THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-425

October 2008

Articles

Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations
Major Timothy Austin Furin

Sentencing Credit for Pretrial Restriction
Major Elizabeth A. Harvey

Cultural Property Protection in Stability Operations
Dick Jackson

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Exercising Passive Personality Jurisdiction over Combatants
Lieutenant Colonel Eric Talbot Jensen

CLE News

Current Materials of Interest

Editor, Captain Alison M. Tulud
Assistant Editor, Major Ann B. Ching
Assistant Editor, Captain Lori A. Magee
Technical Editor, Charles J. Strong

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editor and Assistant Editor thank the Adjunct Editors for their invaluable assistance. The Board of Adjunct Editors consists of highly qualified Reserve officers selected for their demonstrated academic excellence and legal research and writing skills. Prospective candidates may send Microsoft Word versions of their resumes, detailing relevant experience, to the Technical Editor at charles.strong@hqda.army.mil

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department; and the Director, Professional Writing Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. *The Army Lawyer* welcomes articles from all military and civilian authors on topics of interest to military lawyers. Articles should be submitted via electronic mail to charles.strong@hqda.army.mil. Articles should follow *The Bluebook, A Uniform System of Citation* (18th ed. 2005) and the *Military Citation Guide* (TJAGLCS, 13th ed. 2008). No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

Address changes for official channels distribution: Provide changes to the Editor, *The Army Lawyer*, The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781, telephone 1-800-552-3978 (press 1 and extension 3396) or electronic mail to charles.strong@hqda.army.mil.

Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

Articles

Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations
Major Timothy Austin Furin 1

Sentencing Credit for Pretrial Restriction
Major Elizabeth A. Harvey 27

Cultural Property Protection in Stability Operations
Dick Jackson 47

Office of the Judge Advocate General

International and Operational Law Division

International and Operational Law Practice Note

Exercising Passive Personality Jurisdiction over Combatants
Lieutenant Colonel Eric Talbot Jensen 58

CLE News 60

Current Materials of Interest 73

Individual Paid Subscriptions to *The Army Lawyer* ..... Inside Back Cover

Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations

Major Timothy Austin Furin[*]

It's hard to conceive that it would take more forces to provide stability in post-Saddam Iraq than it would take to conduct the war itself and secure the surrender of Saddam's security forces and his army. Hard to imagine.[1]

I. Introduction

Since the end of the Cold War, the United States has been increasingly involved in stabilization and reconstruction operations throughout the world.[2] In many cases, the government has failed to rapidly and effectively respond when necessary.[3] These failures occurred, in large part, because the U.S. Government was not fully prepared to execute these operations.[4] This has resulted in the unnecessary loss of human life, increased damage to civilian infrastructure, and increased overall stabilization and reconstruction costs.[5] The U.S. Government's lack of preparedness in this area was most readily apparent after the fall of Baghdad.[6] The early stabilization and reconstruction efforts in Iraq were met with sharp public criticism and are largely viewed as the catalyst for change in the U.S. Government's policy concerning how stabilization and reconstruction operations are conducted.[7]

Within the Department of Defense (DOD), there have been three significant changes in the conduct of stabilization and reconstruction operations.[8] First, DOD formalized a new stability operations policy that elevated stability operations to a core military mission on par with combat operations.[9] Second, DOD broadened its military planning guidance to more fully address pre-conflict and post-conflict operations.[10] Third, DOD developed a new joint operating concept to serve as the basis for how the military will support future Stabilization, Security, Transition and Reconstruction (SSTR) operations.[11]

The DOD's new approach to SSTR operations raises two critical issues: (1) what is DOD's role when executing these operations and, (2) to what extent can these operations be lawfully conducted under existing fiscal law principles? This article will address those questions. In doing so, it will examine DOD's new approach to SSTR operations and determine the extent to which the armed forces can legally conduct these operations under the current statutory appropriations and authorizations that Congress has enacted for DOD. It will also examine current SSTR operations conducted in support of the

---

[*] Judge Advocate, U.S. Army. Presently assigned as Trial Attorney, Contract and Fiscal law Division, U.S. Army Legal Services Agency, Arlington, Va. LL.M., 2008, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.; J.D., 2003, Temple University; B.S., 1996, University of Akron; A.A.S., 1996, University of Akron. Previous assignments include: Trial Counsel, 2d Brigade, 3d Infantry Division, Fort Stewart, Ga., 2006–2007; Chief of International and Operational Law, Multi-National Division-Baghdad and 3d Infantry Division, Fort Stewart, Ga., 2004–2006; Operational Law Attorney, 3d Infantry Division, Fort Stewart, Ga., 2004; Legal Assistance Attorney, 3d Infantry Division, Fort Stewart, Ga., 2004. Member of the bars of Pennsylvania, the Court of Federal Claims, and the United States Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[1] *Hearing Before the H. Budget Comm.* (Feb. 27, 2003) (statement of Paul Wolfowitz, U.S. Deputy Sec'y of Def.)

[2] U.S. GOV'T ACCOUNTABILITY OFFICE, MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE DOD'S STABILITY OPERATIONS APPROACH AND ENHANCE INTERAGENCY PLANNING, GAO-07-549, at 1 (May 2007) [hereinafter GAO-07-549] (explaining why the Government Accountability Office conducted this study).

[3] Colonel John C. Buss, *The State Department Office of Reconstruction and Stabilization and Its Interaction with the Department of Defense*, 09–05 CTR. FOR STRATEGIC LEADERSHIP 1 (2005) (issue paper written in partial fulfillment of Master of Strategic Studies Degree while the author attended the U.S. Army War College) (on file with author).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* GAO-07-549, *supra* note 2, at 3–4.

[9] U.S. DEP'T OF DEFENSE DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS para. 1.2 (28 Nov. 2005) [hereinafter DODD 3000.05].

[10] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (17 Sept. 2006) (C1, 13 Feb. 2008) [hereinafter JOINT PUB. 3-0].

[11] U.S. DEP'T OF DEFENSE, MILITARY SUPPORT TO STABILIZATION, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS JOINT OPERATING CONCEPT VERSION 2.0 (Dec. 2006) [hereinafter JOINT OPERATING CONCEPT].

Global War on Terrorism, before identifying additional appropriations and authorizations that would enable the U.S. military to fully execute these operations.

This article begins with an overview of the existing fiscal law framework and discusses how that framework is applied to DOD when funding military operations. By examining the U.S. Government's stabilization and reconstruction policy and focusing on the changes that have been made as a result of the perceived failures in Iraq, this article evaluates DOD's new approach to SSTR operations and determines the scope of military support envisioned under that approach. It then discusses several select Congressional appropriations and authorizations that permit DOD to conduct foreign assistance. Finally, this article evaluates the SSTR operations currently being executed in support of the Global War on Terrorism, identifies the fiscal and policy issues raised, and recommends potential solutions to those issues.

II. Fiscal Framework

The general rule is that the Department of State (DOS) is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.[12] There are two exceptions to this rule that allow DOD to fund and conduct foreign assistance in certain cases.[13] First, the Government Accountability Office (GAO) has determined that DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.[14] Second, DOD can fund and conduct foreign assistance if Congress enacts a DOD appropriation and/or authorization for that purpose.[15] In order to fully understand how these exceptions are applied, it is necessary to examine the fiscal framework in which they are rooted.

A. *United States v. MacCollom*

In the case of *United States v. MacCollom*,[16] the Supreme Court examined a statute that granted limited authority to federal courts authorizing them to expend public funds to furnish transcripts for plaintiffs in certain actions.[17] At issue in *MacCollom* was whether the federal courts could authorize the expenditure of public funds to furnish transcripts for plaintiffs in actions that were not explicitly covered by the statute.[18] The Court determined that public funds could not be expended without express congressional authorization.[19] In the plurality opinion, Justice Rehnquist noted, "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."[20] *MacCollom* is the foundation upon which the remainder of the fiscal framework is built. The next section of this article demonstrates how this rule is applied to DOD when funding military activities.

B. The Honorable Bill Alexander Opinion

On 25 January 1984, Congressman Bill Alexander requested that the GAO investigate and provide a formal legal opinion concerning the propriety of using DOD Operations and Maintenance (O&M) appropriations to fund various activities which took place during a military exercise in the Republic of Honduras.[21] Congressman Alexander also requested that the GAO

---

[12] NAT'L SEC. PRESIDENTIAL, DIR. 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 2 (7 Dec. 2005) [hereinafter NSPD 44]; *see also* The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A (1984); Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

[13] *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A; *see also* U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

[14] *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

[15] *Id.*; *see also* U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

[16] 426 U.S. 317 (1976).

[17] *Id.* at 320.

[18] *Id.* at 321.

[19] *Id.*

[20] *Id.* (citing Reeside v. Walker, 11 How. 272, 291 (1851)).

[21] The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A, at 1 (1984).

determine whether any Anti-Deficiency Act (ADA) violations had occurred if they found that the participating units had improperly used O&M appropriations to fund those activities.[22]

1. Facts

On 3 August 1983, DOD commenced a joint combined military exercise (Ahuas Tara) in the Republic of Honduras.[23] During this exercise, over 12,000 U.S. military personnel participated in joint maneuvers with the Honduran military.[24] Part of these maneuvers involved U.S. military forces providing substantial infantry, artillery, and medical training to Honduran military personnel.[25]

United States military forces also completed various construction activities throughout the exercise.[26] These activities included: (1) building a 3500-foot dirt airstrip; (2) expanding a 4300-foot dirt airstrip to 8000 feet; (3) expanding a 3000-foot asphalt airstrip to 3500 feet; (4) building approximately 300 wooden huts to use as barracks, dining facilities, and administrative offices; and (5) conducting site preparation and installing two radar facilities.[27]

Finally, U.S. military forces executed numerous humanitarian assistance missions in support of the exercise.[28] These missions included: (1) providing medical assistance to approximately 50,000 Honduran civilians; (2) providing veterinary services to approximately 40,000 animals; and (3) building a school to be used by Honduran children.[29]

All of the aforementioned activities were charged to DOD O&M appropriations as operational exercise expenses.[30] Generally, O&M appropriations can only be used for "expenses, not otherwise provided for, necessary for the operation and maintenance of the applicable service or agency."[31] The main issue in this case was whether these activities were necessary for the operation or maintenance of the U.S. military units that participated in the exercise.

2. The GAO Findings

On 22 June 1984, the GAO issued a formal opinion finding that DOD had improperly used O&M appropriations during the exercise.[32] First, they determined that DOD improperly used O&M appropriations to train Honduran military personnel and concluded that this training should have been funded by DOS as security assistance to the Republic of Honduras.[33] Next, the GAO found that DOD improperly used O&M appropriations to fund construction activities that cost in excess of $200,000.[34] The GAO indicated that O&M appropriations could have been used to fund construction activities costing less than $200,000 if the activities were primarily for the benefit of U.S. military forces and not for the benefit of the Honduran military.[35] Finally, the GAO determined that DOD improperly used O&M funds to conduct humanitarian assistance

---

[22] *Id.*

[23] *Id.* at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 4.

[32] *Id.* at 1.

[33] *Id.*

[34] *Id.* The statutory threshold for Unspecified Minor Military Construction (UMMC) in 1983 was $200,000. *Id.* at 7. The current statutory threshold for UMMC is $750,000. Department of Defense Appropriations Act, 2008, Pub. L. No. 110–116, div. A, tit. 2, 121 Stat. 1295 (2007).

[35] *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A, at 1.

activities.[36] The GAO noted that DOD has no separate authority to conduct humanitarian assistance activities except on behalf of other U.S. Government agencies or as incidental to the provision of security assistance.[37]

The GAO then turned to the issue of whether the misuse of DOD O&M appropriations, by the units involved in the exercise, constituted ADA violations.[38] The GAO found that these units committed ADA violations when they used O&M appropriations to fund the training of Honduran military personnel and when they used O&M appropriations to provide humanitarian and civic assistance.[39] The GAO was unable to determine if any ADA violations occurred as a result of the various construction activities because they could not establish if any of those activities individually exceeded the $200,000 threshold for unspecified minor military construction.[40] They recommended that DOD conduct its own investigation on this point.[41]

The next sub-section of this article discusses the analysis the GAO used to reach their findings. This analysis is important because it will be used to evaluate whether current SSTR operations are being properly funded.

3. The GAO Analysis

The GAO analysis started by reiterating long standing fiscal law principles.[42] First, the GAO noted that O&M appropriations are to be used for "expenses, not otherwise provided for, necessary for the operation and maintenance of the applicable service or agency."[43] The GAO then stated that DOD did not have unlimited discretion on how to use O&M appropriations.[44] Rather, the use of O&M appropriations must be "necessary or incidental to the proper execution of the object of the appropriation."[45] This is often referred to as the Necessary Expense Doctrine.[46]

The GAO then discussed three factors to be considered under the Necessary Expense Doctrine.[47] First, "the expenditure must be reasonably related to the purpose for which the appropriation was made."[48] Next, "the expenditure must not be prohibited by law."[49] Finally, "the expenditure must not fall specifically within the scope of some other category of appropriations."[50] The GAO then applied these three factors to the activities conducted during the joint combined military exercise in Honduras.[51]

a. Training Activities

The GAO found that DOD improperly used O&M appropriations to train Honduran military personnel during the exercise because the training amounted to security assistance and as such, fell specifically within the scope of more specific appropriations.[52] The GAO noted that during combined military exercises there will necessarily "be a transfer of information

---

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1–2.

[39] *Id.* at 1.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 4.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, 10 U.S.C. § 2241(b) (2000).

[47] *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A, at 4.

[48] *Id.* (citing To Sec'y of State, 42 Comp. Gen. 226, 228 (1962)).

[49] *Id.* (citing To the Sec'y of Agriculture, 38 Comp. Gen. 782, 785 (1959)).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 12.

and skills between the armed forces of the participating countries."[53] The GAO determined that "some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure 'interoperability' of the two forces."[54] The issue here was whether the transfer of information rose "to a level of formal training comparable to that normally provided by security assistance projects."[55]

The GAO examined the training that was conducted by U.S. military forces and found that it constituted formal training instead of training geared towards ensuring the interoperability of United States and Honduran military forces.[56] The GAO determined that DOD could not use O&M appropriations to fund and conduct this training because Congress had specifically established comprehensive legislative programs to formally train foreign military forces.[57]

b. Construction Activities

The GAO found that DOD improperly used O&M appropriations to fund construction activities costing in excess of $200,000, the statutory threshold for unspecified minor military construction projects.[58] They determined that DOD's use of O&M appropriations was proper to the extent construction activities cost less than $200,000.[59] The GAO, however, was unable to determine which construction activities were proper because they could not verify the costs or the accounting methods used.[60]

The GAO noted that Congress had specifically appropriated funds to be used for military construction projects.[61] Next, they established, that apart from this appropriation, Congress had also provided authorization for DOD to use O&M funds for unspecified minor military construction projects costing less than $200,000.[62] The GAO then noted that neither of these authorities were "the basis for DOD's use of O&M funds for its construction activities in Honduras."[63] As such, the GAO examined whether DOD had separate authority, apart from those mentioned above, to use O&M funds for the construction activities conducted during the exercise.[64] The GAO determined that DOD did not have separate authority to use O&M funds for military construction activities because Congress had legislated specific appropriations available for these activities.[65] The GAO then found that regardless of DOD's intentions, O&M appropriations could be used to fund construction activities costing less than the statutory threshold.[66]

c. Humanitarian and Civic Assistance Activities

The GAO found that DOD improperly used O&M appropriations to perform humanitarian assistance and civic activities during the exercise because such activities fell specifically within the scope of other appropriations.[67] First, the GAO recognized that DOD "has long carried out a wide variety of Humanitarian Assistance and civic action programs in Central America."[68] It then noted that, "[i]n some cases, assistance has been provided through written agreements with the Agency

[53] *Id.*

[54] *Id.*

[55] *Id.* at 12–13.

[56] *Id.* at 13.

[57] *Id.*

[58] *Id.* at 10.

[59] *Id.*

[60] *Id.* at 1–2.

[61] *Id.* at 7.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 10.

[67] *Id.* at 14.

[68] *Id.*

for International Development (AID) under authority of the Economy Act, 31 U.S.C. § 1535. In other cases, however, U.S. forces have carried out humanitarian and civic action activities without reimbursement from AID or the host-country."[69] The issue in this case was whether DOD has independent authority to conduct humanitarian assistance activities.[70]

The GAO determined that DOD could conduct humanitarian assistance activities on a limited basis as part of its core military mission.[71] The issue then became whether the humanitarian assistance activities conducted in this case exceeded the scope of what was permissible.[72] The GAO examined the activities conducted during the exercise and found that they were extremely extensive in nature and as such, exceeded the scope of what was permissible.[73] The GAO determined that these activities should have been funded and conducted under DOS authority and not with DOD O&M appropriations.[74]

4. The Conclusion

The Honorable Bill Alexander opinion adds two key pieces to the fiscal framework. First, it establishes that DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.[75] Second, it establishes when DOD can use O&M appropriations to conduct foreign assistance.[76] In particular, it clarifies what activities are "necessary or incidental to the proper execution of the object of an appropriation."[77]

C. Conclusion

The DOS is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.[78] There are two exceptions to this general rule.[79] First, DOD can fund and train foreign military forces if the purpose of the training is interoperability, safety, or familiarization of those forces with U.S. military forces.[80] Second, DOD can fund or conduct foreign assistance if Congress enacts a DOD appropriation and/or authorization for that purpose.[81] Absent one of these two exceptions, DOD cannot fund or conduct foreign assistance on behalf of the U.S. Government. This fiscal framework significantly affects DOD's ability to conduct SSTR operations pursuant to DOD Directive 3000.05.[82]

III. The U.S. Government's Stabilization and Reconstruction Policy

There are numerous U.S. Government agencies that are involved with creating and implementing U.S. foreign policy.[83] The DOS and DOD are largely viewed as the two most significant agencies within this area.[84] This section of the article will

---

[69] *Id.*

[70] *Id.*

[71] *Id.* at 15.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* at 13.

[76] *Id.* at 4.

[77] *Id.*

[78] NSPD 44, *supra* note 12, at 2; *see also* The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A; Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

[79] *The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

[80] *Id.* at 13.

[81] *Id.* at 4; *see also* U.S. CONST. arts. I, § 9, cl. 7; IV, § 3, cl. 2.

[82] *See* DODD 3000.05, *supra* note 9.

[83] Colonel Rickey L. Rife, Defense Is from Mars, State Is from Venus: Improving Communications and Promoting National Security 1 (1998) (unpublished M.S. thesis, U.S. Army War College) (on file with author).

[84] *Id.*

discuss how these agencies have modified their approach to stabilization and reconstruction operations as a result of the Global War on Terrorism.

A. Past Practice

In the past, U.S. foreign policy was conducted by DOS "until it was apparent that diplomacy had run its course and war was inevitable—at which point it was turned over to the military."[85] This separatist approach changed considerably in the years following the Cold War.[86] After the fall of the Soviet Union, DOS and DOD increasingly found themselves being forced to work together to achieve foreign policy goals.[87] Both agencies struggled to define their roles in this new and changing global environment.[88] This identity crisis significantly impacted the various peacekeeping missions and humanitarian efforts that were conducted in Somalia, Haiti, Bosnia, and Kosovo.[89] The lack of clearly defined foreign policy roles came to the forefront during the Global War on Terrorism, and was especially evident during the early stabilization and reconstruction efforts in both Afghanistan and Iraq.[90]

The early stabilization and reconstruction efforts in Afghanistan and Iraq are largely viewed as unsuccessful.[91] For the most part, this can be attributed to the fact that DOS and DOD lacked clearly defined roles and failed to unify their efforts.[92] These initial stabilization and reconstruction failures were met with sharp public criticism and are seen as the reason why these agencies changed their policies concerning how the operations are conducted.[93]

Both DOS and DOD have significantly altered how they approach stabilization and reconstruction operations. The policy changes, and the events that gave rise to them, are discussed below. It is important to note that in most cases the agencies acted independently, so the timing of the events and policy changes do not necessarily coincide.

B. The DOD and the Defense Science Board Study

In January 2004, the Secretary of Defense tasked the Defense Science Board[94] to conduct a study that focused on increasing the effectiveness of U.S. Government agencies "across the spectrum of activities from peacetime through stabilization and reconstruction."[95] The study, *Transition to and from Hostilities*, was performed throughout the summer of 2004 and the results were released in December 2004.[96] The Defense Science Board made two key recommendations that shaped DOD policy.[97]

---

[85] *Id.* at 2.

[86] *Id.* at 1; *see also* GAO-07-549, *supra* note 2, at 1–2.

[87] Rife, *supra* note 83, at 1.

[88] *Id.*

[89] Buss, *supra* note 3, at 1; *see also* GAO-07-549, *supra* note 2, at 1–2.

[90] *Id.*

[91] Buss, *supra* note 3, at 1.

[92] *Id.*

[93] *Id.*

[94] The Defense Science Board is an advisory group that provides independent advice and recommendations to DOD officials on scientific issues, technical issues, manufacturing, the acquisition process, and other matters of special interest. Defense Science Board, Charter Defense Science Board, *available at* http://www.acq.osd.mil/dsb/charter.htm (last visited July 22, 2008).

[95] Memorandum from Chairman, Defense Science Board, to the Office of the Sec'y of Defense, subject: Report of the Defense Science Board 2004 Summer Study on Transition to and from Hostilities (Dec. 2004) [hereinafter Study on Transition to and from Hostilities].

[96] *Id.*

[97] *Id.* at iv–v; *see also* GAO-07-549, *supra* note 2, at 13–17.

First, the Defense Science Board recommended that the government create "Contingency Planning and Integration Task Forces" to focus on countries where the risk of U.S. intervention was high.[98] It suggested that the government staff these task forces with experienced individuals from all agencies that might be involved in future stabilization and reconstruction operations.[99] It also recommended that these task forces expand the model planning process to include not only stabilization efforts that might be conducted during combat operations, but also those that might prevent conflict and assist in post-conflict operations.[100] This recommendation can be viewed as the conception of the Provincial Reconstruction Teams (PRTs) operating in Afghanistan and Iraq.

Next, the Defense Science Board recommended building and maintaining certain fundamental capabilities deemed critical to the success of stabilization and reconstruction operations.[101] This included: (1) making stabilization and reconstruction missions a core competency for DOS and DOD; (2) improving strategic communication capabilities; and (3) focusing intelligence collection efforts to achieve both military and political objectives.[102]

The recommendations of the Defense Science Board dramatically impacted DOD's approach to stabilization and reconstruction operations.[103] First, DOD issued a new stability operations policy, DOD Directive 3000.05, which elevated stability operations to a core military competency.[104] Next, DOD broadened its military planning guidance to more fully address pre-conflict and post-conflict operations.[105] This new planning guidance expands the military planning construct from four phases to six phases and places special emphasis on conflict avoidance.[106] Finally, DOD developed a new joint operating concept to serve as the basis for how the future military commander will support SSTR operations.[107] This joint operating concept focuses the military effort on six key areas, called Major Mission Elements.[108] Each of these policy changes is discussed in greater detail below.

C. The DOS and the Office of the Coordinator for Reconstruction and Stabilization

At the same time that the Defense Science Board was performing the study, *Transition to and from Hostilities*, President Bush established the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) within DOS.[109] The purpose of the S/CRS is to "develop proposals and mechanisms to enhance civilian capabilities, and improve interagency coordination in planning and conducting stabilization and reconstruction operations."[110]

The Office of the S/CRS is led by DOS, but includes representatives from the U.S. Agency for International Development (USAID), DOD, the Central Intelligence Agency (CIA), the Army Corps of Engineers, and the Department of Treasury.[111] Its mission is "to lead, coordinate, and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they can reach a sustainable path toward peace, democracy, and a market economy."[112]

---

[98] Study on Transition to and from Hostilities, *supra* note 95; *see also* GAO-07-549, *supra* note 2, at 13–17.

[99] Study on Transition to and from Hostilities, *supra* note 95.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] GAO-07-549, *supra* note 2, at 3.

[104] *See* DODD 3000.05, *supra* note 9, para. 4.2.

[105] *See* JOINT PUB. 3-0, *supra* note 10.

[106] *Id.*

[107] *See* JOINT OPERATING CONCEPT, *supra* note 11.

[108] *Id.*

[109] Buss, *supra* note 3, at 2; *see also* U.S. Dep't of State, Office of the Coordinator for Reconstruction and Stabilization, http://www.state.gov/s/crs/ (last visited Oct. 3, 2008) [hereinafter S/CRS].

[110] Buss, *supra* note 3, at 2.

[111] *Id.*

[112] *Id.*

In December 2005, President Bush confirmed that DOS was the lead government agency for foreign assistance operations when he issued National Security Presidential Directive 44 (NSPD 44).[113] This directive made DOS the lead U.S. Government agency for all conflict management efforts.[114] Under NSPD 44, the S/CRS is responsible for the integration of all relevant U.S. resources and assets in conducting reconstruction and stabilization operations and reports directly to the Secretary of State.[115] Additionally, NSPD 44 made the S/CRS a member of the new Policy Coordination Committee for Reconstruction and Stabilization Operations (PCCRSO).[116]

D. National Security Presidential Directive 44

On 7 December 2005, President Bush issued NSPD 44.[117] The purpose of NSPD 44 is to "promote the security of the United States through improved coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife."[118] National Security Presidential Directive 44 is significant for three reasons. First, it established new U.S. foreign policy concerning stabilization and reconstruction efforts.[119] Next, it made the DOS the lead agency for all stabilization and reconstruction efforts.[120] Finally, it created a PCCRSO.[121]

National Security Presidential Directive 44 established new U.S. foreign policy. It states,

> The United States has a significant stake in enhancing the capacity to assist in stabilizing and reconstructing countries or regions, especially those at risk of, in, or in transition from conflict or civil strife, and to help them establish a sustainable path toward peaceful societies, democracies, and market economies. The United States should work with other countries and organizations to anticipate state failure, avoid it whenever possible, and respond quickly and effectively when necessary and where appropriate to promote peace, security, development, democratic practices, market economies, and the rule of law. Such work should aim to enable governments abroad to exercise sovereignty over their own territories and to prevent those territories from being used as a base of operations or safe haven for extremists, terrorists, organized crime groups, or others who pose a threat to U.S. foreign policy, security, or economic interests.[122]

It also designated the DOS as the lead agency for all stabilization and reconstruction efforts by directing the Secretary of State to

> coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities. The Secretary of State shall coordinate such efforts with the Secretary of Defense to ensure harmonization with any planned or ongoing U.S. operations across the spectrum of conflict.[123]

Additionally, the Secretary of State and the Secretary of Defense are directed to "integrate stabilization and reconstruction contingency plans with military contingency plans" and "develop a general framework for fully coordinating stabilization and reconstruction activities and military operations at all levels where appropriate."[124]

---

[113] NSPD 44, *supra* note 12, at 2.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 1.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 2.

