interests of the United States. If non-compliance is so demonstrated, compliance is shown as a matter of behaviorial regularity that has little to do with international law's normative power. For instance, historical evidence indicates that diplomatic immunity is nearly always granted but that such grantings take place in the context of bilateral (and not multilateral) relationships between states. As the authors put it, as "broad behavioral regularit[ies] [that develop as] an amalgam of independent, bilateral repeated prisoner's dilemmas".[18]

In the concluding chapters of *Limits*, the authors also provide interesting arguments against so-called liberal "cosmopolitanism"—the view that the interests of the United States (or any state) are subordinate to the larger interests of world society. The authors contend that states have no moral obligation to follow international law.[19] They do *not* say that states should not follow international law. Rather, if such law interferes with an articulable state interest, then international law "imposes no moral obligation that requires contrary action."[20] The authors assert that the state does not organize itself for the purpose of engaging in acts of cosmopolitan charity but instead is organized for the well-being of its own citizens and the execution of their political intentions.[21] International law does not rest on such internal political consent, nor does it necessarily consider the well-being of members of national communities. It thus conflicts with the higher principle of democratic sovereignty. Therefore, as a normative principle, when such law interferes with a state's (especially a liberal democratic state's) own interests, that law does not need to be followed. [22]

In contrasting the goals of such internationalist imperatives with domestic (and more democratic) goals, the arguments the authors make against such forms of liberal cosmopolitanism are telling and effective. Simply put, what if the majority of the domestic population does not want the state to enforce a set of international standards? What, in a world conceived in a philosophically liberal way, gives the international standard any normative viability (beyond appeals to the academic authority of philosophers, such as John Rawls or Jürgen Habermas) if the majority of the people within the borders of a nation do not accept it?

Limits has provoked controversy and criticism, though it would be incorrect to say that the book is little more than controversialist rhetoric. In fact, there has been some detailed empirical evidence published in the past ten years that, at the

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[13] *Id.* at 13-14

[14] *Id.* at 87.

[15] *Id.* at 91-100.

[16] *See* Golove, *supra* note 3, at 347-77 (providing a different view of the exercise of neutrality rights by the United States during the Civil War, and a pointed criticism of Posner and Goldsmith's historical scholarship).

[17] GOLDSMITH & POSNER, *supra* note 1, at 48-49.

[18] *Id.* at 56.

[19] *Id.* at 185.

[20] *Id.*

[21] *Id.* at 189-97, 211.

[22] *Id.*

very least, casts doubt on the ability of international law to affect, absent other compulsions, state behavior.[23] Nevertheless, the foundational premises of the book are open to debate. At the beginning of *Limits*, the authors attempt to preempt some foundational criticisms by making the following statement: "Our theory should be judged not on the ontological accuracy of its methodological assumptions, but on the extent to which it sheds light on problems of international law."[24] This attempt at drawing critical sting is not particularly persuasive, for if a theory's assumptions are not accurate ontologically, then the theory itself must be inaccurate. If the book's assumptions about state behavior are wrong, then its conclusions about international law are almost surely wrong.[25] And unfortunately, the boldness of the book's assertions does not always seem adequately supported by the evidence presented. *Limits* is a relatively short book of 223 pages of text. Partly as a result of its brevity, it does not contain a wealth of statistical data, provide detailed mathematical formulae to explain the game theories that are the theoretical heart of the book, or provide lengthy historical surveys of some of its supporting evidence.

Because of its controversial thesis, critics have launched attacks on the book. For example, by making the state the only actor in international law (as opposed to individuals, non-governmental organizations, or inter-state agencies) at the center of their analysis, the authors open themselves up to possible criticisms that they have too narrowly defined the scope of international law. Political science theorists have taken them to task for not dealing with "constructivist" approaches to world political systems.[26] Others have pointed out that the "realism" the authors claim they are providing to international law is in fact highly "idealist" because it posits a "norm" of democratic sovereignty that they contend must trump the competing "norm" of liberal internationalism.[27] Other scholars assert that the authors' rational choice theory is too reductive and simplistic and does not take into account external societal factors that may shape that theory.[28] In the era of multinational corporations, non-governmental organizations, and terroristic "non-state actors," is a theory of international law that only considers states unduly narrowing?[29] These critics have made their points pointedly and sometimes persuasively. This review highlights and elaborates upon one such critique that is relevant to military legal practice.

The Limits of *Limits*: Norm Internalization and the "Disaggregation" of State Interest

For judge advocates, one of the most relevant critiques of *Limits* focuses on how Posner and Goldsmith conceive of the state. According to the authors' rational choice theory, the state presumably acts in a unified way according to a particular state interest. The state's interest emerges cleanly in this theoretical construction, and little within the state exists to impede it. Yet the proposition that a state is a unified and single-minded agent that acts upon its intentions has been subject to scholarly criticism. Such scholarship points to another possibility—the state, especially an advanced "democratic" one with multiple branches of government and multiple bureaucratic agencies, is composed of many "interests" that are

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[23] Eric Neumayer surveys much of this evidence in a recent article. Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights*?, 49 J. CONFLICT RESOLUTION 922 (2005). Neumayer points out that, in comparison to the regimes of international finance or trade, human rights regimes are comparatively weak. "No competitive market forces drive countries toward compliance, nor are there strong monitoring and enforcement mechanisms." Neumayer, *supra*, at 926. Oftentimes, monitor and enforcement mechanisms are "nonexistent, voluntary, or weak or deficient." *Id*. One study on whether ratification of the International Covenant on Civil and Political Rights has had an effect on political or civil rights finds no difference before and after ratification. Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RESEARCH 95 (1999). Indeed, there is one study that indicates that human rights treaty ratification actually can be harmful because it may falsely indicate that a country is committed to human rights, thus deflecting outside pressure for actual change. That study, however, also indicates that in "fully democratic" countries, treaty ratification can be associated with better human rights records. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). Neumayer's own study yielded mixed results. It indicated that in pure autocracies with no civil societies to speak of, ratification actually was associated with worse violations, but that ratification had stronger and possibly beneficial effects on democratic societies with strong civil societies. Neumayer, *supra*, at 941.

[24] GOLDSMITH & POSNER, *supra* note 1, at 8.

[25] As Robert Cryer, Senior Lecturer in Law at the University of Nottingham, noted author, and book review editor of the *Journal of Conflict and Security Law*, points out, "This is quite extraordinary in that the light that is shed on a subject is necessarily affected by methodology-if that is flawed, the vision it provides will be problematic." Cryer, *supra* note 3, at 185.

[26] "Constructivism" refers to a school of political theory that focuses less on material forces and more on shared ideas and human communities, and that the identities of political actors are formed by those shared ideas. *See* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999) (providing the most comprehensive study of constructivism in international politics).

[27] Anderson, *supra* note 3, at 258.

[28] *See* MARY DOUGLAS, HOW INSTITUTIONS THINK 45-67 (1986) (providing an implicit critique of the presumed rationality in rational choice thinking).

[29] Spiro, *supra* note 3, at 455-6; Raustiala, *supra* note 3, at 429.

