



# THE ARMY LAWYER

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*First Lieutenant A. Benjamin Spencer*

**Setting the Theater the Army Service Component Command Way: A Humanitarian Response to the Ebola Epidemic in Liberia**

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**"Equipped for Combat": Jumping the Gun on Reporting under Section 4(a)(2) of the War Powers Resolution**

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*Judge Advocate General's Corps Professional Bulletin 27-50-17-02*

*February 2017*

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*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.

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*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> and at the Library of Congress website at [http://www.loc.gov/tr/frd/MilitaryLaw/Army\\_Lawyer.html](http://www.loc.gov/tr/frd/MilitaryLaw/Army_Lawyer.html).

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## Lore of the Corps

### The Judge Advocate General's School at Fort Myer (1950-51)

By Fred L. Borch

Regimental Historian and Archivist

While many members of the Regiment know that The Judge Advocate General's School (TJAGSA) was located at the University of Michigan during World War II, few realize that TJAGSA re-opened its doors at Fort Myer, Virginia before moving to the University of Virginia in 1951. What follows is the story of TJAGSA's brief history in northern Virginia.

With the end of hostilities in Europe and the Pacific, and the reduced need for judge advocates (JAs) in a rapid demobilizing Army, TJAGSA closed at the University of Michigan on February 1, 1946.<sup>1</sup>

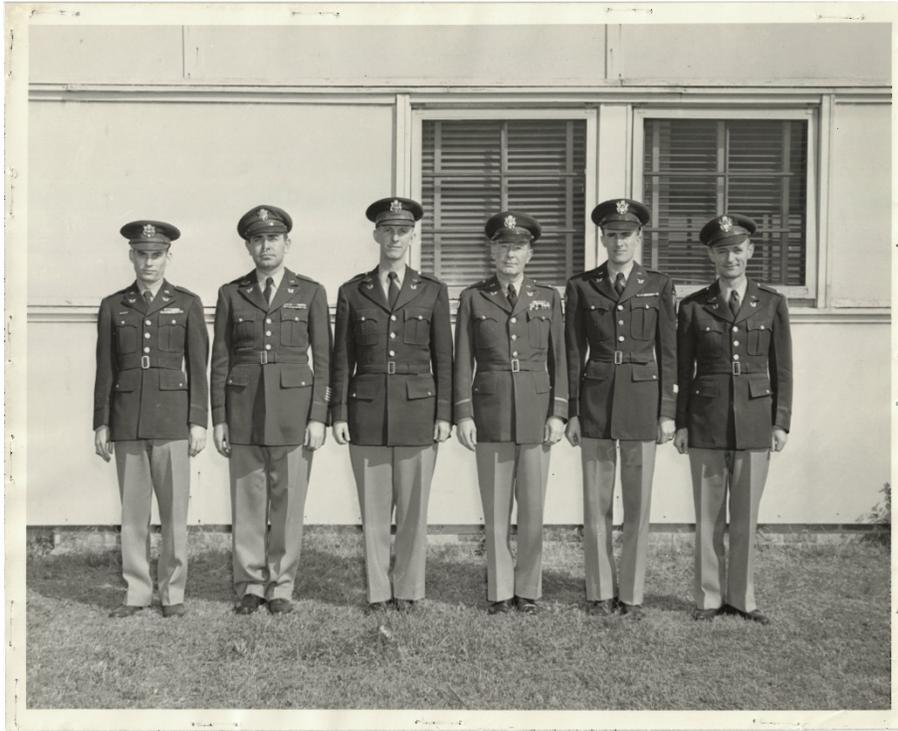
With the outbreak of the Korean War in June 1950 and the enactment of a new Uniform Code of Military Justice (UCMJ) which took effect in May 1951, the Army needed more active duty lawyers. The result was that a large number of Reserve and National Guard JAs, almost all of whom had served in World War II, were recalled to active duty to supplement the 650 JAs already in uniform.<sup>2</sup> Almost immediately, the new Judge Advocate General, Major General Ernest M. "Mike" Brannon,<sup>3</sup> realized that these Reserve and Guard JAs had 'rusty' military justice skills and,

even if they were conversant with the Articles of War, this would not help them in working with the new provisions of new UCMJ. But those JAs already on active duty likewise knew nothing about the newly enacted UCMJ, and since criminal law was the most important element of the Corps' practice in the 1950s, the best course of action was to re-open TJAGSA and provide updated education and training for Army lawyers.

On October 2, 1950, the new military law school opened in "temporary facilities" on South Post Fort Myer. Colonel (COL) Hamilton

"Ham" Young,<sup>4</sup> who had served as the first commandant of TJAGSA in Michigan, was re-appointed as commandant of the new school. But the understanding was that the school was in 'temporary facilities' because Colonel (COL) Charles L. "Ted" Decker, who headed the Special Projects Division at the Office of The Judge Advocate General (OTJAG), was tasked with finding a "permanent" home for the school.<sup>5</sup>

Major General Brannon asked Colonel Young to start classes in the new school as soon as possible. But Young, who was then serving as Chief, War Crimes Division, OTJAG, replied that he needed an assistant. The result was



*Faculty and Staff, TJAGSA, South Post Fort Myer, October 1950. Major Reed is second from the left; Major Horstman, First Lieutenant Kelly and Colonel Young are first, second and third from the right, respectively.*

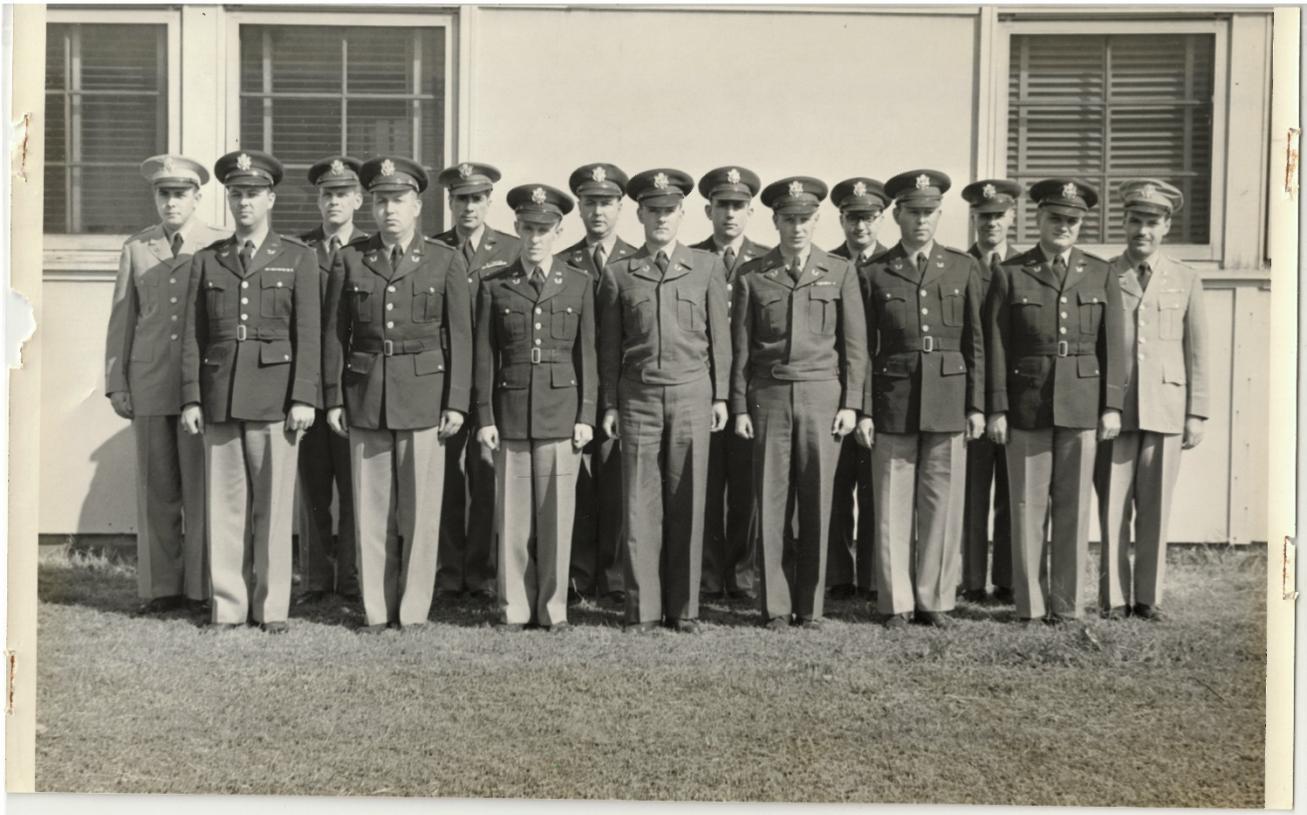
<sup>1</sup> JUDGE ADVOCATE GEN.'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 209 (1975).

<sup>2</sup> *Id.*

<sup>3</sup> Fred L. Borch, *From Infantryman to Contract Attorney to Judge Advocate General: The Career of Major General Ernest M. Brannon (1895-1982)*, *ARMY LAW.*, Feb. 2013, at 1.

<sup>4</sup> For more on Young, see Fred L. Borch, *From West Point to Michigan to China: The Remarkable Career of Edward Hamilton Young (1897-1987)*, *ARMY LAW.*, Dec. 2012, at 1 [hereinafter *Career of Edward Hamilton Young*].

<sup>5</sup> JUDGE ADVOCATE GEN.'S CORPS, *supra* note 1, at 217. Later, Major General Decker served as The Judge Advocate General from 1961 to 1963.



*First Regular JA Class, South Post Fort Myer. The class began on October 2, 1950 and graduated on October 28, 1950.*

that First Lieutenant Joseph B. Kelley (1LT), who had served in World War II as an artillery officer in Burma and China and had recently volunteered for active duty as a JA, was selected to be the new TJAGSA Adjutant.<sup>6</sup>

The new school opened in an empty building on South Post Fort Myer. This section of Fort Myer no longer exists today, but is now part of Arlington National Cemetery. During World War II, however, South Post was a billeting area for women working for the greatly expanded War Department. The Judge Advocate General's (JAG) Corps obtained one of these now empty buildings and converted the first floor from small dormitory rooms into one big classroom for students and offices for faculty. The second floor was used as a Bachelor Officers Quarter (BOQ) for students.<sup>7</sup>

In addition to COL Young as commandant and 1LT Kelly as adjutant and training officer, the faculty consisted of four other officers. Major (MAJ) Robert Reed taught 'Military Affairs' (today's Administrative and Civil Law) and MAJ John Horstman taught military justice. The two other officers taught claims and procurement law.<sup>8</sup>

The school operated for a year on South Post and graduated six JA "Regular" classes—as the four week long basic course was then called. There was no Advanced or Graduate course. No Continuing Legal Education courses were offered.<sup>9</sup>

In the meantime, COL Decker and his team had been scouting locations for a permanent TJAGSA. The University of Michigan once again offered its facilities to the Army as did the University of Tennessee. These offers, however, were both declined because COL Decker convinced Major General Brannon that the school should be closer to Washington, D.C. Decker advanced at least three reasons for this view. First, it would be easier to obtain guest speakers if TJAGSA were closer to the Pentagon. Second, it would be easier to develop other courses at TJAGSA if it were closer in proximity to OTJAG. Third and finally, Decker argued that it would be

<sup>6</sup> Letter from Lieutenant Colonel Joseph B. Kelly, U.S. Army (Retired) to Colonel Gerard St. Amand, Commandant, The Judge Advocate Gen.'s Sch. (May 27, 1998) (on file with The Judge Advocate Gen.'s Legal Ctr. & Sch. Historian).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Presumably, Decker was thinking of the annual world-wide conference for senior leaders in the Corps that had started during World War II and is still held today.

<sup>9</sup> *Id.*; JUDGE ADVOCATE GEN.'S CORPS, *supra* note 1, at 217-18.

easier to hold “policy conferences” if the school were closer to the Pentagon.<sup>10</sup>

Ultimately, the Corps accepted an invitation from the University of Virginia (UVA) to move TJAGSA to its grounds. It seems that this invitation resulted, at least in part, from the efforts of two UVA law school professors who were on active duty for training at the Pentagon and were instrumental in persuading UVA to extend an invitation. But UVA was also attractive because it had the largest law library in the South (then 100,000 volumes) and was only two hours by automobile from Washington D.C. Finally, UVA had recently completed a brand-new dormitory building behind its law school on main ground, and President Colgate W. Darden Jr. offered this new building to the JAG Corps. Having been built to house more than 100 students, this new structure, which ultimately was named Hancock Hall, was big enough to provide office space for TJAGSA faculty and a BOQ for JA students who did not wish to live in town.<sup>11</sup>

On August 25, 1951, TJAGSA at South Post Fort Myer moved by truck to Charlottesville. The move was completed without incident and all offices were up and running on August 27. Colonel Decker was also in charge as the new TJAGSA commandant.<sup>12</sup>

The first Regular course at the new TJAGSA, which began on September 11, 1951, was called the Seventh Regular Course.<sup>13</sup> Some faculty and staff suggested that the numbering should be restarted, with the new course at UVA called the First Regular Course. This idea was resisted, however, by those who had taught at Fort Myer, and who still formed the majority of instructors for the first classes at UVA. They did not like the idea of restarting the numbering of classes. These instructors had a “pride and loyalty to The JAG School . . . at South Post Fort Myer and . . . did not want to see their efforts go unnoticed as the school began to put down permanent roots.”<sup>14</sup> As a result, the first course taught on UVA’s grounds was the Seventh Regular Course.

More than sixty-five years later, TJAGSA (now The Judge Advocate General’s Legal Center and School), is still on the grounds of UVA. But the new school got its start at Fort Myer, and this history is worth remembering.

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website  
<https://www.jagcnet.army.mil/8525736A005BE1BE>

*Dedicated to the brave men and women who have  
served our Corps with honor, dedication, and distinction.*

<sup>10</sup> JUDGE ADVOCATE GEN.’S CORPS, *supra* note 1, at 217-18.

<sup>11</sup> Fred L. Borch, *Military Legal Education in Virginia: The Early Years of the Judge Advocate General’s School in Charlottesville, Virginia*, ARMY LAW., Mar. 2012, 48-51.

<sup>12</sup> *Id.*

<sup>13</sup> There were thirty-eight Army officers in the class, including then 1LT Hugh Clausen, who would later serve as The Judge Advocate General from 1981 to 1985. In November 1955, the Regular Course was renamed the “Special Course.” By the early 1960s, however, it had been designated the “Basic Course.” Today, three “Basic” courses are conducted per year.

<sup>14</sup> See *Career of Edward Hamilton Young*, *supra* note 4.

# Understanding the Department of Defense's Policy Regarding Transgender Servicemembers

First Lieutenant A. Benjamin Spencer\*

## I. Introduction

In June 2016, the Secretary of Defense (SECDEF) issued Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members." This DTM announced that, based on the premise that the "military should be open to all who can meet the rigorous standards for military service and readiness," "transgender individuals shall be allowed to serve in the military."<sup>1</sup> The attachment to the memo declared that servicemembers could no longer be "involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity."<sup>2</sup> The core purpose of the new policy was to ensure that transgender persons would be permitted to serve their country in the armed forces to the same extent as all other persons. However, the integration of openly transgender personnel into the military presents many on-the-ground issues that subsequent guidance and policies have striven to address and that commanders and policymakers will need to confront.

Regarding accession into the military by transgender persons (which is to begin in the summer of 2017), DTM 16-005 states that "gender dysphoria"<sup>3</sup> would remain a disqualifying condition unless the person is certified by a medical provider as having been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months."<sup>4</sup> In the event the person has been receiving cross-sex hormone therapy or has a history of sex reassignment surgery, a medically-certified 18-month period of stability must also be demonstrated prior to accession.<sup>5</sup> For those transgender persons within the military, the policy indicates that once a servicemember's gender marker is officially changed in the Defense Enrollment Eligibility Reporting System (DEERS), that servicemember "will use those berthing, bathroom, and

shower facilities associated with the member's gender marker in DEERS."<sup>6</sup> Importantly, DTM 16-005 directed, "Transgender Service members will be subject to the same standards as any other Service member of the same gender . . ." <sup>7</sup> There is some indication that transgender servicemembers will be entitled to government-funded medical care and treatment associated with a gender transition, although requests for particular care from transgender servicemembers will be handled on a case-by-case basis until the Department of Defense (DoD) issues further policy guidance.<sup>8</sup> Finally, DTM 16-005 announces that "discrimination based on gender identity is a form of sex discrimination,"<sup>9</sup> which is prohibited under current equal opportunity policies and regulations throughout the military.<sup>10</sup>

In the wake of DTM 16-005 the Service Secretaries have been tasked with identifying all issuances, regulations, and policies that bear on or may be affected by the open service of transgender persons and developing revisions to the same as may be necessary to render them consistent with the new policy.<sup>11</sup> For example, at the time the DoD policy was announced, Army Regulation (AR) 40-501 identified "transsexualism" as a medically-disqualifying disorder preventing entry into the Army and could form the basis for separation from the Army,<sup>12</sup> consequences that would be out of step with the new policy.

In response to DTM 16-005, Secretary of the Army Eric Fanning issued Army Directive (Army Dir.) 2016-35, "Army Policy on Military Service of Transgender Soldiers."<sup>13</sup> It echoes the admonitions of DTM 16-005 that transgender Soldiers may serve openly and may not be involuntarily separated or denied reenlistment or continuation of service solely on the basis of gender identity.<sup>14</sup> Additionally, the Army directive affirms that once a Soldier's gender marker is

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<sup>1</sup> U.S. DEP'T OF DEF., DTM 16-005, MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS (30 June 2016) [hereinafter DTM 16-005].

<sup>2</sup> *Id.* at Attachment para. 1.a.

<sup>3</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th ed., 453 (2014) [hereinafter DSM-V] ("Individuals with gender dysphoria have a marked incongruence between the gender they have been assigned to (usually at birth, referred to as *natal gender*) and their experienced/expressed gender. This discrepancy is the core component of the diagnosis.").

<sup>4</sup> DTM 16-005, *supra* note 2, at Attachment para. 2.a.(1).

<sup>5</sup> *Id.* at Attachment para. 2.a.(2), (3).

<sup>6</sup> U.S. DEP'T OF DEF., INSTR. 1300.28, IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS, para. 1.2.b (1 Oct. 2016) [hereinafter DoDI 1300.28].

<sup>7</sup> *Id.* at Attachment para. 1.b.

<sup>8</sup> *Id.* at Attachment para. 4.

<sup>9</sup> DTM 16-005, *supra* note 2, at Attachment para. 5.a.

<sup>10</sup> See U.S. DEP'T OF DEF., DIR. 1020.02E, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DoD (8 June 2015); U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (18 Aug. 1995). Interestingly, DTM 16-005 indicates that both of these directives will be revised to address discrimination based on gender identity specifically. DTM 16-005, *supra* note 2, at Attachment para. 5.b.

<sup>11</sup> DTM 16-005, *supra* note 2, at 2.