[121] *Id.* at 4–5.

[122] *Id.* at 1–2.

[123] *Id.*

[124] *Id.* at 4.

The last significant aspect of NSPD 44 is that it established a PCCRSO.[125] This committee is chaired by the S/CRS and includes various representatives from the National Security Council staff.[126] The purpose of this committee is to coordinate U.S. Government policy concerning future stabilization and reconstruction operations.[127]

This section of the article examines key changes the U.S. Government made concerning its stabilization and reconstruction operations policy. The next section of this article will explore how these changes affect U.S. military operations.

IV. What Is Military Support to SSTR Operations?

Before we can analyze whether DOD can legally fund SSTR operations under the existing fiscal framework, it is necessary to determine exactly what these operations entail. In other words, what is military support to SSTR operations?

Department of Defense Directive (DODD) 3000.05 defines stability operations as "[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions."[128] Military support to these operations includes those "activities that support U.S. Government plans for stabilization, security, reconstruction, and transition operations, which lead to a sustainable peace while advancing U.S. interests."[129] To determine the nature of military support envisioned under the new DOD policy, it is necessary to examine the policy and the additional DOD guidance that stemmed from it.

A. Department of Defense Directive 3000.05

On 28 November 2005, DOD issued DOD Directive 3000.05, *Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations*.[130] This DODD dramatically changed the DOD approach to stabilization and reconstruction operations.[131] First, it officially established DOD's new stability operations policy.[132] Next, it provided initial guidance to DOD on SSTR operations.[133] Finally, it assigned responsibilities within DOD for planning, training, and preparing to conduct and support SSTR operations.[134]

The most significant aspect of the new DOD policy is that it elevated stability operations to a core military mission and directed that they be given the same level of priority as combat operations.[135] This means that stability operations must be "explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, material, leadership, personnel, facilities, and planning."[136] This aspect of the new policy considerably altered past DOD practice, where stability operations were considered only during the last phase, commonly referred to as Phase IV, of major combat operations.[137]

---

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] DODD 3000.05, *supra* note 9, para. 3.1.

[129] *Id.* para. 3.2.

[130] DODD 3000.05, *supra* note 9.

[131] *Id.*

[132] *Id.* para. 1.2.

[133] *Id.* para. 1.1.

[134] *Id.* para. 1.2.

[135] *Id.* para. 4.1.

[136] *Id.*

[137] *See* GAO-07-549 , *supra* note 2, at 14.

A second significant aspect of DODD 3000.05 is that it provided strategic level guidance for planning, training, and preparing to conduct and support SSTR operations.[138] First, this policy directs U.S. military forces to be prepared to "perform all tasks necessary to establish or maintain order when civilians cannot do so."[139] These tasks include rebuilding indigenous institutions, reviving or building the private sector, and/or developing representative governmental institutions.[140] Next, this policy requires DOD to increase cooperation with relevant government agencies, foreign governments and security forces, international and non-governmental organizations, and civilians within the private sector.[141] Third, this policy directs the military to "lead and support the development of military-civilian teams" that could be tasked with "ensuring security, developing local governance structures, promoting bottom-up economic activity, rebuilding infrastructure, and building indigenous capacity for such tasks."[142] Finally, DODD 3000.05 requires increased support to indigenous persons and groups who promote freedom, the rule of law, and an entrepreneurial economy.[143]

The last significant aspect of DODD 3000.05 is that it assigned responsibilities within the DOD for planning, training, and preparing to conduct and support SSTR operations.[144] It tasked the Chairman of the Joint Chiefs of Staff with developing joint doctrine concerning SSTR operations. It also tasked the Commander, U.S. Joint Forces Command with developing a new joint operational concept.[145] This operational guidance is discussed below and helps to further define the type of support U.S. military forces could be required to provide at the tactical level.

B. Joint Publication 3.0

On 17 September 2006, the Chairman of the Joint Chiefs of Staff published Joint Publication 3-0, *Joint Operations*.[146] Joint Publication 3-0 provides "the doctrinal foundation and fundamental principles that guide the Armed Forces of the United States in the conduct of joint operations across the range of military operations."[147] Its purpose is to provide "military guidance for the exercise of authority by combatant commanders . . . and prescribes joint doctrine for operations and training."[148] Joint Publication 3-0 is significant for two reasons. First, it discusses a range of military operations that a combatant commander could employ to support national security goals.[149] Second, it expands the traditional "phasing model" for major operations and campaigns from four to six phases, and incorporates stability operations as an operational consideration during each of those phases.[150]

Joint Publication 3-0 is significant because it discusses a range of military options the combatant commander could employ to support national security goals.[151] Generally, this range of military options consists of three broad categories: (1) military engagement, security cooperation, and deterrence activities; (2) crisis response and limited contingency operations; and (3) major operations and campaigns.[152] Each of these three categories can be used to identify specific military missions, some of which are characterized as SSTR operations.

---

[138] DODD 3000.05, *supra* note 9, para. 1.2.

[139] *Id.* para. 4.3.

[140] *Id.*

[141] *Id.* para. 4.4.

[142] *Id.* para. 4.5, 4.5.1.

[143] *Id.* para. 4.8.

[144] *Id.* para. 5.

[145] *Id.* para. 5.1.

[146] JOINT PUB. 3-0, *supra* note 10.

[147] *Id.* at i.

[148] *Id.*

[149] *Id.* at I-6 to I-10.

[150] *Id.* at IV-27 to IV-29.

[151] *Id.* at I-6 to I-10.

[152] *Id.*

Military engagement, security cooperation, and deterrence activities are generally designed to "shape the operational environment and keep day-to-day tensions between nations or groups below the threshold of armed conflict while maintaining U.S. global influence."[153] Specific military missions within this category include: (1) foreign security assistance, (2) humanitarian and civic assistance, (3) anti-terrorism support, (4) counter-insurgency support, (5) counter-drug operations, and (6) show of force operations.[154]

Crisis response and limited contingency operations are designed to "protect U.S. interests, and prevent surprise attack or further conflict."[155] These operations "can be a single small-scale, limited-duration operation or a significant part of a major operation of extended duration involving combat."[156] Specific military missions within this category include: (1) peacekeeping/peace enforcement operations, (2) foreign humanitarian assistance missions, (3) non-combat evacuation operations, (4) consequence management operations, and (5) limited strikes or raids.[157]

Major operations and campaigns are designed to "prevail against the enemy as quickly as possible, conclude hostilities, and establish conditions favorable to the host nation and the U.S. and its multi-national partners."[158] These operations "often require conducting stability operations to restore security, provide services and humanitarian relief, and conduct emergency reconstruction."[159]

The scope of U.S military support provided to SSTR operations might vary from passive to active depending upon numerous factors associated with each particular operation.[160] For example, U.S. military forces might be the sole agency conducting stabilization operations "when indigenous civil, USG, multi-national or international capacity does not exist or is incapable of assuming responsibility."[161] A more passive example might involve U.S. military forces participating on integrated civilian-military reconstruction teams.[162] These teams could be made up of representatives from the military, other government agencies, foreign governments and security forces, or members of the private sector.[163] A final example might include U.S. military forces simply providing passive support for stabilization and reconstruction operations, such as base security, when and if necessary.[164]

A second important aspect of Joint Publication 3-0 is that broadens the military planning guidance, for major operations and campaigns, to more fully address pre-conflict and post-conflict operations.[165] Previous planning guidance, which considered only four operational phases, was revised to require consideration of six operational phases.[166] Additionally, this expanded planning construct requires planners to consider stability operations during each of the six operational phases.[167]

The first additional phase requires planners to consider different types of activities that might be conducted to stabilize nations and prevent the outbreak of hostilities.[168] These activities will typically involve collaborative interagency planning and include security operations and Humanitarian Assistance missions.[169]

---

[153] *Id.* at I-8 to I-9.

[154] *Id.*

[155] *Id.* at I-9.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *See* JOINT PUB. 3-0, *supra* note 10.

[161] *Id.* at I-9.

[162] *Id.*

[163] *Id.*

[164] *Id.* at I-8 to I-9.

[165] *Id.* at V-1 to V-2.

[166] *Id.* at IV-27 to IV-29.

[167] *Id.*

[168] *Id.* at IV-27.

[169] *Id.*

The second additional phase requires planners to consider different types of activities that will assist in post conflict stabilization, reconstruction, and the transition to self-rule.[170] These activities include security operations, developing local governance capacities, rebuilding infrastructure, and establishing the rule of law.[171]

C. Joint Operating Concept Version 2.0

In December of 2006, the Joint Forces Command published Joint Operating Concept Version 2.0, *Military Support to Stabilization, Security, Transition, and Reconstruction Operations*.[172] The purpose of Joint Operating Concept Version 2.0 is to "describe how the future Joint Force Commander will provide military support to stabilization, security, transition, and reconstruction operations within a military campaign in pursuit of national strategic objectives in the 2014-2026 timeframe."[173]

Joint Operating Concept Version 2.0 focuses on "the full range of military support that the future Joint Force might provide in foreign countries across the continuum from peace to crisis and conflict in order to assist a state or region that is under severe stress or has collapsed due to either a natural or man-made disaster."[174] The scope of military support required for each operation varies depending upon where it fits on that continuum.[175] For example, in "high end" SSTR operations (SSTR operations associated with U.S.-imposed regime change, assisting a faltering government, or responding to a collapse of a foreign government caused by internal failure) it might be necessary to provide extensive military support.[176] Compare this to "low end" SSTR operations (disaster relief, foreign security assistance, etc.) where the support provided by the military will be much narrower.[177]

Joint Operating Concept Version 2.0 uses six Major Mission Elements (MMEs) or desired end states to focus the future joint force commander and the required military efforts.[178] These six MMEs include: (1) establishing and maintaining a safe, secure environment; (2) delivering humanitarian assistance; (3) reconstructing critical infrastructure and restoring essential services; (4) supporting economic development; (5) establishing representative, effective governance and the rule of law; and (6) conducting strategic communication.[179] The military support provided to an operation will be based on the desired end state that the joint force commander is trying to achieve.

D. Conclusion

After reviewing the policy established by DODD 3000.05 and the planning guidance set forth in Joint Publication 3-0 and Joint Operating Concept Version 2.0, we can conclude that the military support provided to SSTR operations will vary for each particular operation. Generally, the military support provided to a particular SSTR operation will be contingent upon three factors: (1) where does the operation fit on the continuum that ranges from peace to crisis to conflict;[180] (2) how is the operation categorized;[181] and (3) what is the desired end-state of that operation?[182] At a minimum, commanders must consider stability operations when planning each phase of any military operation.[183] On the other end of the spectrum, DOD

---

[170] *Id.* at IV-29.

[171] *Id.*

[172] JOINT OPERATING CONCEPT, *supra* note 11.

[173] *Id.* at 1.

[174] *Id.* at 2.

[175] *Id.*

[176] *Id.* at 22.

[177] *Id.* at 23.

[178] *Id.* at 20.

[179] *Id.*

[180] *See* JOINT OPERATING CONCEPT, *supra* note 11.

[181] *See* JOINT PUB. 3-0, *supra* note 10.

[182] *See* JOINT OPERATING CONCEPT, *supra* note 11.

[183] JOINT PUB. 3-0, *supra* note 9, at IV-27 to IV-29.

might find that it is the sole agency conducting SSTR operations after a major operation or campaign.[184] The next section of this article discusses several select congressional appropriations and authorizations that permit DOD to conduct foreign assistance.

V. Select Appropriations and Authorizations that Allow the DOD to Conduct Foreign Assistance

Foreign assistance encompasses any and all assistance provided to a foreign nation on behalf of the U.S. Government.[185] Generally, it can be broken down into three categories: (1) security assistance, (2) humanitarian assistance, and (3) development assistance.[186] Recall that DOS is the government agency primarily responsible for funding and conducting foreign assistance on behalf of the U.S. Government.[187] However, Congress has appropriated funds for DOD to conduct foreign assistance in certain situations.[188] This section of the article will discuss select DOD foreign assistance appropriations and authorizations that impact DOD's ability to conduct SSTR operations.

A. Security Assistance

Security assistance is foreign assistance provided to another nation's military or police forces on behalf of the U.S. Government.[189] It generally involves funding, training, and equipping those forces.[190] The two most significant DOD security assistance appropriations, for purposes of this article, are the Iraqi Security Forces Fund (ISFF) and the Afghanistan Security Forces Fund (ASFF).[191]

On 11 May 2005, President Bush enacted the 2005 Defense Emergency Supplemental Appropriations Act, which established the ISFF and ASFF.[192] These appropriations authorized DOD to provide assistance to the security forces of Iraq and Afghanistan.[193] This assistance included providing equipment, supplies, services, training, and facility and infrastructure repairs to the military and police forces of Iraq and Afghanistan.[194]

On 26 December 2007, President Bush enacted the 2008 Consolidated Appropriations Act (CAA).[195] Division L of the CAA is the 2008 Defense Emergency Wartime Supplemental Appropriation, and it appropriated $1.5 billion to the ISFF and $1.35 billion to the ASFF.[196] These funds are available for obligation through 30 September 2009.[197] They are currently being used to train and equip the military and police forces of Iraq and Afghanistan.[198]

B. Humanitarian Assistance

---

[184] *Id.* at I-9.

[185] *See* The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A (1984).

[186] *Id.*

[187] NSPD 44 *supra* note 12, at 4; *see also The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A; Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151 (2000).

[188] *See generally* Department of Defense Appropriations Act, 2008, Pub. L. No. 110–116, div. A, 121 Stat. 1295 (2007); Consolidated Appropriations Act, 2008, Pub. L. No. 110–116, div. L, 121 Stat. 1844, 1896 (2007); *see also* Major Jose A. Cora, *DOD Authorizations and Appropriations Flowchart*, *infra* App. (2008) (unpublished flowchart depicting DOD authorizations and appropriations).

[189] *See The Honorable Bill Alexander*, 63 Comp. Gen. 422, App. A.

[190] *Id.*

[191] *See* div. L, 121 Stat. 1844, 1896.

[192] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. No. 109–13, 119 Stat. 231 (creating the AfSFF ($1.285 billion) and the ISFF ($5.7 billion).

[193] *Id.*

[194] *Id.*

[195] Div. L, 121 Stat. 1844, 1896.

[196] *Id.*

[197] *Id.*

[198] *See infra* note 237.

Humanitarian assistance is foreign assistance provided directly to the population of another nation by the U.S. Government.[199] There are three significant humanitarian assistance appropriations and authorizations that impact SSTR operations. They are the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation,[200] the Humanitarian and Civic Assistance (HCA) authorization,[201] and the Commander's Emergency Response Program (CERP) authorization.[202]

1. OHDACA

The primary purpose of the OHDACA appropriation is to provide funding for humanitarian de-mining operations.[203] However, the OHDACA appropriation contains a set of authorizations that allows DOD to use OHDACA funds for other types of humanitarian assistance operations.[204] These operations include transporting humanitarian relief supplies, providing foreign disaster, making excess non-lethal supplies available for humanitarian relief, and providing humanitarian assistance.[205] The 2008 DOD Appropriation Act appropriated $102.78 million to be used for OHDACA programs world-wide.[206] It is available for new obligations through 30 September 2010.[207]

2. HCA

The HCA is an authorization that allows DOD to conduct humanitarian assistance operations using DOD O&M funds.[208] Two types of humanitarian assistance operations can be conducted under the HCA authorization.[209] They are pre-planned HCA and de minimis HCA.[210]

Under 10 U.S.C. § 401, pre-planned HCA includes: (1) medical, dental and veterinary care in rudimentary areas; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of rudimentary sanitation systems; and (4) rudimentary construction and repair of public facilities.[211] Pre-planned HCA is available for world-wide use, but the authorization contains several restrictions that make it difficult to access.[212] These restrictions include: (1) HCA may not duplicate other forms of U.S. foreign assistance; (2) the use of HCA requires service level approval; (3) the use of HCA requires DOS concurrence; and (4) operations conducted using HCA must be part of the mission essential task list (METL) of the units conducting those operations.[213] Funding for pre-planned HCA comes from service level O&M funds.[214]

De minimis HCA provides authority for operational unit commanders to react to "targets of opportunity" while conducting authorized military operations world-wide.[215] These activities must be small in scope and must involve only

---

[199] *See* The Honorable Bill Alexander, 63 Comp. Gen. 422, App. A.

[200] *See generally* Department of Defense Appropriations Act, 2008, Pub. L. No. 110–116, div. L, 121 Stat. 1295 (2007); 10 U.S.C.S. § 401 (LexisNexis 2008); 10 U.S.C.S. § 402 (LexisNexis 2008); 10 U.S.C.S. § 404 (LexisNexis 2008); 10 U.S.C.S. § 2557 (LexisNexis 2008); 10 U.S.C.S. § 2561 (LexisNexis 2008).

[201] 10 U.S.C.S. § 401.

[202] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 323, div. L, 122, 122 Stat. 3, 60,.

[203] 10 U.S.C.S. § 401.

[204] *See generally id.* §§ 401, 402, 404, 2557, 2561.

[205] *Id.*

[206] Department of Defense Appropriations Act, 2008, Pub. L. No. 110–116, div. L, 121 Stat. 1295 (2007).

[207] *Id.*

[208] 10 U.S.C.S. § 401; *see also* div. A, 121 Stat. 1295.

[209] 10 U.S.C.S. § 401; *see also* div. A, 121 Stat. 1295; U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS (6 Oct. 1994) [hereinafter DODD 2205.2]; U.S. DEP'T OF DEFENSE, INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM (27 Jan. 1995) [hereinafter DODI 2205.3].

[210] *See* 10 U.S.C.S. § 401; DODD 2205.2, *supra* note 209; DODI 2205.3, *supra* note 209.

[211] 10 U.S.C.S. § 401.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.*

negligible costs.[216] De minimis HCA is undefined, but the general rule is "a few soldiers, a few dollars, for a few hours."[217] Department of Defense Directive 2205.2 limits the amount of funds spent on de minimis HCA to $2500 per operation, unless an exception to the policy is granted which may allow up to $10,000 per operation[218] Funding for de minimis HCA comes from unit level O&M funds.[219]

3. The CERP

The CERP provides appropriated funds directly to commanders of operational units in Afghanistan and Iraq, allowing them to meet the emergency humanitarian and reconstruction needs of the civilian population in their respective areas of operation.[220] The program was initiated on 16 June 2003, when the Coalition Provisional Authority (CPA) authorized the Commander of Coalition Forces "to take all actions necessary to operate a Commanders' Emergency Response Program."[221] On 19 June 2003, the Commander of Combined Joint Task Force 7 (CJTF-7) implemented CERP by issuing Fragmentary Order (FRAGO) 89.[222] This detailed the requirements of the program, including authorized reconstruction projects, implementing tasks, and expenditure limits.[223]

The initial CERP program was funded with millions of dollars of seized Iraqi funds that were recovered by U.S. forces during the early stages of the war.[224] By September 2003, the CPA realized that these recovered funds would not last beyond the end of the year.[225] As a result, President Bush requested an authorization to use DOD O&M appropriations to fund the CERP program.[226] On 6 November 2003, President Bush enacted the 2004 National Defense Authorization Act, which authorized the use of $500 million of DOD O&M funds for CERP projects in Afghanistan and Iraq.[227]

Since November 2003, Congress has continuously reauthorized CERP.[228] On 28 January 2008, President Bush enacted the 2008 National Defense Authorization Act, which authorized the use of up to $977 million of DOD O&M funds for CERP projects in Afghanistan and Iraq.[229] These funds are used for projects that will immediately assist the people of Afghanistan and Iraq, and support the reconstruction of those countries.[230] Examples of CERP projects conducted in Afghanistan and Iraq include water distribution projects, sanitation services, electricity projects, health care efforts, education programs, rule of law and governance initiatives, and civic clean-up activities.[231]

The remainder of this article will analyze the post-conflict SSTR operations that are being conducted in Afghanistan and Iraq, and the limited pre-conflict SSTR operations that are being conducted world-wide in support of the Global War on Terrorism. It will identify the fiscal and policy issues raised by those operations and recommend potential solutions to those issues.

---

[216] *Id.*

[217] *Id.*

[218] DODD 2205.2, *supra* note 209.

[219] *See* 10 U.S.C.S. § 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

[220] Colonel Mark S. Martins, *The Commander's Emergency Response Program*, 37 JOINT FORCE Q. 46, 49 (2005).

[221] *Id.* at 47 (quoting Memorandum from Ambassador L. Paul Bremer, CPA Administrator, to the Commander of Coalition Forces (June 16, 2003)).

[222] *Id.*

[223] *Id.* at 47–48.

[224] *Id.* at 47.

[225] *Id.* at 49.

[226] *Id.*

[227] *Id.*; *see also* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108–136, § 1426, div. L, 117 Stat. 1392 (2003).

[228] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 323, div. L, 122 Stat. 3, 60.

[229] *Id.*

[230] *See* Martins, *supra* note 220, at 47–48.

[231] Afghanistan Provincial Reconstruction Teams, http://www.state.gov/p/sca/rls/fs/80706.htm (last visited Oct. 3, 2008) [hereinafter Afghanistan PRTs]; Fact Sheet on Provincial Reconstruction Teams, Dec. 17, 2007) http://iraq.usembassy.gov/iraq/20060223_prt_fact_sheet.html [hereinafter Iraq PRTs].

VI. Post-Conflict SSTR Operations in Afghanistan and Iraq

Generally, U.S. military forces are conducting post-conflict SSTR operations in Afghanistan and Iraq in three ways. First, PRTs are using a variety of appropriated funds and authorizations to perform numerous stabilization and reconstruction projects within their assigned provinces.[232] Second, operational units are using the CERP program to conduct various stabilization and reconstruction activities within their battle space.[233] Third, U.S. military forces are training and equipping the Afghan National Security Forces and the Iraqi Security Forces.[234] This section of the article will examine the post-conflict SSTR operations in Afghanistan and Iraq and discuss how they are funded. Then it will analyze those funding mechanisms within the fiscal framework discussed earlier. Finally, it will identify the problems that arise within each of these operational constructs.

A. PRTs

Provincial reconstruction teams are integrated civil-military teams that serve as the primary interface between Coalition Forces and the provincial and local governments throughout Afghanistan and Iraq.[235] The primary mission of the PRTs is to develop the provincial and local government's ability to govern, while advancing security, the rule of law, and economic development within the province.[236]

The U.S. military developed the PRT concept in Afghanistan during the summer of 2002, with the first PRT being deployed in early 2003.[237] The success of the PRT initiative in Afghanistan led to the concept being implemented in Iraq.[238] The U.S. military deployed the first Iraqi PRT in November 2005.[239] Currently, there are twenty-five PRTs operating in Afghanistan and twenty-five PRTs operating in Iraq.[240]

The early PRTs in Afghanistan consisted of U.S. military forces, Afghan advisors, and civilian representatives from the DOS, USAID, and the U.S. Department of Agriculture.[241] This composition was slightly modified as the lessons learned developed. The make-up of the existing PRTs, in both Afghanistan and Iraq, varies depending on the needs of each individual province.[242] Generally there are three different PRT models being employed, one in Afghanistan and two in Iraq.[243]

1. The PRT Models

a. The Afghan Model

In Afghanistan, each PRT is made up of 50 to 100 members, with the average size being 80 members.[244] In most cases, the U.S. military retains lead authority over the PRT.[245] The majority of the Afghan PRTs are composed of military

---

[232] *See* Michael J. McNerney, *Stabilization and Reconstruction in Afghanistan: Are PRTs a Model or a Muddle?*, 35 PARAMETERS 32 (Winter 2005–2006) (discussing the PRTs in Afghanistan); *see also* Nima Abbaszadeh et al., Provincial Reconstruction Teams: Lessons and Recommendations (Jan. 2008) (unpublished M.A. thesis, Princeton University) (on file with author).

[233] *See* Martins, *supra* note 220, at 48–49 (discussing the importance of CERP).

[234] *See* Combined Security Transition Command—Afghanistan, http://www.cstc-a.com/index.html (last visited Oct. 3, 2008) [hereinafter CSTC-A]; *see also* Multi-National Security Transition Command—Iraq, http://www.mnstci.iraq.centcom.mil/ (last visited Oct. 3, 2008) [hereinafter MNSTC-I].

[235] Abbaszadeh et al., *supra* note 232, at 5.

[236] Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

[237] McNerney, *supra* note 232, at 32.

[238] Abbaszadeh et al., *supra* note 232, at 5.

[239] *Id.*

[240] *Id.*

[241] McNerney, *supra* note 232, at 32.

[242] Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

[243] Abbaszadeh et al., *supra* note 232, at 49–50.

[244] *Id.* at 49.

personnel because of the emphasis placed on force protection.[246] Military members on the PRT include a headquarters element, a platoon of Soldiers for force protection, civil affairs teams, translators, and psychological operations personnel.[247] Civilian members on the PRT usually number between three and five, and generally include representatives from the DOS, USAID, the Department of Agriculture, and the Department of Justice (DOJ).[248] Most PRTs also include an Afghan advisor from the Afghan Interior Ministry.[249]

b. The Iraqi Model

In Iraq, each PRT is made up of thirty to eighty members, with the average size being fifty members.[250] The DOS retains lead authority over the Iraqi PRTs, with deputy authority delegated to the U.S. military.[251] The majority of the Iraqi PRTs are composed of civilian personnel.[252] There are two reasons for this larger civilian composition. First, there are no dedicated force protection elements because the majority of the Iraqi PRTs are located on U.S. forward operating bases (FOBs).[253] Second, the relative security of the FOB allows for greater civilian participation on the PRTs.[254] Civilian members on the PRT include representatives from the DOS, USAID, the Department of Agriculture, and DOJ.[255] In some cases there are civilian representatives from the U.S. Army Corps of Engineers.[256] Military members on the PRT include headquarters personnel, civil affairs teams, and psychological operations personnel.[257]

c. The Embedded Model

In January 2007, the U.S. military developed the embedded PRT (ePRT) to coincide with the "surge" operations being conducted in Iraq.[258] The ePRTs are made up of twelve to sixteen members and are designed to operate within an Army brigade combat team (BCT) or Marine Corps Regiment (MCR).[259] Civilian members on the ePRT include a team leader from DOS and representatives from other appropriate government agencies.[260] Military members on the ePRT include a civil affairs officer and the necessary representatives from specific military specialties.[261] Most ePRTs also include Iraqi Cultural Advisors.[262] Of the twenty-five PRTs conducting operations in Iraq, ten of them are ePRTs.[263]

---

[245] *Id.*

[246] *Id.* at 50.

[247] *Id.*

[248] *Id.*; *see also* McNerney, *supra* note 232, at 36.

[249] Abbaszadeh et al., *supra* note 232, at 50.

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.* Initially the lack of a dedicated force protection element posed a significant problem because the PRTs could not travel freely about their province. *Id.* This issue was addressed in February 2007, when the Department of State and the DOD signed a Memorandum of Agreement under which they agreed to provide a military escort when the PRTs were required to travel off the FOB. *Id.*

[254] Abbaszadeh et al., *supra* note 232, at 50.