"disaggregated."[30] These scholars further assert that these intergovernmental interests sometimes compete and conflict with one another and that the notion of a constant and single state "will" is a chimera.[31]

According to these scholars' line of thought, then, Posner and Goldsmith are pursuing an illusion, though they believe they are pulling back the curtain of international law to reveal the reality of a singular state interest.[32] While certain states (e.g., highly totalitarian ones) may suggest they are monolithic and reflect a single, unified will, not all states do. Instead, the authors of *Limits* have simply elevated the historical conception of a state (the kind conceived during the heyday of European power-politics) to a level of absolute principle.

Furthermore, as scholars have also pointed out, some international norms appear to take hold within certain bureaucratic structures, and these norms are internalized—absorbed and made a part of its cultural identity—by large components of a governmental bureaucracy.[33] These norms, over time, "thicken" and thus are potential stumbling blocks if another section of government wishes to articulate a state interest that might run contrary to those norms.[34] Within a "disaggregated" government, there are likely impediments to the actualization of a perceived state interest by agencies within that state that have internalized norms that may conflict with that interest.

These impediments are emphasized by one of the critics of *Limits*, Kenneth Anderson. Mr. Anderson states that his own personal observations of the commitment of soldiers in many militaries to the laws of war, both morally and legally, clearly indicate an internalization of international law norms.[35] Norm internalization within the military has been carefully studied by legal scholars in recent years. Marc Osiel, in his excellent book, *Obeying Orders*, details how extensive—and necessary—norm-based training is to the American military, and how vague "reasonableness" standards exist in the military to a greater extent than in civilian society because norms and ethical standards are so internalized.[36] Indeed it may be that the shared norms regarding international law in western militaries indicate the emergence of a "transnational class"—a class that has more in common with those of a similar class outside its borders than fellow nationals of a different class.[37]

In similar fashion, Paul Berman provides another example of the "internalization of international norms" when he points out the role of U.S. military attorneys and their role in opposing the non-application of the Geneva Conventions in detaining and interrogating terrorism suspects.[38] That internal governmental struggle during the opening months of the current struggle against forms of global terrorism reveals quite a lot about how international law norms not only have been internalized but also how those norms themselves have profoundly shaped what emerged as the perceived state "interest." The various apparent disagreements and reversals between and within executive branch departments may indeed show one bureaucratic level or agency being "frustrated" by another element that has "internalized" particular norms of international law.

The twisted trail of the standards of conduct for interrogation from 2002 to the present day highlight this internal struggle.[39] In August 2002, a Department of Justice (DOJ) memorandum on standards of conduct for interrogation stated that in regards to interrogations, the federal torture statute might be an unconstitutional infringement of the powers of the

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[30] *See* ANNE MARIE SLAUGHTER, A NEW WORLD ORDER (2005); Anderson, *supra* note 3, at 273-76; Paul Berman, *Seeing Beyond the Limits of International Law: Jack L. Goldsmith and Eric A. Posner, The Limits of International Law*4-5, 7-12 (U. Conn. Sch. L., Working Paper, 2005) (providing discussions of the concept of "disaggregation").

[31] *Id.*

[32] In *Limits*, the authors discuss this "bureaucratic internalization" but largely dismiss it. Instead, they simply claim that there is little evidence to support the assertion that government officials internalize and get into the habit of complying with international law even when doing so would not serve their government's interests. *See* GOLDSMITH & POSNER, *supra* note 1, at 104-6.

[33] Berman, *supra* note 30, at 34.

[34] *Id*.

[35] Anderson, *supra* note 3, at 271.

[36] MARK OSIEL, OBEYING ORDERS: MILITARY ATROCITY AND THE LAW OF WAR (1999).

[37] Anderson, *supra* note 3, at 271-72.

[38] As Berman points out,

> These acts are not explainable simply by suggesting that this is a "cooperation game" where these military officers obey international law solely to ensure that US targets or captured soldiers in the future are treated similarly. Instead, it seems clear that these officials have internalized the values of international law and see them as part of what is required, both morally and strategically.

Berman, *supra* note 30, at 34.

[39] Colonel Dick Pregent, Briefing, Interrogation Today (Nov. 2, 2005) (on file with author). In that briefing, Colonel Pregent reconstructs the path of the various memoranda and exchanges within the DOD and between the DOD and DOJ during 2001 to 2003.

President and that defenses of necessity and self-defense would potentially be available to those who violated the statute.[40] A subsequent 2 December 2002 Department of Defense (DOD) memorandum allowed, among other things, for persons being interrogated, twenty-hour-interrogations, use of phobias on interrogees, and the use of stress positions (e.g., standing for up to four hours).[41]

These appear to be expressions of an apparent state interest to expand the methods of interrogation used on suspected terrorists. Despite the Secretary of Defense's approval of the December memorandum, just over a month later, on 15 January 2003, the Secretary of Defense *rescinded* the same memorandum.[42] When the approved counter-resistance techniques for Operation Iraqi Freedom (OIF) came out in 16 April 2003,[43] they included the standard pre-2002 *Field Manual 34-52* interrogation "approaches" (techniques), along with dietary manipulation, but they did *not* include stress positions, deprivation of light, twenty-hour-interrogations, use of phobias, or use of mild-non-injurious physical contact.[44] The applicable DOD standards in force were therefore significantly different than the ones granted by the original 2002 DOJ memorandum.[45]

Whatever interests may have been at stake, during this period there was considerable inter-and intra-departmental disagreement and dispute. There was, in other words, furious dispute as to whether these expressions of apparent state interest violated standards of international law. For example, in a series of six memoranda from early 2003 on Interrogation Techniques written by Army, Navy, Air Force, and Marine Offices of the Judge Advocate Generals for a DOD Working Group, there were sharp dissents against "extreme" interrogation, concerns that proposed methods might damage American credibility and that certain proposed interrogation practices might create damaging precedents.[46]

The particulars of the above example show how different bureaucratic agencies can sharply disagree as to what constitutes a state "interest," and perhaps even cause an interest to be reconceptualized because certain norms of international law have been internalized within those bureaucracies. Granted in certain governmental bureaucracies, and assuredly in many militaries, the above norm internalization and intergovernmental struggle to determine a state "interest" likely does not occur. In a totalitarian order, the will of the despot will very possibly override such bureaucratic infighting. The differences between governmental bureaucracies simply reveal that the rational choice model of an unwavering state interest is contingent upon political structures, and that the model cannot be reified into absolute permanence.

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[40] Memorandum, Mr. Jay S. Bybee, Assistant Attorney General, to Mr. Alberto R. Gonzalez, Counsel to the President, subject: Standards of Conduct for Interrogation Under 18 §§ U.S.C. 2340-2340A (Aug. 1, 2002), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html. This memorandum was later superseded in its entirety by a subsequent DOJ memorandum. Memorandum, Mr. Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, subject: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (on file with author). This latter memorandum disagrees with certain statements regarding interrogation standards made in the earlier Bybee memorandum. *Id.*

[41] Memorandum, Mr. William J. Haynes, II, General Counsel, to Mr. Donald H. Rumsfeld, Secretary of Defense, subject: Counter-Resistance Techniques (Nov. 27, 2002) (approved Dec. 2, 2002), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html.