<sup>12</sup> U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, paras. 2-27, 3-35 (14 Dec. 2007) (RAR, 4 Aug. 2011).

<sup>13</sup> U.S. DEP'T OF ARMY, DIR. 2016-35, ARMY POLICY ON MILITARY SERVICE OF TRANSGENDER SOLDIERS (7 Oct. 2016) [hereinafter ARMY DIR. 2016-35].

<sup>14</sup> *Id.* para. 2.

changed in DEERS, “the Soldier will be expected to adhere to Army standards applicable to the preferred gender.”<sup>15</sup> Exceptions to policy for transitioning Soldiers are discouraged, but permitted if a Soldier wishes to depart from the Army’s standards for their gender marker.<sup>16</sup> The other Service Secretaries have also issued policy guidance for their respective branches, which largely tracks the guidance offered in the Army policy.<sup>17</sup>

One interesting aspect of Army Dir. 2016-35 is that it revises multiple Army regulations,<sup>18</sup> although not to such a degree as one might have expected. In AR 40-501, mentioned above, revisions eliminate transexualism, gender identity issues, and “abnormalities or defects of the genitalia such as change of sex” as disqualifying for service.<sup>19</sup> Army Regulation 135-178<sup>20</sup> and AR 635-200,<sup>21</sup> which address reserve component and active duty enlisted separations, are revised to eliminate gender dysphoria and “transsexualism/gender transformation” as grounds for separation.<sup>22</sup> Interestingly, “transvestism”—which is a term that refers to cross-dressing—is retained as a condition that warrants separation under paragraph 6-7a of AR 135-178.<sup>23</sup> The Army Command Policy, AR 600-20, is revised to replace references to discrimination based on sex or gender with “sex (including gender identity).”<sup>24</sup> The Army Substance Abuse Program regulation, AR 600-85, is revised as well, now permitting all Soldiers to use wide-mouth collection cups for specimen collection during the urinalysis process rather than only females (as before).<sup>25</sup>

There are many important questions that will arise for commanders and servicemembers who have to operate under this policy, as well as for military policymakers who will have to oversee and further refine the policy as the services proceed with its implementation. These questions include: Who counts as transgender under the policy and what must they do to come within its ambit? What exactly are the contours of the policy in terms of the rights it provides and the duties it imposes? How are on-the-ground conflicts between the rights and privileges recognized under the policy to be balanced

against or reconciled with the rights and privileges that non-transgender servicemembers may have?

For policymakers, the questions are larger: What impact does transgender accommodation have on interests served by the various gender-distinct policies and practices of the military? Are there any limits on transgender accommodation and recognition that are required in view of potential adverse impacts that the policy may have on the rights or interests of non-transgender servicemembers?

This article will address these questions with the aim of providing commanders, servicemembers, and policymakers with a solid understanding of the new policy and how to navigate the various issues each will face as it is implemented throughout the force.

## II. Who Is “Transgender” Under the Policy?

The main components of the new policy are threefold: (1) Transgender individuals are allowed to serve in the military openly and may not be discriminated against on the basis of their gender identity; (2) transgender servicemembers will be subject to the standards and procedures applicable to the gender with which they identify; and (3) transgender servicemembers will use the berthing, bathroom, and shower facilities associated with their gender identity.<sup>26</sup> Although, on its face, this appears to be broad in its protections, one must understand how the DoD defines “transgender” to understand its true scope.

In DoD Instruction 1300.28, *In-Service Transition for Transgender Service Members*, the DoD defines a transgender servicemember as follows: “A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any servicemember who intends to begin transition, is undergoing transition, or has completed transition and is stable in the

<sup>15</sup> *Id.* paras. 2.c., 3.f.

<sup>16</sup> *Id.* para. 5.

<sup>17</sup> See U.S. DEP’T OF AIR FORCE, AFPM2016-36-01, AIR FORCE POLICY MEMORANDUM FOR IN-SERVICE TRANSITION FOR AIRMEN IDENTIFYING AS TRANSGENDER (6 Oct. 2016) [hereinafter APFM2016-36-01]; U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 1000.11, SERVICE OF TRANSGENDER SAILORS AND MARINES (4 Nov. 2016) [hereinafter SECNAVINST 1000.11].

<sup>18</sup> *Id.* para. 6 (“Effective immediately, the following regulations will be revised in accordance with the language in enclosure 6: AR 40-501, AR 135-178, AR 600-20, AR 600-85, AR 635-200, and AR 638-2.”).

<sup>19</sup> ARMY DIR. 2016-35, *supra* note 14, encl. 6.

<sup>20</sup> U.S. DEP’T OF THE ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (12 Jan. 2017) [hereinafter AR 135-178].

<sup>21</sup> U.S. DEP’T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 Dec. 2016).

<sup>22</sup> ARMY DIR. 2016-35, *supra* note 14, encl. 6.

<sup>23</sup> *Id.*; AR 135-178, *supra* note 22, para. 6-7a.

<sup>24</sup> ARMY DIR. 2016-35, *supra* note 14, encl. 6; U.S. DEP’T OF THE ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014).

<sup>25</sup> ARMY DIR. 2016-35, *supra* note 14, encl. 6; U.S. DEP’T OF THE ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (28 Dec. 2012) [hereinafter AR 600-85]. The mortuary affairs regulation, AR 638-2, is revised in a minor way to strike “and transgenders” from paragraph 2-9b(1), which formerly read, “No uniform is authorized; dark suit only or equivalent for females and transgenders.” ARMY DIR. 2016-35, *supra* note 14, encl. 6.

<sup>26</sup> There are other aspects of the policy, such as the granting of access to medical services for the treatment of transgender persons interested in medical care, which presumably would include gender reassignment surgery. DTM 16-005, *supra* note 2, at Attachment, para. 4.

preferred gender.”<sup>27</sup> Two components of this definition are worth highlighting: *medical diagnosis* and *gender transition*. We will return to those terms in a moment. But as will be seen upon taking a closer look at the policy, the DoD makes these two concepts the foundation for whether and how it will recognize the preferred gender identity of transgender individuals.

In the military—as affirmed by the DoD in the documents announcing its new policy on transgender servicemembers—a servicemember’s gender is recognized based on his or her gender marker in DEERS.<sup>28</sup> A person’s gender marker in DEERS, in turn, determines what uniform and grooming standards, body composition assessment (BCA) standards, and physical readiness testing (PRT) standards apply to that person.<sup>29</sup> Similarly, the DEERS gender marker determines how a servicemember participates in the Military Personnel Drug Abuse Testing Program (MPDATP)<sup>30</sup> and which berthing, bathroom, and shower facilities the servicemember may use.<sup>31</sup> Thus, one’s gender marker in DEERS is the key to how the military treats servicemembers with respect to gender.

Under the new policy, to be recognized as one’s preferred gender in the military, one must have the gender marker in DEERS changed.<sup>32</sup> The question then becomes how does a servicemember do that under the new policy? One could imagine that members could present themselves to their commanders and simply declare or affirm what their gender identity is; then, the commander or some higher authority

could approve a switch in DEERS. But that is not the approach taken in the new policy. Instead, under the new policy, a servicemember’s gender marker in DEERS will only be changed from that assigned at birth “[w]hen the military medical provider determines that a Service member’s gender transition is complete,” the commander has given his or her written approval, and the servicemember provides civilian documentation<sup>33</sup> indicating a gender change.<sup>34</sup> Thus, a person must undergo a gender transition to obtain recognition of their status as transgender. How does the military define “gender transition”?

According to the policy, “Gender transition begins when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary . . . .”<sup>35</sup> The policy further defines the completion of a gender transition as follows: “A Service member has completed the medical care identified or approved by a military medical provider in a documented medical treatment plan as necessary to achieve stability in the preferred gender.”<sup>36</sup> “Medically necessary” is defined as “health-care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms . . . .”<sup>37</sup>

As can be seen, in referring to a “diagnosis” and to “medical care,” the DoD’s new policy regards being transgender as a type of medical condition in need of treatment before it can be recognized. Although neither DTM 16-005, DoDI 1300.28, nor Army Dir. 2016-35 delve into what this condition is, the DoD does seem to identify it in a

<sup>27</sup> DoDI 1300.28, *supra* note 7, at 16 (Glossary).

<sup>28</sup> ARMY DIR. 2016-35, *supra* note 14, at para. 2.c.

<sup>29</sup> DoDI 1300.28, *supra* note 7, para. 1.2.b.

<sup>30</sup> AR 600-85, *supra* note 26, para. 4-9c(2) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

<sup>31</sup> ARMY DIR. 2016-35, *supra* note 14, para. 2.c.

<sup>32</sup> U.S. DEPT. OF DEF. HANDBOOK, TRANSGENDER SERVICE IN THE U.S. MILITARY: AN IMPLEMENTATION HANDBOOK, 43–44, 47 (2016) [hereinafter DOD IMPLEMENTATION HANDBOOK] (indicating that the standards and facilities restrictions for one’s preferred gender apply after the DEERS gender marker is changed).

<sup>33</sup> Such documentation includes a certified birth certificate, court order, or U.S. passport reflecting a person’s preferred gender. *Id.* The U.S. State Department requires physician certification of “clinical treatment” before it will permit a gender change on a U.S. Passport. *Gender Designation Change*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> (last visited Jan. 13, 2017) (“Description of specific treatments is not required. The certification from your physician is based on his or her judgment of your treatment needs.”). States have their own rules regarding changing one’s gender on birth certificates and driver’s licenses, which vary in terms of what procedures and documentation are required. Some states require documentation of a surgical transition, and a few prohibit changing gender on birth certificates, but the trend appears to be toward requiring either evidence of “gender transition treatment” or certification by a physician or psychologist that the change accurately reflects the applicant’s sex or gender identity. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103426 (Deering Supp. 2016) (“The State Registrar shall issue a new birth certificate reflecting a

change of sex without a court order for any person born in this state who has undergone clinically appropriate treatment for the purpose of gender transition . . . .”); VA. CODE ANN. § 32.1-269(E) (2015) (“Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall amend such person’s certificate of birth to show the change of sex . . . .”). The National Center for Transgender Equality has a regularly updated website summarizing state laws on name change, driver’s licenses, and birth certificate policies, with links to forms and other local resources. *ID Documents Center*, NAT’L CENTER FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents> (last updated Jan. 2017). See the Appendix, *infra*, for a description of the regulations governing gender changes in the five states with the highest number of active-duty personnel—California, Florida, North Carolina, Texas, and Virginia.

<sup>34</sup> DoDI 1300.28, *supra* note 7, para. 3.2.d(2). Army Dir. 2016-35 indicates that the applicable approval authority will approve a change to a Soldier’s gender marker in DEERS within 30 days after receiving a request for a change from the Soldier and all required documentation. ARMY DIR. 2016-35, *supra* note 14, para. 3.d. This period is 60 days for reserve component Soldiers. *See id.* The Soldier’s gender marker will be changed once the approval is submitted to the Commander, U.S. Army Human Resources Command (HRC). *Id.* para. 3.e.

<sup>35</sup> DoDI 1300.28, *supra* note 7, para. 3.1.b; *see also* ARMY DIR. 2016-35, *supra* note 14, at para. 3.

<sup>36</sup> DoDI 1300.28, *supra* note 7, at 16 (Glossary); *see also* ARMY DIR. 2016-35, *supra* note 14, para. 3.c.

<sup>37</sup> *Id.*

follow-up publication. In *Transgender Service in the U.S. Military: An Implementation Handbook*, the DoD refers to “gender dysphoria” and defines this as “a medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth.”<sup>38</sup> This divergence is made possible by what the DoD indicates are the distinctions between “gender” and “sex”: “Sex and gender are different. Sex is whether a person is male or female through their biology. Gender is the socially defined roles and characteristics of being male and female associated with that sex. There are a number of people for whom these associations do not match.”<sup>39</sup> Indeed, the current version of the *Diagnostic and Statistical Manual of Mental Disorders—DSM-V*—concur in the DoD’s understanding of the difference between sex and gender as well as the condition of gender dysphoria. It defines gender dysphoria as “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”<sup>40</sup>

It is worth noting that defining a transgender person as one with a gender dysphoria diagnosis who has committed to a gender transition puts the DoD at variance with how the diagnostic and transgender communities define the term “transgender”—with the DoD’s definition being much narrower. As DSM-V recognizes, “Transgender refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender.”<sup>41</sup> It is an “umbrella term” that embraces “anyone whose behavior, thoughts, or traits differ from the societal expectations for his or her biological sex.”<sup>42</sup> The narrower concept of “transsexual”—defined as “[o]ne who lives full time in a gender role consistent with his or her inner gender identity whether such person has had sex reassignment surgery or not”<sup>43</sup>—is more in line with what the DoD is referring to when it uses the term transgender.<sup>44</sup>

Although the DoD policy conditions recognition of one’s gender identity upon undertaking and completing a “gender transition,” the DoD is careful not to dictate what that entails.

The policy recognizes that gender transition is a process that can vary from one individual to the next:

**transition.** Period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role. For many people, this involves learning how to live socially in another gender role; for others this means finding a gender role and expression that are most comfortable for them. Transition may or may not include feminization or masculinization of the body through cross-sex hormone therapy or other medical procedures. The nature and duration of transition are variable and individualized.<sup>45</sup>

The DoD’s handbook on implementation of the transgender policy affirms this view: “Gender transition care is individualized and can include psychotherapy, hormone therapy, RLE [real life experience], and sex reassignment surgery.”<sup>46</sup> *This is important*; the DoD policy does not require a *medical* transition, even though the starting point for a gender transition under the policy is a medical diagnosis of gender dysphoria. Rather, the policy simply requires a transition of some kind, which can include—but need not include—a medical transition.

This puts the DoD policy in line with the position on transitioning in the transgender community, which recognizes the possibility of *social/emotional* and *hormonal/medical* transitions. A social transition is one in which a person publicly identifies as their preferred gender and may choose to express that identity in ways that conform with societal expectations for that chosen gender.<sup>47</sup> The DoD policy refers to this aspect of transitioning as *real life experience* or RLE.<sup>48</sup> A medical transition can involve the use of cross-sex hormone therapy, defined by the DoD as “[t]he use of feminizing hormones in an individual assigned male at birth based on traditional biological indicators or the use of masculinizing hormones in an individual assigned female at birth.”<sup>49</sup> A medical transition can also involve behavioral health care, psychotherapy, or gender reassignment surgery, which would bring one’s sex in line with their preferred gender identity.<sup>50</sup>

<sup>38</sup> DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 9.

<sup>39</sup> *Id.*

<sup>40</sup> DSM-V, *supra* note 4, at 451.

<sup>41</sup> *Id.* at 451.

<sup>42</sup> ALLY WINDSOR HOWELL, *TRANSGENDER PERSONS AND THE LAW* 194 (2013). *See also* NICHOLAS M. TEICH, *TRANSGENDER* 101, at 2 (2012) (“Transgender is defined today as an umbrella term with many different identities existing under it.”).

<sup>43</sup> HOWELL, *supra* note 43, at 194.

<sup>44</sup> Various writings on transgender persons acknowledge that in public policy discussions, the term transgender tends to intend transsexualism as its meaning. *Id.* at 9–10 (“[F]or the purposes of this book, the word *transgender* will be used exclusively to refer to *transsexuals* . . .”) (emphasis in original);

TEICH, *supra* note 43, at 2 (“The type of transgenderism that we are concerned with in the bulk of this book is *transsexualism*.”) (emphasis in original).

<sup>45</sup> DoDI 1300.28, *supra* note 7, at 17.

<sup>46</sup> DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 13.

<sup>47</sup> *See* TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 124–54 (Laura Erickson-Schroth ed., 2014) (discussing the various aspects of social transition for transgender persons) [hereinafter TRANS BODIES].

<sup>48</sup> DoDI 1300.28, *supra* note 7, at 16.

<sup>49</sup> *Id.* at 15.

<sup>50</sup> *See* DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 31 (“Medical treatment may include behavioral health care, use of hormones (which may

If at any point during the transition process the servicemember needs an accommodation for being unable to meet an applicable standard or to comply with a gender-specific regulation, DoD policy empowers commanders to grant exceptions to policy (ETPs): “If a Service member is unable to meet standards or requires an exception to policy (ETP) during a period of gender transition, all applicable tools, including the tools described in this issuance, will be available to commanders to minimize impacts to the mission and unit readiness.”<sup>51</sup> The services may further restrict this authority; for example, in the Army, approval authority for ETPs for transgender servicemembers is withheld to the Assistant Secretary of Army for Manpower and Reserve Affairs.<sup>52</sup>

This ETP policy is similar in the Air Force, with decisional authority withheld to the Air Force A1, the Deputy Chief of Staff for Manpower, Personnel and Services.<sup>53</sup> However, under the Air Force policy, a transitioning airman can request an exemption from the applicable Fitness Assessment (FA) requirements only after documenting an FA failure and only with documentation from their military medical provider validating that they are undergoing cross-sex hormone treatment as part of their transition plan.<sup>54</sup> The Department of the Navy’s policy indicates that the Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) are directed to establish policies and procedures pertaining to readiness issues surrounding transitioning servicemembers, including ETPs.<sup>55</sup> To aid each of the branches in the accommodation and ETP context, the DoD called for the establishment of an entity within each service referred to as the Service Central Coordination Cell (SCCC) for guidance and processing, with ultimate decisions made by the aforementioned officials.<sup>56</sup>

Notwithstanding the DoD’s provision of ETP-granting authority, in the Army’s implementation of the policy, the Secretary of the Army seemed to suggest that ETPs for transitioning Soldiers would be disfavored, at least as a first resort:

In the event that a Soldier undergoing gender transition is unable to meet a particular Army standard as a result of medical treatment or other aspects of the Soldier’s gender transition, the Soldier’s chain of command, together with the Soldier and/or the military medical provider, should consider options (for example, adjusting the date of a physical fitness test or extended leave options) *other than* requesting an ETP to depart from Army standards. If submitted, a request for an ETP to depart from the standards of a Soldier’s gender marker in DEERS must be processed according to the procedures outlined in this paragraph . . . .<sup>57</sup>

In forwarding an ETP request, the requesting servicemember is supposed to provide “an assessment of the expected effects, if any, the ETP will have on mission readiness and the good order and discipline of the unit.”<sup>58</sup>

Beyond being the initial screen for accommodations and ETP requests, commanders are given front-line responsibility for approving the timing of medical treatment associated with a gender transition. As the Army’s policy explains, a Soldier’s brigade-level commander makes this decision, considering “the Soldier’s individual facts and circumstances”; “military readiness” and “effects to the mission”; and the “morale, welfare, good order, and discipline of the unit.”<sup>59</sup> Once a military medical provider certifies that the transition is complete, the provider will notify the commander and recommend when the Soldier’s gender marker should be changed in DEERS.<sup>60</sup> Once the Soldier formally requests approval for a change, the commander confirms that the request has all required information (formal medical diagnosis, medical certification that the transition is complete, and civil legal documentation supporting a gender change), consults with the SCCC, and approves the change.<sup>61</sup> Presumably, if there is any adverse impact on a mission or a deployment, commanders have the discretion under the policy to take that into account in making their decision regarding the timing of gender transitions and gender-marker changes.