[255] *Id.*

[256] Iraq PRTs, *supra* note 231.

[257] Abbaszadeh et al., *supra* note 232, at 50.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] Iraq PRTs, *supra* note 231.

2. Legally Funding the PRTs

Initial funding for the Afghan PRT operations came from DOD's OHDACA appropriation.[264] The PRTs used OHDACA funds to dig wells, build schools, and repair medical clinics.[265] The OHDACA funds, however, are difficult to use and limited in their application to basic humanitarian needs projects.[266] The PRTs found this funding mechanism did not provide them with the means necessary to complete more significant projects such as repairing infrastructure, training and equipping security forces, and developing the rule of law.[267] Additionally, the Afghan PRTs found that the projects they were able to complete with OHDACA funds were identical to those that were being completed by various non-government organizations.[268]

In early 2004, DOS and USAID began to fund Afghan PRT operations by channeling reconstruction aid through the DOS Economic Security Fund (ESF).[269] At about the same time, Congress authorized the use of O&M funds for CERP projects in Afghanistan.[270] Currently, the Afghan PRTs conduct the majority of their reconstruction projects with the DOS ESF funds and use CERP funds as a supplement.[271] Both sources of funding have greatly enhanced the Afghan PRT's ability to achieve their primary mission of assisting the provincial governments.[272]

Initial funding for Iraqi PRT operations came from the appropriated Iraq Relief and Reconstruction Fund (IRRF).[273] This fund is being drawn to a close, so the majority of reconstruction funds are now being channeled through the DOS's ESF.[274] The PRTs are also using DOD O&M funds via the CERP authorization.[275] The Iraqi PRT operations are similar to those being conducted in Afghanistan.[276] Currently, the Iraqi PRTs fund the majority of their reconstruction projects with ESF funds, while CERP funds are used to supplement these projects.[277]

The funding model is slightly different on the ePRT because of the subordination of the ePRT to the BCT or MCR.[278] The relationship between the ePRT and the brigade or regimental commander provides the ePRT with greater access to CERP funds.[279] The ePRT Team Leader, in coordination with select staff members, evaluates potential projects and makes recommendations to the commander for prioritization and funding.[280] As a result, the majority of ePRT operations are funded with CERP.[281]

3. Interagency Coordination Challenges with the PRT Model

Legally funding the PRTs in Afghanistan and Iraq is not a major challenge since Congress has appropriated various funds to conduct these SSTR operations. The multi-agency model of PRTs, however, poses significant civil-military

---

[264] McNerney, *supra* note 232, at 36.

[265] *Id.*

[266] *Id.*; *see supra* pp. 15–16.

[267] McNerney, *supra* note 231, at 36.

[268] *Id.*

[269] Abbaszadeh et al., *supra* note 232, at 49.

[270] Martins, *supra* note 220, at 49.

[271] Abbaszadeh et al., *supra* note 232, at 49.

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*; *see also* Iraq PRTs, *supra* note 231.

[276] Abbaszadeh et al., *supra* note 232, at 49.

[277] *Id.*

[278] *Id.* at 50.

[279] *Id.*

[280] Interview with Major Richard DeMeglio, Brigade Judge Advocate, in Charlottesville, Va. (Mar. 13, 2008) [hereinafter Demeglio Interview].

[281] *Id.*

coordination challenges for DOD, DOS, and other U.S. Government agencies. First, DOS and DOD are culturally distinct and use very different decision making models.[282] Second, DOS and DOD are each attempting to achieve a slightly different end-state.[283] The DOS tends to focus on mid to long term political and economic successes, while DOD tends to focus on short term security concerns.[284] A great example of this issue is the Concerned Local Citizens Program where DOD pays members of local tribes to guard "critical infrastructure."[285] This has resulted in significant short-term security gains, but directly contradicts what DOS is trying to accomplish, namely achieving security with the Iraqi Security Forces.[286] Finally, there has been some disagreement as to the roles that DOD and DOS play within both the PRT and the overall strategic plan.[287]

The U.S. Government widely recognizes the lack of civil-military coordination in the Global War on Terrorism and is making major efforts to improve it. Recall that NSPD 44 requires increased integration and coordination between the Secretary of State and the Secretary of Defense concerning stabilization and reconstruction operations.[288] Additionally, the DOD has created Contingency Planning and Integration Task Forces, or joint civil-military efforts that focus on countries where the risk of U.S. intervention is high.[289] Finally, the Army Chief of Staff recently approved a pilot program that will allow ten DOS foreign officers to attend the intermediate level education class at the Command and General Staff College starting in August 2008.[290] In exchange, the Army will select ten field grade officers to backfill them in their civilian positions.[291] The goal of this exchange program is to increase the cultural understanding between DOS and DOD, and prepare foreign officers for future assignments on PRTs.[292]

B. Operational Units and the CERP

Operational units in Afghanistan and Iraq are using the CERP program to conduct various post-conflict SSTR operations.[293] As noted above, this program is designed to "enable commanders to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility."[294] The CERP is heavily favored by commanders in Afghanistan and Iraq because it provides them with direct control over the funds for certain SSTR activities.[295] This allows them to focus their efforts on needs that are unique to their battle space without having to navigate the cumbersome process of securing the approval to use other funds like OHDACA.[296]

To date, operational units in Afghanistan and Iraq have spent billions of dollars on initiatives designed to provide immediate assistance to the Afghan and Iraqi people, and support the reconstruction of those nations.[297] Examples of these initiatives include: providing sanitation services, conducting civic clean-up projects, repairing and installing generators,

---

[282] *See generally* Rife, *supra* note 83 (discussing the different planning methods used by DOD and DOS).

[283] *Id.*; *see also* GAO-07-549, *supra* note 2; *Effectiveness of the Reconstruction Team Program in Iraq: Hearing Before the H. Comm. On Armed Services*, 110th Cong. 4–5 (2007) [hereinafter Bowen Statement] (statement of Stuart W. Bowen, Jr., Special Inspector General for Iraq Reconstruction).

[284] *Id.*

[285] Demeglio Interview, *supra* note 280.

[286] *Id.*

[287] McNerney, *supra* note 232, at 37; *see also The Role of the Department of Defense in Provincial Reconstruction Teams: Hearing Before the H. Comm. on Armed Services*, 110th Cong. 1 (2007) [hereinafter Parker Statement] (statement of Michelle Parker, USAID, Field Program Officer).

[288] NSPD 44, *supra* note 12, at 4.

[289] JOINT PUB 3-0, *supra* note 10; *see also* NSPD 44, *supra* note 12 at 4; Study on Transition to and from Hostilities, *supra* note 95.

[290] Gina Cavallaro, *Feds to Study with Army Majors at Fort Leavenworth*, FED. TIMES, Dec. 10, 2007, at 5.

[291] *Id.*

[292] *Id.*

[293] Martins, *supra* note 220, at 49; *see also* Abbaszadeh et al., *supra* note 231, at 49; Bowen Statement, *supra* note 283; Parker Statement, *supra* note 287.

[294] Martins, *supra* note 220, at 47 (quoting Memorandum from Ambassador L. Paul Bremer, CPA Administrator, to the Commander of Coalition Forces (June 166, 2003)).

[295] *Id.* at 50; *see also* McNerney, *supra* note 231, at 37; Abbaszadeh et al., *supra* note 231, at 49; Bowen Statement, *supra* note 287.

[296] Martins, *supra* note 220, at 50.

[297] *Id.*; *see also* Abbaszadeh et al., *supra* note 232, at 48.

drilling wells, and providing training to establish the rule of law.[298] These initiatives are being funded with DOD O&M appropriations through the CERP authorization, which was discussed above.[299]

Challenges in Coordinating SSTR Efforts When Operational Units Use CERP

The major issue that arises when operational units conduct SSTR operations with CERP funds is the lack of unity of effort between those units and the other agencies that are involved in SSTR operations.[300] In many cases, the programs that are initiated by operational commanders are decentralized and conflict with those being conducted on a national basis.[301] This problem arises in part because of the different end-state that each participating organization is attempting to achieve.[302] For example, operational units tend to focus their efforts on short-term projects that directly improve the security situation in their battle space.[303] These short-term projects, however, may destabilize the mid or long-term objectives that the PRTs are attempting to achieve.[304]

To achieve success, operational level CERP projects must complement the efforts of the other participating government agencies.[305] One means of achieving this is through the use of ePRTs, which were discussed above. This coordination of effort can be achieved with ePRTs because although they are subordinate to their military commander, they continue to have greater access to the civil-military SSTR technical chain.[306]

C. Training and Equipping the Afghan National Security Forces and the Iraqi Security Forces

In May 2002, U.S military forces began training the first group of Afghan soldiers for the New Afghan Army.[307] Since that time, continuous efforts have been made to organize, train and equip the Afghan National Security Forces.[308] Similar efforts were initiated in Iraq shortly after the fall of Baghdad when U.S. military forces started to train the New Iraqi Army.[309] Currently, there are two separate U.S. military commands responsible for training and equipping the Afghan National Security Forces and the Iraqi Security Forces.[310] They are the Combined Security Transition Command-Afghanistan (CSTC-A) and the Multi-National Security Transition Command-Iraq (MNSTC-I).[311]

Generally, the missions of CSTC-A and MNSTC-I include organizing, training, and equipping the security forces of Afghanistan and Iraq in order to develop stable nations, strengthen the rule of law, and deter and defeat terrorism within their borders.[312] United States military forces, through partnership with the Afghan and Iraqi Governments, are accomplishing these missions by: (1) training and recruiting police officers and soldiers, (2) acquiring weapons, uniforms, and equipment for the security forces, (3) assisting with the organization of the security forces, and (4) assisting with the development of the

[298] Afghanistan PRTs, *supra* note 231; Iraq PRTs, *supra* note 231.

[299] Martins, *supra* note 220, at 49; *see also* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 323, div. L, 122 Stat. 3, 60.

[300] Martins, *supra* note 220, at 49.

[301] *Id.*

[302] *Id.*

[303] *Id.*; *see supra* notes 286–89 and accompanying text.

[304] Martins, *supra* note 220, at 51.

[305] *Id.*

[306] DeMeglio Interview, *supra* note 280.

[307] Ali A. Jalali, *Rebuilding Afghanistan's National Army*, 32 PARAMETERS 72 (Autumn 2002) (discussing the rebuilding of the Afghan National Army).

[308] *Id.*; *see also* CSTC-A, *supra* note 234.

[309] *See* MNSTC-I, *supra* note 234.

[310] CSTC-A, *supra* note 234; MNSTC-I, *supra* note 234.

[311] CSTC-A, *supra* note 234; MNSTC-I, *supra* note 234.

[312] *Id.*

systems necessary for an effective security infrastructure.[313] Legally funding these training organizations in Afghanistan and Iraq is not a major challenge since Congress has appropriated funds to conduct these SSTR operations.[314]

D. Conclusion

Generally, the post-conflict SSTR operations in Afghanistan and Iraq are developing well since Congress has appropriated funds to accomplish the SSTR mission.[315] There are, however, some interagency challenges that continue to decrease the effectiveness of those operations.[316] The majority of these challenges are a result of cultural differences among the different agencies, primarily DOD and DOS, involved in post-conflict SSTR operations.[317] These challenges are widely recognized and there have been major efforts to increase interagency cooperation. These efforts include: (1) designating the DOS as the lead agency for SSTR operations; (2) increasing interagency participation in SSTR operations through the use of the PRTs; and (3) creating an exchange program that will increase the cultural understanding between DOS and DOD.[318] There is still much work to be done, especially in area of planning and conducting SSTR operations at the tactical level, where the goal should be to synchronize those local operations with the SSTR operations being conducted on a national scale.[319]

The next section of this article will address the SSTR operations conducted outside of Afghanistan and Iraq. In addition to the interagency problems that arise in the post-conflict SSTR context, these SSTR operations face significant funding challenges.

VII. SSTR Operations Outside of Afghanistan and Iraq

The U.S. military is currently engaged in limited contingency SSTR operations in various nations throughout the world.[320] These operations vary in scope and intensity depending on the desired strategic end-state.[321] They often lack the same resources that are provided during post-conflict SSTR operations.[322] In some cases, the operational units conducting these SSTR operations are attempting to achieve objectives similar to those the operational units are striving for in Afghanistan and Iraq.[323] One such contingency operation is being conducted by the U.S. Central Command in the Horn of Africa.[324] This section of the article will examine the limited contingency SSTR operations being conducted outside of Afghanistan and Iraq by using Combined Joint Task Force-Horn of Africa (CJTF-HOA) as an example. It will focus on the funding issues associated with limited contingency SSTR operations and discuss how those issues affect the operational units conducting SSTR missions. Finally, it will identify the problems that arise within this operational construct.

---

[313] *Id.*

[314] *Id.*; *see also* Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, div. L, 121 Stat. 1844, 1896 (2007).

[315] *Id.*

[316] *See supra* notes 286–89 and accompanying text.

[317] *See generally* Rife, *supra* note 83.

[318] *See supra* notes 12, 238–66, 293–95 and accompanying text.

[319] *See generally* Martins, *supra* note 220.

[320] *See* GAO-07-549, *supra* note 2, at 1; *see also* Combined Joint Task Force―Horn of Africa, http://www.hoa.africom.mil/AboutCJTF-HOA.asp (last visited Oct. 3, 2008) [hereinafter CJTF-HOA].

[321] *See supra* notes 149–82 and accompanying text.

[322] *See infra* pp. 23–24.

[323] *Compare* CJTF-HOA, *supra* note 320, *with* Afghanistan PRTs, *supra* note 231, *and* Iraq PRTs, *supra* note 231, *and* CSTC-A, *supra* note 234, *and* MNSTC-I, *supra* note 234.

[324] CJTF-HOA, *supra* note 320.

A. CJTF-HOA

The CJTF-HOA is an operational military unit that is conducting limited pre-conflict SSTR operations in the HOA.[325] The mission of CJTF-HOA is to prevent conflict, promote regional stability and protect Coalition interests in order to prevail against extremism.[326] The CJTF-HOA is accomplishing this mission by conducting SSTR operations that include providing clean water, schools, and improved roadways and medical facilities.[327] Additionally, CJTF-HOA is participating in some military-to-military training, as well as other capacity-building programs such as medical, dental, and veterinarian civil action programs.[328]

1. Humanitarian Assistance Funding Challenges for SSTR Operations Outside of Afghanistan and Iraq

The CJTF-HOA is conducting the majority of these pre-conflict SSTR operations using the cumbersome OHDACA appropriation and HCA authorizations.[329] These funding mechanisms have significantly limited their ability to conduct these operations because of the restrictions that are placed on their use.[330]

Recall the earlier analysis concerning the initial PRT operations in Afghanistan. Generally, the Afghan PRTs found that OHDACA funds did not provide them with the means necessary to complete significant projects like repairing critical infrastructure, training and equipping security forces, and developing the rule of law.[331] Additionally, the Afghan PRTs found that the projects they were able to complete with OHDACA funds were identical to those that were being completed by various non-government organizations.[332] These issues are the same issues that confront the operational units conducting pre-conflict SSTR operations outside of Afghanistan and Iraq because they are operating under those same funding constraints.

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the OHDACA appropriation and HCA authorizations, or authorize the use of DOD O&M funds for CERP projects being conducted outside of Afghanistan and Iraq (i.e., Global CERP). On October 31, 2007, DOD recommended that Congress authorize Global CERP in the 2008 National Defense Authorization Act, but Congress did not approve this recommendation.[333] As such, operational units conducting pre-conflict SSTR operations outside of Afghanistan and Iraq are limited to using the existing OHDACA appropriations and HCA authorizations to execute their mission.

2. Security Assistance Funding Challenges for SSTR Operations Outside of Afghanistan and Iraq

A second issue that arises within the pre-conflict SSTR context is the military-to-military training conducted during these operations. Recall that one of the goals of pre-conflict SSTR operations is to prevent conflict by promoting stability within nations at risk of plunging into crisis.[334] One way to stabilize a country is by providing security assistance to its security forces.[335] In Iraq and Afghanistan, that security assistance is funded through the ASFF and ISFF appropriations.[336] The ASFF and ISFF appropriations, however, are not available outside of Afghanistan and Iraq.[337]

---

[325] *Id.*

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] *Id.*; *see also* 10 U.S.C. 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

[330] *See* 10 U.S.C. 401; DODD 2205.2, *supra* note 209; DODD 2205.3, *supra* note 209.

[331] McNerney, *supra* note 232, at 36.

[332] *Id.*

[333] Memorandum from The Honorable Robert M. Gates, Sec'y of Defense, to The Honorable Carl Levin, Chairman, Comm. on Armed Services (Oct. 31, 2007) [hereinafter Sec'y of Defense Memo] (on file with author).

[334] *See supra* Part IV.A.–C.

[335] *Id.*

[336] *See supra* Part VI.C.

[337] *Id.*

Operational units are conducting military-to-military security assistance training during pre-conflict SSTR operations must use appropriated funds from the "Build Capacity and Equip (BCE)" authority found in Section 1206 of the 2007 National Defense Authorization Act.[338] This authority allows DOD to "build the capacity" of foreign military forces in support of the Global War on Terrorism.[339] Its use, however, is severely restricted.[340] Use of the BCE requires the approval of the Secretary of Defense, the concurrence of the Secretary of State, and Congressional notification.[341] Additionally, this fund is only available for new obligations until 30 September 2008, which severely limits DOD's ability to undertake long-term security assistance and stabilization projects.[342] Finally, the BCE authority is only $300 million for use world-wide.[343] This is relatively small when compared to the ASFF ($1.35 billion) and ISFF ($1.5 billion) funds.[344]

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the BCE authorization, extend the availability date, and increase the funding to a level comparable to that of the ASFF and ISFF. On 31 October 2007, DOD recommended that Congress expand the BCE authority and extend its availability past 30 September 2008.[345] Congress did not approve either of these recommendations.[346] As such, operational units conducting military-to-military security assistance training operations outside of Afghanistan and Iraq are limited to using the existing BCE appropriation.

B. Conclusion

The pre-conflict SSTR operations conducted outside of Afghanistan and Iraq face significant funding challenges that substantially affect the operational units conducting these operations. Generally, the funds available for these operations are difficult to use because they are heavily restricted. Additionally, they do not allow the units to execute the types of missions that are necessary to achieve strategic success. Congress should either ease the restrictions that are placed on these funding mechanisms, or create new appropriations that are more expansive and easier to use.

VIII. Conclusion

Since the end of the Cold War, the United States has been increasingly involved in stabilization and reconstruction operations throughout the world.[347] These operations "typically last 5 to 8 years and surpass combat operations in the cost of human lives and dollars."[348] To achieve victory, the U.S. Government must continue to improve how it approaches these operations.

The DOD has significantly changed its approach to SSTR operations.[349] First, DOD formalized a new stability operations policy, which elevated stability operations to a core military mission on the same level with combat operations.[350] Second, the military planning guidance was broadened to more fully address pre-conflict and post-conflict operations.[351] Third, a new joint operating concept was developed to serve as the basis for how the military will support future SSTR

---

[338] John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364 § 1206, 120 Stat. 2083, 2418 (2006).

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Compare* § 1206, *with* Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, div. L, 121 Stat. 1844, 1896 (2007).

[345] Sec'y of Defense Memo, *supra* note 333.

[346] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 323, div. L, 122 Stat. 3, 60.

[347] GAO-07-549, *supra* note 2, at 1.

[348] *Id.*

[349] *Id.* at 3–4.

[350] DODD 3000.05, *supra* note 9.

[351] JOINT PUB. 3-0, *supra* note 10.

operations.[352] This new approach raised two critical issues that were answered by this article: (1) what is DOD's role when executing these operations; and (2) to what extent can these operations be lawfully conduced under existing fiscal law principles?

The DOD's role in SSTR operations will vary dependent upon the nature of the operation. Generally, it will be contingent upon three factors: (1) where does the operation fit on the continuum that ranges from peace to crisis to conflict,[353] (2) how is the operation categorized,[354] and (3) what is the desired end-state of that operation?[355] Recall that at a minimum, military commanders are required to consider stability operations when planning every phase of any military operation.[356] On the other hand, DOD might find it is the sole agency conducting SSTR operations after a major operation or campaign.[357] In most cases, the model will certainly involve some level of interagency collaboration and cooperation.

Current operations in Afghanistan and Iraq demonstrate that the PRT concept is the method most likely to achieve operational success. The use of PRTs allows for greater interagency planning and brings together both the short-term and long-term viewpoints. This is especially true in the ePRTs, which provide the brigade or regimental commander with a viewpoint that goes beyond his unit's battle space. The PRT concept is not perfect, especially in the area of civil-military coordination, but both DOD and DOS have recognized the weaknesses and are in the process of implementing plans that are likely to increase operational success.

Legally funding the current SSTR operations in Afghanistan and Iraq is not a major challenge since Congress has appropriated or authorized various funds for these purposes. The greater funding challenge is with the pre-conflict SSTR operations being conducted in support of the broader Global War on Terrorism. Recall, that these pre-conflict SSTR operations are being conducted using cumbersome funding mechanisms that aren't tailored to the particular mission. In many cases, this has limited the scope of what the operational units can achieve.

To remedy these funding limitations, Congress should ease the restrictions that have been placed on the OHDACA appropriation and HCA authorizations, or authorize the use of DOD O&M funds for CERP projects being conducted outside of Afghanistan and Iraq (i.e., Global CERP). Additionally, Congress should ease the restrictions placed on the BCE authorization, extend its availability date, and increase the funding to a level that allows the operational units to properly conduct military-to-military training. These changes will provide the operational units conducting pre-conflict SSTR operations with the same tools that are being successfully used in Afghanistan and Iraq.

---

[352] JOINT OPERATING CONCEPT, *supra* note 11

[353] *Id.*

[354] JOINT PUB. 3-0, *supra* note 10.

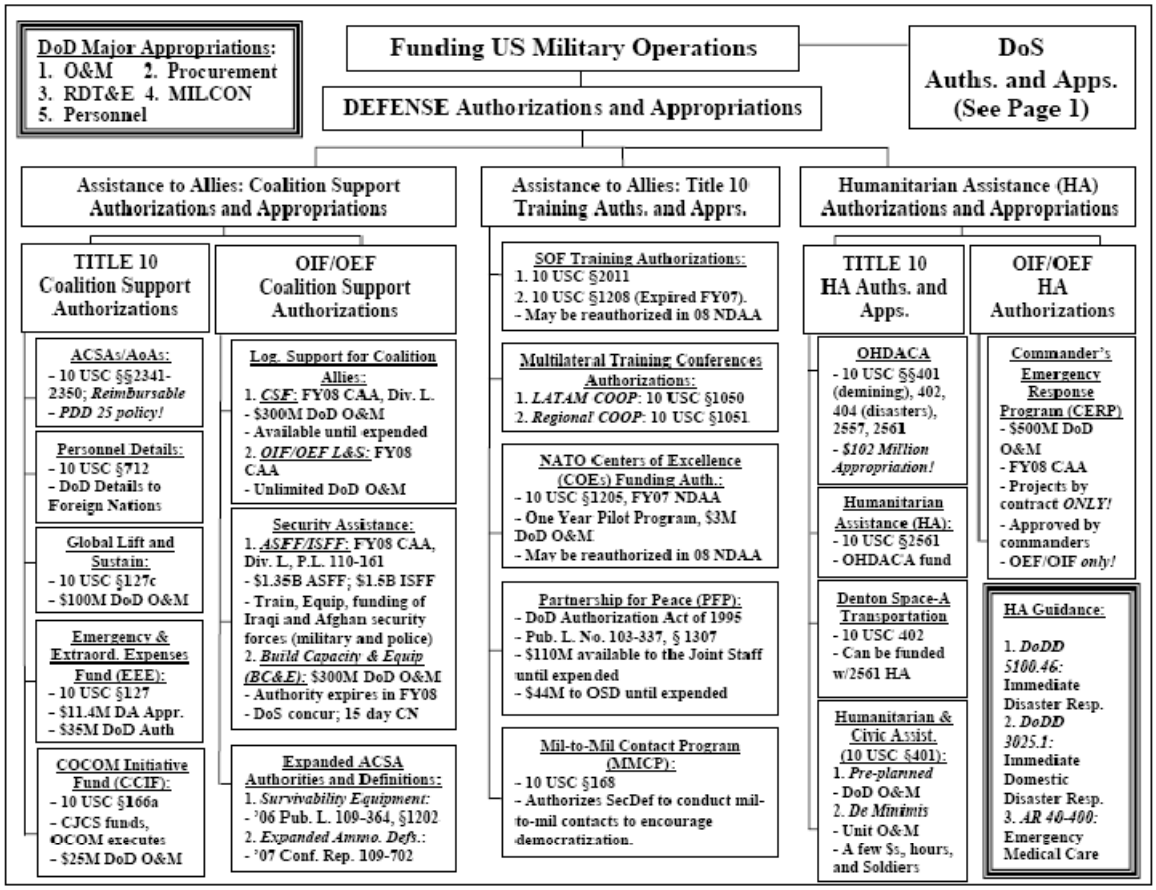
[355] JOINT OPERATING CONCEPT, *supra* note 11.

[356] JOINT PUB. 3-0, *supra* note 10, at IV-27 to IV-29.

[357] *Id.* at I-9.

Appendix

DOD Authorizations and Appropriations[358]



[358] *See supra* note 191.

Sentencing Credit for Pretrial Restriction

Major Elizabeth A. Harvey[*]

I. Introduction

You are a new Marine Corps Judge Advocate. You graduated from Naval Justice School two months ago and have now been assigned as a defense counsel in Camp Pendleton, California. When you checked in, the senior defense counsel handed you twenty case files and told you that you can expect to carry about thirty clients at a time. As you attempt to wade through the procedural and substantive requirements of your new job you notice an issue that sends you to LexisNexis. One of the units aboard the base is Separations Company, Headquarters and Service Battalion, Marine Corps Base. This command receives all West Coast Marines who are arrested by civilian police or federal officers or return on their own after deserting from a unit for more than six months. Many of the Marines who are arrested pursuant to a federal warrant are placed in pretrial confinement when they arrive at Camp Pendleton. The Marines who turn themselves in usually are placed on pretrial restriction. Most of these deserters are charged with unauthorized absence (UA) and are tried in either a summary or special court-martial. Most of these clients plead guilty in order to serve their sentence, take their bad conduct discharge, and get back home as soon as they can. When these cases go to special court-martial, the clients who were placed in pretrial confinement receive a day for day sentencing credit,[1] but the clients who served pretrial restriction garner only "consideration" of their pretrial restraint.[2] For two clients with similar records, similar offenses, and similar adjudged sentences, the practical result can vary by a great deal. A client who is UA for three years, in pretrial confinement for 40 days, and receives a 180 day sentence and a bad conduct discharge from the military judge has 140 days until he can be released from confinement and head home on appellate leave.[3] Another client with the same term of UA, who is on pretrial restriction for 40 days and receives the same sentence from the military judge,[4] has 180 days until his release and appellate leave. In these two cases, the identical sentence from the judge results in one client effectively serving some type of restraint for forty days longer than the other.[5]

As you think about this apparent disparity, another scenario comes to mind. You have a client who is charged with breaking restriction. The maximum punishment for this offense is thirty days of confinement or sixty days of restriction.[6] If your client had been in pretrial confinement for fifteen days before going to court-martial, he would serve at most fifteen

---

[*] Judge Advocate, U.S. Marine Corps. Presently assigned as Appellate Government Counsel, Navy and Marine Corps Appellate Review Activity, Washington, D.C. LL.M., 2008, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.; J.D., 2002, George Mason University School of Law; B.A., History & English, 1996, University of Notre Dame. Previous assignments include Legal Services Support Section, 1st Marine Logistics Group, Camp Pendleton, Cal. 2005–2007 (Defense Counsel 2006–2007, Senior Trial Counsel 2005–2007); Marine Corps Base, Camp Pendleton, Cal. 2002–2005 (Senior Trial Counsel 2004–2005, Legal Assistance Attorney 2002–2004); Motor Transport Officer, 1st Force Service Support Group, Camp Pendleton, Cal. 1997–1999. Member of the bar of Illinois. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course.