[42] Memorandum, Mr. Donald H. Rumsfeld, Secretary of Defense, to Commander, United States Southern Command, subject: Counter-Resistance Techniques (Jan. 15, 2003), *available at* news.findlaw.com/hdocs/docs/dod/62204index.html.

[43] Memorandum, Mr. Donald H. Rumsfeld, Secretary of Defense, to Commander, United States Southern Command, subject: Counter-Resistance Techniques in the War on Terrorism (Apr. 16, 2003), *available at* www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.16pdf).

[44] *Id.*

[45] Indeed, the legislative branch ultimately entered into this area and created definitive guidance for interrogation by Department of Defense personnel when the U.S. Congress passed a law that *only* permitted the use of interrogation methods contained in *Army Field Manual 34-52*. This law was subsequently implemented by the Department of Defense. Memorandum, Mr. Gordon England, Acting Deputy Secretary of Defense, for Secretaries of the Military Departments, et al., subject: Interrogation and Treatment of Detainees by the Department of Defense (Dec. 30, 2005) (on file with author).

[46] *See* Memorandum, Major General Thomas J. Romig, The Judge Advocate General of the Army, to General Counsel, Secretary of the Air Force, subject: Draft Report and Recommendations of the Working Group to Access the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Mar. 3, 2003); Memorandum, Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps, to General Counsel, Secretary of the Air Force, subject: Working Group Recommendations on Detainee Interrogations (Feb. 27, 2003); Memorandum, Rear Admiral Michael F. Dohr, The Judge Advocate General of the Navy, to General Counsel, Secretary of the Air Force, subject: Working Group Recommendations Relating to Interrogation of Detainees (Feb. 6, 2003); Memorandum, Major General Jack L. Rives, The Deputy Judge Advocate General of the Air Force, to General Counsel, Secretary of the Air Force, subject: Final Report and Recommendation of the Working Group to Assess the Legal Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism (Feb. 5, 2003), *available at* balkin.blogspot.com/jagmemos.pdf).

The Usefulness of *Limits*: the Law of Military Occupation

The above discussion highlights an objection to the notion of a state interest in *Limits* that is of particular relevance to military lawyers. Despite criticism of the theory, the rational choice model of *Limits*, however, has some value. Indeed, in certain areas of international law, areas where the question of international law does not necessarily involve deeply internalized norms of behavior, an analysis of international law as an expression of state interest becomes more persuasive.

As an example of this persuasiveness, one should look to the international law of military occupation. As Eyal Benvenisti points out in his book, *The International Law of Occupation*, the twentieth century saw, at least on paper, a great expansion of the scope and extent of this law.[47] And yet as Benvenisti demonstrates, this expansion is highly deceiving because the last century demonstrated an overwhelming reluctance by occupying powers to apply the same expanded set of rules.[48] Benvenisti's analysis of modern occupations led him to the following conclusion that seems lifted out of *Limits*: "My analysis of occupations shows—and this should not be surprising—that social decisions taken and implemented in occupied territories were never incompatible with outcomes sought by occupants."[49]

Benvenisti illustrates that courts in occupied territories nearly always have ruled in favor of the occupying power.[50] In only three instances have courts in third countries offered "credible applications" of occupation law, and in all three of these countries the rulings occurred "long after the occupant had been defeated and the territory liberated."[51] Supranational tribunals have likewise proven hesitant to enforce occupation law, one primary reason being the "lack of consent of states [those occupying the nations] to have these issues adjudicated."[52]

In the case of the international law of military occupation, therefore, it appears as if the state's interest holds near-absolute sway, and that the normative power of international law has little compulsory power. It seems to fit the model that the authors of *Limits* employ quite well. Why is this so?

The most significant reason is because the law of occupation provides ample opportunity for an occupying power to execute only what it perceives to be in its interests. Indeed, the law as codified in the late nineteenth century by European diplomats and politicians sought not only to protect the people of an occupied territory but to ensure that the interests of the occupying power, which one scholar has described as ensuring "a docile, accepting population, behaving as if conquest and transfer to the victor's sovereignty had already happened."[53] The starting point of modern occupation law, Article 43 of the 1907 Hague Regulations, states that the occupying power "shall take all the measures in his power to restore and ensure, as far as possible, public order, and [civil life], while respecting, *unless absolutely prevented*, the laws in force in the country."[54] There is thus significant justification in the law itself for an occupier to disregard an occupied territory's domestic structure. If one is engaged, for instance, in more than physical occupation of the territory (such as a regime change) than an occupying power can use Article 43 to make the case that it is in fact "absolutely prevented" from abiding by the laws of the former sovereign.[55] In fact, as history shows, occupying powers frequently invoked Article 43's expansive language about the duty to restore civil order and public life to justify their extensive interference in an occupied territory's governmental system.[56]

International law has had virtually no normative pull in military occupations. The law was created in such a way to maximize the stronger state's interests. Within the rational choice schema of *Limits*, there has been virtually no need to cooperate or coordinate with another state. Instead, it simply has been a matter of a state coercing another state. Dispensing with occupation law requirements under the Hague Regulations completely, states have developed "nonoccupation" methods to govern conquered territories. These methods include annexation, establishment of puppet regimes, *debellatio* (the

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[47] BENVENISTI, *supra* note 4, at 3-4, 209-12.

[48] *Id.* at 5.

[49] *Id*. at 12.

[50] *Id.* at 201.

[51] *Id*.

[52] *Id*. at 202-03.

[53] GEOFFREY BEST, HUMANITY IN WARFARE 190 (1980). Best examines the historical underpinnings of the law of occupation in that book as well. *Id.* at 179-200.

[54] Hague Convention No. IV, Respecting the Laws and Customs of War on Land art. 43, October 18, 1907, 36 Stat. 2277 (emphasis added).

[55] BENVENISTI, *supra* note 4, at 7.

[56] *Id*. at 10-11.

principle that the conquered state no longer exists), or invocation of invitation rights by the occupied territory's government.[57] The scheme of occupation law is thus largely unused. One critic has gone so far as to question whether a genuine law of occupation has ever existed.[58]

Scholars have paid close attention to the application of occupation law in Iraq, following the U.S.-led invasion and occupation in 2003. Benvenisti calls it "the most significant development in the law of occupation in recent years."[59] He points out that, despite the reluctance of the United States and United Kingdom to call themselves occupiers, United Nations Security Council Resolution (UNSCR) 1483 states that the powers were obliged to conduct themselves in accordance with the international law as occupying powers.[60] Benvenisti asserts that UNSCR 1483 has revived occupation law, and that it lays out the following fundamental principles of that law: its nature is temporary, it is supposed to serve primarily the civilian population; annexation cannot occur, and "sovereignty" is not extinguished.[61] "[T]he law of occupation, according to Resolution 1483, connotes respect to popular sovereignty, not to the deposed regime."[62]

All this is undoubtedly true. However a few points need to be considered. United Nations Security Council Resolution 1438 has to be understood in the political context. The resolution *followed* the occupation of Iraq by the United States and the United Kingdom. It did *not* set the conditions for the occupation before it occurred. The UNSCR is a product of a political body that quite explicitly represents the interests of the states within that body. And thus, in significant ways, UNSCR 1483 very much expresses the interests of the United States, the most powerful member of the Security Council—it grants the right to "transform the previous legal system" in significant ways to conform with the principles of western-style democracies.[63] The resolution also "envisions the role of the modern occupant as the heavily involved regulator," as when it calls upon the occupants to pursue the civil administration of Iraq.[64]

The Security Council's involvement suggests an occupation paradigm for future operations by powerful democratic nations. External international control over the occupation may come in the form of UNSCRs. But if UNSCR 1483 is any indication, this guidance will be rather vague, and at least somewhat coincident with the occupying power's interests, especially if the occupying nation is a superpower such as the United States. Indeed, because such resolutions are the result of state interests—the results of compromises, deals, and interests of states themselves—the use of a UNSCR may be the most effective method of internationally controlling occupations, rather than relying on supranational courts or other tribunals.