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change physical appearance), and/or surgery.”); *see also* TRANS BODIES, *supra* note 48, at 265–90 (discussing surgical transitions for transgender individuals).

<sup>51</sup> DoDI 1300.28, *supra* note 7, at 4.

<sup>52</sup> ARMY DIR. 2016-35, *supra* note 14, para 5.d.

<sup>53</sup> APFM2016-36-01, *supra* note 18, para. 5.2.

<sup>54</sup> *Id.* para. 5.4.a.(1).

<sup>55</sup> SECNAVINST 1000.11, *supra* note 18, at encl. 1, para. 1.

<sup>56</sup> DoDI 1300.28, *supra* note 7, at 2.2.c; ARMY DIR. 2016-35, *supra* note 14, para 4.e (“The Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) has established a Service Central Coordination Cell composed of medical, legal, and military personnel experts to provide advice and assistance to commanders, address their inquiries, and process requests

for ETPs in connection with gender transition for decision by the ASA (M&RA).”).

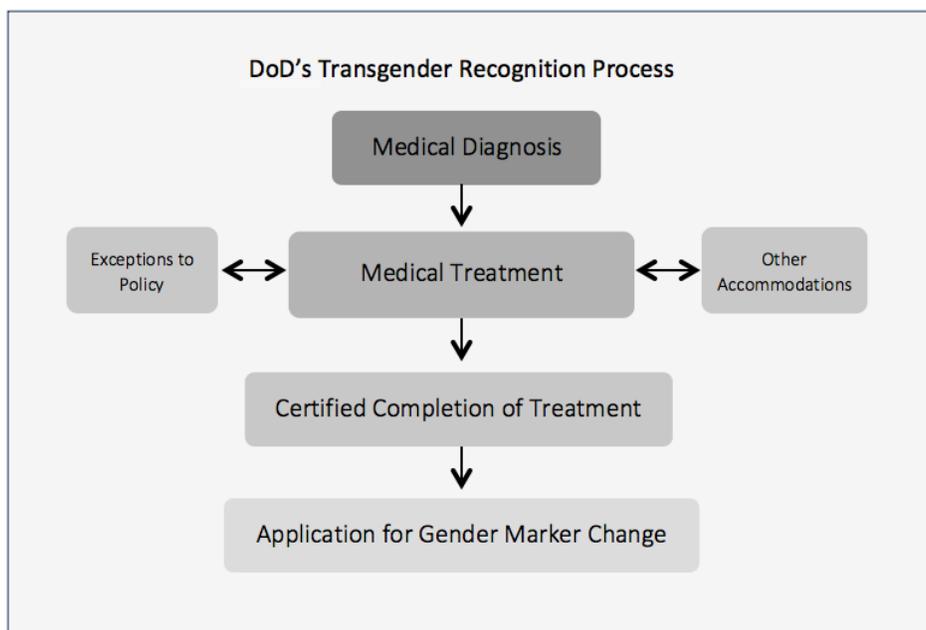
<sup>57</sup> ARMY DIR. 2016-35, *supra* note 14, para. 5 (emphasis added).

<sup>58</sup> *Id.* para. 5.c.

<sup>59</sup> *Id.* para. 3. *See also* SECNAVINST 1000.11, *supra* note 18, para. 4.g (“Commanders and Commanding Officers will assess expected impacts on mission and readiness after consideration of the advice of military medical providers.”).

<sup>60</sup> *Id.* para. 4.

<sup>61</sup> *Id.* para. 4.a, 4.b. The Department of the Air Force and Department of the Navy policies do not differ materially from the Army policy on this topic. *See* APFM2016-36-01, *supra* note 18, para. 5.2.b.; SECNAVINST 1000.11, *supra* note 18, para. 4.h.



To recap, the steps in the military’s transgender recognition process may be summarized as follows: The servicemember must first obtain a diagnosis from a military medical provider that gender transition is medically necessary. The servicemember then receives medical care and treatment for the diagnosed medical condition of gender dysphoria. In the course of receiving treatment, the servicemember may request approval of any needed exceptions to policy (ETPs) to accommodate the servicemember during his or her transition or other accommodations short of an ETP. Once the military medical provider certifies that the treatment regime is complete and that the servicemember is stable in the preferred gender, the servicemember requests approval for a gender marker change in DEERS, which must be supported by documentation (such as a certified birth certificate, court order, or U.S. passport reflecting the preferred gender). The following figure illustrates this process:

Upon completing this process, recognition in the preferred gender—and application of the gender-distinct regulations, policies, and practices relevant thereto—is achieved.

### III. Select Issues Under the Policy

Although there are many potential implications of this new policy,<sup>62</sup> it is worth discussing here just a few.

#### A. The Meaning of “Transgender” and the Transition Commitment Requirement

As previously discussed, the new transgender policy only recognizes as transgender a servicemember who has been diagnosed with gender dysphoria, has been prescribed a gender transition as the treatment, and is either intent on, in the process of, or at the end of completing such a transition.<sup>63</sup> For servicemembers who identify as transgender and wish to receive recognition of their preferred gender, they must commit to transitioning to that gender. But transitioning is a choice, and not one that all transgender persons make.<sup>64</sup> This may be particularly true for those persons embracing or experiencing gender fluidity and for the “growing number of trans people [who] explicitly resist categories that stabilize

<sup>62</sup> See generally AGNES GERE BEN SCHAEFER ET AL., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY (2016), [http://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1500/RR1530/RAND\\_RR1530.pdf](http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf) [hereinafter RAND REPORT].

<sup>63</sup> DoDI 1300.28, *supra* note 7, para. 3.1 (“These policies and procedures are applicable, in whole or in relevant part, to those Service members who intend

to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition and are stable in their preferred gender.”).

<sup>64</sup> See TRANS BODIES, *supra* note 48, at 124 (“Once we make a *decision* to begin making changes that will better reflect our identity, there are numerous ways to start.”) (emphasis added).

gender in any way.”<sup>65</sup> Thus, for those gender nonconforming transgender servicemembers uninterested in or unwilling to commit to a transition, their preference for expressing their gender fluidly will not be recognized under the policy. As such they will have to conform to and comply with the gender-distinct regulations, policies, and practices applicable to their natal sex as indicated in DEERS. For those who do commit, the DoD’s policy leaves unanswered whether the conversion is irrevocable or irreversible. May a fully transitioned servicemember subsequently complete another gender transition back to the previously recognized gender and if so, is there any requirement of stability or duration in the chosen gender before one abandons it to revert to the previous gender? That may not be a realistic scenario if the condition of gender dysphoria is one that has permanence, although the notion of gender fluidity suggests that for some transgender persons, it does not. Nevertheless, policymakers should clarify whether a gender transition is a one-way street.

Relatedly, at the initial entry point, the new policy requires a gender stability that gender non-conforming transgender persons may not be able to exhibit. Under the new policy, transgender persons with a history of gender dysphoria who are interested in accessing into the military remain ineligible for service if they cannot have a medical provider certify that they have been stable “without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.”<sup>66</sup> It may be particularly difficult for gender-fluid/nonconforming transgender persons to meet this standard, although it remains to be seen how it is further defined and implemented.<sup>67</sup> The Navy Department policy provides for the possibility that the 18-month stability period can be reduced or waived on a case-by-case basis.<sup>68</sup>

The lesson here is given that “transgender” as a category in society is broader than the DoD policy embraces, and given that a wider array of persons with gender identity issues may variously consider themselves gender-variant, gender-queer, cross-dressers, intersex, androgynous, or some other place within or beyond the gender binary,<sup>69</sup> a future issue that military policymakers are likely to confront is whether and to what extent these identities should also be recognized and accommodated within the services. For example, recall that one can complete a gender transition within the military without having to undergo any type of medical transition.<sup>70</sup>

<sup>65</sup> Christine Labuski & Colton Keo-Meier, *The (Mis)Measure of Trans*, 2 TRANSGENDER STUD. Q. 13, 14 (2015). See also *id.* at 13 (“We define transgender as dynamic, unstable, and porous.”).

<sup>66</sup> DTM 16-005, *supra* note 2, at Attachment para. 2.a.(1).

<sup>67</sup> The Department of Defense is currently drafting policies that will apply to the accession of transgender persons into the military. See, e.g., ARMY DIR. 2016-35, *supra* note 14, para. 6.b (“This directive does not alter Army accessions policy. No later than July 1, 2017, the Under Secretary of Defense (Personnel and Readiness) will update the policies and procedures governing accessions for transgender applicants in DoD Instruction 6130.03.”).

Thus, a biological male who has transitioned to a female will be permitted (indeed required) to wear the female Army Service Uniform (ASU) but a nontransgender biological male who is a cross-dresser will not.<sup>71</sup> Or gender-fluid or androgynous persons who are not interested in assigning themselves to a fixed gender category must choose a gender identity and clothe themselves accordingly based on their markers in DEERS.

If transgenderism is being taken seriously as a condition worth accommodating, why not address these other categories that the community recognizes as equally valid within the gender identity continuum? Ultimately, as members of those aforementioned groups press for the accommodation that only a subclass of transgendered persons has been granted under DTM 16-005, the even deeper question of the enduring value and relevance of the various gender-distinct policies and practices in the military are likely to become subject to reconsideration as well. That is, why retain gender-based distinctions in the military at all if being subject to them is connected only to one’s subjective state of mind, particularly if other gender-questioning states of mind are not similarly empowered? Just a decade or more ago one could not have imagined the military taking the step that it has with respect to recognizing and accommodating transgender servicemembers. It may be just a matter of time before further steps will need to be taken for others that could yield the unravelling of gender-based distinctions in their entirety.

## B. Transgender Servicemembers and Gender-Distinct Policies and Practices in the Military

Perhaps one of the most challenging aspects of the new policy will be the interface between recognized transgender servicemembers and the various sex/gender-distinct regulations, policies, and practices within the military. The new policy does not indicate that these sex/gender-based distinctions are going to be abandoned. Rather, such distinctions will be retained, with transgender personnel fitting within them as their preferred gender. What are these distinctions and what issues may arise in applying them to transgender personnel?

<sup>68</sup> SECNAVINST 1000.11, *supra* note 18, para. 6.a (“The 18-month periods may be waived or reduced, in whole or in part, in individual cases for applicable reasons. Requests for waiver or reduction of the 18-month periods shall be sent to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) for adjudication.”).

<sup>69</sup> See TEICH, TRANSGENDER 101, *supra* note 43, at 2 (explaining these categories).

<sup>70</sup> See *supra* notes 46-47 and accompanying text.

<sup>71</sup> See *infra* Part III.B. for a further discussion of the interaction between the transgender policy and the uniform and appearance regulations.

With the end of the combat exclusion for women in the military,<sup>72</sup> the remaining distinctions based on sex or gender in the armed forces pertain primarily to the following areas: (1) housing, bathroom, and shower use (“facilities”); (2) uniform and grooming standards (“appearance”); and (3) physical fitness, individual medical readiness (IMR), testing for drug use, and body composition standards (“physical readiness”). Under the DoD’s transgender policy, once gender transition is complete, the standards in the above categories applicable to the preferred gender will apply. To fully assess what the implications of applying these standards to a transgender servicemember might be, it is important to articulate the purpose behind each of these sex-based distinctions.

### 1. Facilities

Distinctions in facilities—which exist both inside and outside the military—presumably are linked to some mix of privacy concerns; societal norms of discretion, modesty; and/or safety concerns, such as an interest in mitigating instances of sexual assault.<sup>73</sup> These rationales can and certainly have been challenged.<sup>74</sup> Regardless of one’s view on their legitimacy, it cannot be denied that the introduction of a recognized transgender servicemember into gender-specific facilities will require directly confronting these rationales. Deriving principally from the fact that gender recognition under DTM 16-005 does not require a medical transition, a recognized transgender male (born female) who retains the biological incidents of the female sex—but has attained formal recognition as a male due to a completed social transition—will be housed with and share common showers and bathroom facilities with biological nontransgender males. The same is true, of course, for transgender females who remain biologically male.

The DoD recognized this possibility in one of the scenarios it put forward in the transgender policy implementation handbook it released.<sup>75</sup> Scenario 11, entitled “Use of Shower Facilities” sets up the following hypothetical: “A transgender Service member has expressed privacy concerns regarding the open bay shower configuration.

Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia.”<sup>76</sup> Rather than indicating that the transgender person may be excluded under such circumstances, the guidance provided to the servicemember is to discuss these concerns with their commander and to “[c]onsider altering your shower hours.”<sup>77</sup> Regarding the commander in this situation, the handbook advises the commander to “employ reasonable accommodations” and to do so “avoiding any stigmatizing impact.”<sup>78</sup> Examples of accommodations include modifying the facility to install shower curtains or making “adjustments to the timing of the use of shower or changing facilities.”<sup>79</sup> Army Dir. 2016-35 concurs in this commander guidance.<sup>80</sup>

The key takeaway here seems to be that transgender servicemembers will be entitled to use the facilities designated for their preferred gender notwithstanding the retention of the biological features of their natal sex. This is so, notwithstanding privacy, modesty, or safety concerns (real or perceived) that may exist among non-transgender servicemembers. The obligation of transgender servicemembers, nontransgender servicemembers, and their commanders is to communicate about any concerns that arise in this context and to work towards reasonable, non-stigmatizing accommodations to account for the same.

The question is whether the approach taken by the handbook makes sense in light of the purpose behind gender-distinct facilities. Good order and discipline is certainly connected to sex-segregated showering facilities, especially—one would imagine—among junior enlisted personnel still in their teenage years. Further, there are likely many Soldiers who would be disturbed or alarmed to find someone with different genitalia sharing an open-bay shower. Although the DoD has anticipated such a scenario under its new policy, its offered solution for the commander is to find non-stigmatizing accommodations that will permit the transgender servicemember to use the facility of his or her gender identity, notwithstanding the retention of his or her natal genitalia. It seems, though, that such guidance gives insufficient weight to the concerns of nontransgender

<sup>72</sup> Press Release, U.S. Dep’t of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), <http://archive.defense.gov/releases/release.aspx?releaseid=15784>.

<sup>73</sup> Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 250 (2013) (“Safety is probably the most common argument in favor of sex-segregated restrooms.”); Katherine A. Womack, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1378 (2010) (“While using these categories to separate residents does not appear to have a ‘sinister purpose’ on its surface, the underlying rationale seems to rely on the belief that sex segregation decreases violence.”).

<sup>74</sup> See, e.g., Kosbie, *supra* note 74, at 250 (“[P]reventing trans people from using sex-segregated restrooms is not related to safety. . . . [T]here is no

evidence that preventing trans people from using their restroom of choice actually enhances safety.”).

<sup>75</sup> See DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 60.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 61.

<sup>80</sup> See, e.g., ARMY DIR. 2016-35, *supra* note 14, at para. 4.b (“[C]ommanders have discretion to employ reasonable accommodations to respect the modesty or privacy interests of Soldiers, including discretion to alter billeting assignments or adjust local policies on the use of bathroom and shower facilities . . .”).

servicemembers impacted by the accommodation. The guidance also assumes that making alterations that accommodate the transgender servicemember but impact everyone else will not itself be stigmatizing; however, it is likely that other servicemembers subjected to such changes will be well aware of why they are being imposed, which may prove to be even more stigmatizing to the transgender servicemember. Finally, in deployed environments, it might be infeasible to make accommodations that might be possible at established military installations. Commanders facing these and other potentially complex scenarios will have to use sound judgment as they balance the rights and needs of transgender servicemembers, the concerns of other servicemembers, and the need to promote good order and discipline.

## 2. Appearance Standards

Unlike distinctions pertaining to facilities, gender-distinct appearance standards are less widespread outside of the military and are generally unconnected with privacy or safety rationales. Instead, uniform and grooming regulations in the military generally reflect conformity with stereotypical, gender-conforming ideals surrounding personal appearance embraced by society at large, with some allowance for personal taste and style. Thus, for example, women may (not must) have long hair; may (at times) wear earrings, hosiery, and cosmetics; and can carry a handbag or purse, but they may not wear a mustache.<sup>81</sup> Physical fitness uniforms tend to be unisex, although in the Navy for its swim test, males may wear the standard issue PT shorts while females typically will wear top coverage to comply with the accepted social norm in this country against public nudity. What happens if a transgender male who remains biologically female does not wish to conform with this norm?

This latter circumstance is addressed by Scenario 14 in the DoD transgender handbook: “It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage.”<sup>82</sup> Again, as with facilities, the new policy does not declare that such persons are obliged to conform to the female top coverage standard if they identify as male. Rather, the guidance provided in the handbook simply advises the servicemember to discuss his desires with his chain of command and reminds the servicemember that it is “courteous and respectful to consider social norms and mandatory to adhere to military standards of conduct.”<sup>83</sup>

<sup>81</sup> U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, paras. 1-8, 1-14, 3-4, 27-13, 27-24 (3 Jan. 2005) [hereinafter AR 670-1].

<sup>82</sup> DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 63.

<sup>83</sup> *Id.*

Commanders facing such a scenario are reminded that they have “discretion to take measures ensuring good order and discipline,” although there does not seem to be any suggestion that such measures may include ordering or requiring the transgender servicemember to wear top cover. The only clear option the handbook suggests is to consider “requiring all personnel to wear shirts” as a solution.<sup>84</sup>

As noted with respect to the handbook’s suggested accommodations in the context of sex-segregated facilities, the approach offered in this context is not ideal. Requiring all personnel to wear shirts can be just as stigmatizing—if not more stigmatizing—for transgender servicemembers given that the nontransgender servicemembers will be aware of the reason for the imposition and some may begrudge the transgender servicemember for preferring to impact everyone else rather than simply covering up out of respect for the sensibilities of others. Again, ensuring unit cohesion and morale, as well as good order and discipline, is a commander responsibility that should empower commanders to seek sensible solutions. However, given the admonition that commanders may not require the transgender servicemember to take some measure that others are not asked to undertake, commanders may have limited options in addressing such situations. Fortunately, the specter of a biologically female transgender male appearing in public without top-cover does not seem to be a likely prospect in light of broadly-accepted norms against public nudity that are not generally challenged.

Moving on to the more cosmetic aspects of the uniform and appearance policy, given that transgender servicemembers who have not surgically transitioned will nevertheless be able—indeed obligated—to comply with the uniform regulations applicable to their preferred gender as revised in DEERS, a biological male Soldier who is recognized as a socially-transitioned female will be permitted, for example, to have long hair in a bun, carry a purse, and wear earrings and cosmetics.<sup>85</sup> Conversely, transgender males who are biologically female will be prohibited from having or doing these things.<sup>86</sup> Is there any problem with this?