[1] *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (holding that all pretrial confinement served in anticipation of trial is credited day for day against the sentence adjudged).

[2] *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-23 (15 Sept. 2002) (C2, 1 July 2003) [hereinafter BENCHBOOK].

[3] *See* UCMJ art. 76a (2008). Appellate leave is authorized under Article 76a for the period after convening authority's action. *Id.* Voluntary appellate leave is also permitted for the period of time after a sentence is served until convening authority's action upon an accused's request and the commander's approval. U.S. MARINE CORPS, ORDER 1050.16A, APPELLATE LEAVE AWAITING PUNITIVE SEPARATION (19 June 1998).

[4] *See* BENCHBOOK, *supra* note 2, para. 2-5-23. The *Military Judges' Benchbook* gives a list of factors for the court to consider in sentencing. *Id.* The duration of pretrial confinement or restriction is listed as one of them. *Id.* In practice, sentences do not seem to be reduced much if at all based upon this "consideration" of the duration of pretrial restriction unless it is exceptionally long.

[5] This article will not discuss the effect of credit awarded by confinement facilities for good behavior or other programs. Nor will it discuss the effect of pretrial agreements and sentence limitations on this issue. Good time credit is issued on an individual basis, depending on the behavior of each inmate. Similarly, the pretrial agreement is negotiated on an individual basis with a specific commander. Too many individual and idiosyncratic variables exist with these two elements of military justice practice to include and discuss in this "big picture" article.

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 102e (2008) [hereinafter MCM]. The maximum punishment for breaking restriction is confinement for one month and forfeiture of two-thirds pay per month for one month. *Id.* at A12-7. Rule for Courts-Martial 1003(b)(5) states that restriction may be adjudged for no more than two months for each month of authorized confinement, and in no case for more than two months. *Id.* R.C.M. 1003(b)(5). Therefore, with a maximum punishment of one month confinement for breaking restriction, the sentence imposed can either be one month confinement or two months restriction.

more days of confinement or thirty days of restriction.[7] But because he has been on pretrial restriction for fifteen days before the court-martial, he can be awarded the full thirty days of confinement or sixty days of restriction.[8] This troubles you because it seems inequitable and allows "punishment"[9] in excess of the maximum allowable under the Uniform Code of Military Justice (UCMJ).

After hours spent scouring the *Military Justice Reporters* and talking to fellow defense counsel, you decide to challenge the issue. You walk into court with a client from Separations Company who is pleading guilty to unauthorized absence from his unit for two years. He has been on pretrial restriction for forty days prior to trial. As sentencing begins, the military judge notes that the charge sheet shows no pretrial confinement and therefore, no *Allen* credit.[10] You stand up and address the military judge. "Sir, the defense moves for credit to be awarded to the accused for his pretrial restriction. We ask for twenty days of confinement credit based on forty days of pretrial restriction." The military judge looks back at the charge sheet, notes that the accused has indeed been on pretrial restriction for forty days, and looks back at you. "Counsel, what case law can you give me that tells me that I can or must give the credit you ask for?"

This article serves to answer to that question. The first portion of the article traces the history of sentencing credits in military criminal practice. The first judicially recognized credit for pretrial confinement came from *United States v. Allen* and since that time, several other types of judicially created and codified credits have emerged. An accused receives credit for all pretrial confinement served in a military facility.[11] An accused will receive credit if he is illegally punished before trial in violation of Article 13, UCMJ.[12] The accused receives sentencing credit for restriction that is deemed tantamount to confinement.[13] He receives credit for any nonjudicial punishment served for the same offense he is convicted of at court-martial.[14] An accused will be credited if the government violates Rule for Court-Martial (RCM) 305 procedures.[15] However, if an accused serves pretrial restriction that does not amount to confinement or punishment, he does not currently receive any recognized sentencing credit.

The second portion of this article will analyze the reasoning of the cases and the legislation that has developed the variety of sentencing credits that exist today. Although *Allen* credit is born out of judicial interpretation of Department of Defense Instruction (DODI) 1325.4 that on its face does not extend to restriction,[16] this article argues that as other credits have evolved since *Allen*, a credit for pretrial restriction must be judicially created.[17] This credit would serve to ensure equity and certainty in sentencing. It would also make certain that servicemembers did not serve punishments greater than the maximum allowable under the UCMJ.

---

[7] *See* United States v. Pierce, 27 M.J. 367, 369 (C.M.A. 1989) (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. 1969), App. 25, Tbl. of Equivalent Punishments, ¶¶ 127*c*(2), 131*d*). In the 1969 Table of Equivalent Punishments that *Pierce* cites, one day of confinement is equivalent to two days of restriction. *Id*. Therefore, the fifteen days of pretrial confinement will be credited as fifteen days of confinement or thirty days of restriction, depending on whether the sentence adjudged is confinement or restriction.

[8] Once again, because pretrial restriction is only a consideration in sentencing, the full month of confinement or two months of restriction detailed *supra* in note 6 is available despite the pretrial restriction served.

[9] Pretrial restraint is not considered punishment, but rather a tool to ensure appearance at trial and to prevent the accused from committing future serious misconduct. However, *Allen* credit for pretrial confinement effectively replaces a day of "punishment" confinement with a day of pretrial "nonpunishment" confinement, so that pretrial confinement counts toward all maximum punishment calculations.

[10] *See* BENCHBOOK, *supra* note 2, para. 2-4.

[11] *See* 17 M.J. 126 (C.M.A. 1984).

[12] United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[13] United States v. Mason, 19 M.J. 274 (C.M.A. 1985).

[14] United States v. Pierce, 27 M.J. 367 (C.M.A. 1989).

[15] MCM, *supra* note 6, R.C.M. 305.

[16] *Allen*, 17 M.J. 126.

[17] The opinion in *Allen* was based on DODI 1325.4, which seemed to say that the military would award sentencing credit in the same manner as the federal courts. *Id.* The case law from federal courts on house arrest tends to disallow any credit for house arrest that is not tantamount to confinement. *See, e.g.*, United States v. Insley, 927 F.2d 185 (4th Cir. 1991) (holding that requiring a defendant to reside with parents, leave only to seek employment, work, or go to church, and be electronically monitored did not constitute "official detention" requiring sentencing credit); United States v. Edwards, 960 F.2d 278 (2d Cir. 1992) (holding that electronic monitoring and defendant's restriction largely to his residence did not entitle defendant to credit, although terms may be rather restrictive). This article will discuss the distinction between house arrest and restriction in lieu of arrest in section III.B., *infra*, and argue that our form of restriction cannot be captured by the Department of Justice (DOJ) rules on sentencing credit. Further, as mentioned *supra*, the military case law since *Allen* has moved from technical adherence to DOJ standards to equity-based judicial creations. From an equity standpoint, a credit for pretrial restriction is appropriate.

Finally, this article will advocate a specific credit that will permit one day of sentencing credit for every two days of pretrial restriction. This proposed sentencing credit is based on the concept of sentence equivalency that has existed since the 1969 revision of the UCMJ and continues to the present. The 1969 *Manual for Courts-Martial* (*MCM*) included a chart that listed equivalent punishments.[18] In this chart, one day of confinement equaled two days of restriction to limits.[19] This chart itself is not contained in the current version of the MCM; however the content remains in a different form. Rule for Courts-Martial 1003(b)(5) states that restriction can be awarded where confinement is authorized at a rate of two months restriction for one month of confinement.[20] It further states that both confinement and restriction can be adjudged, but they may not exceed the maximum authorized amount of confinement, "calculating the equivalency at the rate specified in this subsection."[21] Additionally, the *Military Judges' Benchbook* uses the equivalency chart from the 1969 *MCM* in its instruction on crediting prior nonjudicial punishment.[22] This table also establishes that one day of confinement is equal to two days of restriction.[23] Based on the history of sentencing credits and the philosophy behind the various credits currently given, this article will argue that a credit for pretrial restriction is a natural extension of the existing sentencing credits.

Whenever a new rule is created in military justice, its limits are quickly tested. As will be discussed in the background section in Part II, the creation of *Allen* credit soon generated questions about credit in cases where an accused was not put into pretrial confinement, but was restricted under conditions so severe as to essentially be confinement.[24] This led to case law that allowed the *Allen* credit to be extended to cases where terms of pretrial restraint were considered "tantamount to confinement."[25] Similarly, adoption of this restriction credit would engender its own questions. What would be the minimum restrictions to allow for the credit? Would the remedy always be one day of confinement credit for each two days of pretrial restriction, or would the military judge have the discretion to shape the remedy to fit the restriction? If the accused were restricted to his barracks, but allowed to wear civilian clothes and drive to his workspace, would he potentially receive only one day confinement credit for every three days of this restriction? Or would a bright line rule of minimum restriction standards that must be met in order to receive the credit be better? Would commanding officers be tempted to place an accused servicemember on pretrial restriction just slightly more permissive than this bright line in order to avoid the credit? Would the next step then be to develop a line of case law on restraint tantamount to restriction? In evaluating these logical follow on questions, this article will advocate a bright line rule for determining the type of restriction that allows for this credit. The credit would be like *Allen* credit and be defined, not discretionary. The minimum standard for applying the credit should mirror the definition of restriction in lieu of arrest under RCM 304(a)(2). This standard is the same one used to determine whether or not the speedy trial clock has begun and is therefore not a new standard, but a new application of an existing standard. This adoption of the RCM 707(a) standard for restriction should allow for a consistent application and easier transition into the new credit, rather than a graduated scale.

The background and analysis contained herein will give the practitioner a compilation of sources with which to make a motion for credit and, when posed with the question from the military judge in the hypothetical above, to answer it and either get the credit requested, or at least place the issue on the record so that it may be determined by the appellate courts in the future. Someday the credit may be not only recognized, it may be named after your client.

---

[18] DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 632 (1982) (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[19] *Id.*

[20] MCM, *supra* note 6, R.C.M. 1003(b)(5).

[21] *Id.*

[22] BENCHBOOK, *supra* note 2, para. 2-7-21, tbl.2-6.

[23] *Id.*

[24] *See, e.g.*, United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disposition); United States v. Smith, 20 M.J. 528, 531 (C.M.A. 1985).

[25] *Mason*, 19 M.J. 274.

II. The History of Sentencing Credits in Military Justice

A. Pre-*United States v. Allen*

Initially, confinement served before the convening authority took action on the proceedings of the court-martial was considered pretrial confinement and was not credited towards the sentence.[26] This type of confinement was legally distinguished from confinement as a result of a sentence because a prisoner could not legally be punished until the convening authority acted.[27]

Confinement prior to convening authority's action was not counted toward the sentence adjudged. However, military justice did have a mechanism for considering this term of "pretrial" confinement. Before the UCMJ was enacted, pretrial confinement was "a matter in mitigation to be considered by a reviewing authority in his action on sentence."[28] The convening authority was the only participant in the court-martial to consider the pretrial restraint and it was considered "highly irregular and impermissible" for members to consider pretrial confinement when they deliberated on a sentence.[29]

While the UCMJ was being drafted following World War II, a Cornell Law School professor proposed that pretrial confinement be included as a sentencing factor that the court considered in determining a sentence.[30] When the *MCM* containing the UCMJ was completed in 1951, it directed that pretrial confinement was a matter to be considered by the court-martial in adjudging an appropriate sentence.[31] This requirement continues today. The *Military Judges' Benchbook*'s sentencing instructions include a list of several factors to be considered on sentencing, including "the duration of the accused's pretrial confinement or restriction."[32]

In 1982, the Court of Military Appeals (COMA) heard the case of *United States v. Davidson*.[33] Airman First Class (A1C) Vance Davidson had been convicted of involuntary manslaughter and sentenced to a dishonorable discharge, three years confinement at hard labor, total forfeitures, and reduction to the lowest enlisted pay grade.[34] At the time, the three years confinement at hard labor was the maximum confinement authorized for the offense.[35] The accused had been in pretrial confinement for 143 days when his sentence was adjudged.[36] On appeal, the court looked at the issues of: (1) whether it was error for the military judge not to instruct the members to consider Davidson's pretrial confinement in determining their sentence; (2) whether it was error for the staff judge advocate not to advise the convening authority to consider the pretrial confinement; and (3) whether it was illegal for the accused to serve more confinement time than authorized under the UCMJ for the offense when his pretrial confinement was added to his adjudged confinement at hard labor.[37]

The court in *Davidson* surveyed the history of pretrial confinement and its role in acting as a "temporary restraint only as strict as necessary to secure the presence of the accused for trial and execution of his sentence."[38] The court pointed to Article 13, UCMJ stating that it "expressly provided that the imposition of pretrial restraint was not for the purpose of

---

[26] *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 64 (3d ed. 1913), *cited in* United States v. Davidson, 14 M.J. 81, 85 (C.M.A. 1982).

[27] *Id.*

[28] *Davidson*, 14 M.J. at 85 (citing editions of the *MCM*, U.S. Army from 1917 to 1949).

[29] *Id.*

[30] *Id.* (citing REPORT OF NAVY GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD (KEEFE REPORT) 185 (Jan. 1947)).

[31] *Id.* This change was not made to remove consideration of pretrial restraint by the convening authority when taking action, it was added as an additional requirement. *Id.* Convening authorities were still to consider pretrial restraint in their action. *Id.* at 86.

[32] BENCHBOOK, *supra* note 2, para. 2-5-23.

[33] 14 M.J. 81.

[34] *Id.* at 82.

[35] *Id.* The 2008 edition of the *MCM* states a maximum allowable punishment for involuntary manslaughter of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years. MCM, *supra* note 6, at A12-3.

[36] *Davidson*, 14 M.J. at 82.

[37] *Id.* at 83.

[38] *Id.* at 84.

punishment but a necessary tool for the administration of justice."[39] Based on the premise that pretrial restraint is expressly not for punishment, the court found that the period of pretrial restraint does not extend an adjudged sentence beyond the maximum allowable for the offense.[40] The court found, however, that the military judge did err in neglecting to instruct the members to consider his pretrial confinement and that the staff judge advocate did err in neglecting to advise the convening authority to consider the pretrial confinement when taking action as required in the *MCM*.[41] The court ordered the lower court to reassess the accused's sentence and to reduce his sentence by at least the 143 days he served in pretrial confinement.[42] This was not to operate as a credit for his time, but was instead to substitute for the lack of consideration given those 143 days by the panel members and convening authority.[43]

In a concurring opinion, Chief Judge Everett addressed a 1966 change in federal law. In the Bail Reform Act, Congress directed that credit be given to federal prisoners for time spent in pretrial confinement.[44] Although the Act expressly excluded offenses triable by court-martial, Chief Judge Everett saw it as recognition by Congress that "although in legal theory pretrial confinement may not constitute punishment, it often seems almost the same from the standpoint of the persons confined and may have much the same effect upon him."[45] The Bail Reform Act meant that no federal civilian defendant would serve confinement beyond the maximum allowable for his offense, and Chief Judge Everett believed that the same consideration should be given to servicemembers tried under the UCMJ.[46] He further felt that failing to do so would create an equal protection issue.[47] Servicemembers serving pretrial confinement were subject to greater punishment than civilians in federal court and other servicemembers who were not placed in pretrial restraint.[48] The chief judge did not advocate a credit such as that given by the Bail Reform Act, but he did believe that in cases where the accused is sentenced to the maximum allowable confinement, his approved sentence should be reduced by the number of days served in pretrial confinement, so that he would not serve aggregate confinement beyond the maximum allowable.[49]

B. *United States v. Allen*[50]

Shortly after *Davidson* was decided, another case came before the court. This time, the Bail Reform Act played a prominent role in the majority opinion. Private First Class (PFC) Melvin Allen was a young Marine convicted of robbery and assault consummated by a battery.[51] He was sentenced to be confined at hard labor for twenty-four months, to forfeit $501.30 pay per month for six months, to be reduced to E-1, and to be discharged from the Marine Corps with a bad-conduct discharge.[52] Allen had spent eighty days in pretrial confinement and the military judge had properly instructed the members as required in *Davidson*.[53] The accused's argument for credit for his pretrial confinement was based on DODI 1325.4.[54] This instruction required the military services to use the same procedures to compute sentences that the Department of Justice

---

[39] *Id.*

[40] *Id.*

[41] *Id.* at 86.

[42] *Id.*

[43] *Id.*

[44] 18 U.S.C. § 3568 (2000).

[45] *Davidson*, 14 M.J. at 87 (Everett, C.J., concurring).

[46] *Id.* at 88.

[47] *Id.* at 89.

[48] *Id.*

[49] *Id.*

[50] 17 M.J. 126 (C.M.A. 1984).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*; U.S. DEP'T OF DEFENSE, INSTR. 1325.4, TREATMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTION FACILITIES (7 Oct. 1968).

(DOJ) used.[55] Because the DOJ followed the mandate of the Bail Reform Act to give credit for pretrial confinement, PFC Allen argued that the DODI required the services to do the same.[56]

The court examined the fact that the Bail Reform Act expressly exempted offenses triable by court-martial, but determined that this was an exemption, not a prohibition.[57] The military was free to adopt this element of federal law if it so desired.[58] The court determined that the Secretary of Defense had in fact done just that in his instruction, "voluntarily incorporating the pretrial-sentence credit extended to other Justice Department convicts."[59]

This case created a day for day credit against an adjudged sentence for any pretrial confinement. In his concurring opinion, Chief Judge Everett pointed out the benefits of such a rule.[60] It provided a certainty in sentencing that had been missing.[61] He pointed out the difficulty in determining exactly how "consideration" of the accused's pretrial confinement fit into members' deliberations on sentence.[62] He also saw disparities in the way in which convening authorities considered pretrial confinement when taking their action.[63] This day for day credit removes uncertainty and allows the accused better information when determining what pleas to enter or what pretrial agreements to propose.[64]

Along with certainty, Chief Judge Everett felt that the new rule from *Allen* created a uniformity of treatment between civilian and military defendants.[65] Extending the sentencing credit to servicemembers tried by court-martial with pretrial confinement would put them in the same position as defendants tried in federal district courts.[66] Chief Judge Everett also referred back to his concurrence in *Davidson* and noted that the *Allen* credit would mean that the aggregate of pretrial and post-trial confinement would not exceed the maximum authorized confinement for an offense.[67]

The majority of the court determined that DODI 1325.4 required pretrial confinement to be credited towards a servicemembers sentence.[68] The opinion relies completely on the technicalities of that instruction and the Bail Reform Act.[69] Chief Judge Everett's equity arguments came in his concurrence to the majority result.[70] However, as this area of law has continued to evolve, the issue of sentencing credits has become more about these equity type arguments and less about strict interpretation of DODIs and statutes.

C. *United States v. Mason*[71]

Before *Allen* created a credit for pretrial confinement, pretrial restraint was still a heavily litigated area. The timing of pretrial confinement or arrest was significant in determining an accused's rights to due process and a speedy trial. The courts were examining the concept of restriction conditions that were tantamount to confinement when making speedy trial

---

[55] *Allen*, 17 M.J. 126.

[56] *Id.*

[57] *Id.* at 127.

[58] *Id.*

[59] *Id.* at 128.

[60] *Id.* at 129 (Everett, C.J., concurring).

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 128 (majority opinion).

[69] *Id.*

[70] *Id.* at 129 (Everett, C.J., concurring).

[71] 19 M.J. 274 (C.M.A. 1985) (summary disposition).

determinations under Article 10, UCMJ.[72] At the time, RCM 707 did not exist. Instead, speedy trial for those in pretrial confinement or arrest was governed by Article 10, which stated that: "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him."[73] In addition to Article 10, the decisions in *United States v. Burton*[74] and *United States v. Driver*[75] created a presumptive violation of Article 10 whenever pretrial confinement exceeded ninety days.[76] If the case was not tried within those ninety days, the Government would then have a "heavy burden" to show diligence in processing the charges.[77]

Within this speedy trial context, in 1976 the Court of Military Appeals examined the issue of restriction tantamount to confinement in *United States v. Schlif*.[78] The accused was in pretrial confinement for seventy days. Additionally, he spent fifty-seven days restricted to the "narrow confines of his squadron area, the terms of said restriction including an hourly sign-in procedure."[79] The court agreed with the Air Force Court of Military Review that those days constituted "severe restriction amounting to confinement."[80] The fifty-seven days were added to the seventy days spent in pretrial confinement to make 127 days of pretrial confinement, triggering the *Burton* rule.[81]

Following on the heels of the *Allen* case, *United States v. Mason*[82] used a summary disposition to easily shift the analysis of pretrial restriction that had been used for speedy trial purposes in cases like *Schlif* to credit determination.[83] In *Mason*, the accused was restricted to the dayroom with permission to go to the latrine, chapel, and mess hall with an escort.[84] He was also required to sign in hourly and could not participate in training.[85] The court in *Mason* awarded day-for-day *Allen* credit for this restriction tantamount to confinement.[86]

A few months later, the court released its opinion in *United States v. Smith* further defining the parameters of restriction tantamount to confinement that should receive *Allen* credit.[87] Specialist (SPC) Smith was in pretrial confinement for six days before being released and restricted to his barracks for fifty-six days.[88] The restriction prohibited him from using the phone

---

[72] *See, e.g.*, United States v. Schlif, 1 M.J. 251 (C.M.A. 1976) (finding that restriction tantamount to confinement combined with actual confinement to create a total period of 127 days before trial began); United States v. Burrell, 13 M.J. 437 (C.M.A. 1982) (holding that time spent in a hospital prior to pretrial confinement was not tantamount to confinement for speedy trial purposes).

[73] UCMJ art. 10 (1969). The Sixth Amendment to the United States Constitution ensures an accused's right to due process and a speedy trial. U.S. CONST. amend. VI. This right exists whether or not an accused is confined, whereas Article 10, UCMJ applies only to those assigned to pretrial confinement or arrest. However, the requirements of Article 10 as developed by *Burton* and *Driver* are more rigorous than those of the Sixth Amendment; therefore, speedy trial case law in military justice primarily looks to Article 10 to ensure that an accused in pretrial confinement has been afforded a speedy trial. *Burrell*, 13 M.J. 437.

[74] 21 C.M.A. 112 (C.M.A. 1971).

[75] 23 C.M.A. 243 (C.M.A. 1974).

[76] *Schlif*, 1 M.J. at 252.

[77] *Id.*

[78] 1 M.J. 251.

[79] *Id.* at 252.

[80] *Id.*

[81] *Id. United States v. Burton* created a presumptive violation of Article 10 whenever pretrial confinement exceeded ninety days. *See* 21 C.M.A. 112; *see also* United States v. Weisenmuller, 34 C.M.R. 434 (C.M.A. 1968) (finding restriction to the barracks, necessity store, and mess hall along with hourly sign in and other restrictions amounted to confinement); United States v. Acireno, 15 M.J. 570 (C.M.A. 1982) (holding that restriction to the barracks, mess hall, and legal services office with an escort along with other restrictions equated to confinement even without a sign in requirement). *But see* United States v. Burrell, 13 M.J. 437 (C.M.A. 1982) (holding that time spent in a hospital prior to pretrial confinement was not tantamount to confinement for speedy trial purposes); United States v. Powell, 2 M.J. 6 (C.M.A. 1976) (finding that restriction to post was not tantamount to confinement).

[82] 19 M.J. 274 (C.M.A. 1985) (summary disposition).

[83] *Id.*

[84] *See* United States v. Smith, 20 M.J. 528, 531 (C.M.A. 1985).

[85] *Id.*

[86] *Mason*, 19 M.J. at 274.

[87] 20 M.J. 528 (C.M.A. 1985).

[88] *Id.* at 530.

without permission, performing normal duties, leaving his barracks without permission and an escort, and having visitors outside of specified hours and location.[89] He was required to perform duties assigned by the company commander and first sergeant and to sign in every thirty minutes during certain periods.[90] He also had to remain in his room with the door unlocked during certain hours.[91]

The court in *Smith* stated that the determination of whether certain conditions of restriction are tantamount to confinement is based on the "totality of the conditions imposed."[92] The court specifically examined the case law concerning restriction tantamount to confinement for speedy trial purposes.[93] It then turned to the cases on restriction involving sentencing credit, including *Mason* and Article 13 cases.[94] In examining these cases, the court identified factors to be considered in determining whether an accused's pretrial restraint is tantamount to confinement.[95] These factors include the nature and scope of the restraint, the types of duties performed during the period of restraint, and the degree of privacy allowed.[96] Additional factors include the requirement to sign in with someone in authority or to be subject to regular checks to ensure the accused's presence; an escort requirement; the nature of any telephone and visitor privileges; access to religious, medical, recreational and other support facilities; the location of sleeping accommodations; and whether the accused is allowed to keep and use his personal property.[97]

The court in *Smith* took care to differentiate restriction tantamount to confinement from illegal pretrial punishment. The court found that although SPC Smith's restriction was essentially the same as pretrial confinement, it was not a violation of Article 13, UCMJ.[98] The conditions of the restriction were lawful and related to legitimate goals of pretrial restraint.[99] However, on a spectrum between "restriction" and "confinement," these conditions rendered his restriction tantamount to confinement.[100] The court granted SPC Smith fifty-six days of administrative credit for his pretrial restriction.[101]

Mason credit is significant for several reasons. First, neither *Mason* nor *Smith* discussed the federal statute or DODI 1325.4 which was used as the basis for *Allen*. Although federal case law does provide for pretrial confinement credit based on onerous, confinement-like conditions of a halfway house or house arrest,[102] it is never mentioned in these cases. Both *Mason* and *Smith* adopt the equity argument inherent in the *Schlif* line of cases and apply the same test to determine additional sentencing credit. This shows that although *Allen* was ostensibly decided on statutory interpretation as opposed to equity, basic notions of equity and fairness underlie sentencing credit case law as a whole. Also significant is the easy manner in which *Mason* picked up the analysis from one area of the law, speedy trial under *Burton* and Article 10, UCMJ and applied it to a new area, pretrial confinement credit. Section III.F. suggests a similar adaptation in extending *Allen* credit to pretrial restriction that does not amount to confinement. The current test used to determine when the speedy trial clock begins under RCM 707 can be used to determine when conditions are sufficient to warrant the type of restriction credit being proposed.