In the case of the international law of occupation, the book's economic-based rational choice theory appears empirically persuasive for a number of reasons. First, occupation law was conceived not just to protect those in the occupied territory but also to enforce the conquering state's interest. The calculus was heavily favored toward state interest from the outset since the conquering state could invoke the applicable law to pursue its interests. Second, in contrast to international law standards on torture and interrogation of prisoners, there has been little "norm internalization" of what constitutes an "occupation"—the very nature of the law is ambiguous, and some scholars doubt whether a genuine law of occupation even exists. Third, the apparent revitalization of occupation law has come about through a mechanism—UNSCRs—in which state interests of members of that Council are explicit. Therefore, in areas of international law that more clearly allow the articulation of a pure state "interest," the book's economic-based rational choice theory has some applicability. It should also be noted, however, that the modern law of occupation is a historical construction, initially developed in the late nineteenth and early twentieth centuries during the heyday of the nation-state. Because occupation law currently favors state interest does not mean that it *always* will. At least for the time being, occupation law still seems very much suited to the needs and interests of the occupying power.

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[57] *Id.* at 5.

[58] "Indeed it is tempting to question seriously whether any genuine 'law' of occupation ever existed, at least if one understands 'law' as 'authoritative and controlling state practice.'" Robert C. Beck, Review, *The International Law of Occupation*, 4 L. & POLS. BOOK REV. 89 (1994).

[59] BENVENISTI, *supra* note 4, at viii-ix.

[60] *Id.* at ix; S.C. Res. 1483, UN Doc. S/RES/1483 (May 22, 2003).

[61] BENVENISTI, *supra* note 4, at xi.

[62] *Id.*

[63] *Id.*

[64] *Id.* at xii.

Conclusion

Posner and Goldsmith have written a provocative and controversial book that is also accessible and intriguing, and they deserve a great deal of credit for this. The book is relevant for military attorneys, as it contains both strengths and weaknesses relevant to the practice of military law. Unlike other critics, who find the rational choice model without value, I think in certain areas of international law, the model appears to work very well. But I also contend that the economics-based rational choice theory suits these certain areas of international law because history has made it so. To paraphrase the historian John Lukacs, rather than understanding historical developments in terms of economic models, we instead must attempt to understand economic models in terms of historical developments.[65] As history as shown, we are—or at least can be—more than the sum of our desires or our interests, and therein lay the true limits of *The Limits of International Law*.

[65] John Lukacs, *About Historical Factors, or the Hierarchy of Powers*, *in* REMEMBERED PAST 28 (2005).

USALSA Report

United States Army Legal Services Agency

Trial Judiciary Note

A View from the Bench: Defense Requested Experts

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Introduction

Experts can provide invaluable assistance to the defense in courts-martial. Forensic experts may help develop a defense or attack the government's scientific evidence. If the accused is mentally ill, experts may assist with an insanity defense or provide mitigation evidence. In cases involving scientific, medical, or mental health issues, the defense should consider hiring an expert.

An accused in a court-martial can obtain an expert at government expense, if such assistance is necessary.[1] The defense counsel representing such an accused should request expert assistance as early as possible. The defense counsel must also decide whether to request an expert consultant or an expert witness.[2] An expert consultant's job is to help the defense counsel research the case, evaluate and develop the evidence, and understand a scientific or medical theory.[3] An expert witness's job, on the other hand, is to testify at trial.[4]

This article discusses the differences between expert consultants and expert witnesses and identifies the procedures for obtaining defense experts and how the government should process these requests.

Expert Consultants

An expert consultant assists defense counsel prepare for trial.[5] Consultants research the case and advise defense counsel in their areas of expertise. Consultants are covered by the attorney-client privilege;[6] therefore, the defense counsel can discuss trial strategy with consultants without revealing the content of these discussions to the prosecutor.

To obtain an expert consultant at government expense, the defense must show that employment of an expert is necessary for an adequate defense.[7] Specifically, the defense must show the following: (1) why expert assistance is needed, (2) what the expert assistance would accomplish, and (3) why defense counsel, on their own, are unable to gather and present the evidence that the expert consultant would develop.[8] To establish the third point, the defense counsel must show that the expert's assistance will help them understand a scientific or technical field that they would be unable to understand through independent research.

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[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2005) [hereinafter MCM]; UCMJ art. 46 (2005).

[2] United States v. Langston, 32 M.J. 894 (A.F.C.M.R. 1991) (explaining the difference between an expert consultant and expert witness).

[3] *See infra* notes 5-11 and accompanying text.

[4] *See infra* notes 12-16 and accompanying text.

[5] *Langston*, 32 M.J. at 896.

[6] MCM, *supra* note 1, MIL. R. EVID. 502; *Langston*, 32 M.J. at 896.

[7] Ake v. Oklahoma, 470 U.S. 53 (1985); United States v. Burnette, 29 M.J. 473 (C.M.A. 1990); UCMJ art. 46 (2005).

[8] United States v. Ndanyi, 45 M.J. 315 (1996) (utilizing a three-part test to determine that military judge did not err in denying defense request for assistance of DNA expert).

Although the defense can propose employment of a specific expert consultant, the government is not required to hire the requested individual if it can provide an adequate substitute.[9] An adequate substitute is one with sufficient training or experience to properly advise the defense counsel on the expert theory in question.[10] The threshold to prove that such a substitute is adequate is generally low. It does not matter whether the consultant agrees with the defense theory of the case, as long as he can assist the defense in formulating the theory[11]

Expert Witnesses

A defense expert witness's sole task it to testify at trial. Since witnesses are not covered by the attorney-client privilege,[12] defense counsel who discuss their theory of the case with an expert witness risk revealing the theory to the government. The standard for obtaining expert witnesses is whether their testimony is relevant and necessary.[13] The defense can meet this burden by showing that an expert's testimony will assist the defense theory of the case.

As with an expert consultant, the defense can propose employment of a specific expert witness. The government, however, is not required to hire the requested witness if it can provide an adequate substitute.[14] There is a relatively high threshold to show that a substitute expert witness is adequate. If the requested expert witness supports a defense theory that is relevant to the case, the adequate substitute must also support this theory. A substitute that has a different scientific view will usually be inadequate.[15] In addition, if the government has obtained an expert to assist in its case, the substitute provided to the defense must have professional qualifications reasonably comparable to those of the government expert.[16]

Obtaining the Expert

Defense counsel who need an expert should submit an appropriate request to the convening authority.[17] The request should specify what type of expert is needed and why the expert is necessary.[18] Defense counsel should also specify whether they are requesting an expert consultant or witness.