To address that question, one must ask whether these aspects of the gender-distinct clothing and appearance regulations further any interests that should take priority over the recognition of a servicemember’s preferred gender identity. On the one hand, the “feminine” apparel and accessorization allowances in the regulations seem to be a concession to the personal tastes and preferences that females are socially permitted to have. The prohibition against

<sup>84</sup> *Id.*

<sup>85</sup> AR 670-1, *supra* note 82, paras. 1-8, 1-14, 3-4, 27-13, 27-24 (explaining the circumstances in which these accouterments are allowed).

<sup>86</sup> *Id.* at paras. 3-2, 3-4 (prescribing “tapered” hairstyles, limiting jewelry to females in certain uniforms, and stating that “[m]ales are prohibited from wearing cosmetics”).

“feminine” apparel and accouterments for males is equally tied to social conventions of appearance for males, but seems less connected with furthering good order and discipline when compared with the gender-based facilities restrictions discussed above. On the other hand, one could argue that there is a connection between the gendered aspects of the uniform and appearance standards and good order and discipline; prevailing social conventions suggest that, at present, a biologically male transgender female who dresses in female attire is likely to garner a potentially disruptive reaction from some non-transgender servicemembers uncomfortable with such displays. Further, military uniforms in this country are designed to inspire pride and confidence in the military, sentiments that currently are connected with prevailing social norms and expectations regarding differential appearance between the sexes. Transgender servicemembers and commanders will need to be mindful of all of these considerations as they navigate the appearance standards under the new policy.

As previously noted, in view of the fact that under the new policy, biological males identifying as females may follow the female-specific provisions of the uniform and appearance policy, one can legitimately ask whether it is justified to limit such access to transgender persons who have transitioned, or even to transgender persons at all? In other words, if biological males will be permitted to dress as females under the policy, provided they have changed their gender marker in DEERS, what is the rational basis for prohibiting nontransgender males who are simply cross-dressers from doing the same?<sup>87</sup> This is not said to be snide; rather, the question is raised because the reality of these possibilities hints at the further possibility that sex/gender-based distinctions pertaining to clothing and appearance may be abandoned as more servicemembers come forward seeking to express themselves through their appearance in a way that conforms with their identity.<sup>88</sup> Currently, accommodations around uniform and appearance regulations are tied to things like religious rights,<sup>89</sup> medical conditions,<sup>90</sup> and now gender identity, but one could imagine a loosening of the gender-based distinctions if societal norms migrate in that direction (just as societal norms around tattoos have evolved in ways that have shaped military regulations).<sup>91</sup>

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<sup>87</sup> Note that even after the issuance of Army Dir. 2016-35, “transvestism” or cross-dressing remains a disabling mental condition that may serve as a ground for involuntary separation of reserve component Army personnel. See U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 6-7a (18 Mar. 2014); ARMY DIR. 2016-35, *supra* note 14, encl. 6 (leaving in place the “transvestism” reference while deleting references to gender dysphoria and transsexualism as disqualifying conditions).

<sup>88</sup> This was the case for Captain Simratpal Singh, who recently obtained permission from the Army to wear long hair under a turban and a beard in uniform in conformity with his Sikh religious faith. Nadeen Shaker, *Sikh Army Captain Allowed To Wear Beard and Turban in Uniform*, CNN.com, <http://www.cnn.com/2016/04/04/us/sikh-army-captain-simratpal-singh-beard-turban/> (updated Apr. 5, 2016).

The Army’s uniform regulation—AR 670-1—was not revised by Army Dir. 2016-35, the directive implementing the DoD’s transgender policy. Instead, the Secretary of the Army indicated that the Deputy Chief of Staff, G-1, will review that regulation and provide any updates or revisions as necessary. Thus, it remains to be seen what, if any, changes will be made to account for some of the aforementioned issues. It is possible, for example, that some gender-specific uniform and appearance standards may be revised to become gender neutral as occurred with the wide-mouth collection cup policy for drug testing under AR 600-85.<sup>92</sup> But it does not appear that it would be consistent with DTM 16-005 for AR 670-1 to be revised in a way that requires non-biologically transitioned transgender Soldiers to conform to the clothing and appearance designated for their biological sex rather than their preferred gender, unless policymakers reach the conclusion that such “cross-dressing” would present too much a threat to good order and discipline (a conclusion that likely would evoke some pushback if not adequately supported by solid evidence).

### 3. Physical Readiness

Beyond stylistic and cultural considerations are the fitness requirements associated with military service. In each branch, the fitness standards generally applicable to servicemembers vary by gender. These gender-based distinctions are rooted in generalized understandings of physiological differences between males and females that presume males are stronger and faster than equally fit females of the same age.<sup>93</sup>

Under DTM 16-005, transgender servicemembers who have completed a transition and had their gender marker changed in DEERS will be held to that standard. That raises the prospect of a transgender female who remains biologically male being subject to the female fitness and body composition standards. On the one hand, the female physical readiness standards for each exercise tend to be lower, e.g., longer times allowed for runs and fewer push-ups and sit-ups required within a given period of time.<sup>94</sup> On the other hand, the weight allowed for males is greater than for females of the same

<sup>89</sup> See *id.*

<sup>90</sup> See, e.g., AR 670-1, *supra* note 82, para. 3-2b(1) (permitting males to wear cosmetics “when medically prescribed”).

<sup>91</sup> See *It’s Official: Army Issues New Tattoo Rules*, ARMY TIMES (Apr. 10, 2015), <https://www.armytimes.com/story/military/careers/army/2015/04/10/army-regs-tattoos-uniforms/25576197/>.

<sup>92</sup> AR 600-85, *supra* note 26, para. E-4, E-5.

<sup>93</sup> Kristy N. Kamarck, Cong. Res. Serv., R42075, *Women in Combat: Issues for Congress* (2015).

<sup>94</sup> See NAVY PHYSICAL READINESS PROGRAM, GUIDE 5: PHYSICAL READINESS TEST (PRT) (2016), <http://www.public.navy.mil/bupers->

height.<sup>95</sup> Thus, a Soldier fitting this profile would be held to “lower” fitness standards than biologically identical nontransgender males, but a “tougher” weight standard.

The question is whether this makes sense in light of the interests that the fitness and weight regulations are meant to further. Asked differently, what bearing does or should a person’s gender identity have on how the military assesses one’s physical readiness? If there are legitimate innate physiological differences between biological males and females that justify these distinctions in the first place, one’s gender identity does not necessarily bear on or alter those differences—particularly if there has been no medical transition.

To illustrate, in the Army a 22-year-old male Soldier must be able to run 2 miles in no more than 16:36 minutes.<sup>96</sup> That Soldier’s psychological identification as a female does not diminish his/her ability to complete the run within that same time period. However, under DTM 16-005, that Soldier will be subjected to the female Physical Readiness Training (PRT) standard if he/she completes all of the steps required to change his/her gender designation in DEERS, which does not require a medical/surgical transition. This Soldier—a transgender female who is biologically male—will now be permitted to complete the 2-mile run in 19:36 minutes.<sup>97</sup>

If a biologically male 22-year old Soldier must be able to run 2 miles in 16:36 minutes to be considered qualified for continued Army service and ready for deployment, there does not appear to be any justification for dispensing with that requirement on the ground that the biological male Soldier is transgender and identifies as female. Setting that view to the side, the point is that policymakers need to confront this issue and determine whether physical readiness assessments should continue to be connected to gender identity or whether it makes sense to revise the regulations to base fitness assessments on physiological/biological realities.

What of those transgender servicemembers who have medically transitioned? Hormone treatment will impact testosterone levels, which will likely have some bearing on muscle mass and body fat percentages, which in turn could impact performance or the satisfaction of body composition standards. Servicemembers and commanders will need to keep these realities in mind both during and after the transition process to ensure that the relevant policies are applied in ways that are consistent with the interests that they are designed to further. Additionally, for all transgender servicemembers,

regardless of the type of transition they have undergone, there may be challenges in complying with the newly applicable physical readiness standards that could result in failures of the Army Physical Fitness Test (APFT). Current regulations permit separation from the military for repeated weight<sup>98</sup> or APFT failures;<sup>99</sup> policymakers will need to decide whether it will remain acceptable to separate servicemembers based on repeated body composition or physical fitness failures that are caused by their transgender status. One would think that if the physical readiness standards are truly meaningful, failures connected with one’s gender transition and the resulting application of more challenging standards will continue to warrant separation. That possibility should be part of what commanders and transgender servicemembers take into account when determining whether a recognized gender transition is an appropriate course of action.

A separate component of physical readiness is being free from drug use, which is policed in the Army through the Army Substance Abuse Program. The regulation governing the program, AR 600-85, mandates that observers (those who watch specimen donors to ensure provenance) be the same gender as the Soldier being tested.<sup>100</sup> Army Directive 2016-35 does not change this aspect of the regulation, although it does eliminate the female-only entitlement to an “[o]ptional wide mouth collection cup” for collecting the urine specimen.<sup>101</sup> Indeed, this revision to the drug testing procedure provides an example of the elimination of a gender-distinct rule that the Army has made gender neutral in light of the advent of transgender Soldiers. It may be that in other spheres gender-distinct regulations may migrate toward becoming gender neutral if appropriate and consistent with the purposes underlying the rule.

In any event, by retaining the requirement that urinalysis observers be the same gender, it will be possible for a biologically male transgender female to serve as an observer for a non-transgender female, and vice versa. The DoD’s transgender policy implementation handbook recognizes this possibility in Scenario 12, entitled “Urinalysis.” The handbook suggests that in such situations, the privacy and comfort concerns of all persons involved should be discussed and alternate observation options should be considered: “Depending on Service regulations, you may consider alternate observation options if a request from a transgender Service member or an observer is made. Options could include observation by a different observer or medical

[npc/support/21st\\_Century\\_Sailor/physical/Documents/Guide%205-Physical%20Readiness%20Test.pdf](http://npc/support/21st_Century_Sailor/physical/Documents/Guide%205-Physical%20Readiness%20Test.pdf).

<sup>95</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 600-9, THE ARMY BODY COMPOSITION PROGRAM, tbl. B-1 (28 June 2013) [hereinafter AR 600-9].

<sup>96</sup> U.S. DEP’T OF ARMY, FORM 705, ARMY PHYSICAL FITNESS TEST SCORECARD, 2-Mile Run Standards (May 2010).

<sup>97</sup> *Id.*

<sup>98</sup> AR 635-200, *supra* note 22, para. 18-1.

<sup>99</sup> AR 635-200, *supra* note 22, para. 13-2.e.

<sup>100</sup> AR 600-85, *supra* note 26, para. 4-9.c.(2) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

<sup>101</sup> See ARMY DIR. 2016-35, *supra* note 14, encl. 6 (amending Appendix E of AR 600-85 as noted).

personnel.”<sup>102</sup> However, the integrity of the program may not be undermined in favor of privacy concerns.<sup>103</sup> Thus, as with issues that arise in the housing, bathroom, and other facilities context, there are legitimate privacy/modesty concerns that servicemembers and commanders will have to work out as these issues arise, taking care not to violate the policy requiring recognition of a servicemember’s preferred gender as indicated in DEERS. That said, it would seem to be reasonable, at a minimum, for a nontransgender servicemember to be granted a request for a same-sex observer out of deference to their legitimate privacy concerns.

#### IV. Conclusion

Having reviewed the new transgender policy and some of its implications, the following observation is worth noting. It is interesting that the very idea of transgenderism—that one’s gender identity can vary from one’s biological, natal sex—requires an embrace of socially-determined concomitants of gender identity. That is to say that what makes one “female” is not one’s genitalia, but one’s affinity for things, behaviors, attire, and behavior that society has labeled feminine; as the DoD states it, “Gender is the socially defined roles and characteristics of being male and female associated with that sex.”<sup>104</sup>

Thus, a female transgender biological male is not simply a man who likes feminine things but rather is a female because of her affinity for those things. The deep irony of transgenderism is that its definitional attribute of gender nonconformity is actualized by expressions that in truth *embrace* rather than reject conformity with the societal expectations associated with a person’s preferred gender.<sup>105</sup> Indeed, it may be more accurate to regard being transgender not as gender nonconformity but simply as a pronouncement of an entitlement to live and be accepted as one who conforms with gender stereotypes that diverge from their biological sex. The DoD’s new policy does not seek to address this conundrum at all; rather, it takes transgenderism as it presents itself and simply says, “Ok, if you want to identify as gender X, that’s fine with us, so long as you commit to that and conform to the military standards that apply to gender X.”

This observation is offered because that reality is what I think contributes to much of the tension that may arise as the policy is implemented. Because transgender persons within the military’s definition (i.e., those who have transitioned) do not challenge gender-specific policies and practices but rather merely seek to traverse them—potentially while still

presenting as phenotypically divergent from their expressed preferences—the military will end up with countless gender-bending non-sequiturs. In other words, by maintaining the array of gender-based distinctions discussed above rather than tearing them down, and plugging gender non-conforming socially-transitioned transgender persons into such a system, a mismatch between the original—potentially no longer tenable—rationale for the distinction and its application to such personnel is inevitable.

Going forward, although there will likely be conflict and challenges as the new policy is implemented,<sup>106</sup> there does appear to be sufficient guidance for how many of these challenges are to be addressed on the ground. Commanders will be key figures, and should remain fully empowered to make decisions that are in the best interest of good order and discipline, unit cohesion, and morale. The interests of transgender servicemembers cannot always trump the interests of the team and the mission; reasonable accommodations should be identified that do not compromise these interests, even if some *reasonable* imposition on the transgender servicemember—or others—results. Most people are sensible, and with sufficient training and reasonable accommodation, it is likely that the military and its servicemembers will adjust without too much difficulty as personnel in the armed forces of other nations with such policies have done.<sup>107</sup> The key to successful implementation will be strong and supportive leadership, which, fortunately, in our military is not in short supply.

<sup>102</sup> DoD IMPLEMENTATION HANDBOOK, *supra* note 33, at 61.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Labuski & Keo-Meier, *supra* note 66, at 14 (“Quantifying the so-called trans population also risked allying with forms of legitimacy and conformity through which many trans people have thus far been marginalized.”).

<sup>106</sup> See RAND REPORT, *supra* note 63, at 61–62 (discussing how the experience of foreign militaries has shown some instances of resistance, bullying, harassment of transgender personnel).

<sup>107</sup> See *id.* (discussing experience of other militaries that have integrated transgender servicemembers into their ranks).

APPENDIX

*Gender change regulations in U.S. States with the largest populations of active-duty military personnel*

State	Name Change	Driver ID Update	Birth Certificate Amendment	Authorities
CA	The applicant files a petition for a name change order in Superior Court; change of name related to gender identity does not require publication of a newspaper notice or, unless an objection is filed, an in-person hearing. Additional requirements apply to individuals under the jurisdiction of the Department of Corrections and registered sex offenders.	The applicant must change their name with the Social Security Administration before changing Department of Motor Vehicles records, and must provide documentary evidence of the new name and a Medical Certification and Authorization (Gender Change) form completed by a licensed physician or psychologist. Forms are available online.	The applicant files a petition in the Superior Court, including the affidavit of a licensed physician that the applicant has "undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards." A single petition may be filed to change an applicant's name and order the issuance of a new birth certificate. The new birth certificate becomes the only birth certificate open to public inspection.	Cal. Civ. Proc. Code §§ 1275–1279.5; Cal. Code Regs. tit. 13, §§ 20.04-.05; Cal. Health & Safety Code §§ 103425–103440
FL	The applicant submits a petition to the Circuit Court; an official form is available online. The applicant must be fingerprinted for a national criminal history records check. No publication is required.	The applicant must submit a certified copy of the court order for a name change. Changing gender designation requires a statement from the attending physician that the applicant is undergoing appropriate clinical treatment for gender transition.	The Department of Health amends a birth certificate when it receives a Report of Legal Change of Name. Changing the sex on a birth certificate requires "original, certified, or notarized supporting documentary evidence." According to advocacy groups, this evidence must include a physician's affidavit that the applicant has completed sex reassignment in accordance with the appropriate medical procedures. Application form is available online.	Fla. Stat. §§ 68.07, 382.016; Fla. Admin. Code rr. 64V-1.002 to .033
NC	The applicant submits a petition to the Superior Court after publishing notice at the courthouse door for ten days. The publication notice is not required if the applicant is a victim of domestic violence, sexual offense, or stalking. The petition must include proof of the applicant's good character by two county citizens and the results of a criminal history record check. Registered sex offenders are prohibited from obtain name changes.	A person whose name changes must notify the Division of Motor Vehicles within sixty days. According to advocacy groups, changing the gender designation on a license requires submitting a letter from a physician that the applicant has undergone gender reassignment surgery.	The State Registrar will issue a new birth certificate because of sex reassignment surgery, upon written request accompanied by a notarized statement from the physician who performed the surgery or a licensed physician who can certify that the applicant has undergone the surgery.	N.C. Gen. Stat. §§ 101-2 to -7, 20-7.1, 130A-118
TX	The applicant submits a notarized petition to the District Court or County Court. The applicant must submit fingerprints and information on any criminal record. There are further requirements for applicants with felony convictions and registered sex offenders. No publication is required.	A change of name must be reported to the Department of Public Safety within thirty days. Individuals who want to change their gender must visit a driver license office and provide an original certified court order or an amended birth certificate verifying the change.	An amended birth certificate can be issued upon application. Change of sex as a result of gender reassignment surgery requires a certified copy of a court order. Application form is available online.	Tex. Fam. Code Ann. §§ 45.101–.103; 37 Tex. Admin. Code §§ 15.24, 15.36; Tex. Health & Safety Code §§ 192.010–.011

<b>State</b>	<b>Name Change</b>	<b>Driver ID Update</b>	<b>Birth Certificate Amendment</b>	<b>Authorities</b>
VA	The applicant submits an Application for Change of Name (Adult) to the Circuit Court. Forms are available online. Applications are not accepted from incarcerated persons, probationers, or registered sex offenders except for good cause. No publication is required, and the court may order the record sealed if the applicant shows cause to believe that a public record would be a serious safety threat.	The applicant submits a Driver's License and Identification Card Application requesting a change of name, accompanied by a copy of the court order granting the change. A change of gender requires a Gender Designation Change Request signed by a physician, psychiatrist, nurse practitioner, clinical social worker, psychologist, or professional counselor certifying the applicant's gender identity. Forms are available online.	The State Registrar will amend a birth certificate to show change of sex upon receipt of a certified copy of a court order indicating "that the sex of an individual has been changed by medical procedure." A notarized affidavit from the physician performing the gender reassignment surgery is also required.	Va. Code Ann. §§ 8.01-217, 46.2-323, 32.1-269; Va. Admin. Code § 5-550-320

## Setting the Theater the Army Service Component Command Way: A Humanitarian Response to the Ebola Epidemic in Liberia

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*In West Africa, Ebola is now an epidemic of the likes that we have not seen before. It's spiraling out of control. It is getting worse. It's spreading faster and exponentially. Today, thousands of people in West Africa are infected. That number could rapidly grow to tens of thousands. And if the outbreak is not stopped now, we could be looking at hundreds of thousands of people infected, with profound political and economic and security implications for all of us. So this is an epidemic that is not just a threat to regional security—it's a potential threat to global security if these countries break down, if their economies break down, if people panic. That has profound effects on all of us, even if we are not directly contracting the disease.<sup>1</sup>*

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The authors wish to acknowledge the contributions, guidance, and advice of Colonel Daria P. Wollschlaeger and Ms. Anita Fitch as well as the assistance of Sergeant First Class Andrea N. Parris.