---

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 531.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 531–32.

[98] *Id.* at 532.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 532–33.

[102] *See* United States v. London-Cardona, 759 F. Supp. 60 (D.P.R. 1991) (finding twenty-four-hour house arrest confining defendant to a small space—no more than thirty feet outside her front door—with surveillance around the clock and only truly necessary trips to church, doctors, and lawyers upon approval of court officials to constitute official detention for credit purposes).

D. *United States v. Pierce*[103]

Article 15, UCMJ details the procedures for nonjudicial punishment.[104] Article 15(f) states that nonjudicial punishment is not a bar to forwarding the same charge or related charges to a court-martial.[105] However, it also allows an accused to show that he has received punishment so that the previous nonjudicial punishment can be considered in determining an appropriate sentence in the court-martial.[106] In 1989, the case of *United States v. Pierce* came before the COMA, challenging the ability of a convening authority to court-martial a servicemember for an offense for which he had already received nonjudicial punishment.[107] The court determined that Congress's intent to allow a convening authority to do just that was apparent from the plain text of Article 15.[108] The court looked at exactly how a prior nonjudicial punishment could be used in a court-martial for the same offense.[109] The court held that the government cannot use the nonjudicial punishment in any way during the merits portion of the case—not even for impeachment or to show a bad service record.[110]

Although Article 15 clearly allowed an accused to be convicted of an offense for which he had previously been given nonjudicial punishment, the court held that Article 15 did not allow an accused to be punished twice for the same offense.[111] Allowing an accused to be punished twice for the same offense would violate "the most obvious, fundamental notions of due process of law."[112] Therefore, in cases where an accused has received nonjudicial punishment for an offense and is then court-martialed and found guilty of the same offense, he is entitled to "complete credit for any and all nonjudicial punishment suffered: day-for-day, dollar-for-dollar, stripe-for-stripe."[113] The court pointed to the table of equivalent punishments from the 1969 *MCM* as a guide to reconciling nonjudicial punishment with punishment received at a court-martial.[114] The court also discussed the manner in which the consideration would be given to the accused. The accused decides whether the prior punishment will be shown to the court-martial for its consideration on sentencing, or whether it will be left to the convening authority to ensure that credit is given.[115] In this case, the convening authority approved as much of the sentence as was allowed by the pretrial agreement, clearly not crediting the nonjudicial punishment against the sentence.[116] The court returned the case for the lower court either to determine whether the military judge had considered the nonjudicial punishment in his sentence or to adjust the appellant's sentence by crediting his nonjudicial punishment.[117]

The *Pierce* credit is significant because it allows credit to be applied for restriction served before trial. Although the restriction being credited in this case is "punishment" restriction as opposed to "restraint" restriction, it provides a framework for how this restriction can be credited. The opinion cites the 1969 *MCM* Table of Equivalent Punishments and states that "[c]onfinement for 1 day is equivalent to 2 days' restriction . . . ."[118] The fundamentals of due process that do not allow an accused to be punished twice for the same offense are based in the same equity arguments that should not allow an accused to serve more than the maximum allowable sentence through pretrial restriction.

---

[103] 27 M.J. 367 (C.M.A. 1989).

[104] UCMJ art. 15 (2008).

[105] *Id.* art. 15(f).

[106] *Id.*

[107] 27 M.J. at 368.

[108] *Id.*

[109] *Id.* at 369.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[115] *Id.*

[116] *Id.* at 370.

[117] *Id.*

[118] *Id.* at 369.

E. Article 13 Violations

Article 13, UCMJ states that "[n]o person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to ensure his presence . . . ."[119] The seminal authority for cases where the conditions of arrest or confinement are unduly harsh or overly rigorous is *United States v. Suzuki*.[120] Not all Article 13 cases include conditions of confinement. Other forms of pretrial punishment have been the basis for sentencing credits.[121] For several years, the manner in which sentencing credits were applied for Article 13 violations was unclear.[122] In some circumstances, the credits were applied to the adjudged sentence and, in others, to the sentence as approved.[123] Finally, *United States v. Spaustat* created a prospective rule that settled the issue and determined that all Article 13 sentencing credits would be applied to the sentences as approved.[124]

1. United States v. Larner[125]

Although the military justice system lacked any type of sentencing credit for legal pretrial confinement prior to *United States v. Allen*, it handled illegal pretrial confinement in violation of Article 13 differently. In 1976, in the case of *United States v. Larner*,[126] the COMA created an administrative credit for illegal pretrial confinement. In that case, Marine Corporal (Cpl) Larner's sentence included ten years confinement.[127] On review, the Navy-Marine Corps Court of Military Review (NMCMR) determined that he had served fifty-six days of illegal pretrial confinement.[128] The NMCMR reassessed the sentence and reduced it to nine years, ten months.[129] Unfortunately for the accused, because of the graduated good time system in place at that time, this reduction would actually cause him to stay in confinement for 196 days more than if his sentence had been left alone.[130] The COMA determined that the original sentence had not become illegal because of the pretrial confinement, but that the illegality of the pretrial restraint made it equivalent to post-trial punishment.[131] Therefore, they found a sentence reassessment to be inappropriate.[132] The proper remedy was an administrative credit that gave the accused day-for-day credit for the pretrial confinement.[133]

2. United States v. Suzuki[134]

In 1983, still a year before *Allen* was published, the COMA decided the case of *United States v. Suzuki*.[135] Airman First Class Suzuki's sentence included four years confinement.[136] The trial judge in his case found that a period of sixty-five days

---

[119] UCMJ art. 13 (2008).

[120] 14 M.J. 491 (C.M.A. 1983).

[121] *See, e.g.*, United States v. Rock, 52 M.J. 154 (C.A.A.F. 1999).

[122] Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and its Application*, ARMY LAW., Aug. 1999, at 1, 12.

[123] *See, e.g.*, *Rock*, 52 M.J. 154; United States v. Spausat, 57 M.J. 256 (C.A.A.F. 2002).

[124] *Spausat*, 57 M.J. at 263–64.

[125] 1 M.J. 371 (C.M.A. 1976).

[126] *Id.*

[127] *Id.* at 372.

[128] *Id.* This confinement was found to violate Article 13 of the UCMJ. *Id.*

[129] *Id.*

[130] *Id.* at 373. Under the good time schedule, a prisoner with a sentence of ten years or more can earn up to ten days of good time per month. *Id.* (citing SEC'Y OF THE NAVY INSTR. 1640.9, DEP'T OF THE NAVY CORRECTIONS MANUAL para. 1009.1 (May 31, 1973). Reducing Cpl Larner's sentence to nine years, ten months meant that he was now only able to earn eight days of good time a month. *Id.*

[131] *Larner*, 1 M.J. at 373.

[132] *Id.*

[133] *Id.* at 375. This administrative credit was to be applied to the approved sentence.

[134] 14 M.J. 491 (C.M.A. 1983).

of pretrial confinement was illegal.[137] He granted day for day credit for this period as dictated by *Larner*.[138] Additionally, there were seven days during this illegal confinement in which A1C Suzuki was placed in administrative and disciplinary segregation.[139] The conditions of this segregation led the military judge to grant an additional two days of credit for each day spent in this segregation, to be added to the sixty-five days already credited.[140] This created an overall credit of seventy-nine days towards A1C Suzuki's four year sentence.[141] The convening authority, on the advice of his staff judge advocate, gave Suzuki the sixty-five days of credit, but did not credit A1C Suzuki with the additional fourteen days ordered by the judge.[142]

The COMA found that the military judge's remedy of more than day-for-day credit was appropriate.[143] The court stated that "where pretrial confinement is illegal for several reasons and the military judge concludes the circumstances require a more appropriate remedy, a one-for-one day credit limit is not mandated."[144]

Suzuki is an interesting case primarily because of where it falls on the timeline of sentencing credit case law. *Larner* had equated illegal pretrial confinement to legal post-trial confinement, therefore garnering an accused credit for that time served.[145] *Suzuki* expanded a trial judge's ability to basically punish the government for illegal and harsh conditions by giving additional credit beyond just the number of days served illegally. This came just in time for the *Allen* decision. It allowed credit for illegal pretrial punishment to survive *Allen*. If *Larner* had been the last significant decision in this area, the argument that illegal pretrial confinement should be credited because it is essentially punishment in advance of a conviction would have been superceded by *Allen*'s decision to grant credit to all pretrial confinement as though it were post-trial punishment.[146] The decision in *Suzuki* gives military judges great discretion to determine what conditions and circumstances constitute an illegal pretrial punishment and then to award an adequate remedy, beyond just day-for-day credit due for pretrial confinement.

Also of note in the *Suzuki* decision is the dissent. Judge Cook looked to the fact that the accused's sentence was already greatly reduced by a pretrial agreement with the convening authority.[147] In fact, the four years of confinement which he was adjudged was reduced to thirteen months.[148] Judge Cook believed that the seventy-nine days of credit granted by the military judge were subsumed by the thirty-five month sentence reduction required by the pretrial agreement.[149] He did not agree that the sentencing credit should be applied against the approved sentence, but that it should instead be applied against the adjudged sentence.[150] This issue raised by Judge Cook lingered in the case law on illegal pretrial punishment credit until *United States v. Spaustat* was decided in 2002.[151]

---

[135] *Id.*

[136] *Id.* at 492.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* at 494 (Cook, J., dissenting).

[142] *Id.* at 492 (majority opinion).

[143] *Id.* at 493.

[144] *Id.*

[145] United States v. Larner, 1 M.J. 371, 373 (C.M.A. 1976).

[146] The court in *Allen* did not make the decision to grant this credit because it believed that pretrial confinement was equivalent to post-trial punishment, but the practical effect is the same as pointed out in Chief Judge Everett's concurrence in *Davidson*. United States v. Davidson, 14 M.J. 81, 87 (C.M.A. 1982).

[147] *Suzuki*, 14 M.J. at 494 (Cook, J., dissenting).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* 57 M.J. 256 (C.A.A.F. 2002).

3. United States v. Rock[152]

In 1999, the issue raised in the *Suzuki* dissent came before Court of Appeals for the Armed Forces (CAAF) in the case of *United States v. Rock.*[153] The accused, PFC Rock, spent 160 days before trial on pretrial restriction.[154] He was not allowed to train in his military occupational specialty, he performed work details, and had some conditions on his liberty.[155] These conditions together did not amount to restriction tantamount to confinement; however, they did amount to pretrial punishment in violation of Article 13, UCMJ.[156] The military judge awarded the accused 240 days of confinement credit for this illegal pretrial punishment.[157]

When the military judge announced his sentence, he announced that he had taken the 240 days (eight months) of credit into account when adjudging his sentence.[158] He stated that his adjudged sentence of fifty-three months included that credit.[159] The pretrial agreement then further reduced the adjudged sentence to an approved sentence of thirty-six months.[160] The issue on appeal was whether the eight months of credit should have been applied to the adjudged sentence[161] or to the thirty-six month sentence as approved.[162]

The court lays out the rule that "credit against confinement awarded by a military judge *always* applies against the sentence adjudged—unless the pretrial agreement itself dictates otherwise."[163] If the pretrial agreement limits confinement to a certain period less than that adjudged, then the accused cannot be required to serve more confinement than agreed upon, whether it is actual or constructive confinement.[164] If the Article 13 violation is overly rigorous pretrial confinement or restriction tantamount to confinement, then the pretrial agreement's maximum confinement provision would cause the sentencing credit to be applied to the approved sentence.[165] However, if the Article 13 violation does not involve confinement or conditions tantamount to confinement, then the pretrial agreement has no impact and the credit should be applied to the adjudged sentence.[166]

In a concurrence to this case, Judge Effron questioned whether or not applying credit to adjudged sentences allowed the accused to receive meaningful relief.[167] Along with this apparent inequity, the result in *Rock* further confused the area by creating different applications of sentencing credit depending on the type of Article 13 violation.[168]

---

[152] 52 M.J. 154 (C.A.A.F. 1999).

[153] *Id.*

[154] *Id.* at 156.

[155] *Id.* at 155.

[156] *Id.*

[157] *Id.* at 156. The military judge used a calculation of 1.5 days credit for each day of this punishment. *Id.* Under *Suzuki*, the military judge has discretion to fashion a scale of credit for Article 13 violations that can extend beyond day-for-day credit. United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[158] *Rock*, 52 M.J. at 155.

[159] *Id.*

[160] *Id.*

[161] Essentially sixty-one months, because the fifty-three month announced sentence included those eight months of credit. *Id.*

[162] *Id.*

[163] *Id.* at 156–57.

[164] *Id.* at 157.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 157–58 (Effron, J., concurring). This absence of meaningful relief is illustrated in *United States v. Ozores*. 53 M.J. 670, 675 (A.F. Ct. Crim. App. 2000) (holding that the seven days of Article 13 credit due the accused after he was taken to the hospital "while wearing only his underpants and undershirt and waiting to see a doctor for a considerable period of time in a public area while handcuffed" were correctly credited to the adjudged sentence instead of the approved sentence).

[168] *See* Seidel, *supra* note 122, at 12 (arguing for a clear uniform application of Article 13 sentencing credits to approved sentences).

4. United States v. Spaustat[169]

In 2002, the court reexamined the rule from *Rock* and cleared up the double standard.[170] Staff Sergeant Spaustat had been stripped of his staff sergeant stripes while in pretrial confinement.[171] The trial judge found this to be an Article 13 violation and ordered *Allen* credit for the 102 days of pretrial confinement and *Suzuki* credit for the 92 days he served in pretrial confinement without his rank.[172] The question in *Spaustat* was the application of these credits to his adjudged and approved sentence.[173] The court was able to decide this case under the rule in *Rock* because the illegal pretrial punishment was an incident of his pretrial confinement, and therefore the credit had to be applied to the approved sentence unless the pretrial agreement stated otherwise.[174] However, citing the confusion that remained in the case law as well as the inequity raised by Judge Effron in his concurrence in *Rock*, the court took the opportunity to issue a new rule that applies to all Article 13 credit cases.[175] The rule is now that the convening authority is required to apply all confinement credits for violations of Article 13 or RCM 305[176] and all *Allen* credit against the approved sentence unless the pretrial agreement provides otherwise.[177]

F. RCM 305(k) Credit

1. RCM 305

Rule for Courts-Martial 305 covers the rules and procedures governing pretrial confinement.[178] The rule dictates who may be confined, as well as who may order that confinement.[179] The rule establishes an accused's right to counsel as well as the notification requirements when an accused is ordered into pretrial confinement.[180] It also mandates a review of pretrial confinement by a neutral and detached officer within seven days of the imposition of confinement.[181]

Rule for Courts-Martial 305(k) defines the remedy for violations of the portions of the rule listed above.[182] This remedy is described as an administrative credit against the sentence adjudged for any confinement served as the result of these violations.[183] The credit is one day credit for each day served in confinement as a result of the violation.[184] Additionally, RCM 305(k) incorporates the finding in *Suzuki* and allows the military judge to order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.[185] All RCM 305(k) credit is applied in

---

[169] 57 M.J. 256 (2002).

[170] *Id.*

[171] *Id.* at 257.

[172] *Id.* at 258. The military judge actually states that he is applying both credits to the adjudged sentence, but then deducts the difference between the adjudged sentence and the confinement limitation in the pretrial agreement as well, effectively applying all credits to the approved sentence. *Id.* It was the military judge's inability to clearly state his sentence and how he was applying credits that led to the issue in this case.

[173] *Id.* at 261–62.

[174] *Id.* at 262.

[175] *Id.* at 263.

[176] For further discussion on RCM 305 credit, see Section II.F. *infra.*

[177] *Spaustat*, 57 M.J. at 263–64.

[178] MCM, *supra* note 6, R.C.M. 305.

[179] *Id.* R.C.M. 305(b), (c).

[180] *Id.* R.C.M. 305(f), (h).

[181] *Id.* R.C.M. 305(i).

[182] *Id.* R.C.M. 305(k) (listing the remedy for violations of RCM 305(f), (h), or (i)).

[183] *Id.*

[184] *Id.*

[185] *Id.* Note, however, that this remedy only encompasses the Article 13 violation laid out in *Suzuki*: that of unusually harsh confinement conditions. Rule for Courts-Martial 305(k) does not grant a remedy for Article 13 violations that do not amount to confinement. Illegal pretrial punishment that does not involve or amount to confinement does not currently have a codified remedy. MCM, *supra* note 6, R.C.M. 305(k). This area of the law is still controlled by case law, including *United States v. Spausat.* 57 M.J. 256 (2002).

addition to other credit the accused may be entitled to, such as *Allen* or *Mason* credit.[186] Further, the rule states that if no confinement is adjudged, or is less than the amount of credit due, then the credit can be applied against hard labor without confinement, restriction, fine, and forfeitures, in that order.[187] When applying RCM 305(k) credit to punishment other than confinement, the rule points to the conversion formulas in RCM 1003(b)(6) and (7).[188] This is another example of the use of sentence equivalencies in current practice, despite the removal of the table that appeared in the 1969 *MCM*.

2. United States v. Gregory[189]

After *Mason* was decided, another issue arose out of the restriction tantamount to confinement line of cases regarding RCM 305(k) credit. If an accused is placed in pretrial restriction, the requirements of RCM 305 do not apply. However, if a court later determines that the terms of pretrial restriction were so onerous as to be tantamount to confinement, then is an accused also entitled to RCM 305(k) credit because the command did not follow the requirements of RCM 305 when placing him in that pretrial restriction? This question first arose in the case of *United States v. Gregory*.[190] Private Gregory was restricted for thirty-one days prior to his trial and the military judge at the trial level found that the conditions of the restriction were onerous enough to be considered tantamount to confinement.[191] The accused received thirty days of *Mason* credit as a result of this restriction.[192] On appeal, Gregory argued that because his restriction was equivalent to confinement, the Government was required to comply with the notification and review procedures in RCM 305.[193] The command in his case had not, and he asked the Army Court of Military Review (ACMR) to add thirty additional days of RCM 305(k) credit to the *Mason* credit already granted.[194] The court determined that restriction tantamount to confinement is a form of pretrial confinement and that, therefore, the provisions of RCM 305 do apply.[195] The court found that the rules promulgated in RCM 305 were aimed at the effect of a given type of pretrial restraint, rather than the formal label attached to the restraint.[196] Thus, where restraint is labeled restriction, but is essentially confinement, RCM 305 should apply.[197] The court granted the thirty days of RCM 305(k) credit along with the thirty days of *Mason* credit to the approved sentence in the case.[198] In deciding this case, the ACMR reemphasized the lack of a bright line rule to determine when restriction is tantamount to confinement, again referring to the totality of the circumstances test found in *Smith*.[199] The court attempted to calm commanders who might be alarmed at this new requirement by stating that conditions of restriction amounting to confinement were rare.[200] In a summary disposition, the COMA ruled that the ACMR had been correct in requiring RCM 305 procedures to apply to restriction tantamount to confinement and affirmed the decision.[201]

---

[186] MCM, *supra* note 6, R.C.M. 305(k).

[187] *Id.* Courts have refused to extend this principle and apply credit for legal pretrial confinement to other forms of punishment when no confinement is adjudged. *See* United States v. Smith, 56 M.J. 290 (C.A.A.F. 2002) (holding that an accused who spent ninety-four days in legal pretrial confinement and then was not adjudged any confinement was not entitled to have pretrial confinement credit applied against his other adjudged punishments because RCM 305(k) only granted such credit for illegal pretrial confinement and neither Congress nor the President have acted to grant such credit for legal pretrial confinement).

[188] MCM, *supra* note 6, R.C.M. 305(k). Although the language in RCM 305(k) cites RCM 1003(b)(6) and (7), this appears to be an error reflecting an older version of RCM 1003(b) than is found in the current *MCM*. *Id.* The conversion formulas of RCM 1003(b) appear in paragraphs (5) and (6) and show one day of confinement to equal two days of restriction one and a half days of hard labor without confinement. *Id.* Rule for Courts-Martial 1003(b)(7) specifies confinement itself as an allowable punishment, without reference to any conversion rates. *Id.* R.C.M. 1003(b)(7).

[189] 21 M.J. 952 (A.C.M.R. 1986).

[190] *Id.*

[191] *Id.* at 953.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 955–56.

[196] *Id.* at 956.

[197] *Id.*

[198] *Id.* at 958.

[199] *Id.* at 955.

[200] *Id.* at 956.

[201] United States v. Gregory, 23 M.J. 246 (C.M.A. 1986).

3. United States v. Rendon[202]

The rule from *Gregory* was reexamined in *Rendon* in 2003.[203] The trial judge in *Rendon* had determined that the accused's restriction was tantamount to confinement.[204] For this he awarded the accused *Mason* credit.[205] The accused also requested thirty-three days of additional RCM 305(k) credit for the command's failure to provide a review of that restraint.[206] The trial judge denied the RCM 305(k) credit, finding that it asked too much of a commander to grant RCM 305 review based on a guess as to what a judge may eventually determine.[207] The CAAF looked at RCM 305 again and found "no evidence that the President intended the procedural protections or the credit provided in RCM 305 to apply to anything other than the physical restraint attendant to pretrial confinement."[208] The court supported its argument by acknowledging that the President had never expanded RCM 305's coverage to include any form of restriction despite the many years since the *Mason* decision.[209] The court adopted the new rule that restriction tantamount to confinement does not, per se, trigger RCM 305.[210] The procedural requirements of RCM 305 are only necessary when the conditions or circumstances of the restriction meet the definitional requirements for "confinement", including physical restraint depriving an accused of his freedom.[211]

The case law in this area has led to a murky state where restriction conditions can be onerous enough to be considered "tantamount to confinement," and are thus eligible for *Mason* credit, but somehow do not meet the definitional requirements for confinement requiring RCM 305 procedures and credit. Instead, in order to receive both *Mason* credit and RCM 305(k) credit, the pretrial restriction must not only be tantamount to confinement, but must also include physical restraint depriving an accused of his freedom. The lack of a bright line rule in this area is intended to allow the military judges the ability to examine a multitude of potential restrictions and conditions and determine what credit, if any, should apply.[212] However, the current state of the case law makes it difficult for commanders, staff judge advocates, and trial attorneys to anticipate the outcome of a motion for *Mason* and RCM 305(k) credit.

III. A New Credit for Pretrial Restriction

Against this background of sentencing credits, this article argues for a new credit, one for legal pretrial restriction that is not tantamount to confinement. This new credit flows logically from the credits that already exist. Its creation would create certainty and equity in sentencing. It would prevent an accused from serving more punishment than he is sentenced to, or more punishment than allowed by law. A credit for pretrial restriction that does not warrant *Mason* credit might allow the case law under *Mason* to shift and align more with *Rendon*, reducing the confusion in that area.

This pretrial restriction credit should be granted at the rate of two days of restriction for one day of confinement, according to the equivalency rate in the 1969 *MCM* and in the present day RCM 1003(b)(5). Although it would seem that this new credit would impose an added requirement on military judges to determine what constitutes "restriction" for credit purposes, this standard already exists in the speedy trial arena. Much as the court in *Smith* adopted the standards for

---

[202] 58 M.J. 221 (C.A.A.F. 2003).

[203] *Id.*

[204] *Id.* at 222–23. Seaman Rendon was restricted to Training Center Yorktown, prohibited from wearing civilian clothes, required to stay in a restriction room, had reporting requirements after duty hours and on weekends, could not leave his room after 2200, and could not utilize MWR facilities. *Id.*

[205] *Id.*

[206] *Id.* at 223.

[207] *Id.*

[208] *Id.* at 224.

[209] *Id.* Of note is the fact that in *Gregory*, the court noted that if the President did not agree with the court's application of RCM 305 to restriction tantamount to confinement, then he would be able to limit its applicability through clarification of the rule in future reviews of the *MCM*. *Id.* The President did not do so.

[210] *Id.*

[211] *Id.*; *see also* United States v. Regan, 62 M.J. 299 (C.A.A.F. 2006) (holding that an officer sent to treatment prior to trial was restricted in a manner tantamount to confinement for *Mason* purposes, but was not physically restrained beyond conditions imposed for medical reasons and was therefore not entitled to RCM 305 review or credit).

[212] United States v. Gregory, 21 M.J. 952 (A.C.M.R. 1986).

restriction tantamount to confinement from speedy trial, so can trial courts look to past analysis under RCM 707(a) for guidance on determining when restriction begins.

A. Certainty

Currently, an accused who has served pretrial restraint merits some consideration of his pretrial restraint by the members or military judge when it comes to sentencing. That restraint lies in a list of factors to be considered, such as the accused's age, education, rank, etc.[213] It is impossible to tell what level of consideration that pretrial restraint is given when the sentence is announced. Certainly, an accused can still be awarded the maximum punishment allowable for an offense, causing an observer to deduce that the sentencing authority "considered" the restraint, but placed no appreciable value on it. This is the same concern that Chief Judge Everett expressed in his concurrence in *Allen* when it came to pretrial confinement.[214] Before *Allen*, no one could either foresee exactly what weight was being given to pretrial confinement by various sentencing authorities and convening authorities, or determine how court members factored pretrial confinement into their sentence.[215] Therefore, the credit created by *Allen* provided a "certainty that [was then] lacking in the treatment of pretrial confinement in this military justice system."[216] Chief Judge Everett saw the value of the *Allen* rule in providing certainty to all parties.[217] A convening authority could consider the credit that would be applied when determining to which level of court-martial to refer a case.[218] An accused could make the same consideration when proposing a pretrial agreement.[219] Court members who are advised as to the amount of an accused's pretrial confinement will know specifically how this will be treated for sentencing purposes.[220]

This same argument can be made for pretrial restriction. All sides of the court-martial process—the convening authority, the accused, and the fact-finder—will understand from the outset how the period of pretrial restriction will factor into the sentencing. It can also inform a convening authority's decision to impose pretrial restriction.

An additional aspect of certainty comes into play when examining the case law on restriction tantamount to confinement. The case law since *Mason* has left the area anything but clear. The factors in *Smith* help, but commands are able to come up with restrictions not contemplated or laid out in *Smith*. Often, military judges are left to their own discretion and therefore can come up with different results for substantially the same set of facts. Three cases from the Air Force appellate court illustrate this fact. In 1991, the court heard the case of Cadet First Class (C1C) Sassaman.[221] Cadet First Class Sassaman was restricted to the cadet command post for fifty-one days.[222] He was allowed access to the chapel, library, and gym under escort and had to sign in and out whenever he left his room.[223] This was determined to be restriction tantamount to confinement and C1C Sassaman was granted *Mason* credit.[224]

In 1995, the court decided *United States v. Perez*, a case where the accused was restricted only to the confines of the base.[225] The trial judge had determined this to be tantamount to confinement and the Court of Criminal Appeals affirmed under the abuse of discretion standard.[226]

---

[213] *See* BENCHBOOK, *supra* note 2, para. 2-5-23.