Before requesting an expert consultant, defense counsel should educate themselves on the scientific or medical issues involved. A defense request for an expert consultant will be granted only if defense counsel can show that the consultant will develop evidence that the defense counsel cannot develop on their own.[19]

Defense counsel often first ask for an expert consultant. Since consultants are covered by the attorney-client privilege, they can often more effectively help the defense prepare the case. Consultants can also help defense counsel determine if expert testimony will be needed at trial. In many cases expert consultants later become defense witnesses.[20]

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[9] United States v. Ford, 51 M.J. 445 (1999) (finding that the military judge properly denied a defense request for assistance of explosives expert where adequate substitute was provided).

[10] *Ndanyi*, 45 M.J. at 319.

[11] *Cf.* United States v. Van Horn, 26 M.J. 434 (C.M.A. 1988) (holding that the military judge erred in ruling that the government provided an adequate substitute for the defense requested expert witness; substitute was inadequate because his proferred testimony contradicted that of the defense requested expert).

[12] United States v. Langston, 32 M.J. 894 (A.F. Ct. Crim. App. 1991).

[13] MCM, *supra* note 1, R.C.M. 703(d).

[14] *Id.*

[15] *Van Horn*, 26 M.J. at 434. *Cf.* United States v. Robinson, 43 M.J. 501 (Army Ct. of Crim. App. 1995) (finding that the military judge did not abuse his discretion in denying defense motion to employ clinical psychologist as witness where the government provided a psychiatrist as an adequate substitute and defense did not establish that divergent views existed).

[16] *See* United States v. Warner, 62 M.J. 114 (2005) (providing that the government is required to provide defense expert with qualifications similar to those of government expert. Although this case involved an expert consultant, the holding applies equally to expert witnesses since the court pointed out that a consultant may become a witness). *Cf.* United States v. Robinson, 43 M.J. 501 (A.F. Ct. Crim. App. 1995) (defense is not entitled to "best" expert available).

[17] MCM, *supra* note 1, R.C.M. 703(d).

[18] *Id.*

[19] United States v. Short, 50 M.J. 370 (1999) (holding that the military judge properly denied defense request for urinalysis expert consultant where there was no showing that defense counsel was unable to educate herself on subject); United States v. Ndanyi, 45 M.J. 315, 319 (1996).

If the case involves mental health issues, requesting an inquiry into the mental responsibility of the accused under Rule for Courts-Martial 706[21] is another means of obtaining expert assistance. Although the experts who conduct the examination are not covered by the attorney-client privilege, Rule for Courts-Martial 706 generally prohibits release of statements made by the accused during the examination.[22]

Defense counsel should submit requests for experts well in advance of trial. Experts need time to research the case and formulate their opinions. The more lead-time they are given, the more effective their assistance will be.

Defense counsel may request a specific expert by name. Appropriate experts can be found at military medical facilities, local finance and information systems offices, crime and drug testing laboratories, and similar organizations. The U.S. Army Trial Defense Service also has a wealth of information on appropriate experts.[23] Requesting an expert who is employed by the government is usually more effective because it is generally easier to obtain their services and attendance at trial.[24] Civilian experts are typically expensive and arranging their testimony at trial may be difficult or impossible.[25] If the defense requests a civilian expert, the defense must provide an estimate of the expert's fees.[26] Convening authorities are only required to pay *reasonable* fees and expenses.[27]

If the convening authority denies a defense requested expert, defense counsel should promptly bring this issue to the attention of the military judge after referral of charges.[28] Waiting to litigate such issues until the eve of trial means that even if the judge grants the defense request, the defense expert will have little or no time to prepare.

The Government Response

Defense expert requests must be forwarded to the convening authority.[29] Before advising the convening authority on these requests, the government attorneys working on the case should carefully review the request to ensure it is in proper form. The government should ensure that the request properly identifies the type of expert, the necessity of the expert, and whether a consultant or a witness is involved. If the request is deficient, the government attorneys should notify the defense counsel and request clarification.

If the request is in proper form, and the expert is necessary to the case, the government attorneys should look for an appropriate expert in the local area. Government attorneys should first look for an expert who is already employed by the government.[30] If the defense has requested an expert by name, the government may consider finding an adequate substitute.[31]

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[20] *Warner*, 62 M.J. at 114.

[21] MCM, *supra* note 1, R.C.M. 706.

[22] *Id.* R.C.M. 706(c)(5); *id.* MIL. R. EVID. 302. This privilege prevents any statement made by the accused and any derivative evidence from being received into evidence against the accused. *Id.* MIL. R. EVID. 302(a). The privilege does not apply if the accused first introduces such statements into evidence. *Id.* MIL. R. EVID. 302(b)(1).

[23] *See generally* Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 1, 20.

[24] *See* United States v. Burnette, 29 M.J. 473 (C.M.A. 1990) (holding that the military judge did not err in denying defense request for civilian expert consultant in urinalysis where defense rejected the assistance of any government experts).

[25] If the trial is held overseas, there is no compulsory process to require a civilian witness to come overseas to attend. MCM, *supra* note 1, R.C.M. 703(e)(2)(A).

[26] *Id.* R.C.M. 703(d).

[27] *Army Regulation 27-10* provides that payments to expert witnesses will be made under the Department of Justice Expert Rate Schedule. *See* U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES, MILITARY JUSTICE para. 5-21(d) (13 June 2005). Although an updated version of the Department of Justice schedule is not currently available, the purpose of the Army regulation is to ensure that compensation to experts is reasonable. For a general discussion of this issue, see Major Alan K. Hahn, *Voluntary and Involuntary Expert Testimony in Courts-Martial*, 106 MIL. L. REV. 77, 97 (1984).

[28] MCM, *supra* note 1, R.C.M. 703(d).

[29] *Id.*

[30] United States v. Ndanyi, 45 M.J. 315, 319 (1996) (finding that usually the expert services available in the military are sufficient to permit the defense to adequately prepare for trial).

[31] MCM, *supra* note 1, R.C.M. 703(d).

If the government has already employed an expert to assist in their case, the substitute provided to the defense should have professional qualifications reasonably comparable to those of the government expert.[32]

The government should act on defense requests for experts expeditiously. The convening authority must take action before the issue can be litigated.[33] If the convening authority denies the request, the denial should be promptly brought to the military judge's attention. Litigating these issues on the eve of trial may result in delay of the case and greater expense for the government.

Expert Testimony at Trial

As noted above, defense expert consultants often turn into witnesses.[34] Therefore, defense counsel should discuss the trial dates with their expert at the outset, regardless of whether the expert is a consultant or a witness. Defense counsel should ensure that experts have plenty of time to prepare, should their testimony be required.

Once the defense identifies an expert consultant as a witness, the attorney-client privilege no longer applies.[35] This means that the government will be able to interview the expert and review the information the expert used to prepare for trial.

Conclusion

Experts can be critical to the defense. If an accused needs expert assistance, the defense counsel should submit a request to the convening authority as early as possible. The defense counsel must distinguish between expert witnesses and expert consultants, since different rules apply to each. If the convening authority denies a defense request for an expert and the defense wishes to litigate this issue, the defense counsel should notify the military judge as soon as practicable so the issue can be resolved well in advance of trial.