<sup>1</sup> President Barack Obama, Remarks on the Ebola Outbreak, Sept. 16, 2014, <https://www.whitehouse.gov/the-press-office/2014/09/16/remarks-president-ebola-outbreak>.

## I. Introduction

In 2014, West Africa was struck by an unprecedented outbreak of the Ebola virus disease (EVD).<sup>2</sup> The Ebola virus disease spread from southeastern Guinea to Liberia, Nigeria, and Sierra Leone.<sup>3</sup> By September 2014, it had infected nearly 5,000 people and killed more than 2,400.<sup>4</sup> Due to “poor and overburdened medical infrastructure, weak state institutions, cultural practices, and limited education about the disease,”<sup>5</sup> the region was unable to adequately stave off the outbreak.<sup>6</sup> The fear was that an unchecked outbreak could kill hundreds of thousands, foster state collapse, and ultimately spread beyond the region.<sup>7</sup>

In conjunction with international efforts, the United States mobilized a relief effort led by the United States Agency for International Development (USAID) and substantially supported by the Department of Defense (DoD). Through Operation United Assistance (OUA), the DoD tasked U.S. Africa Command (AFRICOM) with establishing a two-star Joint Force Command (JFC) in Monrovia, Liberia, “in order to provide command and control of military activities and coordination with U.S. Government interagency and international relief efforts.”<sup>8</sup> In turn, AFRICOM tasked its Army Service Component Command (ASCC)—U.S. Army Africa (USARAF)—with theater opening and initial command of the Joint Forces Command-United Assistance (JFC-UA).<sup>9</sup> At the invitation of the Liberian government, Monrovia, Liberia, was chosen as the location for the JFC-UA headquarters.<sup>10</sup>

A number of complex and novel legal issues arose during OUA, both during USARAF’s command of JFC-UA and after transition of that command to the 101st Airborne Division, in which USARAF continued to support as AFRICOM’s ASCC.<sup>11</sup> Many of these issues were influenced and

complicated by the unique nature of the EVD threat, the relative ambiguity surrounding the applicable operational and fiscal authorities, and the challenges inherent in Liberia’s terrain, infrastructure, and history. This article details those issues and describes how the USARAF Office of the Staff Judge Advocate (OSJA), as part of the JFC-UA, analyzed and resolved them.

Part II of this article contextualizes OUA by detailing the 2014 EVD outbreak and the consequent international response, as well as providing a summary of the key facets of Liberian history relevant to the legal issues faced by the JFC. Part III details the interagency relationship between the USAID and the DoD that enabled the operation. It also explains USARAF’s role as the Army Service Component Command in Africa. Part IV explores in depth the legal issues the JFC faced within the broad categories of governing rules and orders including commanding general directives and rules of engagement and mission execution issues including issues of land use as well as the use of Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA) appropriations for humanitarian assistance and disaster relief.

## II. Context

Joint Forces Command-United Assistance operated under complex circumstances. A deadly and contagious disease was the enemy, and it spread throughout a region only recently recovered from conflict.

<sup>2</sup> Ebola virus disease (EVD), formerly known as Ebola hemorrhagic fever, was discovered in 1976 near the Ebola River in the Democratic Republic of Congo (DRC) and simultaneously in Nzara, Sudan. *Ebola (Ebola Virus Disease), Transmission*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vhf/ebola/transmission/index.html> (last visited Mar. 30, 2015) [hereinafter CDC *Transmission*]. Since 1976, outbreaks sporadically surfaced throughout Africa. *Id.* However, to date, the 2014 EVD outbreak has caused more deaths than all past EVD outbreaks combined. *Id.*

<sup>3</sup> See *infra* Part I for a description of the EVD.

<sup>4</sup> *West Africa – Ebola Outbreak, Fact Sheet #1, Fiscal Year 2014*, U.S. AGENCY FOR INT’L DEV. (Oct. 29, 2014), <http://www.usaid.gov/sites/default/files/documents/1864/10.29.14%20-%20USG%20West%20Africa%20Ebola%20Outbreak%20Fact%20Sheet%20%235%20FY%2015.pdf>. [hereinafter USAID *Fact Sheet #1*]; DEP’T OF DEF., Executive Order, Operation United Assistance, JS MOD 1, Para. 1, (25 Sept. 14) [hereinafter JS MOD 1 to OUA EXORD]. Exacerbating the problem was the impact on the health care community in the affected countries.

<sup>5</sup> JS MOD 1 to OUA EXORD, *supra* note 4, para. 1.

<sup>6</sup> USAID *Fact Sheet #1*, *supra* note 4.

<sup>7</sup> JS MOD 1 to OUA EXORD, *supra* note 4, para. 1a.

<sup>8</sup> JS MOD 1 to OUA EXORD, *supra* note 4, para. 3.B.1.B, JS MOD. United States Africa Command (AFRICOM) was also told to be prepared to transition the Joint Force Command (JFC) to a three-star headquarters. *Id.* para. 3.B.1.B.1. Operation United Assistance was envisioned as providing support along two lines of operation: “(1) support to [USAID]-led foreign humanitarian assistance (FHA) efforts to provide medical care in Ebola-affected countries and reduce biological threats associated with the Ebola outbreak; and (2) preparations to respond to breakdown in civil authority across West Africa.” JS MOD 1 to OUA EXORD, *supra* note 4 narrative para.

<sup>9</sup> Theater Opening is defined by Army doctrine as the ability to establish and operate ports of debarkation (air, sea, and rail), establish a distribution system and sustainment bases, and to facilitate port throughput for the reception, staging, onward movement and integration of forces within a theater of operations. HOW THE ARMY RUNS: A SENIOR LEADER REFERENCE HANDBOOK, U.S. ARMY WAR COLLEGE (2015)

<sup>10</sup> President Obama’s Remarks, *supra* note 1.

<sup>11</sup> For purposes of this article, Joint Forces Command-United Assistance (JFC-UA) will refer to the JFC-UA as commanded by MG Darryl Williams, Commander, U.S. Army Africa (USARAF), unless specifically noted otherwise.

## A. Tragedy in West Africa: 2014 Epidemic

Ebola Virus Disease is a severe and often fatal disease with no proven treatment or vaccine.<sup>12</sup> Though the EVD's "natural reservoir host" is unknown, spillover to humans occurs through contact with infected animals such as fruit bats or primates or through handling or consuming "bush meat."<sup>13</sup> Once humans become infected, the virus spreads through direct contact between the blood or body secretions of a human carrier and the broken skin or mucous membranes of another.<sup>14</sup> Ebola virus disease symptoms present within two to twenty-one days of exposure and include fever (greater than 101.5°F), a severe headache, muscle pain, weakness, diarrhea, vomiting, abdominal (stomach) pain, lack of appetite, and, in some cases, both internal and external bleeding (symptoms that are in some ways similar to malaria, making the use of malaria prophylactics absolutely critical in areas where the spread of Ebola is suspected).<sup>15</sup> Even with medical attention, the average fatality rate is fifty percent.<sup>16</sup>

The 2014 EVD epidemic overwhelmed West Africa. To date, the epidemic has caused more deaths than all past EVD outbreaks combined.<sup>17</sup> Likely beginning in February 2014 in southeastern Guinea,<sup>18</sup> the disease spread to Liberia and Sierra Leone, and, in August 2014, the total number of suspected and confirmed EVD cases reached over 1,800.<sup>19</sup> The few existing EVD treatment centers were quickly

overwhelmed as transmission rates reached unprecedented levels.<sup>20</sup> In existing hospitals not resourced for infectious disease treatment, the problem was exacerbated by infections of the health care workers treating the infected.<sup>21</sup>

By August 2014, national and international authorities scrambled to address the deteriorating situation. The World Health Organization (WHO) designated the EVD outbreak as meeting the criteria of a "Public Health Emergency of International Concern,"<sup>22</sup> and the World Bank pledged up to \$200 million to support immediate response efforts.<sup>23</sup>

In Liberia (the focus of eventual JFC-UA efforts), Liberian President Ellen Johnson Sirleaf declared a State of Emergency,<sup>24</sup> and the U.S. Ambassador to Liberia, Deborah R. Malac, identified the situation as a disaster.<sup>25</sup> United States government principals directed that the "Ebola epidemic should be treated as a tier-one national security priority."<sup>26</sup>

Upon Ambassador Malac's August 2014 declaration of a disaster, the USAID activated a Disaster Assistance Response Team (DART) to coordinate the U.S. Government response.<sup>27</sup> Additionally, the USAID provided \$3 million to support the Center for Disease Control (CDC) experts working in the affected areas of West Africa.<sup>28</sup> Determining that these efforts were not sufficient, President Obama announced on

<sup>12</sup> *Ebola Virus Disease*, WORLD HEALTH ORGANIZATION, <http://www.who.int/mediacentre/factsheets/fs103/en> (last visited May 15, 2016) [hereinafter WHO Factsheet].

<sup>13</sup> CDC *Transmission*, *supra* note 2. Transmission also occurs through direct contact with contaminated objects such as syringes. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* *Preventing and Understanding Ebola*, U.S. AFR. COMMAND, <https://www.africom.mil/NewsByCategory/document/23642/africom-medical-guidance> (last visited May 15, 2016) [hereinafter AFRICOM *Ebola*].

<sup>16</sup> WHO Factsheet, *supra* note 12. Death rates have reached as high as 90% in past outbreaks. *Id.*

<sup>17</sup> *Outbreaks Chronology: Ebola Virus Disease*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/history/chronology.html> (last visited May 15, 2016). The EVD outbreak in West Africa has killed 11,325 people and infected nearly 28,652 as of May 15, 2016. *Id.*

<sup>18</sup> *Origins of 2014 Ebola Epidemic*, WORLD HEALTH ORG., <http://who.int/csr/disease/ebola/one-year-report/virus-origin/en/> (last visited April 13, 2015). Current theories posit that the first "spillover event" to humans resulted from a two-year-old boy's exposure to fruit bat droppings. Michelle Roberts, *First Ebola Boy Likely Infected by Playing in Bat Tree*, BBC NEWS, <http://www.bbc.com/news/health-30632453> (last visited April 13, 2015).

<sup>19</sup> USAID *Fact Sheet #1*, *supra* note 4.

<sup>20</sup> Dr. Joanne Liu, President, Medecins Sans Frontieres Int'l, United Nations Special Briefing on Ebola (Sept. 2, 2014), <http://www.doctorswithoutborders.org/news-stories/speechopen-letter/united-nations-special-briefing-ebola>.

<sup>21</sup> As of August 2014, the World Health Organization (WHO) estimated more than 170 health care workers had contracted the EVD, resulting in

more than 80 health care worker deaths. USAID *Fact Sheet #1*, *supra* note 4. In fact, the John F. Kennedy hospital in Monrovia was forced to close temporarily due to the Ebola-related deaths of many health care workers, as well as due to other health care workers striking over their lack of pay. *Nurses go on strike in Ebola-hit Liberia*, YAHOO NEWS (Sept. 3, 2014, 5:14AM), <http://news.yahoo.com/nurses-strike-ebola-hit-liberia-225150202.html>.

<sup>22</sup> Statement on the first Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa, WORLD HEALTH ORGANIZATION (Aug. 8, 2014), <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>.

<sup>23</sup> Press Release, World Bank Group, *Ebola: World Bank Group Mobilizes Emergency Funding to Fight Epidemic in West Africa* (Aug. 4, 2014), <http://www.worldbank.org/en/news/press-release/2014/08/04/ebola-world-bank-group-mobilizes-emergency-funding-for-guinea-liberia-and-sierra-leone-to-fight-epidemic>. The World Bank later announced in September it would increase the financing to \$400 million. Press Release, World Bank Group, *World Bank Group to Nearly Double Funding in Ebola Crisis to \$400 Million* (Sept. 25, 2014), <http://www.worldbank.org/en/news/press-release/2014/09/25/world-bank-group-nearly-double-funding-ebola-crisis-400-million>.

<sup>24</sup> President Sirleaf closed all schools, placed all non-essential government employees on compulsory leave, and deployed the Armed Forces of Liberia (AFL) and police to impose quarantines if necessary. President Sirleaf Johnson, *Statement on the Declaration of a State of Emergency* (Aug. 6, 2014), <http://www.emansion.gov.lr/doc/sdseg.pdf>.

<sup>25</sup> USAID *Fact Sheet #1*, *supra* note 4.

<sup>26</sup> CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], OPERATION UNITED ASSISTANCE, MODIFICATION 1 para. 1.a. (25 Sept. 2014) [hereinafter CJCS EXORD MOD 1].

<sup>27</sup> USAID *Fact Sheet #1*, *supra* note 4.

<sup>28</sup> *Id.*

September 16, 2014, an increase in the U.S. response to include DoD participation.<sup>29</sup> This announcement led to the immediate establishment of the JFC-UA in Monrovia, Liberia.<sup>30</sup>

## B. Liberian History in Perspective

The Ebola virus disease struck a country hardened by decades of conflict, yet also fortified by a unique and independent history, epitomized by its inception story. In 1817, as an alternative to emancipation of slaves, Robert Finley, a Presbyterian pastor, helped establish the American Colonization Society (ACS) to return free African-Americans to Africa.<sup>31</sup> By 1822, the ACS helped establish a colony<sup>32</sup> that, in 1847, formalized its status as the sovereign Republic of Liberia.<sup>33</sup> The Republic of Liberia issued a Declaration of Independence; adopted a constitution fundamentally based on the U.S. Constitution; established its capital, Monrovia, named after the fifth U.S. President James Monroe, a prominent supporter of colonization; and selected a flag similar to that of the United States.<sup>34</sup> During World War II, Liberia and the United States became strategic partners. Previously neutral, in 1942, Liberia relinquished its neutral status and allowed the United States to build a large runway at Roberts Field that became a significant stopover for troops and equipment en route to the European and North African theaters.<sup>35</sup>

During the seven-term presidency of William V.S. Tubman, Liberia experienced a period of economic growth

and political ascension in Africa.<sup>36</sup> Well before its colonized neighbors, Liberia afforded suffrage to its citizens, including its indigenous population, and foreign investment was encouraged. Internationally, as the first independent republic in Africa and a founding member of the United Nations, Liberia was an influential actor during the independence movement that swept the continent.<sup>37</sup>

Despite its successes, Liberia experienced internal stressors that ultimately led to brutal civil wars. A main factor was tensions between its indigenous and Americo-Liberian population, which, despite comprising a minority, held a disproportionate amount of economic and political power as compared to the indigenous population.<sup>38</sup> Additionally, political repression caused internal strife. President Tubman became increasingly authoritarian over the course of his presidency, including instituting restrictions on the freedom of press, creating a domestic security service to monitor political opponents, and rewriting the constitution to enable his seven terms of office.<sup>39</sup> In 1971, then-Vice President William Tolbert succeeded President Tubman and the bulk of political power remained with Americo-Liberian elites. Furthermore, in 1979, after riots erupted following a price increase of subsidized rice, President Tolbert initiated a crackdown against political opponents.<sup>40</sup>

On April 12, 1980, a group of enlisted soldiers of the Armed Forces of Liberia (AFL), led by Master Sergeant Samuel Doe, forcibly entered the presidential mansion and killed President Tolbert.<sup>41</sup> However, Doe and his cohorts

<sup>29</sup> President Barack Obama, Remarks on the Ebola Outbreak, Sept. 16, 2014 (located at <https://www.whitehouse.gov/the-press-office/2014/09/16/remarks-president-ebola-outbreak>).

<sup>30</sup> Indeed, at the time of the announcement, Major General Darryl Williams, Commanding General of USARAF, was on the ground in Liberia conducting an assessment of the situation. President Obama's Remarks, *supra* note 1. He was subsequently directed to remain in place to establish the JFC-UA command. *Id.*

<sup>31</sup> *The African-American Mosaic-Colonization*, LIBR. OF CONGRESS, <http://www.loc.gov/exhibits/african/afam002.html> (last visited May 15, 2016).

<sup>32</sup> *Id.* When colonists started arriving in 1816, the American Colonization Society (ACS) took steps to lease, annex, or buy tribal lands along the coast and on major rivers leading inland using force if necessary. *Id.* In 1821, Lieutenant (Lt.) Robert Stockton persuaded African King Peter to sell Cape Montserado (or Mesurado) by pointing a pistol at his head and in 1825 King Peter and other native kings agreed to sell land in return for 500 bars of tobacco, three barrels of rum, five casks of powder, five umbrellas, ten iron posts, and ten pairs of shoes, among other items. *Id.* By 1867, the ACS had settled more than 13,000 emigrants—known as Americo-Liberians—in Liberia. *Id.* Americo-Liberians treated the original inhabitants (made up of sixteen tribes) as second-class citizens. *Id.*; *The World Factbook, Liberia*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/li.html> (last visited May 15, 2016); F.P.M. VAN DER KRAAIJ, *THE OPEN DOOR POLICY: AN ECONOMIC HISTORY OF MODERN LIBERIA* (1983). Despite being only a small percentage of the population, the Americo-Liberians excluded the indigenous people of Liberia from economic and political systems. F.P.M. VAN DER KRAAIJ, *supra*, at xvii.

<sup>33</sup> Although this part of the western coast of Africa had not yet been colonized by European nations, European merchants traded heavily with coastal tribes for melegueta pepper and ivory during the 15th and 16th centuries. F.P.M. VAN DER KRAAIJ, *supra* note 32, at 2-3. However, the slave trade became the primary commodity, with several countries using the coastal tribes of Gola and Mandingo as brokers. *Id.* Many interior tribes suffered from raids until the slave trade was abolished in Great Britain and the United States by 1808. *Id.*

<sup>34</sup> *From Abe Lincoln to Ebola: A Short History of Liberia*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/foreign-affairs-defense/firestone-and-the-warlord/from-abe-lincoln-to-ebola-a-short-history-of-liberia/> (last visited May 15, 2016).

<sup>35</sup> F.P.M. VAN DER KRAAIJ, *supra* note 32, at IV, 400.

<sup>36</sup> Tubman's presidency spanned the years 1944 to 1971. D. ELWOOD DUNN, *LIBERIA AND INDEPENDENT AFRICA, 1940S TO 2012: A BRIEF POLITICAL PROFILE* 3 (2012).

<sup>37</sup> *Id.* at 5.

<sup>38</sup> F.P.M. VAN DER KRAAIJ, *supra* note 32, at xv; 1 REPUBLIC OF LIBERIA, TRUTH AND RECONCILIATION COMM'N 4 (2009) [hereinafter RECONCILIATION COMM'N].

<sup>39</sup> *Id.* at vi.