[214] United States v. Allen, 17 M.J. 126, 129 (C.M.A. 1984) (Everett, C.J., concurring).

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 130.

[220] *Id.*

[221] United States v. Sassaman, 32 M.J. 687 (A.F.C.M.R. 1991).

[222] *Id.* at 691.

[223] *Id.*

[224] *Id.*

[225] United States v. Perez, No. 28853, 1995 CCA LEXIS, at *12 (A.F. Ct. Crim. App. Mar. 10, 1995).

[226] *Id.* at *7.

A year later, in *United States v. Truell*, the Air Force Court of Criminal Appeals agreed with a military judge who determined that Airman Truell's restriction did not rise to the level of confinement when he was restricted to his three-room suite in the dormitory, his work site and the dining hall.[227] He was prohibited from drinking alcoholic beverages, had to report daily to the mental health clinic to receive Antabuse, and had to receive permission to go anywhere else.[228]

The disparate outcomes at the trial level and great discretion on the issue granted to trial courts by appellate courts illustrate the uncertainty inherent in this area of the law. A credit for pretrial restriction would ensure that all restriction received some credit. If some credit existed for all pretrial restriction, military judges would be less likely to grant *Mason* credit for the close cases. Instead of facing a choice between no credit and day-for-day credit, a military judge would have a choice between this proposed credit and day-for-day credit. The judge may decide that the conditions of pretrial restriction are adequately compensated by the credit proposed here and avoid extending *Mason* credit to cases that may not require that extreme remedy. Limiting *Mason* credit to the outlying cases can increase the certainty among all parties as to what type of sentencing credit an accused will receive at trial.

B. Equity

In reading *United States v. Allen*, a credit for pretrial restriction does not leap out as a logical extension. This is because of the technical aspect of the *Allen* opinion. Despite Chief Judge Everett's concurrence, the majority opinion comes down to statutory interpretation of DODI and a federal statute.[229] In determining whether this interpretation could extend to pretrial restriction, we look at the case law that has developed under the federal law. The Bail Reform Act that was the original basis of *Allen* was 18 U.S.C. § 3568.[230] The current federal law that calls for credit for pretrial confinement is 18 U.S.C. § 3585.[231] Under that law, a string of cases attempting to gain credit for restriction less than confinement have developed. Generally, the closest equivalent that civilians have to pretrial restriction is house arrest. For the most part, federal courts have not given confinement credit to defendants serving house arrest.[232] The only time that credit is given is when the conditions of house arrest are so onerous as to equate to confinement, much as military courts have created *Mason* credit.[233]

Although federal defendants under house arrest are not allowed credit under federal law, this does not mean that military accused should not receive credit for pretrial restriction. Civilian house arrest is not nearly as restrictive as military pretrial restriction. A civilian under house arrest can enjoy the comfort of his home, can usually have visitors to his home, and can make meals and eat in his home. Further, when the civilian defendant leaves his home to go to work, his employment is not part of the system imposing restrictions. His work is not affected by his house arrest, his duties should not change, and while at work, he can escape the confines of his restraint. Military accused are ordinarily required to serve their pretrial restriction in the barracks. The comfort inherent in a person's home is generally absent from a barracks. The style of barracks can range from an open squad bay occupied by forty servicemembers to a "dorm" room that provides some privacy, but is still largely regulated. While in the barracks, restricted servicemembers usually go to the mess hall for meals, often with an escort. Their ability to have visitors is regulated by both barracks regulations and the terms of their restriction. Instead of just electronic monitoring, pretrial restriction usually involves some sort of sign-in requirement and supervision by an appointed noncommissioned officer or servicemember standing duty. A servicemember's job duties are dictated by his unit and are frequently impacted by his pretrial status, if not by the restriction itself. These differences between house arrest and

[227] United States v. Truell, No. 29014, 1996 CCA LEXIS, at *157 (A.F. Ct. Crim. App. May 13, 1996).

[228] *Id.* at *3. Antabuse (generic name disulfiram) is used to treat alcohol abuse by producing unpleasant side effects when the patient drinks or is exposed to alcohol. Medline Plus Drug Information: Disulfiram, U.S. Nat'l Library of Medicine & Nat'l Inst. of Health, http://www.nlm.nih.gov/medline plus/druginfo/medmaster/a68260.html (last visited Sept. 15, 2008).

[229] United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984).

[230] *Id.* at 126.

[231] 18 U.S.C. § 3568 (2000).

[232] *See* United States v. Insley, 927 F.2d 185 (4th Cir. 1991) (holding that requiring a defendant to reside with parents, leave only to seek employment, work, or go to church, and be electronically monitored did not constitute "official detention" requiring sentencing credit); United States v. Edwards, 960 F.2d 278 (2d Cir. 1992) (holding that electronic monitoring and defendant's restriction largely to his residence did not entitle defendant to credit, although terms may be rather restrictive).

[233] *See* United States v. London-Cardona, 759 F. Supp. 60 (D.P.R. 1991) (finding twenty-four-hour house arrest confining defendant to a small space—no more than thirty feet outside her front door—with surveillance around the clock and only truly necessary trips to church, doctors, and lawyers upon approval of court officials to constitute official detention for credit purposes).

pretrial restriction argue against applying the federal view of house arrest to pretrial restriction. A federal court would likely view military pretrial restriction as equivalent to "official detention," even if a military court would not find it tantamount to confinement.

Even if house arrest and pretrial restriction were considered to be the same, and pretrial restriction would not merit sentencing credit under 18 U.S.C. § 3585, an argument still exists for the extension of credit to pretrial restriction for equity reasons. Although *Allen* was a technical, statutory decision instead of an equitable one, the equity reasons cited by Chief Judge Everett in his concurrence can be found in other areas of military sentencing credit jurisprudence. The decision in *Pierce* cites due process considerations in determining that an accused cannot be punished twice for the same offense. *Mason* is born out of consideration for an accused who faces the constraints of confinement without the formal designation. *Suzuki* credit is entirely an equity-based credit; the discretion of the military judge allows him to make an accused whole after the accused suffers illegal pretrial confinement.

Extending credit to pretrial restriction is an equitable solution as well. Although RCM 304 dictates that pretrial restraint is not to be used as punishment,[234] the effect of pretrial restriction is largely the same as the effect of punitive restriction. In looking at the definitions, the definition of restriction in lieu of arrest in RCM 304(a) is: "the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted."[235] Restriction that can be awarded as punishment at court-martial is specified as "restriction to specified limits."[236] It is not further defined, but the discussion section states that restriction does not exempt the person on whom it is imposed from any military duty.[237]

In *Davidson*, Chief Judge Everett stated that "confinement while awaiting trial is not completely dissimilar from confinement after sentence is adjudged."[238] He also stated that "while pretrial confinement may be necessary to protect certain well-defined and circumscribed societal interests, . . . the fact remains that significant adverse consequences are inflicted on the persons confined."[239] Similarly, an accused on pretrial restriction may be placed there for legitimate reasons that do not equate to punishment. However, the restrictions on his liberty feel the same as post-trial restriction does. Therefore, fairness would demand that once his sentence is adjudged, the accused receive credit for the time already spent in this status.

C. Maximum allowable punishment

Chief Judge Everett raised an additional point in his concurrence in *Davidson*. He felt that failing to grant credit for pretrial confinement created an issue with the maximum allowable punishments for offenses.[240] In *Davidson*, the accused served 143 days in pretrial confinement before being sentenced to the maximum punishment for his offense.[241] Chief Judge Everett advocated following the Bail Reform Act and granting credit for pretrial confinement to avoid punishing a servicemember beyond the sentence prescribed by the President in the Table of Maximum Punishments.[242]

Although the decision in *Allen* fixes this problem regarding confinement, the same problem identified by Chief Judge Everett in 1982 still exists for pretrial restriction. As stated above, the practical differences between pre- and post-trial restriction are usually as small as the differences between pre- and post-trial confinement. Allowing an accused to serve pretrial restriction and then receive the maximum sentence for an offense exceeds the Table of Maximum Punishments as well. Crediting that pretrial restriction will resolve this problem in the same manner that *Allen* attempted to in 1984.

---

[234] MCM, *supra* note 6, R.C.M. 304.

[235] *Id.* R.C.M. 304(a)(2).

[236] *Id.* R.C.M. 1003(b)(5).

[237] *Id.* R.C.M. 1003(b)(5) discussion.

[238] United States v. Davidson, 14 M.J. 81, 88 (C.M.A. 1982) (Everett, C.J., concurring).

[239] *Id.*

[240] *Id.* at 88.

[241] *Id.* at 82 (majority opinion).

[242] *Id.* at 88 (Everett, C.J., concurring).

D. *Mason*/RCM 305(k) Confusion

After the decision in *Gregory*, the case law on RCM 305(k) credit for restriction tantamount to confinement was clear, although it imposed a difficult requirement on the command. *Gregory* essentially required a commander to guess what a military judge would find at trial and determine whether he needed to follow the procedures of RCM 305 when placing an accused on pretrial restriction. When the CAAF decided *Rendon*, it created confusion in the area of restriction tantamount to confinement. Although *Rendon* alleviated some of the concern over the likelihood of a judge granting RCM 305 credit, it muddied the waters regarding the difference between restriction tantamount to confinement and restriction that merits RCM 305 procedures. After all, what is the difference between restriction "tantamount to confinement" and restriction that meets the "definitional requirements" of confinement, including physical restraint? How can restriction be deemed tantamount to confinement, yet not meet the definitional requirement of confinement? This problem seems to exist because military judges are attempting to find a balance between compensating an accused for what the judge perceives to be harsh restriction conditions, and understanding the commander's difficulty in prejudging restriction in order to determine whether to follow RCM 305 procedures.

If credit is given for pretrial restriction, military judges will be less inclined to find restriction to be tantamount to confinement in the marginal cases. The military judge will not have to compensate the accused for all but the most severe restriction conditions under *Mason* if he is already receiving a credit for pretrial restriction. Military judges will likely save *Mason* credit for conditions that follow the *Rendon* definition of confinement. Once the conditions of restriction tantamount to confinement qualifying for *Mason* credit are more in line with the conditions that trigger RCM 305 requirements under *Rendon*, the entire body of restriction tantamount to confinement law will be clearer. Severe restriction conditions involving physical restraint that approximate confinement would not only qualify an accused for *Mason* credit, but are also easier for commanders to identify as triggering RCM 305 procedures. The inconsistency in these two lines of cases will resolve itself.

E. Equivalency Formula

In the 1969 *MCM*, Appendix 25 included a Table of Equivalent Punishments.[243] In this table, one day of confinement equaled two days of restriction to limits.[244] This table no longer accompanies the UCMJ, but the equivalency it states is incorporated into the current *MCM*. Rule for Courts-Martial 1003(b)(5) lists restriction as an allowable punishment resulting from a court-martial.[245] It also states that restriction may be adjudged for no more than two months for each month of authorized confinement.[246] In no case may it be adjudged for more than two months.[247] Confinement and restriction may both be adjudged, but they may not be added together to exceed the maximum authorized confinement when two days of restriction is calculated to equal one day of confinement.[248] This conversion formula is also referenced in RCM 305(k) when granting credit for illegal pretrial confinement to adjudged punishments other than confinement.[249]

It makes sense then to keep this equivalency when granting sentencing credit for pretrial restriction. If confinement is awarded at trial, then the rate of credit would be one day of confinement credit for every two days of pretrial restriction. If restriction is awarded at trial, then the pretrial restriction would be credited at a rate of day-for-day. This rate should be definite, as the *Allen* credit is, because it is not granted based on wrongdoing by the command, as in *Suzuki*. This credit merely serves to credit the accused for the restraint served before trial, as *Allen* credit does. The military judge should not have discretion to alter this conversion based on conditions of restriction. Any restriction that meets the restriction in lieu of arrest standard would qualify for credit in this amount. Military judges concerned with adjusting credit based on difficult conditions of pretrial restriction can still look to *Mason* credit or Article 13 credit if the restriction is found to be tantamount to confinement or to constitute punishment.

---

[243] SCHLEUTER, *supra* note 18, at 632 (citing 1969 MCM, *supra* note 7, App. 25, Tbl. of Equivalent Punishments).

[244] *Id.*

[245] MCM, *supra* note 6, R.C.M. 1003(b)(5).

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.* R.C.M. 305(k).

F. RCM 707 analysis

In 1986, RCM 707 was amended to state that the speedy trial clock begins for an accused when pretrial restriction in lieu of arrest, arrest, or confinement is imposed.[250] This amendment removed the 1984 standard wherein all forms of restraint, including conditions on liberty, triggered the speedy trial clock.[251] The effect of such a change meant that the courts were forced to differentiate between conditions on liberty and restriction in lieu of arrest. The definition in the *MCM* of restriction in lieu of arrest is "the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted."[252] This definition does not cover many of the requirements that commands impose for pretrial restrictees, including prohibitions on wearing civilian clothes, sign in requirements, escort requirements, etc. The trial judges have been given a great deal of discretion in determining whether a set of conditions crosses the line from conditions on liberty to restriction in lieu of arrest.[253] The cases that have made these determinations have focused on whether the conditions of pretrial restraint place any "realistic, significant restraint on the liberty of the service member concerned."[254] Restricting a Soldier who lives in the barracks to post is more likely to be a condition on liberty, while requiring a married Soldier to move into the barracks could be considered restriction in lieu of arrest.[255] Just as trial judges can distinguish between conditions on liberty and restriction for speedy trial purposes, so can they make that determination in deciding whether credit for pretrial restriction is warranted.[256]

G. Potential issues

There is still some potential for abuse in this new credit. Commands may try to characterize the restraint as conditions on liberty instead of pretrial restriction in order to skirt the credit. However, the level of restraint required for restriction in lieu of arrest is still relatively low. Most commanders who place an accused in pretrial restraint do so out of legitimate concerns about appearance for trial or further misconduct. These commanders will ensure that the accused is restricted as much as necessary to minimize the risk of flight or misconduct. Almost any restrictions that will accomplish these goals will place an accused in the equivalent of pretrial restriction, entitling him to this credit. Commanders will take the credit for this restriction as a given, just as they do for pretrial confinement. Most commanders do not make decisions on pretrial restraint based on an attempt to keep an accused from receiving credit, but in order to accomplish the legitimate goals of pretrial restraint. Once the credit is established, it will figure into bargaining for pretrial agreements, preventing windfalls by the accused. On the contrary, because this credit will create certainty in the area and reduce *Mason* credit, the command will avoid situations where the accused gains unanticipated credit.

IV. Conclusion

The case law surrounding credit for pretrial confinement began with *United States v. Allen*[257] in 1984. Since that time, the law has expanded to create several types of credits. The focus has shifted from statutory interpretation back to traditional notions of equity. For the same reasons of equity, sentencing credit should be extended to pretrial restriction. The client sitting next to you at the defense table should not serve more time in restraint than a client placed in pretrial confinement, and certainly should not serve more than is authorized by law. The loophole should be closed, and a credit of one day of confinement should be granted for every two days of pretrial restriction served.

---

[250] *See* United States v. King, 30 M.J. 59 (C.M.A. 1990) (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1984) (C2, 15 May 1986)).

[251] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (1984).

[252] MCM, *supra* note 6, R.C.M. 304(a)(2).

[253] *See, e.g.*, United States v. Buford, No. 32161, 1997 CCA LEXIS 11, at *6–7 (A.F. Ct. Crim. App. Jan. 8, 1997).

[254] United States v. Fujiwara, 64 M.J. 695, 699 (A.F. Ct. Crim. App. 2007) (holding that possible requirement to "stay in the local area" did not create a restriction in lieu of arrest).

[255] *Id.* (comparing United States v. Wilkinson, 27 M.J. 645 (A.C.M.R. 1988), *with* United States v. Wagner, 39 M.J. 832 (A.C.M.R. 1994)).

[256] *See, e.g.*, *Buford*, No. 32161, 1997 CCA LEXIS, at *11 (finding that the military judge did not abuse discretion when he found that restriction to base and requirement to ask permission for off-base appointments did not constitute restriction in lieu of arrest); United States v. McLeod, No. 30883, 1995 CCA LEXIS 184 (A.F. Ct. Crim. App. July 20, 1995) (finding that placement in the transition flight with some limitations on the accused's freedom of movement did not constitute restriction in lieu of arrest); *Wagner*, 39 M.J. 832 (finding that order for married soldier to move from off-base home with family into barracks could potentially constitute restriction in lieu of arrest, but break in such restriction prevented speedy trial violation).

[257] 17 M.J. 126 (C.M.A. 1984).

Cultural Property Protection in Stability Operations

Dick Jackson[*]

Introduction

Cultural property protection has, once more, risen to a level of prominence in the law of war. The Treaty Priority List for 2007,[1] a message from the Executive Branch to Congress that conveys support for the ratification of treaties, included the 1954 Hague Cultural Property Convention[2] for the first time in this administration. On 15 April 2008, several key administration officials testified before the Senate Foreign Relations Committee on this convention and several other law of war treaties. In his opening remarks for the hearing, John Bellinger, the Legal Counsel for the Secretary of State, noted the efforts of the military in applying the 1954 Hague Convention in warfare: "After some fifty years of experience, we have concluded that U.S. practice is entirely consistent with this Convention and that ratifying it will cause no problems for the United States or for the conduct of U.S. military operations." [3] Although the Convention is yet unratified, Department of Defense (DOD) policy is to apply the law of war (of which the 1954 Hague Convention is an integral part) "during all armed conflicts, however such conflicts are characterized, and in all other military operations."[4] Over the last several decades, the result of U.S. adherence to these standards in armed conflict has been manifested in our conduct on the battlefield. But what of the application of this Convention in less certain times, during the post-conflict or stability phase of operations?

The protection of cultural property should serve as a key focal point in stability operations and counter-insurgency efforts by the U.S. military, even if such protection is not required as a matter of law. If the center of gravity of the counter-insurgency (COIN) fight is the people,[5] then their cultural heritage is the conscience of the people, often serving as their ethnic or religious touchstone—or even a flashpoint for opposing ethnic groups—and a visible symbol of their society. Three illustrations of the importance of cultural property are available from recent United States and coalition operations: the protection of Eastern Orthodox monasteries in Kosovo; the destruction of the 1200 year-old spiral minaret in Samarra, Iraq; [6] and the looting of the Iraqi National Museum.[7] As a matter of law, each deserved varying degrees of protection from the ravages of warfare, ethnic hatred, and post-conflict chaos. However, it is clear, as a matter of policy, that their protection serves the interests of peaceful resolution and stability in the post-conflict phase of military operations. Evolving military doctrine in this area would do well to provide for the essential security and restoration or preservation requirements of similar cultural icons in the future.

The requirements for military forces to respect cultural property during international armed conflict are relatively clear. Hays Parks, the Deputy General Counsel for Law of War Matters in the DOD General Counsel's Office, and several others have provided an exhaustive review of cultural property protections during armed conflict.[8] The Hague Cultural Property

---

[*] Colonel (Ret.) Richard B. "Dick" Jackson is the Special Assistant to the Army Judge Advocate General for Law of War Matters. A retired Judge Advocate, he has over thirty years' experience in application of the law of war to military operations as an infantry officer, a NATO Legal Advisor, a Staff Judge Advocate (SJA) at the Theater Army and division levels, and as a legal advisor in joint and combined operations from the Balkans and Iraq, to Haiti and Panama. The opinions expressed in this article are the author's alone; they do not necessarily reflect the position of the Army or the U.S. Government.

[1] U.S. Department of State, Treaties Pending in the Senate, http://www.state.gov/s/l/treaty/pending/ (last visited Oct. 1, 2008). Just prior to publication of this article, the U.S. Senate provided its advice and consent to 1954 Hague Cultural Property Convention. *See* S. EXEC. REP. 110-26 (2008).

[2] Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *reprinted in* ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAW OF WAR 374 (2001) [hereinafter 1954 Hague Convention]. The Convention was finally submitted for ratification in 1999. Letter of Transmittal from President Clinton to the Senate Committee on Foreign Relations, Treaty Doc. 106-1 (Jan. 6, 1999), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:td001.106.pdf.

[3] *Hearing Before the S. Comm on Foreign Relations*., 110th Cong. 3 (Apr. 15, 2008) (testimony of John B. Bellinger, Legal Advisor, Dep't of State), *available at* http://foreign.senate.gov/testimony/2008/BellingerTestimony080415p.pdf.

[4] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM 2 (9 May 2006).

[5] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1–28 (15 Dec. 2006).

[6] Geoff Corn, "*Snipers in the Minaret—What is the Rule?" The Law of War and the Protection of Cultural Property: A Complex Equation*, ARMY LAW., July 2005, at 28.

[7] *See generally* MATTHEW BOGDANOS, THIEVES OF BAGHDAD (2005); ANTIQUITIES UNDER SIEGE: CULTURAL HERITAGE PROTECTION AFTER THE IRAQ WAR (Lawrence Rothfield ed., 2008); *see also* Major John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190 MIL. L. REV. 111 (2006/2007).

[8] William Hays Parks, *Protection of Cultural Property from the Effects of War*, *in* THE LAW OF CULTURAL PROPERTY AND NATURAL HERITAGE: PROTECTION, TRANSFER AND ACCESS 3-1 (Marilyn Phelan ed., 1998); *see also* ROGER O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED

Convention of 1954, despite the lack of ratification by the United States, provides for "safeguarding" and "respect" for cultural property to "prevent destruction or damage in the event of armed conflict."[9] These provisions provide for protections from intentional attack, incidental damage, pillage, and theft by state actors and military forces of states who are parties to the Convention.[10]

The efforts of the United States and other coalition forces to protect cultural property during the first Gulf War have been well documented, emphasizing the requirements of Article 27 of the Annex to the 1907 Hague Convention IV Respecting the Law of Customs of War on Land (Hague IV),[11] protecting cultural property, "provided they are not being used for military purposes."[12] During Operations Iraqi Freedom (OIF) and Enduring Freedom (OEF) there have been no reports of the U.S. military intentionally targeting cultural sites; indeed, coalition forces were expressly prohibited from looting cultural sites or removing cultural property from the country.[13] The measures designed to protect cultural sites from the ravages of war, per se, have been largely successful. It is the aftermath, post-conflict or stability operations, that provides the greatest current challenge in the protection of cultural property.

The requirement to assist "competent national authorities" in "safeguarding and preserving [their] cultural property" during periods of occupation is also relatively well settled.[14] But when does "occupation" begin and what is the extent of assistance to "competent national authorities" that is required by international law? Are there exceptions to the military obligations to protect cultural property and refrain from its use? If the situation arises during peacekeeping or UN-sanctioned coalition operations, what are the legal obligations in those operations? Are they derived from the Law of War or International Human Rights Law? Are all coalition partners able to use deadly force to defend cultural property? If the legal obligations are unclear, evolving military doctrine for counter-insurgency warfare and stability operations make it imperative to protect cultural property, as an essential element of the national identity and conscience of the people who are the subject of this form of warfare.

Kosovo

Cultural property and religious sites have often been the object of destruction by ethnic belligerents bent on destroying the cultural identity of opposing groups. Harvard historian, András J. Riedlmayer, documented the systematic destruction of cultural and religious properties in Bosnia[15] and Kosovo[16] and testified during Slobodan Milosevic's trial in the Hague for ethnic cleansing in the Balkans.[17] And, shortly after the UN-sanctioned coalition operation in Kosovo began, the UN Education, Scientific and Cultural Organization (UNESCO) felt compelled to issue the following warning or instructions to the people of that region, be they Serb or Kosovar Albanians:

CONFLICT (2006); Patty Gerstenblith, *From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century* 37 GEO. J. OF INT'L LAW 245 (Winter 2006).

[9] 1954 Hague Convention, *reprinted in* ROBERTS & GUELFF, *supra* note 2, arts. 3, 4.

[10] Parks, *supra* note 8, at 3-1.

[11] Hague Convention IV Respecting the Law of Customs of War on Land, Annex art. 27, 18 Oct. 1907, 36 Stat. 2277, 1 Bevans 631, *reprinted in* ROBERTS & GUELFF, *supra* note 2, at 78.

[12] U.S. DEPARTMENT OF DEFENSE, FINAL REPORT TO CONGRESS, CONDUCT OF THE PERSIAN GULF WAR 611 (Apr. 1992).

[13] U.S. Central Command, Gen. Order No. 1A (19 Dec. 2000), *in* 1 CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ 376 (Aug. 2004).

[14] 1954 Hague Cultural Property Convention, *reprinted in* ROBERTS & GUELFF, *supra* note 2, art. 5, at 375. *But see* Major John C. Johnson, *Under New Management: The Obligation to Protect Cultural Property During Military Occupation*, 190 MIL. L. REV. 111 (2006/2007) (implying that, during Operation Iraqi Freedom, once organized resistance ended U.S. Forces had a legal obligation to restore order and prevent looting).

[15] ANDRÁS J. RIEDLMAYER, DESTRUCTION OF CULTURAL HERITAGE IN BOSNIA-HERZEGOVINA, 1992–1996: A POST-WAR SURVEY OF SELECTED MUNICIPALITIES, http://hague.bard.edu/reports/BosHeritageReport-AR.pdf (last visited Sept. 29, 2008).

[16] ANDRÁS J. RIEDLMAYER, DESTRUCTION OF CULTURAL HERITAGE IN KOSOVO: A POST-WAR REPORT (Sept. 21, 2000), http://palimpsest.stanford.edu/byform/mailing-lists/cdl/2000/1124.html.

[17] Riedlmayer testified in Slobodan Milosevic's trial that over one third of the 607 mosques in Kosovo were destroyed during the 1998–1999 hostilities and ethnic cleansing by Serbs and Serb forces. Prosecutor v. Milosevic, Case No. IT-02-54 (Apr. 9, 2002) (transcript available at http://www.un.org/icty/transe54/020409ED.htm).

Cultural Property—Basic Rules

1. Do not damage or steal cultural property.
2. If you find a cultural object, do not sell it or barter it; bring it to the local administration.
3. Do not abuse cultural objects belonging to other ethnic groups. Do not destroy them; remember that this may inspire them to do the same to cultural objects dear to you.
4. Do not make your house in a church, a monument or museum.
5. Do not sell cultural objects to black market dealers; your country needs those objects.
6. Remember that cultural objects are not only for you but also for your children and grandchildren and for all humanity.
7. Do not damage the cemeteries of other ethnic groups; remember that this may inspire them to do the same to your own cemeteries.