[32] United States v. Warner, 62 M.J. 114 (2005).

[33] MCM, *supra* note 1, R.C.M. 703(d).

[34] *Warner*, 62 M.J. at 114.

[35] United States v. Langston, 32 M.J. 894. 896 (A.F.C.M.R. 1991).

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2006 - October 2007) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	55th Graduate Course	14 Aug 06 – 24 May 07
5-27-C22	56th Graduate Course	13 Aug 07 – 28 May 08
5-27-C20	171st JA Officer Basic Course	22 Oct – 3 Nov 06 (BOLC III) Ft. Lee
		3 Nov 06 – 31 Jan 07 (BOLC III) TJAGSA
5-27-C20	172d JA Officer Basic Course	4 – 16 Feb 07 (BOLC III) Ft. Lee
		16 Feb – 2 May 07 (BOLC III) TJAGSA
5-27-C20	173d JA Officer Basic Course	1 – 13 Jul 07 (BOLC III) Ft. Lee
		13 – Jul – 26 Sep 07 (BOLC III) TJAGSA **(Tentative)**
5F-F70	38th Methods of Instruction Course	26 – 27 Jul 07
5F-F1	194th Senior Officers Legal Orientation Course	13 – 17 Nov 06
5F-F1	195th Senior Officers Legal Orientation Course	29 Jan – 2 Feb 07
5F-F1	196th Senior Officers Legal Orientation Course	26 – 30 Mar 07
5F-F1	197th Senior Officers Legal Orientation Course	11 – 15 Jun 07

5F-F1	198th Senior Officers Legal Orientation Course	10 – 14 Sep 07
5F-F3	13th RC General Officers Legal Orientation Course	14 – 16 Feb 07
5F-F52	37th Staff Judge Advocate Course	4 – 8 Jun 07
5F-F52-S	10th Staff Judge Advocate Team Leadership Course	4 – 6 Jun 07
5F-F55	2007 JAOAC (Phase II)	7 – 19 Jan 07
5F-JAG	2007 JAG Annual CLE Workshop	1 – 5 Oct 07
JARC-181	2007 JA Professional Recruiting Seminar	17 – 20 Jul 07
NCO ACADEMY COURSES		
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	6 Nov – 8 Dec 06
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	28 Jan – 2 Mar 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	3 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	3 Apr – 4 May 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	11 Jun – 13 Jul 07
512-27D30 (Phase 2)	Paralegal Specialist BNCOC	13 Aug – 14 Sep 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	6 Nov – 8 Dec 06
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	28 Jan – 2 Mar 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	11 Jun – 13 Jul 07
512-27D40 (Phase 2)	Paralegal Specialist ANCOC	13 Aug – 14 Sep 07
WARRANT OFFICER COURSES		
7A-270A1	18th Legal Administrators Course	5 – 9 Feb 07
7A-270A2	8th JA Warrant Officer Advanced Course	16 Jul – 3 Aug 07
7A-270A0	14th JA Warrant Officer Basic Course	29 May – 22 Jun 07
ENLISTED COURSES		
5F-F58	2007 Sergeants Major Symposium	5 – 9 Feb 07
512-27DC5	22d Court Reporter Course	29 Jan – 30 Mar 07
512-27DC5	23d Court Reporter Course	23 Apr – 22 Jun 07
512-27DC5	24th Court Reporter Course	30 Jul – 28 Sep 07
512-27DC6	8th Court Reporting Symposium	29 Oct – 3 Nov 07

512-27D/20/30	18th Law for Paralegal NCOs Course	26 – 30 Mar 07
512-27D/40/50	16th Senior Paralegal Course	18 – 22 Jun 07
512-27D-CLNCO	9th Chief Paralegal/BCT NCO Course	5 – 9 Mar 07
ADMINISTRATIVE AND CIVIL LAW		
5F-F21	6th Advanced Law of Federal Employment Course	17 – 19 Oct 07
5F-F22	61st Law of Federal Employment Course	15 – 19 Oct 07
5F-F23	60th Legal Assistance Course	7 – 11 May 07
5F-F23	61st Legal Assistance Course	29 Oct – 2 Nov 07
5F-F24	31st Admin Law for Military Installations Course	19 – 23 Mar 07
5F-F28	2006 Income Tax Course	11 – 15 Dec 06
5F-F29	25th Federal Litigation Course	30 Jul – 3 Aug 07
5F-F202	5th Ethics Counselors Course	16 – 20 Apr 07
5F-F23E	2007 USAREUR Legal Assistance CLE	22 – 26 Oct 07
5F-F24E	2007 USAREUR Administrative Law CLE	17 – 21 Sep 07
5F-F26E	2007 USAREUR Claims Course	15 – 19 Oct 07
5F-F28E	2006 USAREUR Income Tax CLE	4 – 8 Dec 06
5F-F28H	2006 HAWAII Income Tax CLE	13 – 17 Nov 06

CONTRACT AND FISCAL LAW		
5F-F10	157th Contract Attorneys Course	5 – 13 Mar 07
	158th Contract Attorneys Course	23 Jul – 3 Aug 07
5F-F11	2006 Government Contract Law Symposium	5 – 8 Dec 06
5F-F12	76th Fiscal Law Course	30 Apr – 4 May 07
5F-F13	3d Operational Contracting Course	14 – 16 Mar 07
5F-F102	6th Contract Litigation Course	9 – 13 Apr 07
5F-F15E	2007 USAREUR Contract & Fiscal Law CLE	13 – 16 Feb 07
N/A	2007 Distance Learning Fiscal Law	6 – 9 Feb 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Washington, DC)	16 – 19 Jan 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Yuma, AZ)	22 – 26 Jan 07
5F-F14	Comptrollers Accreditation Fiscal Law Course (Ft. Monmouth, NJ)	5 – 8 Jun 07

CRIMINAL LAW		
5F-F33	50th Military Judge Course	23 Apr – 11 May 07
5F-F34	27th Criminal Law Advocacy Course	5 – 16 Feb 07
5F-F34	28th Criminal Law Advocacy Course	10 – 21 Sep 07
5F-301	10th Advanced Advocacy Training	29 May – 1 Jun 07
5F-F35E	2007 USAREUR Criminal Law CLE	29 Jan – 2 Feb 07
INTERNATIONAL AND OPERATIONAL LAW		
5F-F42	3d Advanced Intelligence Law Course	27 – 29 Jun 07
	48th Operational Law Course	30 Jul – 10 Aug 07
5F-F42	87th Law of War Course	29 Jan – 2 Feb 07
5F-F42	88th Law of War Course	9 – 13 Jul 07
5F-F44	2d Information Operations Course	16 – 20 Jul 07
5F-F45	7th Domestic Operational Law Course	29 Oct – 2 Nov 07
5F-F47	47th Operational Law Course	26 Feb – 9 Mar 07
5F-F47	48th Operational Law Course	30 Jul – 10 Aug 07