<sup>40</sup> *Id.* at 459.

<sup>41</sup> The soldiers, led by a twenty-eight-year-old Master Sergeant named Samuel Doe, then took thirteen cabinet ministers down to the beach along the capital of Monrovia and publicly executed them. DUNN, *supra* note 36, at 18.

were illiterate and lacked any governmental experience.<sup>42</sup> Corruption became rampant as officials were appointed from Doe's ethnic Krahn tribe. Interethnic tensions rose as the infrastructure began to decay and traditional ethnic enemies of the Krahn were singled out for government mistreatment.<sup>43</sup>

By 1989, many opposed to the Doe regime fled to Cote d'Ivoire and rallied behind Charles Taylor, one of Doe's former deputy ministers.<sup>44</sup> When Taylor entered Liberia with his army of child soldiers, he earned the support of a population weary of Doe's repressive and corrupt regime. Taylor's National Patriotic Front of Liberia (NPFL) force dominated the AFL<sup>45</sup> as well as a stabilization force deployed by the Economic Community of West Africa (ECOWAS) comprised primarily of Nigerian troops.<sup>46</sup>

On September 9, 1990, a splinter group of the NPFL, the Independent National Patriotic Front of Liberia, captured Doe in a raid on Monrovia. Doe was tortured before being killed on video, and his body was desecrated.<sup>47</sup> This violent act plunged Liberia into six years of a brutal and cruel sectarian civil war that involved widespread and systematic rape, torture, and murder.<sup>48</sup> Ultimately, a comprehensive peace agreement was signed in 1996 and elections held in July 1997.<sup>49</sup> Charles Taylor still controlled most of Liberia and was elected President with a promise to end the conflict but the oppression and atrocities did not cease under his administration.<sup>50</sup> In fact, Taylor destabilized the region of West Africa by providing material support and safe havens to a brutal rebel group in neighboring Sierra Leone's civil war, in effect exporting the brutality and cruelty he started in Liberia.<sup>51</sup>

Sectarian violence continued in Liberia and some rebel groups obtained support from neighboring Guinea.<sup>52</sup> By June 2003, rebel groups were on the outskirts of Monrovia, and the United Nations Court in Sierra Leone indicted Charles Taylor for crimes against humanity and war crimes.<sup>53</sup> After mortar rounds landed on the U.S. Embassy grounds killing several Liberian refugees, the United States deployed several ships and a Marine Expeditionary Unit.<sup>54</sup> Charles Taylor resigned as President and fled to Nigeria on August 11, 2003, and Joint Task Force Liberia deployed U.S. Marines ashore to secure Roberts International Airport in advance of the arrival of the United Nations peacekeeping force, known as the United Nations Mission in Liberia (UNMIL).<sup>55</sup> Out of a total population of four million Liberians, roughly two hundred thousand Liberians were killed and nearly one million sought refuge in neighboring countries during the Liberian Civil War (1989-1997) and the Liberians United for Reconciliation and Democracy (LURD) and Movement for Democracy in Liberia (MODEL) insurrection (1999-2003).<sup>56</sup> The conflicts were particularly brutal and involved systematic murder, torture, rape, and even cannibalism.<sup>57</sup> The warring factions recruited children as young as six years old and forced them to kill friends and family members, rape and be raped, serve as sexual slaves and prostitutes, labor, take drugs, engage in cannibalism, and torture and pillage communities.<sup>58</sup>

In 2005, Ellen Johnson-Sirleaf was elected President with fifty-nine percent of the vote and again in 2011 with ninety percent of the vote.<sup>59</sup> Charles Taylor was turned over to the International Criminal Court in The Hague in 2006 and became the first former head of state to be convicted of war crimes since the Nuremberg trials.<sup>60</sup> On May 30, 2012, he was sentenced to fifty years' imprisonment.<sup>61</sup>

<sup>42</sup> Anjali Mitter Duva, *The Lone Star: The Story of Liberia*, PUBLIC BROADCASTING SERVICE, <http://www.pbs.org/wgbh/globalconnections/liberia/essays/history/> (last visited May 15, 2016).

<sup>43</sup> *Id.*

<sup>44</sup> Charles Taylor was educated in the United States and was accused of embezzling while head of government procurement. Christian Miller & Jonathan Jones, *Firestone and the Warlord*, PROPUBLICA (Nov. 16, 2014), <https://www.propublica.org/article/firestone-and-the-warlord-print>. Arrested by the United States at the request of Doe, he escaped from a Massachusetts jail. *Id.* Taylor always claimed he escaped with the assistance of the Central Intelligence Agency (CIA). *Id.* Taylor then made his way to Libya and received instruction from Moammar Gadhafi's military camp for African revolutionaries. *Id.*

<sup>45</sup> The National Patriotic Front of Liberia (NPFL) was made up primarily of Gio and Mano tribesmen, while the Armed Forces of Liberia (AFL) was comprised primarily of ethnic Krahn. *Id.*

<sup>46</sup> Duva, *supra* note 42.

<sup>47</sup> Miller & Jones, *supra* note 44.

<sup>48</sup> *Id.*

<sup>49</sup> Duva, *supra* note 42.

<sup>50</sup> *Id.*

<sup>51</sup> The Prosecutor v. Charles Ghankay Taylor, 2003 SCSL-03-01-I Indictment 3 (Sierra Leone).

<sup>52</sup> Miller & Jones, *supra* note 44.

<sup>53</sup> See The Prosecutor v. Charles Ghankay Taylor, 2012 SCSL-03-01-T Trial Judgment 186-210 (Sierra Leone).

<sup>54</sup> Blair A. Ross, Jr., *The U.S. Task Force Experience in Liberia*, MIL. REV., May-June 2005, 60-67, 64. U.S. Southern European Task Force (SETAF) formed and commanded JTF Liberia. *Id.* SETAF is now USARAF/SETAF.

<sup>55</sup>

<sup>56</sup> RECONCILIATION COMM'N, *supra* note 38, at 44.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 44.

<sup>59</sup> 2011 Presidential and Legislative Elections, NAT'L ELECTIONS COMMISSION, LIBERIA, <http://www.necliberia.org/results2011/> (last visited May 15, 2016).

<sup>60</sup> Marlise Simons, *Liberian Ex-Leader Convicted for Role in Sierra Leone War Atrocities*, N.Y. TIMES, Apr. 27 2012, at A6.

<sup>61</sup> The Prosecutor v. Charles Ghankay Taylor, 2012 SCSL-03-01-T Sentencing Judgment 40 (Sierra Leone). The Special Court for Sierra Leone made its final major decision on 26 September 2013 when its Appeals Chamber upheld the 50-year sentence handed down to former Liberian

Presently, both the international community and United States continue to support Liberia's overall security environment. The United Nations Mission in Liberia continues to operate there, and, during OUA, provided invaluable assistance to the JFC's operations in the country's rural areas. Additionally, in early 2004, Congress provided \$200 million in International Disaster and Famine Assistance funding, which enabled the United States to take a leadership role in the reconstruction of Liberia.<sup>62</sup> This included demobilizing the former AFL and recruiting, vetting, and training the new AFL.<sup>63</sup> And, through the Operation Onward Liberty program initiated in 2010, AFRICOM mentors and advises the AFL with the goal of developing a responsible, operationally capable military that is respectful of civilian authority and the rule of law.<sup>64</sup>

An understanding of Liberia's history was critical to gaining situational awareness of the JFC-UA's operating environment. The JFC-UA, including the OSJA, incorporated this knowledge into its planning and execution of its mission.<sup>65</sup> Doing so allowed for JFC-UA personnel to identify and connect with key stakeholders already operating in the area in order to gain access, insight, and efficiency when addressing a myriad of emergent issues.

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President Charles Taylor. The court ruling in April 2012 found Mr. Taylor guilty of five counts of crimes against humanity, five counts of war crimes, and one count of other serious violations of international humanitarian law perpetrated by Sierra Leone's Revolutionary United Front (RUF) rebels, whom he supported. For more information, see Lansana Gberie, *The Special Court for Sierra Leone Rests—For Good*, AFRICAN RENEWAL (Apr. 2014), <http://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rests-%E2%80%93good#sthash.hufZTiLp.dpuf>.

<sup>62</sup> *Liberia: History*, U.S. AGENCY FOR INT'L DEV., <http://www.usaid.gov/liberia/history> (last updated Nov. 20, 2014) [hereinafter USAID *Liberia: History*].

<sup>63</sup> *Id.*

<sup>64</sup> *U.S. Africa Command Fact Sheet, Operation Onward Liberty*, U.S. AFRICA COMMAND (Oct. 2012), <http://www.africom.mil/Doc/10032>.

<sup>65</sup> For example, as discussed in Part III, *infra*, the history of conflict in Liberia shaped the content of the JFC-UA weapons posture guidance.

<sup>66</sup> The USAID's mission is to "partner to end extreme poverty and to promote resilient, democratic societies while advancing our security and prosperity." *Mission, Vision and Values*, U.S. AGENCY FOR INT'L DEV., <http://www.usaid.gov/who-we-are/mission-vision-values> (last updated Jan. 29, 2014). Since its creation by the U.S. Foreign Assistance Act of 1961, USAID has been working in Liberia with a focus on education, health, and rural and urban development. USAID *Liberia: History*, *supra* note 57. In 2003, USAID focused its efforts on post-conflict recovery and helping Liberia rebuild its government. *Id.* The USAID shifted its emphasis from recovery to long-term development in 2009 with programs that concentrate on establishing a stable democracy, changing the culture of impunity, systematic corruption and poor governance, closing severe gaps in access to quality education and health care, expanding economic opportunity through agricultural enterprise and natural resources management, and helping to rebuild essential infrastructure and sources of renewable energy. *Id.*

<sup>67</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, I-1 and III-7 (3 Jan. 2014) [hereinafter JOINT PUB. 3-29]. Per Joint Publication 3-29, "the US military normal conducts FHA [Foreign

### III. The Key U.S. Government Players: Who's in Charge?

The USAID was already operating in Liberia before the Ebola outbreak.<sup>66</sup> After the outbreak, the agency was assigned the lead in executing the U.S. government's EVD response. The JFC-UA supported USAID efforts according to established doctrine, and its mission was limited in scope and duration and only employed to fill an immediate assistance gap with unique military capabilities.<sup>67</sup> The JFC's mandate also reflected Foreign Humanitarian Assistance (FHA) doctrine that its ultimate objective was to enable civilian control of disaster relief efforts.<sup>68</sup> As the ASCC assigned to AFRICOM, USARAF was initially assigned the task of serving as the JFC-UA command.

#### A. United States Agency for International Development as Lead Agency

The USAID's Office of U.S. Foreign Disaster Assistance (OFDA) led the EVD response and directed requests for to the JFC-UA.<sup>69</sup> In the wake of a large-scale disaster, such as the EVD outbreak, the OFDA deploys a DART to coordinate and manage optimal U.S. government responses, while working with local officials, the international community, and relief agencies.<sup>70</sup> During OUA, the DART coordinated, communicated and implemented requests for support to the

Humanitarian Assistance] in support of another USG department or agency." "Although US military forces are organized, trained, and equipped to conduct military operations that defend and protect US national interests, their inherent, unique capabilities may be used to conduct FHA activities." *Id.* President Obama echoed the joint doctrine's recognition of the unique capabilities that DoD can bring to a FHA mission, "And our forces are going to bring their expertise in command and control, in logistics, in engineering. And our Department of Defense is better at that, our Armed Services are better at that than any organization on Earth." President Barack Obama, *supra* note 28. For a description of the legal basis for using military assets in disaster relief operations, see John N. Ohlweiler, *Building the Airplane in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW., Jan. 2011 at 14-15.

<sup>68</sup> JOINT PUB. 3-29, *supra* note 67 at I-14; CHAIRMAN JOINT CHIEFS OF STAFF, EXORD, OPERATION UNITED ASSISTANCE, para. 3.A.3. (15 Sept. 2014) [hereinafter CJCS EXORD].

<sup>69</sup> The USAID's major organization units are called bureaus. Each bureau houses staff responsible for major subdivisions of the Agency's activities. *Bureaus*, U.S. AGENCY FOR INT'L DEV. <http://www.usaid.gov/who-we-are/organization/bureaus>, (last updated July 23, 2014). The USAID has both geographic bureaus that are responsible for the overall activities in countries and functional bureaus that conduct Agency programs worldwide in-nature or cross geographic boundaries. *Id.* Nested within USAID's Bureau for Democracy, Conflict and Humanitarian Assistance, Office of U.S. Foreign Disaster Assistance (OFDA) provides and coordinates U.S. government humanitarian assistance in response to international disasters to save lives, alleviate suffering, and reduce the social and economic impact of disasters, and also assists communities and governments in building capacity to prepare for disasters and to mitigate their consequences. *Bureau for Democracy, Conflict and Humanitarian Assistance*, U.S. AGENCY FOR INT'L DEV. <http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/office-us> (last updated Mar. 6, 2015) [hereinafter USAID *Bureau for Humanitarian Assistance*].

<sup>70</sup> USAID *Bureau for Humanitarian Assistance*, *supra* note 64.

JFC-UA through the Mission Tasking Matrix (MITAM) system.<sup>71</sup> This system collates assistance requests from government and non-government organizations participating in humanitarian efforts and the DART reviews, prioritizes, and validates the requests for execution by the appropriate actor.<sup>72</sup> If military support is deemed necessary, the DART communicates the request to the military unit and tracks the specific task until completion.<sup>73</sup> The status of the action is reported back to the requesting organization and through the broader U.S. interagency system.<sup>74</sup>

Although the MITAM system is designed for use at the tactical level to provide flexible coordination between the DART civilian-military coordinator and a tactical military unit, this did not occur during the initial phases of OUA. Rather, during Phases One and Two of the OUA, the Joint Staff withheld approval authority of the OFDA-validated MITAM requests.<sup>75</sup>

The result was delayed execution of many requests since each had to be routed through AFRICOM to the Joint Staff, which then had to issue a modification (MOD) to the Execution Order (EXORD) through AFRICOM and back to JFC-UA before JFC-UA could execute any action.<sup>76</sup> In mid-October, the Joint Staff modified the process, allowing JFC-UA to accept any MITAM request that did not fundamentally change the nature of the military mission or substantially increase the funding.<sup>77</sup>

#### B. U.S. Army Africa's Role as the Army Service Component Command

The ASCC acts as the Theater Army reporting directly to the Department of the Army and serving as the U.S. Army's single point of contact for combatant commands.<sup>78</sup> The Theater Army/ASCC also acts as the Joint Forces Land Component Command or Joint Task Force Command when directed. For OUA, the Joint Staff tasked USARAF with theater opening, creating logistics hubs and life support areas, while simultaneously conducting the mission through four

lines of effort: (1) designing and building treatment facilities, (2) training health care workers, (3) providing logistical support for humanitarian assistance, and (4) establishing command and control for humanitarian operations until follow on forces deployed and arrived to take over the mission.<sup>79</sup>

Initially, USARAF planned to deploy with a majority of its headquarters staff to establish command and control of military forces assisting in the United States "whole of government" response to the epidemic.<sup>80</sup> However, once the initial party of roughly twenty personnel departed on September 18, 2014, USARAF made the decision to limit the size of the forward deployed force.<sup>81</sup> The reason for limiting the size of the force during Phase One of OUA was because of the lack of adequate facilities and infrastructure for a larger force.<sup>82</sup> To compound the situation, OUA began during the rainy season, which lasts from July through December, making many roads impassable and making it difficult to identify land that was not flooded or otherwise in use by other agencies in support of the humanitarian assistance effort.

USARAF OSJA deployed its Staff Judge Advocate and Chief of Operational Law to the Joint Operations Area (JOA). The remainder of the Operational Law team established a seven-day-a-week, full-time support in the rear-Joint Operations Center (JOC) located at Vicenza, Italy.<sup>83</sup> Fiscal law, international law, and claims attorneys also provided substantial assistance.

#### IV. Legal Issues

The JFC-UA faced a predicament similar to the issue encountered by Joint Task Force-Haiti (JTF-H) during the immediate response to the 2010 earthquake. The forces were trained and experienced with escalation of force (EoF) as a threat identification tool in a hostile counter insurgency type environment after years of operations conducted in Iraq and Afghanistan.<sup>84</sup> Prior to these conflicts, EoF was considered a

<sup>71</sup> YONI BLOCK, IMPROVING CIVILIAN-MILITARY COORDINATION DURING FOREIGN DISASTER RESPONSE OPERATIONS: THE DEVELOPMENT OF THE JHOC AND GROWTH OF OFDA'S MILITARY LIAISON TEAM, OFFICE OF FOREIGN DISASTER ASSISTANCE ANNUAL REPORT FOR FISCAL YEAR 2012, 67, 69 (2012).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> CJCS EXORD, *supra* note 63, para. 3.B.1.A.2.

<sup>76</sup> This assertion is based on MAJ Robson's recent professional experiences as the Chief, Operational Law for U.S. Army Africa and Joint Forces Command – United Assistance, from July 2014 to present [hereinafter MAJ Robson's Professional Experiences]

<sup>77</sup> JOINT STAFF, EXORD: OPERATION UNITED ASSISTANCE MOD 2 CORRECTED COPY, para. 3.B.1.A.2. (14 Oct. 2014) [hereinafter CJCS EXORD MOD 2].

<sup>78</sup> U.S. DEP'T OF ARMY, REG. 10-87 ARMY COMMANDS, ARMY SERVICE COMPONENT COMMANDS, AND DIRECT REPORTING UNITS at i (4 Sept. 2007).

<sup>79</sup> CJCS EXORD, *supra* note 68, para. 3.A.2.A.

<sup>80</sup> MAJ Robson's Professional Experiences, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> Such awareness of other actors' competing demands and general circumstances on the ground is paramount. *Id.*

<sup>83</sup> The Joint Operations Center (JOC)-rear was manned on a rotating basis by the USARAF Office of the Staff Judge Advocate (OSJA) O-5 Deputy Staff Judge Advocate, three operational law judge advocates in the rank of Captain, and an operational law non-commissioned officer in charge (NCOIC) in the rank of Sergeant First Class.

<sup>84</sup> See Ohlweiler, *supra* note 67 (for discussion of how escalation of force (EoF) morphed into a "threat assessment" tool post-9/11).

progressive use of force to deter a threat.<sup>85</sup> Just as in Haiti, there was a deliberate effort to re-focus and retrain the force on the traditional use of EoF.

#### A. Governing Orders, Rules, and Policies

Major General (MG) Williams established policies almost immediately after JFC-UA was created in order to accomplish the mission and protect the force. In his OUA General Order Number One (GO#1), Major General Darryl Williams restricted the conduct of JFC personnel based on the specific dangers posed by EVD and the inherent dangers and risks of operating in the JOA. He used two policy directives to create a climate of supporting a humanitarian mission in a permissive environment while still ensuring force protection. Additionally, through the rules of engagement and medical engagement protocols, he established parameters governing the appropriate use of force, and appropriate provision of medical treatment, respectively.