Cultural property is protected by international treaty.[18]

But the destruction of cultural and religious property in Kosovo did not stop. Kosovar Albanians, frustrated with the lack of progress in political resolution of their final status as a country, engaged in reverse ethnic cleansing of Serbian enclaves and religious sites throughout Kosovo.[19] In the resultant riots of 2004, several religious sites, including the fourteenth century Monastery of the Archangel at Prizren, were destroyed by crowds of angry Kosovar Albanians.[20]

In discussing the obligation to protect cultural property with the legal advisor of the NATO contingent assigned that area of Kosovo, it became readily apparent that "national caveats" prevented the use of deadly force to protect property in UN peacekeeping operations; human rights law took precedence over the law of war in cultural property protection.[21] Some national contingents felt constrained by the European Convention on Human Rights (ECHR), Article 2, which protects the "right to life," to never use deadly force to defend property even if the property was occupied.[22] For example, *R. v. Clegg*, the United Kingdom case on the use of force at a checkpoint in Northern Ireland, held that the use of deadly force to protect property was a violation of Article 2, ECHR and profoundly affected the utility and capacity of European contingents to protect cultural property.[23] This legal interpretation garnered a perverse result. In several locations during the 2004 riots, NATO contingents, following their own national instructions, evacuated Serb enclaves and religious sites[24] rather than defend those properties with deadly force, thereby implicitly engaging in the ethnic cleansing they were there to prevent. The proud and dedicated Italians, however, protected the fourteenth century Monastery at Decani, vowing not to evacuate their post and defend the lives of the monks, as well as the precious property, which was designated a world heritage site in 2004.[25]

For UN-sanctioned peacekeeping operations, this clash of legal regimes may be resolved by more recent case law from the European Court of Human Rights. In the *Behrami* and *Saramati* cases from the Grand Chamber, the court applied a "displacement" theory—the activities (including, in Behrami's case, mine clearing operations) of the UN Mission in Kosovo (UNMIK) that the UN Security Council sanctioned were not regulated by the ECHR, particularly Article 2.[26] Saramati, whose detention by UNMIK was at issue, was not given access to the "due process" provisions of the ECHR's Article 5.[27]

---

[18] UNESCO, Protection of Cultural Property in Armed Conflict, 843 INT'L REV. RED CROSS 862 (Sept. 30, 2001), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JREN.

[19] Peter Bouckaert, *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004*, 16 HUMAN RIGHTS WATCH NO. 6 (July 2004), *available at* http://www.reliefweb.int/rw/RWFiles2004.nsf/FilesByRWDocUNIDFileName/HMYT-639R5V-hrw-s&m-26jul.pdf/$File/hrw-s&m-26jul.pdf.

[20] Dagens Nyheter, *To Defend the Monastery in Prizren*, EUROPE NEWS (June 25, 2007), *available at* http://europenews.dk/en/node/1277.

[21] Interview with Legal Advisor, NATO Contingent at Prizren, Kosovo (Mar. 2005). Even though the monastery at Prizren was occupied, the contingent responsible evacuated the property, rather than resorting to deadly force to protect it. *Id.*

[22] *Id.*; *see also* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

[23] R v. Clegg, [1995] 1 AC 482, [1995] UKHL 1, [1995] 1 All ER 334; *see also* McCann v. UK [1995] ECHR 18984/1991, 213 ("the Court is not persuaded that the killing of the three terrorists [conducting a site recon for a bombing in Gibraltar] constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention"); *see also* FRENCH PENAL CODE art. 122-5, *available at* http://www.amnestyusa.org/document.php?lang=e&id=BC09E69B0637A55680256A0800458230 (last visited July 17, 2008) (authorizing the use of force in self-defense, but not in defense of property).

[24] Bouckaert, *supra* note 19.

[25] Interview with various Italian soldiers and commanders, Decani Monastery, Italy (Mar. 2005); UNESCO World Heritage Site Designation 28 COM 14B.47, http://whc.unesco.org/en/decisions/130 (last visited Sept. 29, 2008), .

[26] Behrami v. France, and Saramati v. France, Germany and Norway (dec.) [GC], App. nos. 71412/01; 78166/01, Eur. Ct. H.R. (2007).

[27] *Id.* para. 127.

The UNMIK forces were subordinate to UN command and were therefore acting on behalf of the UN, not as European states, subject to the ECHR. The UK House of Lords opinion in *Al Jedda* is susceptible to a similar interpretation. The House of Lords found that Article 5 of the ECHR did not apply to military detention operations in Southern Iraq, which were authorized by UN Security Council Resolution 1546 and subject to the detention regime established for "imperative reasons of security."[28]

A recent Canadian case concerning detention in Afghanistan questioned application of the Canadian Charter on Rights and Freedoms. The case found that the detention regime was governed by an agreement with the Afghan government and international humanitarian law, or the law of war, and not by extraterritorial application of Canadian human rights law.[29] There is an emerging area of agreement in applying the law of war to actions taken pursuant to UN-sanctioned coalition and peacekeeping operations. This emerging consensus should allow application of the law of war-based standards for protection of cultural property in such operations in the future.

Iraq

The application of cultural property law in post-conflict stability operations in Iraq has been discussed in numerous fora over the last several years. Geoff Corn clearly covered the gambit of legal issues in his excellent article in the July 2005 *The Army Lawyer*, "Snipers in the Minaret—What is the Rule?"[30] Books have been written about the looting of the Iraqi Museum, a tragedy that resulted in the loss of thousands of artifacts which dated back to the dawn of civilization in Mesopotamia.[31] But the legal analysis of both incidents bears repeating, in order to establish the legal obligations, so that the policy implications are clear for post-conflict stability operations.

Snipers in the Minaret, Revisited

The placement of U.S. military snipers in the 800-year-old spiral minaret in Samarra was a tactical decision, intended to overwatch key terrain, specifically, a road intersection that had "become the scene of almost incessant attacks,"[32] but also driven by the obligation of occupying forces to provide security for the local populace from terrorist attacks. Even if the most stringent cultural property protections of Article 4(1) of the 1954 Hague Cultural Property Convention apply, requiring States to refrain "from any use of the property or its immediate surroundings . . . which are likely to expose it to destruction or damage in the event of armed conflict,"[33] the law allows these obligations to be waived "in cases where military necessity imperatively requires such a waiver."[34] It is very difficult to argue to a tactical commander that imperative military necessity, derived from the Hague rules for occupation to provide security for the local populace does not trump the requirement of the commander[35]—does not trump the obligation in Article 4(1). But a thorough understanding of COIN tactics and the importance of this monument to the patrimony of Iraq may have dictated a different outcome. While, as a matter of law, the use of the minaret by military snipers was permissible, as a matter of policy and COIN tactics, the destruction of the minaret that resulted from its occupation was antithetical to U.S. interests in establishing a stable Iraq that protects its antiquities from harm and respects the sanctity of ancient religious sites.

---

[28] Al Jedda v. Sec'y of State for Defense, 58 UKHL 25 (2007).

[29] Amnesty Int'l, Canada v. Chief of Defense Staff, 336 FC 83 (2008).

[30] Corn, *supra* note 6, at 28.

[31] BOGDANOS, *supra* note 7.

[32] Corn, *supra* note 6, at 40.

[33] 1954 Hague Convention, *reprinted in* ROBERTS & GUELFF, *supra* note 2, art. 4(1).

[34] *Id*. art. 4(2).

[35] Hague IV, *reprinted in* ROBERTS & GUELFF, *supra* note 2, art. 43.

The Looting of the Iraqi National Museum

The looting of the Iraqi National Museum received a great deal of media attention, much of which exaggerated the effects of the looting and ignored the efforts of the museum staff to hide and preserve the most valuable objects, reflecting the ancient history of the Tigris and Euphrates River Valleys.[36] In the protection of cultural property from looting, the 1954 Hague Convention requires military forces: (1) to refrain from "theft or pillage" in the conduct of military operations; and (2) in occupation, to "as far as possible, support the competent national authorities of the occupied country in safeguarding and preserving its cultural property."[37]

There are no allegations that U.S. Armed Forces participated in looting; in fact, General Order Number 1 specifically prohibits such conduct.[38] As a matter of law, the obligation to "as far as possible, support the competent national authorities" does not attach until an occupation is established, which requires that "organized resistance [be] overcome and the force in possession must have taken measures to establish its authority."[39] And there is still considerable controversy to this day about when U.S. forces established effective control over the area of Baghdad near the museum, which would trigger the protection of an occupying force.[40] However, while there was no legal obligation to prevent looting during a period of chaos between major combat operations and "occupation" both Colonel (COL) Bogdanos and Major (MAJ) John C. Johnson, rightly concluded that U.S. Armed Forces should have provided protection for the museum, to assist Iraqi authorities, sooner.[41] It may or may not have prevented the tragedy; nonetheless, the failure to adequately plan for stability operations, even during the combat phase of operations, clearly was a lesson learned from OIF.

Analysis of the Planning for OIF

In the planning for OIF, the most glaring error was the failure to plan for stability operations and post-conflict reconstruction. Even before the war began, then-Chief of Staff of the Army General Shinseki testified to Congress that several hundred thousand troops would be required to stabilize the country after the invasion.[42] General Shinseki was speaking from experience—he led the 70,000-strong NATO Stabilization Force (SFOR) into Bosnia at the end of the Bosnian conflict.[43] Admittedly in hindsight, several post-war histories have come to a similar conclusion. In a "Special Report" for the United States Institute of Peace, Robert Perito concluded, "Important lessons for future U.S. peace and stability operations can be found in the civil upheaval that occurred in Iraq following the collapse of Saddam Hussein's regime. These include lessons pertaining to public order, street crime, border control, and police recruitment, training, and combat."[44]

In *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, Michael R. Gordon and General Bernard E. Trainor added, "Bush, Cheney, Rumsfeld, and Tommy Franks spent most of their time and energy on the least demanding task—defeating Saddam's weakened conventional forces—and the least amount on the most demanding—rehabilitation of and security for the new Iraq."[45] Gordon and Trainor provided a detailed analysis of the planning process, including assumptions made for planning, explaining that "there was no plan" for the occupation of Iraq.[46] In particular, when warned of the potential for looting by prominent Iraqis, including the current President, Jalal Talabani, the concerns were "duly

---

[36] BOGDANOS, *supra* note 7, at 15, 270–71.

[37] 1954 Hague Convention, *reprinted in* ROBERTS & GUELFF, *supra* note 2, at 375.

[38] *See supra* note 13 discussion in text.

[39] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 139 (1956).

[40] *Compare* BOGDANOS, *supra* note 7, at 205–11, *with* Johnson, *supra* note 7, at 149–52.

[41] BOGDANOS, *supra* note 7, at 211; Johnson, *supra* note 7, at 152.

[42] *Posture of the United States Army: Hearing on Defense Authorization Request for Fiscal Year 2004 and the Future Years Defense Program Before the S. Comm. on Armed Services*, 108th Cong. (Feb. 25, 2003) (statement of General Eric K. Shinseki, Chief of Staff, U.S. Army), *available at* http://armed-services.senate.gov/statemnt/2003/February/Shinseki.pdf.

[43] Greg Schulte, *SFOR Continued*, 46 NATO REV. 27, NO. 2 (Summer 1998), *available at* http://www.nato.int/docu/review/1998/9802-08.htm.

[44] ROBERT M. PERITO, THE COALITION PROVISIONAL AUTHORITY'S EXPERIENCE WITH PUBLIC SECURITY IN IRAQ (U.S. INST. FOR PEACE SPECIAL REPORT) 137 (Apr. 2005).

[45] M.R. Gordon & B.E. Trainor, *Cobra II: The Inside Story of the Invasion and Occupation of Iraq* 503 (2006).

[46] *Id*. at 152.

noted," but the administration did not want Americans to "enforce the law in Iraq," as it was "something best left to the Iraqis themselves."[47]

The official Army history of the conflict, "On Point II," came to a similar conclusion regarding the planning for stability and support operations. "On Point II" noted the institutional memory available from the failure during the 1989 Panama invasion (Operation Just Cause) to adequately prepare for "a period of looting and general lawlessness in the wake of the collapse of the Noriega government."[48] Despite a history and depth of experience in military operations other than war (the doctrinal term for stability operations at the start of OIF), particularly in the last decade of the twentieth century, and an Army commitment to "full-spectrum operations," the authors noted a failure of emphasis on both doctrine and training for stability and support operations and counterinsurgency, partly due to the "Army's preference for viewing itself as an institution that fights conventional wars."[49] General friction in the inter-agency process, often exacerbated by then-Deputy Under Secretary of Defense Douglas Feith, prevented the Office of Reconstruction and Humanitarian Assistance (ORHA) from coordinating with other agencies on post-conflict planning.[50]

At the end of the planning process, Phase IV (the post-conflict phase) was "nothing but a skeleton."[51] Although religious sites, like the Imam Ali Shrine in An Najaf, were identified as potential post-conflict "flashpoints," and Phase IV objectives included "maintenance of law and order," the forces assigned to the tasks did not match the forces required—of up to 300,000 troops.[52] Despite these planning handicaps, the V Corps Staff, led by the Staff Judge Advocate, COL Marc Warren, planned for occupation ordinances to prevent "looting, rioting, and general civil disorder in post-Saddam Iraq;" these became the basis for V Corps fragmentary orders (FRAGO's) issued to subordinate units during the march to Baghdad.[53] But much of the planning for stability and support operations assumed that the Iraqi institutions and infrastructure necessary to maintain general civil order would remain in place; and that quickly proved to be an erroneous assumption.[54] As both COL Bogdanos and the Iraqi Museum Director, Danny George, have noted, the Iraqi forces responsible for defending that area of Baghdad and the museum officials who were responsible for securing the museum had "melted away" by 10 April 2003, when the looting by Iraqi civilians ensued.[55] However, by all accounts, even if U.S. forces were not required to secure the museum as a matter of law at the time the Iraqi National Museum was looted, the responsibility to plan for adequate forces to conduct stability and support operations was a key failure of planning and execution in OIF.

Doctrinal Lessons Learned

The Army has been called one of the great learning institutions in the United States.[56] And in many respects, that learning is re-learning the lessons of the past.[57] But U.S. Army doctrine has certainly made great strides in the last five years to incorporate counterinsurgency doctrine and stability and support operations into the mainstream of Army thought and practice. The seminal doctrinal publication in that regard is Field Manual (FM) 3-24, *Counterinsurgency* (*COIN Manual*),[58] followed more recently by the capstone manual for all Army operations, FM 3-0, *Operations*.[59]

---

[47] *Id*. at 157.

[48] U.S. DEP'T OF ARMY, ON POINT II: TRANSITION TO THE NEW CAMPAIGN 55 (2008).

[49] *Id*. at 60.

[50] *Id*. at 71.

[51] *Id*. at 72.

[52] *Id*. at 73–74.

[53] *Id*. at 78.

[54] *Id*. at 79.

[55] BOGDANOS, *supra n*ote 7, at 206; *see also* ANTIQUITIES UNDER SIEGE, *supra* note 7, at 30–31.

[56] David Ignatius, *An Army that Learns*, WASH. POST, July 13, 2008, at B07.

[57] ON-POINT II, *supra* note 48, at 80; *see also* LIEUTENANT COLONEL JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM (2005).

[58] FM 3-24, *supra* note 5.

[59] U.S. DEP'T OF ARMY FIELD MANUAL 3-0 (FM 3-0), OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0].

While the *COIN Manual* emphasizes counterinsurgency tactics and winning the "hearts and minds" of the populace,[60] FM 3-0 recognizes stability and support operations as one of three primary missions for the Army, an integral part of "full-spectrum operations," across the conflict spectrum, from peacetime engagement to major combat operations.[61]

> The Army's operational concept is full spectrum operations: Army forces combine offensive, defensive and stability or civil support operations simultaneously as part of an interdependent joint force to seize, retain, and exploit the initiative, accepting prudent risk to create opportunities to achieve decisive results. They employ synchronized action—lethal and non-lethal—proportional to the mission and informed by a thorough understanding of all variables of the operational environment. Mission command that conveys intent and an appreciation of all aspects of the situation guides the adaptive use of Army forces.[62]

The operational concept addresses simultaneous engagement on many levels, more than combat between forces, for the first time in the doctrine of Army operations. It recognizes that "Army forces conduct operations in the midst of populations," requiring forces to "defeat the enemy and simultaneously shape civil conditions."[63] "Shaping civil conditions (in concert with civilian organizations, civil authorities, and multinational forces) is just as important to campaign success . . . [and] often more important than the offense and defense."[64] Army forces "retain the initiative by anticipating enemy actions and civil requirements and acting positively to address them . . . [and] remedy the conditions threatening lives, property, and domestic order."[65]

The *COIN Manual* makes security of the populace and public order "over-arching requirements of counterinsurgency operations."[66] Although there are multiple lines of operation in COIN, civil security operations "set the conditions for establishing essential services," including the protection of public buildings and key cultural sites.[67] And enabling of host-nation capabilities, like protection of public facilities, is a key tenet of both COIN and stability operations.[68] Controlling crowds and urban unrest and securing key facilities are essential tasks for military forces supporting host-nation police in COIN operations.[69] By any measure, restoring public order and protection of public infrastructure have become centerpieces of military operations, instead of afterthoughts.

Respect for cultural norms and objects has also become an integral part of both stability and counterinsurgency operations. As emphasized in FM 3-0, "Cultural awareness makes Soldiers more effective when operating in a foreign population and allows them to leverage local culture to enhance the effectiveness of their operations."[70] The *COIN Manual* educates Soldiers on the importance of "cultural forms," including symbols or cultural objects, which counterinsurgents can use "to shift perceptions, gain support, or reduce support for insurgents."[71] Cultural awareness, too, is a critical competency for successful counterinsurgency:

> Cultural awareness has become an increasingly important competency for small-unit leaders. Perceptive junior leaders learn how cultures affect military operations. They study major world cultures and put a priority on learning the details of the new operational environment when deployed. Different solutions are required in different cultural contexts. Effective small-unit leaders adapt to new situations, realizing their

---

[60] FM 3-24, *supra* note 5.

[61] FM 3-0, *supra* note 59.

[62] *Id.* para. 3-1.

[63] *Id.* para. 3-2.

[64] *Id.*

[65] *Id*. para. 3-3.

[66] FM 3-24, *supra* note 5, para. 6-1.

[67] *Id*. para. 6-6.

[68] *Id*. para. 6-6; *see also* FM 3-0, *supra* note 59, para. 3-7.

[69] FM 3-24, *supra* note 5, para. 6-21.

[70] FM 3-0, *supra* note 59, para. 3-16.

[71] FM 3-24, *supra* note 5, para. 3-8.

> words and actions may be interpreted differently in different cultures. Like all other competencies, cultural awareness requires self-awareness, self-directed learning, and adaptability.[72]

Cultural awareness training, including the recognition of key cultural artifacts, has become an essential training block for deploying Soldiers.[73] For example, Ms. Rush, of the Fort Drum Cultural Heritage section in the Directorate of Public Works, in conjunction with Colorado State University, has developed an excellent pre-deployment training brief for Iraq.[74] The U.S. Army John F. Kennedy Special Warfare Center and School, along with experienced civil affairs officers, has developed an excellent guide for identification, planning considerations, documentation, and preservation of cultural arts, monuments and archives.[75] These training resources enhance preparedness and make cultural property protection an important consideration in military operations.

Civil affairs doctrine provides only limited support for cultural heritage protection, however. Previous generations relied heavily on civil affairs expertise, resident in the arts and monuments teams, to protect and preserve both movable and immovable cultural property. *The Rape of Europa*, by Lynn Nicholas, describes the herculean efforts of just such cultural property experts, drafted into the Army in World War II, to preserve and restore much of the art and cultural history of Europe during and after the war.[76] Only one such expert, MAJ Corinne Wegener, a reserve civil affairs officer who is an art curator in Minneapolis, was available to assist the Iraqis in restoring their National Museum in 2003.[77] And due to the difficulty of recruiting and retaining such expertise (particularly in a reserve function, subject to frequent deployments), the continued reliance on cultural property expertise in civil affairs is problematic.[78] The civil affairs doctrine, Field Manual 3-05.40, omits any mention of arts and monuments teams. Support to civil administration subsumes this function in the infrastructure and public health and welfare sections of civil affairs units.[79] As a result, no dedicated functional expertise is available to perform the tasks required to preserve, restore and reconstruct cultural property that has been ravaged by warfare. While civil affairs involvement in planning, coordination, and evaluation of host nation cultural property preservation capabilities will be essential to future stability operations, it is the capability resident in other government agencies, civil society, non-governmental organizations, and inter-governmental organizations that will provide the greatest protection for cultural property in stability operations.

The doctrine assigning responsibility for protection of cultural property in stability operations is still evolving. The management of interagency efforts in reconstruction and stabilization was assigned to the Department of State, Office of the Coordinator for Reconstruction and Stabilization (CRS), in a 2005 National Security Presidential Directive (NSPD-44).[80] The CRS was charged with coordinating: (1) U.S. Government "responses for reconstruction and stabilization with the Secretary of Defense to ensure harmonization with any planned or ongoing U.S. military operations, including peacekeeping missions, at the planning and implementation phases;" and (2) "reconstruction and stabilization activities and preventative strategies with foreign countries, international and regional organizations, nongovernmental organizations, and private sector entities with capabilities that can contribute to such efforts . . . ."[81] The DOD policy is provided in DOD Directive 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*.[82] The DOD policy states:

> Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly

---

[72] *Id*. para. 7-3.

[73] Corinne Wegener, *Assignment Blue Shield: The Looting of the Iraq Museum and Cultural Property at War*, *in* ANTIQUITIES UNDER SIEGE, *supra* note 7, at 171.

[74] Under Secretary of Defense Legacy Resource Management Program, Iraq Cultural Heritage Training (2008), http://www.savingantiquities.org/0947/09476/resourcesiraqenl.html.

[75] U.S. DEP'T OF ARMY, GRAPHIC TRAINING AID 41-01-002, CIVIL AFFAIRS ARTS, MONUMENTS AND ARCHIVES GUIDE (2005).

[76] LYNN H. NICHOLAS, THE RAPE OF EUROPA (1994).

[77] Wegener, *supra* note 73, at 164.

[78] Interview with Corinne Wegener, President of the U.S. Comm. of the Blue Shield, in Washington, D.C. (Apr. 2008).

[79] U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS pp. 2-13 to 2-14 (29 Sept. 2006).

[80] THE WHITE HOUSE, NAT'L SECURITY PRESIDENTIAL DIR. (NSPD) 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION 2 (7 Dec. 2005).

[81] *Id.* at 3.

[82] U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.

Stability operations are conducted to help establish order that advances U.S. interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.

Many stability operations tasks are best performed by indigenous, foreign, or U.S. civilian professionals. Nonetheless, U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.[83]

Stability operations can only be successfully accomplished with integrated civilian and military efforts. The tasks assigned to the military include working closely with other U.S. Government agencies, foreign governments and security forces, global and international organizations, United States and foreign nongovernmental organizations, and private-sector individuals.[84] Provincial reconstruction teams in Afghanistan and Iraq[85] and recent legislation authorizing interagency reserve stability and reconstruction teams[86] are the first signs that all U.S. Government capabilities are being mobilized to support these efforts. While the specific doctrinal guidance for stability operations (other than the capstone policy in FM 3-0, discussed above) is still in draft, it is clear that civilian infrastructure protection and the development of indigenous capabilities in the area of cultural property protection will remain an integrated approach, incorporating the capabilities of the myriad actors and organizations of governmental and nongovernmental organizations and civil society.[87]

Governments and international organizations have provided support to cultural property protection, to some degree, in current conflicts. The Italian government provided crucial support to the Iraq Department of Antiquities in restoring the damage done to cultural artifacts in Baghdad.[88] However, UNESCO is establishing a fund to support cultural property protection in armed conflict, pursuant to Article 29 of the Second Protocol to the 1954 Hague Convention.[89] The provision of funds for this purpose, once finally approved by the States parties to the Second Protocol, will provide important intergovernmental resources for the protection of cultural property during armed conflict.[90]

There have also been developments in the capability of civil society to support cultural property protection in stability operations. The Second Protocol, in Articles 11 and 27, recognizes a role for "non-governmental organizations having objectives similar to those of the [1954 Hague] Convention," to include UNESCO, the International Committee of the Blue Shield and its constituent bodies, the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) and the International Committee of the Red Cross (ICRC).[91]

Most law of war practitioners are familiar with the ICRC's role in assisting State parties to apply the Geneva Conventions, but few have heard of the International Committee of the Blue Shield, which has a similar mission focusing on the protection of cultural property. The recent establishment of a U.S. Committee of the Blue Shield should serve to assist

---

[83] *Id*. at 2.

[84] *Id*. at 3.

[85] *See, e.g*., U.S. Dep't of State, Fact Sheet, Provincial Construction Teams: Building Iraqi Capacity and Accelerating the Transition to Iraqi Self-Reliance (11 Jan. 2007), *available at* http://www.state.gov/r/pa/scp/78599.htm.

[86] *See* U.S. Dep't of State, Secretary Condoleezza Rice, Remarks at the Civilian Reserve Corps Rollout (16 July 2008), http://www.state.gov/secretary/rm/2008/07/107083.htm.

[87] The new U.S. Army Field Manual covering this area was released during the publication phase of this article. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008).

[88] ANTIQUITIES UNDER SIEGE, *supra* note 7, at 135–40.

[89] *See, e.g.*, Adopted Recommendations, Second Meeting of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, U.N. Doc. CLT-07/CONF/212/4 (Apr. 4, 2008), *available at* http://unesdoc.unesco.org/images/0015/001593/159306E.pdf.

[90] Mounir Bouchenaki, *UNESCO and the Safeguarding of Cultural Heritage in Postconflict? Situations: Efforts at UNESCO to Establish an Intergovernmental Fund for the Protection of Cultural Property in Times of Conflict*, *in* ANTIQUITIES UNDER SIEGE, *supra* note 7, at 207–18.

[91] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (26 Mar. 1999), http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html. This Protocol entered into force on 9 March 2004, and there are currently forty-eight States which are parties to the Protocol, although the United States has not yet submitted this Protocol to the Senate for ratification. *Id.*

military personnel in the training and dissemination of cultural property materials, as well as (eventually) the type of emergency response capabilities provided by established humanitarian organizations like the ICRC.[92] With U.S. membership from the local affiliates of the International Council of Museums, the International Council of Monuments and Sites, the International Council on Archives, the International Federation of Library Associations and Institutions, the Coordinating Council of Audiovisual Archives Associations, as well as the American Institute for Conservation of Historic and Artistic Works, and the Archeological Institute of America, the U.S. Committee of the Blue Shield has a wealth of expertise available to supplement military and U.S. governmental efforts to protect cultural property during armed conflict.[93] Ideally, the Blue Shield will take its place alongside other humanitarian organizations and nongovernmental organizations in the interagency planning process, currently facilitated by CRS, the Undersecretary for Policy in the Office of the Secretary of Defense, and the J5 of the Joint Staff, but conducted by joint force planners at the operational level (combatant command or joint task force level).[94] Employment of these capable nongovernmental assets would normally occur through civil-military operations centers, along with civil affairs assets, so that crisis-response capabilities resident in civil society will be available to assist in stability operations.[95]

The Way Ahead

Protection of cultural property in stability operations has had a checkered past. While the legal obligations of cultural property protection in armed conflict have been scrupulously adhered to, the legal obligations to provide such protection in stability operations have been less clear. To varying degrees, the destruction of cultural property during stability operations in recent coalition operations in Kosovo and Iraq have demonstrated the failure of legal mechanisms in ensuring such protection, as well as the importance of emphasizing policy solutions and delineating responsibilities for the protection of cultural property during post-conflict stability operations.