3. Naval Justice School and FY 2007 Course Schedule

Please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131, for information about the courses.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	16 Oct – 15 Dec 06 22 Jan – 23 Mar 07 4 Jun – 3 Aug 07 13 Aug – 12 Oct 07
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	26 – 30 Mar 07 (USMC) 26 – 30 Mar 07 (NJS) 6 – 10 Aug 07 (USMC) 6 – 10 Aug 07 (NJS)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	7 – 11 May 07 10 – 14 Sep 07
914L	Law of Naval Operations (Reservists) (010) Law of Naval Operations (Reservists) (020)	14 – 18 May 07 17 – 21 May 07
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	29 May – 8 Jun 07 6 – 17 Aug 07

850V	Law of Military Operations (010)	11 – 22 Jun 07
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	26 – 30 Mar 07 (San Diego) 16 – 20 Apr 07 (Norfolk)
	National Institute of Trial Advocacy (020)	14 – 18 May 07 (San Diego)
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060)	8 – 12 Jan 07 (New Port) 12 – 16 Mar 07 (New Port) 7 – 11 May 07 (New Port) 23 – 27 Jul 07 (New Port) 24 – 28 Sep 07 (New Port)
4048	Estate Planning (010)	23 – 27 Jul 07
No CDP	Prosecuting Trial Enhancement Training (010)	22 – 26 Jan 07
7487	Family Law/Consumer Law (010)	16 – 20 Apr 07
7485	Litigating National Security (010)	5 – 7 Mar 07
748B	Naval Legal Service Command Senior Officer Leadership (010)	20 – 31 Aug 07
2205	Defense Trial Enhancement (010)	8 – 12 Jan 07
3938	Computer Crimes (010)	21 – 25 May 07 (Norfolk)
961D	Military Law Update Workshop (Officer) (010) Military Law Update Workshop (Officer) (020)	TBD TBD
961M	Effective Courtroom Communications (020)	26 – 30 Mar 07 (San Diego)
961J	Defending Complex Cases (010)	16 – 20 Jul 07
525N	Prosecuting Complex Cases (010)	9 – 13 Jul 07
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	11 – 15 Dec 06 (Pensacola, FL) 29 Jan – 2 Feb 07 (Yokosuka, Japan) 5 Feb – 9 Feb 07 (Okinawa, Japan) 12 – 16 Feb 07 (Pensacola, FL) 26 – 30 Mar 07 (Pensacola, FL) 2 – 6 Apr 07 (Quantico, VA) 9 – 13 Apr 07 (Camp Lejeune, NC) 23 – 27 Apr 07 (Pensacola, FL) 23 – 27 Apr 07 (Naples, Italy) 4 – 8 Jun 07 (Pensacola, FL) 9 – 13 Jul 07 (Pensacola, FL) 27 – 31 Aug 07 (Pensacola, FL)

961A	Continuing Legal Education (PACOM) (010) Continuing Legal Education (EUCOM) (020)	29 – 30 Jan 07 (Yokosuka, Japan) 23 – 24 Apr 07 (Naples, Italy)
7878	Legal Assistance Paralegal Course (010)	16 Apr – 20 Apr 07
3090	Legalman Course (010) Legalman Course (020)	16 Jan – 30 Mar 07 16 Apr – 29 Jun 07
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 07
049N	Reserve Legalman Course (Phase I) (010)	9 – 20 Apr 07
056L	Reserve Legalman Course (Phase II) (010)	23 Apr – 4 May 07
846M	Reserve Legalman Course (Phase III) (010)	7 – 18 May 07
5764	LN/Legal Specialist Mid Career Course (020)	17 – 28 Sep 07
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted (020)	TBD TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	19 – 30 Mar 07 (Newport) 7 – 18 May 07 (Norfolk) 16 – 27 Jul 07 (San Diego)
4046	SJA Legalman (020)	29 May – 7 Jun 07 (Newport)
627S	Senior Enlisted Leadership Course (040) Senior Enlisted Leadership Course (050) Senior Enlisted Leadership Course (060) Senior Enlisted Leadership Course (070) Senior Enlisted Leadership Course (080) Senior Enlisted Leadership Course (090) Senior Enlisted Leadership Course (100) Senior Enlisted Leadership Course (110) Senior Enlisted Leadership Course (120) Senior Enlisted Leadership Course (130) Senior Enlisted Leadership Course (140) Senior Enlisted Leadership Course (150) Senior Enlisted Leadership Course (160) Senior Enlisted Leadership Course (170) Senior Enlisted Leadership Course (180)	10 – 12 Jan 07 (Mayport) 29 – 31 Jan 07 (Pendleton) 30 Jan – 1 Feb 07 (Yokosuka, Japan) 6 – 8 Feb 07 (Okinawa, Japan) 21 – 23 Feb 07 (Norfolk) 20 – 22 Mar 07 (San Diego) 28 – 30 Mar 07 (Norfolk) 25 – 27 Apr 07 (Norfolk) 24 – 26 Apr 07 (Bremerton) 1 – 3 May 07 (San Diego) 23 – 25 May 07 (Norfolk) 17 – 19 Jul 07 (San Diego) 18 – 20 Jul 07 (Great Lakes) 15 – 17 Aug 07 (Norfolk) 28 – 30 Aug 07 (Pendleton)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	27 Nov – 15 Dec 06 29 Jan – 16 Feb 07 5 – 23 Mar 07 30 Apr – 18 May 07 4 – 22 Jun 07 23 Jul – 10 Aug 07 10 – 28 Sep 07

0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	4 – 15 Dec 06 22 Jan – 2 Feb 07 5 – 16 Mar 07 2 – 13 Apr 07 4 – 15 Jun 07 30 Jul – 10 Aug 07 10 – 21 Sep 07
3760	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	8 – 12 Jan 07 (Mayport) 26 Feb – 2 Mar 07 2 – 6 Apr 07 25 – 29 Jun 07 16 – 20 Jul 07 (Great Lakes) 27 – 31 Aug 07
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (030)	18 – 29 Jun 07
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	27 Nov – 15 Dec 06 8 – 26 Jan 07 26 Feb – 16 Mar 07 7 – 25 May 07 11 – 29 Jun 07 30 Jul – 17 Aug 07 10 – 28 Sep 07
947J	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	27 Nov – 8 Dec 06 8 – 19 Jan 07 2 – 13 Apr 07 7 – 18 May 07 11 – 22 Jun 07 30 Jul – 10 Aug 07
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	29 Jan – 2 Feb 07 (Pendleton) 12 – 16 Feb 07 (San Diego) 2 – 6 Apr 07 (San Diego) 23 – 27 Apr 07 (Bremerton) 4 – 8 Jun 07 (San Diego) 20 – 24 Aug 07 (San Diego) 27 – 31 Aug 07 (Pendleton)
2205	CA Legal Assistance Course (010)	5 – 9 Feb 07 (San Diego)
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalmen (010)	26 Feb – 9 Mar 07

4. Air Force Judge Advocate General School Fiscal Year 2007 Course Schedule

Please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445, for information about attending the listed courses.