##### 1. “Bush Meat” and Other Unique Rules in GO#1

United States Africa Command’s GO#1 is applicable to all U.S. personnel deployed to the AFRICOM AOR, and it provides the necessary guidance for security cooperation engagements such as military-to-military events and combined exercises.<sup>86</sup> However, Liberia presented a unique operating environment characterized by hazardous medical conditions, potential political instability, and other dangers. Ironically, while the EVD was always in the forefront of JFC-UA’s force protection strategy, the two greatest dangers to U.S. Forces in Liberia were malaria and traffic accidents.<sup>87</sup> As a result, JFC-UA supplemented the AFRICOM GO#1 with additional, and more specific, prohibitions and requirements in order to maintain good order and discipline, ensure the health and safety of U.S. personnel, and guarantee the success of the mission. Additionally, the JFC-UA legal team also solicited proposals for the GO#1 from the follow-on force, the

101st Airborne Division, in order to guarantee a smooth transition requiring minimal subsequent changes in policy.

The JFC-UA GO#1 prohibited numerous activities that are linked to the spread of the EVD and other diseases prevalent in West Africa. Such measures included prohibitions against sexual relations with local nationals, the consumption of “bush meat,” and coming into close contact with individuals known to have the EVD either living or dead.<sup>88</sup> Also, GO#1 prohibited the medical treatment of local nationals without the approval of the JFC Commander.<sup>89</sup> In addition to the usual restrictions on photographing human remains that were articulated in the AFRICOM GO#1, the JFC-UA GO#1 further prohibited the photographing of sick individuals or posting such photographs to social media.<sup>90</sup>

Normally during operations, alcohol consumption is prohibited, however, the JFC Commander ultimately retained the two-drink limit permitted in AFRICOM GO#1 after considering a number of factors.<sup>91</sup> First and foremost, the seniority, maturity, and experience of those individuals deployed to the JFC-UA from USARAF were senior officers and senior enlisted. Additionally, U.S. Forces did not operate vehicles in Liberia; USARAF only deployed with two non-tactical vehicles and a few tactical vehicles. The JFC-UA contracted for Liberian drivers and vehicles to transport personnel because of their familiarity with the area, terrain, and also because of the lack of posted directional symbols and street signs made driving chaotic and hazardous.<sup>92</sup> As a result, the associated risk of a two-drink limit was considered very low. The order therefore directed that the consumption of two alcoholic beverages was “permitted only during non-duty periods at locations where U.S. personnel are lodged,” and not within eight hours of the start of duty.<sup>93</sup>

Another atypical section of this General Order was one that included mandated behavior necessary due to the unique challenges faced in the JOA. In order to curtail the potential spread of disease among U.S. Forces, the GO#1 required U.S. Forces to comply with all prescribed preventative medical

<sup>85</sup> *Id.*

<sup>86</sup> While recognizing the need for Soldiers to remain aware and disciplined in all situations and the inherent dangers of the area of operations (AO), AFRICOM General Order #1 (GO #1) is not nearly as strict as those drafted for contingency operations such as in Iraq or Afghanistan. For example, there is no blanket prohibition on the consumption of alcohol. Instead, the order limits alcohol consumption to two beverages in a 24-hour period, and not within eight hours of operating a motor vehicle. Headquarters, U.S. Afr. Command, Gen. Order No. 1 paras. 2(c), 2(c)4 (18 Oct. 2013). When a Soldier is operationally deployed (participating in a “named” or “unnamed” operation conducted pursuant to any SECDEF or AFRICOM EXORD) there are greater restrictions. In this case, alcohol may only be consumed during non-duty periods at base camps or rear areas and not within eight hours of the start of regularly scheduled duty. *Id.* paras. 2(c)(5)(b), (c). A mission commander of operational forces may further restrict the use of alcohol as circumstances dictate. *Id.* para. 2(c)(5)(a). Beyond this, the order contains fairly standard prohibitions against taking war trophies, proselytizing, patronizing prostitutes, photographing human remains, etc. *Id.* paras. 2(e), (f), (k), (n), (o).

<sup>87</sup> See Chaplain (Lt. Col.) David Deppmeier, *U.S. Army Africa Chaplain Delivers Hope in Ebola-Stricken Liberia*, U.S. ARMY (Oct. 24, 2014), [http://www.army.mil/article/136876/U\\_S\\_Army\\_Africa\\_chaplain\\_delivers\\_hope\\_in\\_Ebola\\_stricken\\_Liberia/](http://www.army.mil/article/136876/U_S_Army_Africa_chaplain_delivers_hope_in_Ebola_stricken_Liberia/).

<sup>88</sup> Headquarters, Joint Forces Command – United Assistance, Gen. Order No. 1 para. 2(q), (r) (5 Oct. 2014). “Bush meat” is the meat of wild animals like bats or monkeys.

<sup>89</sup> *Id.* para. 2(p).

<sup>90</sup> *Id.* para. 2(f).

<sup>91</sup> *Id.* para. 2(c)(4), (5).

<sup>92</sup> MAJ Robson’s Professional Experiences, *supra* note 76. An additional benefit of hiring local drivers and vehicles greatly reduced the most likely cause of claims against the U.S. government, traffic collisions. *Id.*

<sup>93</sup> JFC-UA GO#1, *supra* note 88, para. 2(c)(4), (5) However, when the 101st Airborne Division assumed command in early November, the Commander instituted a complete ban on alcohol.

measures such as taking malaria medication.<sup>94</sup> Joint Forces Command members were also required to immediately report any sickness or injury to medical personnel so that they could be promptly evaluated.<sup>95</sup> Additionally, JFC personnel were ordered to obey Liberia's curfew requirements.<sup>96</sup> The purpose of this was to not only demonstrate respect for host nation sovereignty, but also to ensure the safety of the force.<sup>97</sup> However, GO#1 delegated authority to the operations directorate of the Joint Forces Command (J3) to grant exceptions to the curfew requirements in order to fulfill mission requirements. Finally, in order to defend against the risks inherent to driving in Liberia, the GO#1 also instituted two-vehicle convoy requirements in rural areas.<sup>98</sup>

## 2. Armed and Ready to Fight Disease: The Initial Weapons Posture

Within the first days of OUA, MG Williams issued two orders governing the circumstances of when and how JFC personnel would carry weapons in Liberia.<sup>99</sup> Both policies—an Initial Weapons Policy (IWP) and a Weapons Posture

Directive (WPD)—attempted to strike the balance between reasonable force protection requirements, the permissive<sup>100</sup> and humanitarian nature of OUA, and Liberia's historical scars from its traumatic civil wars.<sup>101</sup> Neither policy contradicted the OUA rules of engagement, including JFC personnel's inherent right of self-defense.<sup>102</sup> Rather, these orders specified the circumstances under which JFC personnel could carry weapons in the JOA and, if carried, the posture with which they were to be carried.<sup>103</sup>

The IWP was issued within the first days of OUA and outlined the Commander of JFC's (JFC-CDR) overall weapons guidance in advance of the more detailed WPD. Although the IWP was drafted as instructions to the force, its primary purpose was to reassure the U.S. Ambassador to Liberia that the JFC appreciated the permissive, non-kinetic environment<sup>104</sup> within which it was operating.<sup>105</sup> Restrictive in nature, the IWP successfully justified the carriage of weapons pursuant to the existing status of forces agreement<sup>106</sup> balanced against the U.S. Ambassador's concerns regarding U.S. personnel carrying weapons in Liberia.

<sup>94</sup> *Id.* para. 3(a).

<sup>95</sup> *Id.* para. 3(b).

<sup>96</sup> *Id.* para. 3(c).

<sup>97</sup> MAJ Robson's Professional Experiences, *supra* note 76.

<sup>98</sup> JFC-UA GO#1, *supra* note 88, para. 3(d).

<sup>99</sup> Per diplomatic agreement, Liberia allows U.S. personnel to carry arms in the country while on duty and if authorized in the personnel's orders. See Agreement Regarding the Status of United States Personnel Who May Be Temporarily Present in Liberia, U.S.-Liberia, April 20, 2005, T.I.A.S. No. 05-420.2 [hereinafter DipNote]. It is vital that judge advocates analyze applicable international agreements when planning an operation in order to understand the authorities that may influence and sometimes dictate command decisions. JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS ch. III (16 July 2013); Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112 (1998).

In a contingency operation, it is also important to find out whether the nations that are involved in the operation are parties to any international agreements that are binding on the United States as a matter of either binding customary international law or as host nation law. The responsible unified command or Department of State representative for the regional area of the operation can provide information on the relevant international agreements.

*Id.*

<sup>100</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-35, DEPLOYMENT AND REDEPLOYMENT OPERATIONS ch. I, 1(c)(1) (31 Jan. 2013).

A permissive environment is an [Operational Environment] in which host nation (HN) military and law enforcement agencies have control, the intent, and the capability to assist operations that a unit intends to conduct. In this situation, entry operations during deployment are unopposed and the host country is supporting the deployment.

*Id.*

<sup>101</sup> Both Ambassador Malac and Fritz Stiemens, the Chief of Security for Firestone Tire and Rubber Company, on separate occasions used the term

"traumatized" to describe the population of Liberia following the two civil wars. MAJ Robson's Professional Experiences, *supra* note 76. Both implored U.S. forces to not show weapons or take an aggressive force protection posture for this reason. *Id.*

<sup>102</sup> The authors acknowledge the controversy regarding the "inherent right and obligation" of individual and unit self-defense and the arguable misapplication of unitary jus ad bellum below the level of national self-defense. See Gary P. Corn, *Should the Best Offense Ever Be a Good Defense? The Public Authority to Use Force in Military Operations: Recalibrating the Use of Force Rules in the Standing Rules of Engagement*, 49 VAND. J. TRANSNAT'L L. 1 (2016); John J. Merriam, *Natural Law and Self-Defense*, 43 MIL. L. REV. 86-87 (2010). However, that concept remains a part of the rules of engagement. CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A (13 June 2005) [hereinafter CJCSI SROE 3121.01B]

<sup>103</sup> Accordingly, though most JFC personnel had deployed with a M9 pistol, those weapons were secured until the command issued its posture guidance. MAJ Robson's Professional Experiences, *supra* note 76.

<sup>104</sup> The JFC was very mindful that Liberia invited U.S. assistance to quell EVD and not to introduce its military into the country. See Memorandum for Michael L. Bruhn, Executive Secretary of Defense, subject: (SBU) Request for DoD Medical Support to Respond to Ebola Infectious Disease Outbreak in Liberia (Aug. 25, 2014). The JFC's weapons policy had to acknowledge the fact that numerous other entities—including USAID personnel—were operating in the Joint Operations Area (JOA) unarmed despite executing similar missions as the JFC.

<sup>105</sup> Apart from the specific atmospherics surrounding the OUA humanitarian assistance mission, unclassified USARAF intelligence indicated that Liberians generally viewed the U.S. military personnel with respect and would not likely seek confrontation. Ken McNulty, ACoS, G2, Plans Officer U.S. Army Africa, Joint Intelligence Preparation of the Operational Environment, (Sept. 23, 2014) (unpublished PowerPoint presentation) (on file with the authors). Moreover, firearms were scarce among Liberians and the most common weapons were machetes and knives. *Liberia 2015 Crime and Safety Report*, OVERSEAS SECURITY ADVISORY COUNCIL, <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=16960> (last visited June 2, 2016).

<sup>106</sup> See DipNote *supra* note 99 and accompanying text.

Nevertheless the IWP allowed JFC personnel to be armed if threat assessments deemed it necessary,<sup>107</sup> such as when JFC personnel would be operating in remote locations. The IWP rested on four principles that applied to all personnel (including civilians and contractors): (1) Not all JFC-UA personnel will carry weapons on a twenty-four hour, day-to-day basis; (2) JFC-UA personnel will carry weapons based on threat assessments tailored to each mission; (3) JFC-CDR holds approval authority to carry weapons; and (4) when authorized to carry weapons, the M9 will be the default weapon.<sup>108</sup> Additionally, Servicemembers were instructed not to unnecessarily brandish their weapons.

### 3. Weapons Posture Directive: A Tactical Directive by Another Name

The WPD elaborated on the IPW and provided JFC personnel more detailed guidance. The purpose was instructive and clarified the authorization process, the types of weapons allowed, and safety and carriage guidelines.<sup>109</sup> Commanders at the O-5 (Lieutenant Colonel) level were delegated the authority to approve weapons for a mission.<sup>110</sup> The WPD required that any authorization be dependent on a risk assessments that included: (1) the potential of personnel to be isolated during operations, (2) the remoteness of the area, and (3) perceived danger and threats. The WPD allocated one weapon per three JFC personnel traveling together.<sup>111</sup>

The WPD also limited the types of weapons. Consistent with IWP, the M9 remained the default weapon; however, personnel located at rural Ebola Treatment Unit (ETU) sites or guarding facilities would be authorized to carry M4 or M16 rifles, shotguns and designated 40mm weapons employing

nonlethal ammunition. Prohibited in the JOA were crew-served weapons (to include the M249) and high-explosive ammunition.<sup>112</sup>

The WPD also encouraged JFC personnel to carry weapons in the most inconspicuous and non-threatening manner possible. Hip holsters and concealment under a military blouse were recommended when interacting with the local population. However, personnel performing guard duty were not required to conceal their weapons.<sup>113</sup> Both the IWP and WPD set the tone for the OUA and communicated the humanitarian purpose. Nonetheless, neither policy nor directive modified or blurred the rules of engagement (ROE) or the escalation of force (EOF) procedures.

### 4. Rules of Engagement: Use of Force During a Humanitarian Mission?

The Joint Forces Command—United Assistance ROE was based on the AFRICOM EXORD,<sup>114</sup> which was derived from the Chairman of the Joint Chiefs of Staff Standing Rules of Engagement (SROE),<sup>115</sup> as along with the AFRICOM Theater-Specific ROE.<sup>116</sup> The SROE is the “bedrock of all U.S. military engagements throughout the spectrum of conflict”<sup>117</sup> which “establishes fundamental policies and procedures governing the actions to be taken by U.S. commanders and their forces during all military operations . . . occurring outside U.S. territories.”<sup>118</sup> Along with the SROE, the AFRICOM EXORD authorized several supplemental rules of engagement and protective measures available for implementation by the JFC upon AFRICOM’s approval.<sup>119</sup>

<sup>107</sup> The Commander, Joint Forces Command (CDRJFC), like all military commanders, had a duty to protect his force, regardless of the nature of the mission. See U.S. DEP’T OF DEF., INSTR. 2000.16, DOD ANTITERRORISM STANDARDS para. 4.3 (Oct. 8, 2006) (“[C]ommanders at all levels shall have the authority to enforce security measures and are responsible for protecting persons and property subject to their control.”). Threats to the force did exist. For example, on September 16, 2014, one day after President Obama announced the JFC’s deployment, eight health workers in Guinea were stoned, clubbed, and macheted to death. See Abby Phillip, *Eight Dead in Attack on Ebola Team in Guinea. ‘Killed in cold blood.’* WASH. POST (Sept. 18, 2014), [www.washingtonpost.com/news/to-your-health/wp/2014/09/18/missing-health-workers-in-guinea-were-educating-villagers-about-ebola-when-they-were-attacked/](http://www.washingtonpost.com/news/to-your-health/wp/2014/09/18/missing-health-workers-in-guinea-were-educating-villagers-about-ebola-when-they-were-attacked/). Moreover, the threat of terrorist attacks against U.S. forces wherever they are located is ever-present. See Jane Gilliland Dalton, *The United States National Security Strategy: Yesterday, Today and Tomorrow*, 52 NAVAL L. REV. 60 (2005) (locating Liberia within an “arc of instability” that breeds terrorists against the United States).

<sup>108</sup> For a detailed description of the Initial Weapons Policy (IWP), see *infra* Appendix A.

<sup>109</sup> For a detailed description of the Weapons Posture Directive (WPD), see *infra* Appendix B.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Headquarters, U.S. AFRICA COMMAND, UNITED ASSISTANCE EXECUTE ORDER (Sept. 16, 2014) [*hereinafter* AFRICOM EXORD]. This document is classified.

<sup>115</sup> CJCSI SROE 3121.01B, *supra* note 102.

<sup>116</sup> The AFRICOM Theater Rules of Engagement are Classified. Theater-specific ROE are in effect for almost every operation and implemented as supplemental measures to the standing rules of engagement (SROE). Major Eric C. Husby, *A Balancing Act: In Pursuit of Proportionality in Self-Defense for On-Scene Commanders*, ARMY LAW. May, 2012.

<sup>117</sup> Richard J. Grunawalt, *The JCS Standing Rules of Engagement: A Judge Advocate’s Primer*, 42 A.F. L. REV. 245 (1997).

<sup>118</sup> INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA422, OPERATIONAL LAW HANDBOOK 84 (2014) [*hereinafter* OPLAW HANDBOOK]. A key tenet of the SROE is that it does not limit the inherent authority of commanders to exercise self-defense, and it is therefore applicable even in non-kinetic operations such as OUA. CJCSI 3121.01B, *supra* note 102, at A-3.

<sup>119</sup> AFRICOM EXORD, *supra* note 116, para. 3.D. (S).

*a. Escalation of Force Development*

Similar to Joint Task Force-Haiti (JTF-H) in Operation Unified Response (responding to the 2010 Haiti earthquake), much of ROE planning centered on the development of “traditional” EoF, “threat deterrent” measures focused on disengagement or defusing hostile situations.<sup>120</sup> Of particular importance was providing JFC personnel clear guidelines for disengagement-based EoF procedures in the JOA.<sup>121</sup> Accordingly, the JFC-UA established the following nine EoF procedures on its ROE card:

**DISENGAGEMENT** – When a tactical situation permits, you must first attempt to avoid the threat through disengagement, bypass, or break in contact.

**HOST NATION** – If disengagement is impossible, seek Host Nation authority support and intervention.

**AUDIBLE SIGNALS** – Shout verbal warnings; horn siren; bull horns; vehicle mounted PA system; sound commanders; etc.

**VISUAL SIGNS** – show hand and arm signals; employ flags, spotlights or flares; etc.

**SHOW OF FORCE** – (e.g., pointing to; unholstering; brandishing, or aiming of a weapon). Warning shots are not authorized.

**PHYSICAL MANIPULATION** – Shove or block movement with the use of equipment (e.g., riot control gear) to prevent direct physical contact.

**USE OF LESS THAN DEADLY FORCE** – (temporary detention with use of PPE; approved non-lethal weapons)

**DEADLY FORCE** - In self-defense or where specifically authorized.<sup>122</sup>

A ROE and EoF briefing was also created with situational vignettes for JFC personnel.<sup>123</sup>

The supplemental ROE designations and EoF measures were detailed on the JFC-UA ROE Card. The EoF side of the ROE card began with a reminder in bold “this is a humanitarian assistance mission – minimize the use of force and de-escalate all situations whenever possible.”<sup>124</sup> Furthermore, the ROE card also contained the following guidance on both sides: “Remember that you are here to help the Liberian people. Treat all civilians and non-U.S. personnel with dignity and respect. The choices you make will have strategic impact.”<sup>125</sup> This clear, direct articulation of the Commander’s intent, along with Servicemembers’ professionalism, training, and appreciation for the humanitarian-nature of this military operation, no EoF or ROE incident took place that resulted in harm to U.S. Forces or host-nation members.