Sarah Sewell, Director of the Carr Center for Human Rights at Harvard University, has noted that the law is necessary, but not sufficient, to protect humanitarian concerns in armed conflict; policy development has, in many instances, outstripped advances in the law.[96] The advances in military doctrine over the last several years, including the adoption of counterinsurgency concepts and acknowledgement of a core stability operations mission, highlighted by the *COIN Manual* and FM 3-0, have brought cultural property protection to a new level of emphasis in military operations across the spectrum of conflict.

The past is a prologue in military operations, as an agile Army responds to mistakes made in previous campaigns. The way ahead for cultural property protection during armed conflict includes continued protection of key sites, through improved intelligence and targeting techniques.[97] Continued emphasis on this issue in the planning and conduct of offensive combat operations will sustain an excellent U.S. military track record in this area.[98] Increased awareness of the importance of cultural property in stability operations and counterinsurgency should also increase the protection afforded to cultural property in future campaigns. But the increased emphasis on post-conflict security operations and simultaneous conduct of stability operations with combat operations should pay the greatest dividend for cultural property protection in future military operations. The emphasis on gaining effective control and maintaining public order during stability operations should enhance the protection of all public infrastructure, including key cultural sites, in coordination with host-nation security forces. The increasing acceptance by our coalition allies, particularly in UN-sanctioned operations, of the defense of essential cultural property as a military mission will also lead to enhanced protection for cultural sites that are an integral part of so many societies and represent their ethnic or cultural identity.

The increased integration of military and civil capabilities should also enable cultural property protection in future stability operations. While military capabilities in this area, particularly the expertise formerly provided by "arts and

---

[92] Wegener, *supra* note 73, at 165.

[93] *Id*. at 171.

[94] U.S. DEP'T OF DEFENSE, JOINT PUB. 5-0, JOINT OPERATION PLANNING II-6 (20 Dec. 2006).

[95] *See generally* U.S. DEP'T OF DEFENSE, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS chs. III, IV (8 July 2008); *see also* Wegener, *supra* note 73, at 171.

[96] Sarah Sewell, Keynote Address at the University of Virginia International Humanitarian Law Conference, Co-sponsored by the ICRC, UVA and TJAGLCS (May 31, 2007) [hereinafter Sewell Keynote Address].

[97] CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3227.01, NO-STRIKE POLICY AND GUIDANCE (C) 2 (8 June 2007).

[98] The increased policy emphasis on targeting that has resulted in humanitarian benefits was the specific example used by Sarah Sewell in her UVA address. Sewell Keynote Address, *supra* note 96.

monuments" teams from civil affairs, may be decreasing, the capacity of the U.S. Government to respond to stability operations is increasing. International efforts to improve and fund cultural property protection during armed conflict are increasing, with the involvement of intergovernmental organizations like UNESCO and the States committed to the Second Protocol to the 1954 Hague Cultural Property Convention. Civil society, through organizations like the U.S. Committee of the Blue Shield, is mobilizing to enhance military training and protect cultural property during armed conflict. And the integration of host-nation, nongovernmental, intergovernmental, and U.S. governmental organizations in the planning and conduct of stability operations bodes well for future protection of the vital cultural heritage of nations involved in armed conflict. While the law has not evolved as quickly, through the development of policy and doctrine oriented toward the key aspects of stability operations, the U.S. military is poised to seize the moral high ground in cultural property protection during post-conflict and stability operations.

Office of the Judge Advocate General
International and Operational Law Division

International and Operational Law Practice Note

Exercising Passive Personality Jurisdiction over Combatants[1]

Lieutenant Colonel Eric Talbot Jensen[2]

Since the onset of the Global War on Terror, U.S. Soldiers have been the subject of judicial proceedings in a number of foreign countries. One such case in Italy involved Army National Guardsman Specialist (SPC) Mario Lozano.[3] The following is a synopsis of an article which will appear in an upcoming edition of *The International Lawyer*, the journal of the American Bar Association Section of International Law and published in cooperation with the Dedman School of Law at Southern Methodist University.

On 4 March 2005, Nicola Calipari and Andrea Carpani, members of the Italian Ministry of Intelligence, were traveling to the Baghdad Airport.[4] With them in the car was Giuliana Sgrena, a journalist who had been taken hostage one month before and who had just been released and was on her way back to Italy.[5]

> At 20:45 hours the car, while entering Route Irish, was struck by a beam of light and immediately afterwards by gunshots, coming from one side of the road, which fatally wounded Calipari. The latter was sitting on the back seat beside Ms. Sgrena, and having become aware of the danger he placed himself in front of her, shielding her with his body. Both Ms. Sgrena and Carpani were wounded.
>
> The gunfire came from US soldiers who had organized, acting on the orders of the high command, a checkpoint that was not planned on a permanent basis but had instead been set up that evening in order to secure the transit of the convoy in which US Ambassador Negroponte was to travel.[6]

As a result of this tragic event, on 7 February 2007, Italian judge Sante Spinachi "granted an indictment request made seven months ago by prosecutors" against SPC Lozano.[7] The Italian prosecutors argued that the case was "political" because it involved several agents of the Italian state, meaning that "Lozano can be tried in absentia."[8]

Whether SPC Lozano fired the shots that killed Mr. Calipari and wounded Ms. Sgrena and Mr. Carpani was never at issue. Rather, the issue was whether SPC Lozano was criminally responsible for the actions he took on that evening. After the incident, a joint Italian-U.S. commission investigated the incident but could not agree on the findings.[9] The United States "cleared its troops of any wrongdoing"[10] and asserted that "[t]he soldiers stuck to the rules of engagement for this sort of situation and therefore no action should be taken against them."[11] The Italian prosecutor disagreed and brought the case to trial in Italy on 27 September 2007 where SPC Lozano's attorney, Alberto Biffani, argued that "members of the multinational

---

[1] Eric Talbot Jensen, *Exercising Passive Personality, Jurisdiction Over Combatants: A Theory in Need of a Political Solution*, 42 INT'L LAW. (forthcoming 2008).

[2] Chief, Int'l Law Branch, Office of The Judge Advocate General, U.S. Army, Rosslyn, Va.

[3] Rome Court of Assize, 25 Oct. 2007, n. 5507/07 (transl. by E. A. Stace) (translation on file with author),

[4] *Id.* at 3.

[5] *Id.*

[6] *Id.*

[7] *Judge Orders Indicts of U.S. Soldier in Calipari Case*, ANSA ENGLISH MEDIA SERV. (Rome), Feb. 7, 2007, *available at* LexisNexis Library.

[8] *Id.*

[9] Rome Court of Assize, n. 5507/07, at 4.

[10] *Accused US Soldier Defends Self*, ANSA ENGLISH MEDIA SERV., June 20, 2007, *available at* LexisNexis Library.

[11] *Id.*

force in Iraq are under 'exclusive jurisdiction' of the country that sent them."[12] The Italian prosecutors argued that they had jurisdiction by way of "passive personality."[13]

As the initial question of the case was jurisdiction, Judge Gargani had to determine whether Italy had jurisdiction to try a foreign Soldier for acts committed during an armed conflict where the victim was Italian.[14] He ruled that Italy did not have jurisdiction.[15] He based his ruling on the international law principle that "between the criterion of passive authority and that of the flag there can be no doubt that the latter, [is] the strongpoint of international law" and prevails in a jurisdictional argument.[16] The ruling was subsequently upheld on appeal at the Court of Cassation, Italy's highest court of appeal.[17]

This principle that the law of the flag, or a Soldier's sending state, prevails over a claim of passive personality jurisdiction in a case like this is an extremely important ruling, especially given current operations. Absent another international agreement, the exercise of passive personality criminal jurisdiction over a combatant for combatant acts is inappropriate when the combatant's sovereign has cognizance of the case.

A Soldier such as SPC Lozano, who was acting as the agent of his sovereign and was determined by his sovereign to have acted appropriately in the circumstances, ought not to be subject to a foreign nation's domestic criminal process via passive personality jurisdiction.

---

[12] Marta Falconi, *Trial of US Soldier Charged with Murder of Italian Agent in Iraq Resumes in Rome*, ASSOC. PRESS WORLDSTREAM, Sept. 27, 2007, *available in* LexisNexis Library.

[13] Judge Gargani examined the different types of jurisdiction recognized under international law, including that of passive personality which he defined as "attribut[ing] such jurisdiction to the State to which the victim belongs." Rome Court of Assize, n. 5507/07, at 8.

[14] *Id.* at 13.

[15] *Id.*

[16] *Id.*

[17] Agence France Presse, *Italy Court Quashes Case of US Soldier Who Killed Secret Agent*, MIDDLE EAST TIMES, June 20, 2008, *available at* http://www.metimes.com/International/2008/06/20/italy_quashes_case_of_us_soldier_who_killed_secret_agent/9371/.

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 (2008 - September 2008) (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	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C20	177th JAOBC/BOLC III (Ph 2)	7 Nov 08 – 4 Feb 09
5-27-C20	178th JAOBC/BOLC III (Ph 2)	20 Feb – 6 May 09
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5F-F1	204th Senior Officer Legal Orientation Course	20 – 24 Oct 08
5F-F1	205th Senior Officer Legal Orientation Course	26 – 30 Jan 09
5F-F1	206th Senior Officer Legal Orientation Course	23 – 27 Mar 09
5F-F1	207th Senior Officer Legal Orientation Course	8 – 12 Jun 09
5F-F3	15th RC General Officer Legal Orientation	11 – 13 Mar 09
5F-F52	39th Staff Judge Advocate Course	1 – 5 Jun 09

5F-F52S	12th SJA Team Leadership Course	1 – 3 Jun 09
5F-F55	2009 JAOAC (Ph 2)	5 – 16 Jan 09
NCO ACADEMY COURSES		
5F-F58	27D Command Paralegal Course	2 – 6 Feb 09
600-BNCOC	1st BNCOC Common Core (Ph 1)	6 – 27 Oct 08
600-BNCOC	2d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	3d BNCOC Common Core (Ph 1)	5 – 24 Jan 09
600-BNCOC	4th BNCOC Common Core (Ph 1)	9 – 27 Mar 09
600-BNCOC	5th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
600-BNCOC	6th BNCOC Common Core (Ph 1)	3 – 21 Aug 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	27 Jan – 3 Mar 09
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	1 Apr – 5 May 09
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	30 Oct – 9 Dec 08
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	2 Apr – 2 May 09
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 May – 3 Jul 09
WARRANT OFFICER COURSES		
7A-270A1	20th Legal Administrators Course	15 – 19 Jun 09
7A-270A2	10th JA Warrant Officer Advanced Course	6 – 31 Jul 09
7A-270A3	9th Senior Warrant Officer Symposium	2 – 6 Feb 09
ENLISTED COURSES		
512-27D/20/30	20th Law for Paralegal NCO Course	23 – 27 Mar 09
512-27D-BCT	11th BCT NCOIC/Chief Paralegal NCO Course	20 – 24 Apr 09
512-27D/DCSP	18th Senior Paralegal Course	15 – 19 Jun 09
512-27DC5	28th Court Reporter Course	26 Jan – 27 Mar 09
512-27DC5	29th Court Reporter Course	20 Apr – 19 Jun 09
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC6	9th Senior Court Reporter Course	14 – 18 Jul 09
512-27DC7	10th Redictation Course	5 – 16 Jan 09
512-27DC7	11th Redictation Course	30 Mar – 10 Apr 09

ADMINISTRATIVE AND CIVIL LAW		
5F-F202	7th Ethics Counselors Course	13 – 17 Apr 09
5F-F21	7th Advanced Law of Federal Employment Course	26 – 28 Aug 09
5F-F22	62d Law of Federal Employment Course	24 – 28 Aug 09
5F-F23	63d Legal Assistance Course	27 – 31 Oct 08
5F-F23	64th Legal Assistance Course	30 Mar – 3 Apr 09
5F-F23E	2008 USAREUR Legal Assistance CLE	3 – 7 Nov 08
5F-F24	33d Administrative Law for Installations Course	16 – 20 Mar 09
5F-F24E	2009 USAREUR Administrative Law CLE	14 – 18 Sep 09
5F-F26E	2008 USAREUR Claims Course	20 – 24 Oct 08
5F-F28	2008 Income Tax Law Course	8 – 12 Dec 08
5F-F28E	2008 USAREUR Tax CLE Course	1 – 5 Dec 08
5F-F28H	2009 Hawaii Income Tax CLE Course	12 – 16 Jan 09
5F-F28P	2009 PACOM Tax CLE	6 – 9 Jan 09
TBD	2009 Hawaii Estate Planning Course	20 – 23 Jan 09
5F-F29	27th Federal Litigation Course	3 – 7 Aug 09
CONTRACT AND FISCAL LAW		
5F-F10	161st Contract Attorneys Course	23 Feb – 3 Mar 09
5F-F10	162d Contract Attorneys Course	20 – 31 Jul 09
5F-F103	9th Advanced Contract Law Course	16 – 20 Mar 09
5F-F11	2008 Government Contract Law Symposium	2 – 5 Dec 08
5F-F12	79th Fiscal Law Course	20 – 24 Oct 08
5F-F12	80th Fiscal Law Course	11 – 15 May 09
5F-F13	5th Operational Contracting Course	4 – 6 Mar 09
5F-F14	27th Comptrollers Accreditation Fiscal Law Course	13 – 16 Jan 09
5F-F15E	2009 USAREUR Contract/Fiscal Law Course	2 – 6 Feb 09
5F-DL12	3rd Distance Learning Fiscal Law Course	19 – 22 May 09

CRIMINAL LAW		
5F-F301	12th Advanced Advocacy Training Course	27 – 29 May 09
5F-F31	15th Military Justice Managers Course	24 – 28 Aug 09
5F-F33	52d Military Judge Course	20 Apr – 8 May 09
5F-F34	31st Criminal Law Advocacy Course	2 – 13 Feb 09
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F35	32d Criminal Law New Developments Course	3 – 6 Nov 08
5F-F35E	2009 USAREUR Criminal Law CLE	12 – 16 Jan 09
INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	5th Intelligence Law Course	22 – 26 Jun 09
5F-F43	5th Advanced Intelligence Law Course	24 – 26 Jun 09
5F-F44	4th Legal Issues Across the IO Spectrum	13 – 17 Jul 09
5F-F45	8th Domestic Operational Law Course	27 – 31 Oct 08
5F-F47	51st Operational Law of War Course	23 Feb – 6 Mar 09
5F-F47	52d Operational Law of War Course	27 Jul – 7 Aug 09
5F-F47E	2009 USAREUR Operational Law CLE	27 Apr – 1 May 09
5F-F48	2d Rule of Law	6 – 10 Jul 09

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030) Lawyer Course (040)	14 Oct – 12 Dec 08 26 Jan – 27 Mar 09 26 May – 24 Jul 09 3 Aug – 2 Oct 09
0258	Senior Officer (010) (Newport) Senior Officer (020) (Newport) Senior Officer (030) (Newport) Senior Officer (040) (Newport) Senior Officer (050) (Newport) Senior Officer (060) (Newport) Senior Officer (070) (Newport) Senior Officer (080) (Newport)	20 – 24 Oct 08 (Newport) 26 – 30 Jan 09 (Newport) 9 – 13 Mar 09 (Newport) 4 – 8 May 09 (Newport) 15 – 19 Jun 09 (Newport) 27 – 31 Jul 08 (Newport) 24 – 28 Aug 09 (Newport) 21 – 25 Sep 09 (Newport)

2622	Senior Office (Fleet) (010) Senior Office (Fleet) (020) Senior Office (Fleet) (030) Senior Office (Fleet) (040) Senior Office (Fleet) (050) Senior Office (Fleet) (060) Senior Office (Fleet) (070) Senior Office (Fleet) (080) Senior Office (Fleet) (090) Senior Office (Fleet) (100) Senior Office (Fleet) (110)	3 – 7 Nov 08 (Pensacola) 12 – 16 Jan 09 (Pensacola) 2 – 6 Mar 09 (Pensacola) 23 – 27 Mar 09 (Pensacola) 27 Apr – 1 May 09 (Pensacola) 27 Apr – 1 May 09 (Naples, Italy) 8 – 12 Jun 09 (Pensacola) 15 – 19 Jun 09 (Quantico) 22 – 26 Jun 09 (Camp Lejeune) 27 – 31 Jul 09 (Pensacola) 21 – 25 Sep 09 (Pensacola)
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030) BOLT (040) BOLT (040)	15 – 19 Dec 08 (USN) 15 – 19 Dec 08 (USMC) 30 Mar – 3 Apr 09 (USMC) 30 Mar – 3 Apr 09 (USN) 27 – 31 Jul 09 (USMC) 27 – 31 Jul 09 (USN)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	14 – 15 Feb 09 (Yokosuka) 27 – 28 Apr 09 (Naples, Italy)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	22 – 26 Jun 09 21 – 25 Sep 09
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	11 – 22 May 09 20 – 31 Jul 09
4044	Joint Operational Law Training (010)	27 – 30 Jul 09
4046	SJA Legalman (010) SJA Legalman (020)	23 Feb – 6 Mar 09 (San Diego) 11 – 22 May 09 (Norfolk)
627S	Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090 Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160)	12 – 14 Nov 08 (Norfolk) 12 – 14 Nov 08 (San Diego) 12 – 14 Jan 09 (Mayport) 2 – 4 Feb 09 (Okinawa) 9 – 11 Feb 09 (Yokosuka) 17 – 19 Feb 09 (Norfolk) 17 – 19 Mar 09 (San Diego) 23 – 25 Mar 09 (Norfolk) 13 – 15 Apr 09 (Bremerton) 27 – 29 Apr 09 (Naples) 26 – 28 May 09 (Norfolk) 26 – 28 May 09 (San Diego) 30 Jun – 2 Jul 09 (San Diego) 10 – 12 Aug 09 (Millington) 9 – 11 Sep 09 (Norfolk) 14 – 16 Sep 09 (Pendleton)
748A	Law of Naval Operations (010)	14 – 18 Sep 09
748B	Naval Legal Service Command Senior Officer Leadership (010)	6 – 19 Jul 09
748K	USMC Trial Advocacy Training (010) USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030)	20 – 24 Oct 08 (Camp Lejeune) 11 – 15 May (Okinawa, Japan) 18 – 22 May 09 (Pearl Harbor)

	USMC Trial Advocacy Training (040)	14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	23 – 27 Mar 09 20 – 24 Apr 09
846L	Senior Legalman Leadership Course (010)	20 – 24 Jul 09
846M	Reserve Legalman Course (Ph III) (010)	4 – 15 May 09
850V	Law of Military Operations (010)	1 – 12 Jun 09
932V	Coast Guard Legal Technician Course (010)	3 – 14 Aug 09
961J	Defending Complex Cases (010)	11 – 15 May 09
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	20 – 24 Oct 08 (Mayport) 6 – 10 Apr 09 (San Diego)
525N	Prosecuting Complex Cases (010)	18 – 22 May 09
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	29 Sep – 12 Dec 08 12 Jan – 27 Mar 09 11 May – 24 Jul 09
049N	Reserve Legalman Course (Ph I) (010)	6 – 17 Apr 09
056L	Reserve Legalman Course (Ph II) (010)	20 Apr – 1 May 09
2205	Defense Trial Enhancement (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	15 – 26 Jun 09 (Norfolk) 13 – 24 Jul 09 (San Diego)
5764	LN/Legal Specialist Mid-Career Course (010) LN/Legal Specialist Mid-Career Course (020)	14 – 24 Oct 08 4 – 15 May 09
7485	Classified Info Litigtion Course (010)	5 – 7 May 09 (Andrews AFB)
7487	Family Law/Consumer Law (010)	6 – 10 Apr 09
7878	Legal Assistance Paralegal Course (010)	6 – 11 Apr 09
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 09 6 – 9 Apr 09 6 – 9 Jul 09
NA	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030) Legal Specialist Course (040)	12 Sep – 14 Nov 08 5 Jan – 5 Mar 09 30 Mar – 29 May 09 26 Jun – 21 Aug 09
NA	Speech Recognition Court Reporter (010) Speech Recognition Court Reporter (020) Speech Recognition Court Reporter (030)	27 Aug – 6 Nov 08 5 Jan – 3 Apr 09 25 Aug – 31 Oct 09
NA	Leadership Training Symposium (010)	27 – 31 Oct 08 (Washington, DC)

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) 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) Legal Officer Course (090)	20 Oct – 7 Nov 08 1 – 19 Dec 08 26 Jan –13 Feb 09 2 – 20 Mar 09 30 Mar – 17 Apr 09 27 Apr – 15 May 09 1 – 19 Jun 09 13 – 31 Jul 09 17 Aug – 4 Sep 09
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050 Legal Clerk Course (060) Legal Clerk Course (070))	20 – 31 Oct 08 1 – 12 Dec 08 26 Jan – 6 Feb 09 2 – 13 Mar 09 20 Apr – 1 May 09 13 – 24 Jul 09 17 – 28 Aug 09
3760	Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	17 – 21 Nov 08 12 – 16 Jan 09 23 – 27 Feb 09 23 – 27 Mar 09 18 – 22 May 09 10 – 14 Aug 09 14 – 18 Sep 09
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) 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)	20 Oct – 7 Nov 08 1 – 19 Dec 08 5 – 23 Jan 09 23 Feb – 13 Mar 09 4 – 22 May 09 8 – 26 Jun 09 20 Jul – 7 Aug 09 17 Aug – 4 Sep 09
947J	Legal Clerk Course (010) 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)	14 – 24 Oct 08 1 – 12 Dec 08 5 – 16 Jan 09 30 Mar – 10 Apr 09 4 – 15 May 09 8 – 19 Jun 09 27 Jul – 7 Aug 09 17 Aug – 4 Sep 08
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)	2 – 6 Feb 09 (Okinawa) 9 – 13 Feb 09 (Yokosuka) 30 Mar – 3 Apr 09 (San Diego) 13 – 17 Apr 09 (Bremerton) 27 Apr – 1 May 09 (San Diego) 1 – 5 Jun 09 (San Diego) 14 – 18 Sep 09 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, 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.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 09-01	7 Oct – 20 Nov 08
Paralegal Craftsman Course, Class 09-01	14 Oct – 20 Nov 08
Reserve Forces Judge Advocate Course, Class 09-A	25 – 26 Oct 08
Advanced Environmental Law Course, Class 09-A (Off-Site, Wash DC)	27 – 29 Oct 08
Federal Employee Labor Law Course, Class 09-A	8 – 12 Dec 08
Deployed Fiscal Law & Contingency Contracting Course, Class 09-A	15 – 18 Dec 08
Trial & Defense Advocacy Course, Class 09-A	5 – 16 Jan 09
Paralegal Apprentice Course, Class 09-02	6 Jan – 19 Feb 09
Air National Guard Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Air Force Reserve Annual Survey of the Law, Class 09-A (Off-Site)	23 – 24 Jan 09
Advanced Trial Advocacy Course, Class 09-A	26 – 30 Jan 09
Interservice Military Judges Seminar, Class 09-A	27 – 30 Jan 09
Pacific Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	2 – 5 Feb 09
Homeland Defense/Homeland Security Course, Class 09-A	2 – 6 Feb 09
Legal & Administrative Investigations Course, Class 09-A	9 – 13 Feb 09
European Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	17 – 20 Feb 09
Judge Advocate Staff Officer Course, Class 09-B	17 Feb – 17 Apr 09
Paralegal Craftsman Course, Class 09-02	24 Feb – 1 Apr 09
Paralegal Apprentice Course, Class 09-03	3 Mar – 14 Apr 09
Area Defense Counsel Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Defense Paralegal Orientation Course, Class 09-B	30 Mar – 3 Apr 09
Environmental Law Course, Class 09-A	20 – 24 Apr 09
Military Justice Administration Course, Class 09-A	27 Apr – 1 May 09

Paralegal Apprentice Course, Class 09-04	28 Apr – 10 Jun 09
Reserve Forces Judge Advocate Course, Class 09-B	2 – 3 May 09
Advanced Labor & Employment Law Course, Class 09-A	4 – 8 May 09
CONUS Trial Advocacy Course, Class 09-A (Off-Site, location TBD)	11 – 15 May 09
Operations Law Course, Class 09-A	11 – 21 May 09
Negotiation and Appropriate Dispute Resolution Course, Class 09-A	18 – 22 May 09
Environmental Law Update Course (DL), Class 09-A	27 – 29 May 09
Reserve Forces Paralegal Course, Class 09-A	1 – 12 Jun 09
Staff Judge Advocate Course, Class 09-A	15 – 26 Jun 09
Law Office Management Course, Class 09-A	15 – 26 Jun 09
Paralegal Apprentice Course, Class 09-05	23 Jun – 5 Aug 09
Judge Advocate Staff Officer Course, Class 09-C	13 Jul – 11 Sep 09
Paralegal Craftsman Course, Class 09-03	20 Jul – 27 Aug 09
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI:	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250

GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 in (MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Phase I (Non-Resident Phase), Deadline for RC-JAOAC 2009

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University, the online home of TJAGLCS located at https://jag.learn.army.mil. The new course is expected to be open for registration on 1 April 2008.

The suspense for submission of all RC-JAOAC Phase I (Non-Resident Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. Please note that registration for Phase I through the Army Institute for Professional Development (AIPD) is now *closed* to facilitate transition to the new JAOAC (Phase I) on JAG University. The new course is expected to be open for registration on 1 April 2008. This requirement includes submission of all writing exercises, whether completed under the old JA 151, Fundamentals of Military Writing subcourse, or under the new JAOAC Distributed Learning military writing subcourse.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major, and, ultimately, to be eligible to enroll in Intermediate-Level Education (ILE).

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 Distributed Learning Department, TJAGLCS for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I Non-Resident courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC resident phase. 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, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Judge Advocate General's School, U.S. Army (TJAGSA) 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 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.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

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).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516 Environmental Law Deskbook, JA-234 (2006).

AD A377491 Government Information Practices, JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707 The Law of Federal Employment, JA-210 (2000).

AD A360707 The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672 Unauthorized Absences Programmed Text, JA-301 (2003).

AD A302674 Crimes and Defenses Deskbook, JA-337 (2005).

AD A274413 United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel

assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. TJAGSA Legal Technology Management Office (LTMO)

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.