Air Force Judge Advocate General School Maxwell AFB, AL	
Course Title	**Dates**
Judge Advocate Staff Officer Course, Class 07-A	10 Oct – 14 Dec 06
Deployed Fiscal Law & Contingency Contracting Course, Class 07-A	28 Nov – 1 Dec 06
Paralegal Apprentice Course, Class 07-02	8 Jan – 21 Feb 07
Claims & Tort Litigation Course, Class 07-A	8 – 12 Jan 07
Air National Guard Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Air Force Reserve Annual Survey of the Law, Class 07-A & B (Off-Site)	19 – 20 Jan 07
Computer Legal Issues Course, Class 07-A	22 – 26 Jan 07
Legal Aspects of Information Operations Law Course, Class 07-A	22 – 24 Jan 07
Trial & Defense Advocacy Course, Class 07-A	29 Jan – 9 Feb 07
Total Air Force Operations Law Course, Class 07-A	9 – 11 Feb 07
Homeland Defense Course, Class 07-A	12 – 16 Feb 07
Fiscal Law Course (DL), Class 07-A	12 – 16 Feb 07
Paralegal Craftsman Course, Class 07-02	13 Feb – 20 Mar 07
Judge Advocate Staff Officer Course, Class 07-B	20 Feb – 20 Apr 07
Paralegal Apprentice Course, Class 07-03	2 Mar – 13 Apr 07
Environmental Law Update Course (DL), Class 07-A	26 – 30 Mar 07
Paralegal Craftsman Course, Class 07-003	2 Apr – 4 May 07
Interservice Military Judges' Seminar, Class 07-A	10 – 13 Apr 07
Advanced Trial Advocacy Course, Class 07-A	23 – 27 Apr 07
Paralegal Apprentice Course, Class 07-04	22 Apr – 5 Jun 07
Environmental Law Course , Class 07-A	30 Apr – 4 May 07
Reserve Forces Judge Advocate Course, Class 07-A	7 – 11 May 07
Reserve Forces Paralegal Course, Class 07-A	7 – 18 May 07
Operations Law Course, Class 07-A	14 – 24 May 07

Military Justice Administration Course, Class 07-A	21 – 25 May 07
Accident Investigation Board Legal Advisors' Course, Class 07-A	4 – 8 Jun 07
Staff Judge Advocate Course, Class 07-A	11 – 22 Jun 07
Law Office Management Course, Class 07-A	11 – 22 Jun 07
Paralegal Apprentice Course, Class 07-05	18 Jun – 31 Jul 07
Advanced Labor & Employment Law Course, Class 07-A	25 – 29 Jun 07
Negotiation and Appropriate Dispute Resolution Course, Class 07-A	9 – 13 Jul 07
Judge Advocate Staff Officer Course, Class 07-C	16 Jul – 14 Sep 07
Paralegal Craftsman Course, Class 07-04	7 Aug – 11 Sep 07
Paralegal Apprentice Course, Class 07-06	13 Aug – 25 Sep 07
Reserve Forces Judge Advocate Course, Class 07-B	27 – 31 Aug 07
Trial & Defense Advocacy Course, Class 07-B	17 – 28 Sep 07
Legal Aspects of Sexual Assault Workshop, Class 07-A	25 – 27 Sep 07

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the March 2006 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2007

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2006***, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2007. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2007 JAOAC will be held in January 2007 and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2006). If the student receives notice of the need to re-do any examination or exercise after 1 October 2006, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2006 will not be cleared to attend the 2007 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions regarding attendance at Phase II (Residence Phase) or completion of Phase I writing exercises, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil.

For system or help desk issues regarding JAOAC or any on-line or correspondence course material, please contact the Distance Learning Department at jagc.training@hqda.army.mil or commercial telephone (434) 971-3153.

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.
Florida**	Assigned month every three years
Georgia	31 January annually
Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually

New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period end 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially
West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state).
**Must declare exemption.

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2006-2007).

Date	Unit/Location	ATTRS Course Number	Topic	POC
17-20 Nov 06	12th LSO Columbia, SC	Course #: JAO-1 Class: 001	International & Operational Law Administrative & Civil Law/ Legal Assistance	LTC Jim Hardin (919) 219-3860 jim.hardinjr@us.army.mil
10-12 Nov 06	214th LSO Bloomington, MN		Cancelled due to funding	CPT Eric Teegarden (612) 239-3599 eric.teegarden@us.army.mil
18-19 Nov 06	77th RRC New York City, NY	Class: 002	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	MAJ John P. Dupon (718) 352-5654 john.dupon@us.army.mil
27-28 Jan 07	70th RRC Seattle, WA	Class: 003	International & Operational Law Administrative & Civil Law/ Legal Assistance	MAJ Tom Quinlan (253) 565-5019 thomas.p.quinlan@us.army.mil SFC Victoria White (ATTRS Registration) Victoria.stephens@usar.army.mil
3-4 Feb 07	96th RRC/87th LSO Salt Lake City, UT	Class: 004	International & Operational Law Administrative & Civil Law/ Legal Assistance	SFC Matthew Neumann (801) 656-3600 matthew.neumann@usar.army.mil
24-25 Feb 07	174th LSO Buena Vista (Orlando), FL	Class: 005	International & Operational Law Contract & Fiscal Law	MSG Timothy Stewart (305) 779-4022 tim.stewart@us.army.mil
3-4 Mar 07	10th LSO Ft. Belvoir, VA	Class: 006	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	MAJ Arthur Kaff (703) 588-6762 arthur.kaff@us.army.mil
10-11 Mar 07	63d RRC/78th LSO Anaheim, CA	Class: 007	Contract & Fiscal Law Criminal Law	MAJ DeEtte Loeffler (619) 241-6966 deette.loeffler@us.army.mil
20-22 Apr 07	90th RRC Tulsa, OK	Class: 008	Criminal Law Administrative & Civil Law/ Legal Assistance	LTC Baucum Fulk (501) 771-8765 baucum.fulk@us.army.mil
28-29 Apr 07	Indiana ARNG Indianapolis, IN	Class: 009	Contract & Fiscal Law Administrative & Civil Law/ Legal Assistance	LTC Brian Dickerson (317) 247-3491 brian.c.dickerson@in.ngb.army.mil
4-6 May 07	213th LSO Atlanta, GA	Class: 010	International & Operational Law Contract & Fiscal Law	LTC Robin Allen (404) 562-9583 allen.robin@epamail.epa.gov
19-20 May 07	139th LSO Nashville, TN	Class: 011	Contract & Fiscal Law Criminal Law	LTC Kymberly Haas (615) 256-3148 attorneykhaas@aol.com
19-20 May 07	91st LSO Oak Brook, IL	Class: 012	International & Operational Law Administrative & Civil Law/ Legal Assistance	CPT Bradley Olson (309) 782-3361 bradley.olson@us.army.mil
22-24 Jun 07	94th RRC Boston/Devins, MA	Class: 013	International & Operational Law Administrative & Civil Law/ Legal Assistance	CPT Susan Lynch (978) 784-3933 susan.lynch@usar.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile.Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

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AD A372624	Legal Assistance Worldwide Directory, JA-267 (1999).
AD A360700	Tax Information Series, JA 269 (2002).
AD A350513	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).
AD A350514	Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

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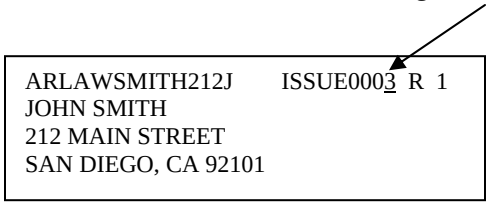

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