The AFRICOM EXORD provided the JFC-CDR with the ability to request supplemental protective measures and designate certain property and personnel as defensible with deadly force.<sup>126</sup> The ROE working group also identified those requests and the surrounding issues of when self-defense could be used, when and how Servicemembers could detain individuals interfering with the mission, and when and how to protect specific military and foreign property.<sup>127</sup> Ultimately, the JFC-CDR authorized JFC personnel to use force, up to and including deadly force, to defend U.S. Forces, U.S. nationals, friendly persons, and foreign personnel (operating with U.S. Forces) in response to a hostile act or demonstrated hostile intent.<sup>128</sup> Additionally, JFC-UA personnel could use force, up to and including deadly force, against individuals who commit, or are about to commit an act that is likely to cause damage to, or loss of, military or foreign aircraft or maritime vessels.<sup>129</sup>

*b. Temporary Detention Is Not Detention*

Temporary detention as an authorized ROE posed particular challenges given the non-kinetic nature of the JFC-OUA mission. Most JFC-OUA personnel did not immediately recognize the relevance or need for temporary detention as a ROE for several reasons, including the

<sup>120</sup> See Ohlweiler, *supra* note 67 (for discussion of how escalation of force (EOF) morphed into a “threat assessment” tool post-9/11).

<sup>121</sup> See Major Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, 83 (1994) (“[The ROE] must guide the soldier to wary but restrained actions . . . in operations other than war when facing any individual or force that the command has not declared hostile.”).

<sup>122</sup> For a detailed description of the EOF authorities provided on the ROE card, see *infra* Appendix X.

<sup>123</sup> These briefings were passed to the 101st Airborne Division for to use in preparing their personnel for deployment. This assertion is based on the professional experience of MAJ Lenze, CPT Dastoor, CPT Dickinson and CPT Rich as the OUA Operational Law Team for U.S. Army Africa from

September 2014 to November 2014 [hereinafter Authors’ Professional Experience].

<sup>124</sup> *Id.* The text read as follows “[t]his is a humanitarian assistance mission – MINIMIZE USE OF FORCE and DE-ESCALATE ALL SITUATIONS WHENEVER POSSIBLE.” *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> AFRICOM EXORD, *supra* note 116, para. 3.D.2. (S).

<sup>127</sup> For a detailed description of the ROE authorities provided on the ROE card, see *infra* Appendix A.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

humanitarian nature of the mission, the permissive environment in which the JFC-OUA was operating, and the EVD's transmission potential through physical contact.

The JFC-OUA staff tended to view detention through the lens of previous detention operations in Operation Iraqi Freedom and Operation Enduring Freedom. In those contingency operations, detention was employed out of necessity, in large part, to clear battle spaces of the enemy, obviously not a requirement in this JOA. Additionally, planners viewed the substantial doctrine and procedure applicable to robust detention operations (e.g., *Joint Publication 3-63*<sup>130</sup>) as an unnecessary drain on their time in light of more pressing needs. Force protection and surgeon staff sections also recommended directives to avoid physical contact with local nationals, creating difficulties in conceptualizing how temporary detention would pragmatically be implemented. Furthermore, JFC-OUA personnel reported that Liberian law enforcement officials publicized that they would not accept individuals suspected of carrying the EVD, weakening the possibility of transfer upon detention.<sup>131</sup> Therefore, the JFC-UA OSJA drafted temporary detention policy following the general detention guidance in foreign humanitarian assistance joint doctrine<sup>132</sup> and focused on four principles.<sup>133</sup>

First, temporary detention was conceptually limited to a last resort, self-defense, EoF measure. The policy did not authorize formal detention operations nor did it identify detention personnel, detention facilities, or collection points, or authorize intelligence gathering.<sup>134</sup> The policy also stated that temporary detention was to be avoided to the "farthest extent possible" and was "perhaps best understood as temporary 'restraint' required by immediate circumstances

and only after other, less aggressive self-defense measures have been ruled out."<sup>135</sup>

The second principle was that temporary detention was indeed meant to be *temporary*. Detained individuals were to be immediately transferred to local authorities or outright released if transfer was unfeasible. Regarding the transfer option, the policy tasked the JFC-UA OPD with identifying local points of contact located near operational locations in order to establish specific transfer procedures. In the event transfer was impossible (for example, if relevant authorities refused to accept an individual suspected of carrying EVD), the policy required immediate release as soon as the individual no longer threatened the mission. In any case, the policy only authorized temporary detention for a period up to twenty-four hours. Only the USAFRICOM Commander could grant exceptions based on clearly articulated justifications.

Third, the protection of JFC-UA personnel from the EVD transmission shaped the temporary detention policy. The policy first stressed that temporary detention did not necessarily involve physical restraint but could instead involve simply "taking non-contact actions to neutralize the imminent threat and escorting the individual away from protected forces/ property." In the event direct physical contact was necessary, JFC-UA personnel were required to wear personal protective equipment (PPE), based on input from the surgeon. Specifically, the policy required JFC-UA personnel to wear face shields and surgical latex gloves before using physical contact to temporarily detain *any* individual. If physical contact was required to temporarily detain an individual known or reasonably expected to carry EVD, the

<sup>130</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-63, DETAINEE OPERATIONS ch. III para. 1.a. (13 Nov. 2013).

The JFC should consider a plan for detainee operations within the JOA early in the planning cycle of any operation. Planning for detainee operations should be in place prior to the start of operations. The commander should analyze the wide array of logistical and operational requirements to conduct detainee operations. These requirements begin with the correct number and type of personnel on the ground to conduct the operation. Other requirements are the identification, collection, and execution of a logistical plan to support detainee operations throughout the JOA. Plans should adequately account for a potentially very large influx of detainees during the first days of combat operations.

*Id.*

<sup>131</sup> Liberia law enforcement had in fact released prisoners from their jails over concerns of the EVD transmission. MAJ Robson's Professional Experiences, *supra* note 76.

<sup>132</sup> JOINT PUB. 3-29, *supra* note 67, at A-3. Joint Publication 3-29 generally addresses the use of temporary detention as a "specified ROE" during foreign humanitarian assistance missions like OUA. The policy states: "When detention is authorized, pursuant to specified ROE, or made necessary during lawful exercise of unit or individual self-defense, commanders must be prepared to control, maintain, protect, and account for

all categories of detainees in accordance with applicable US policy, domestic law, and applicable international law." Department of Defense Directive 2310.01, *Department of Defense Detainee Program*, establishes the overarching DoD detainee policy and directs that all detainees, regardless of the status of the detainee or the characterization of the conflict, shall be treated humanely at all times while in the care, custody, or control of any member of the DoD components. Civilian internees are civilians who are interned during an international armed conflict or belligerent occupation for security reasons, for protection, or because they have committed an offense against the detaining power. *Id.*

<sup>133</sup> Before JFC-UA adopted the policy, JFC UA OSJA provided the 101st Airborne Division, the unit set to assume JFC-UA command, the opportunity to review and comment. In addition, the ROE Working Group discussed the details of the temporary detention policy and members of USARAF OSJA further scrutinized the details of the policy. The USARAF G2 (intelligence), G35 (FUOPS), Office of the Provost Marshal, Surgeon cell, and Operational Protection Directorate (OPD) all provided valuable input. As noted above, the USARAF staff initially questioned the need or value of a temporary detention policy. However, once JFC-UA OSJA explained temporary detention as exclusively being a ROE, self-defense measure, the staff became more receptive to the policy. MAJ Robson's Professional Experiences, *supra* note 76.

<sup>134</sup> JOINT PUB. 3-29, *supra* note 67.

<sup>135</sup> Authors' Professional Experiences, *supra* note 127.

policy also required JFC-UA personnel to wear protective suits.<sup>136</sup>

The final guiding principle was that all individuals under JFC-UA control were to be treated humanely and in accordance with the law of armed conflict and U.S. law and policy. The policy applied both the minimum standards of Common Article 3 to the Geneva Conventions of 1949,<sup>137</sup> as construed and applied by U.S. law, as well those additional standards articulated in *Department of Defense Instruction 3020.4*.<sup>138</sup> Language was also duplicated from *Joint Publication 3-93* that mandated immediate reporting of incidents of possible, suspected, or alleged violations of humane treatment standards, regardless of the “stress or deep provocation” by detained personnel.<sup>139</sup>

### c. Medical Engagement Protocols—“MedROE”

Distinct from the use of force ROE and commonly, albeit incorrectly, referred to as “medical ROE,” the JFC-UA established the medical “rules of eligibility”—governing which categories of individuals were eligible for medical treatment by JFC personnel.<sup>140</sup> Given that an infectious and deadly disease was the JFC-UA’s primary threat, these rules were of prime importance. Creating medical engagement

<sup>136</sup> Follow-on forces deployed with Tyvex protective suits. Authors’ Professional Experiences, *supra* note 127.

<sup>137</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>138</sup> The law of armed conflict (LOAC) applies to all military operations. U.S. DEP’T OF DEF. DIR. 2311.01E, DOD LAW OF WAR PROGRAM (9 May 2006). Per DoD directive, “humane treatment” includes:

- (a) Adequate food, drinking water, shelter, and clothing.
- (b) Reasonable access to the open air, reasonable educational and intellectual activities, and appropriate contacts with the outside world (including, where practicable, exchange of letters, phone calls, and video teleconferences with immediate family or next of kin, as well as family visits).
- (c) Safeguards to protect health and hygiene, and protection against the rigors of the climate and the dangers of military activities.
- (d) Appropriate medical care and attention required by the detainee’s condition, to the extent practicable.
- (e) Free exercise of religion, consistent with the requirements of detention.
- (f) Reasonable access to qualified interpreters and translators, where applicable and practicable.

U.S. DEP’T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM para. 3.b.(1) (19 Aug. 2014).

<sup>139</sup> JOINT PUB. 3-63, *supra* note 67, at I-1 and I-3.

<sup>140</sup> *Joint Publication 4-02* defines the directives issued that delineate the circumstances and limitations under which United States medical forces will initiate medical care and support to those individuals that are not

protocols was initially hindered by the first Chairman of the Joint Chiefs of Staff (CJCS) and AFRICOM orders that contradicted each other and potentially contradicted standing DoD regulation and policy. Detailed and extensive discussions therefore took place between USARAF/JFC OSJA, USARAF/JFC Surgeons, AFRICOM Office of Legal Counsel, and Joint Staff Office of Legal Counsel so that consensus could be achieved.

The first modification to the CJCS OUA EXORD published on September 25, 2014, prohibited DoD personnel from providing “direct patient care” to non-DoD personnel.<sup>141</sup> This blanket prohibition seemingly contradicted DoD regulatory and policy obligations to render aid in circumstances such as temporary detention or after a self-defense incident.<sup>142</sup> Furthermore, the language ostensibly barred the treatment of all non-DoD personnel, including American citizens, for any reason whatsoever. For example, one prohibition in the EXORD (strangely placed in the funding paragraph) stated that “DoD personnel will not provide direct patient care to non-DoD personnel.”<sup>143</sup> This would potentially prohibit care of a Department of State employee suffering from a non-EVD related sickness or other injuries. Such a prohibition was deeply concerning in an environment like Liberia with very few health care options.

Department of Defense health care beneficiaries or designated eligible for care in a military medical treatment facility by the Secretary of Defense as “medical engagement protocols”. JOINT CHIEFS OF STAFF, JOINT PUB. 4-02, HEALTH SERVICE SUPPORT, GL-10 (26 July 2012). However, that nomenclature was not always used.

<sup>141</sup> CJCS EXORD MOD 1, *supra* note 26, para. 4.A (UNCLASS). The U.S. government was very clear from the beginning of OUA that U.S. forces would not directly treat victims of the EVD. As early as September 19, 2014, almost a week before President Obama addressed Ebola in the United Nations, Pentagon spokesman Rear Admiral John Kirby stated to the press that the US mission in Liberia “does not include U.S. military personnel treating Ebola patients.” *U.S. Military in Liberia Begins Fight Against Ebola*, STARS AND STRIPES, Sept. 19, 2014. However, the CJCS EXORD was far more limiting.

<sup>142</sup> For example, under the LOAC, U.S. forces are required to treat enemy prisoners and wounded. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3364, 75 U.N.T.S. 287. Operation United Assistance is not an “armed conflict” for the purposes of international law or U.S. policy. Rather, it is a Foreign Humanitarian Assistance Operation. JOINT PUB. 3-29, *supra* note 67. However, under the provisions of U.S. DEP’T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1, “Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.” Consequently, by DoD policy, the LOAC applies to OUA. This could include provisions to render aid to the wounded in case of a self-defense incident, or to provide proper medical care to prisoners or individuals held in temporary detention. The extent of these requirements was a source of discussion between the JFC-UA and AFRICOM legal and medical cells and was never entirely resolved.

<sup>143</sup> CJCS EXORD MOD 1, *supra* note 26, para. 4.A.

Additionally, the CJCS EXORD was contradicted by the AFRICOM OUA EXORD which authorized the provision of basic sick-call services to foreign health care workers being trained by JFC personnel.<sup>144</sup> Nevertheless, JFC-OUA and AFRICOM published an initial Rules of Medical Eligibility Matrix which barred direct patient care to non-DoD personnel.<sup>145</sup>

Subsequent to numerous conference calls addressing the identified issues and consensus, the AFRICOM OUA OPOD published on October 4, 2014 barred “direct patient care” only to victims of the EVD.<sup>146</sup> Likewise, the Joint Staff published MOD 2 to the OUA EXORD ten days later and made similar changes. These changes provided broad authority to treat individuals in the JOA for non-EVD related maladies within the boundaries of existing regulations.<sup>147</sup>

Consequently, JFC-OUA and AFRICOM reassessed the local Rules of Medical Eligibility. Other factors on the ground in Liberia, however, complicated the process. The Surgeon Cell persuasively argued that treating local nationals for non-EVD disorders still might expose JFC personnel to an unacceptable risk of the EVD infection. Moreover they were concerned that a policy allowing the treatment of local nationals could quickly overwhelm the JFC’s medical resources which were extremely limited. Accordingly, the JFC-UA policy was to not treat local nationals except under circumstances where it is required by law or regulation such as temporary detention. However, U.S. citizens, non-governmental organization (NGO) workers, and others could be treated for non-EVD sickness or injury as prescribed by DoD regulations.

## B. Mission Execution When You Need Permission

The above governing rules and policies established the foundation upon which the JFC-UA mission execution could occur. The primary mission—supporting USAID’s foreign

humanitarian assistance efforts to eradicate the EVD—depended in large part on securing land interests from which to house personnel, stage logistical support, and establish the vital Ebola Treatment Units (ETUs). Moreover, as with any operation, mission success substantially hinged upon navigating the applicable fiscal authorities. This task was especially challenging during OUA given the relatively limited guidance concerning the applicable fiscal appropriation: OHDACA. This section addresses these land use and fiscal law issues.

### 1. Land Use

Securing the use of Liberian real estate was integral to mission success. As AFRICOM’s ASCC responsible for setting the theater, and as the initial JFC-UA command, USARAF needed to identify real estate to accommodate incoming equipment and personnel.<sup>148</sup> Specifically, land was needed to establish Life Support Areas (LSAs)<sup>149</sup> and to serve as Intermediate Staging Bases (ISBs) for downloading and storing supplies and equipment in support of OUA’s logistics line of effort. Moreover, securing land for ETU sites was a priority.<sup>150</sup>

Finding real estate proved challenging. Poor existing infrastructure and Liberia’s rainy season complicated matters.<sup>151</sup> There were also competing demands from other entities (e.g., NGOs, intergovernmental organization (IGOs), etc.) for the limited amount of available dry land. Additionally, and unlike in past humanitarian missions, the Liberian government lacked the authority to simply take private property because of a compelling national interest.<sup>152</sup> Therefore, to meet its land demands, the JFC-UA negotiated leases with both private corporations and various government ministries to meet its real estate needs.

<sup>144</sup> AFRICOM EXORD, *supra* note 116, para. 3.C.1.A.4.E. (UNCLAS).

<sup>145</sup> See, e.g., JOINT FORCE COMMAND—UNITED ASSISTANCE, OPERATION ORDER, RESPONSE TO EBOLA ANNEX C, APP. 7, TAB A, GUIDELINES FOR MEDICAL CARE ELIGIBILITY (2 Oct. 14) (UNCLAS/FOUO). This order was later modified by several FRAGOs. Prohibitions against treating local nationals were also included in the Joint Force Command—United Assistance General Order Number One, *supra* note 88, para. 2(p).

<sup>146</sup> UNITED STATES AFRICA COMMAND, OPERATION ORDER, OPERATION UNITED ASSISTANCE para. 3.A.2.B.2. (4 Oct. 2014) (UNCLASS/FOUO).

<sup>147</sup> *Id.*

<sup>148</sup> At the beginning of OUA the White House announced that 3000 Servicemembers were deploying to Liberia. President Obama’s Remarks, *supra* note 1.

<sup>149</sup> The Force Provider is a 150-person base camp life support capability that are completely self-contained, lightweight and rapidly deployable and employable. U.S. DEP’T OF ARMY, TECHNIQUES PUBLICATION 4-45, FORCE PROVIDER OPERATIONS para. 1-9 (24 Nov. 2014) [hereinafter TECHNIQUES PUB. 4-45]. Support capabilities of a single 150-person module are: climate-controlled billeting for 150 personnel, sanitary climate-controlled showers sufficient for one 10-minute shower per person/per day, sanitary,

climate-controlled latrines, food service to include up to three cook-prepared meals daily, and laundry services. Life Support Areas (LSA) are base camps to sustain life support. *See id.*

<sup>150</sup> Liberian authorities were responsible for selecting the Ebola Treatment Unit (ETU) locations and securing the rights to build and operate. MAJ Robson’s Professional Experiences, *supra* note 76.

<sup>151</sup> Typically, areas that are not heavily forested or vegetated are already owned and occupied or uninhabitable during the rainy season. MAJ Robson’s Professional Experiences, *supra* note 76.

<sup>152</sup> JTF-Haiti After Action Review (Aug. 18, 2010). In October 2014, the Liberian legislature denied President Sirleaf’s request for emergency powers to include the power to confiscate private property. <http://allafrica.com/stories/201410131639.html>. Many in the opposition party saw the request for additional emergency powers as a tactic to curtail the President’s political opponents. See Clair MacDougall, *Liberia President, Citing Ebola Gains, Ends State of Emergency*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/world/africa/president-ellen-johnson-sirleaf-ends-state-of-emergency.html>.

## 2. Use of Leases in OUA

The JFC-UA needed to identify and procure use of land immediately. Equipment and supplies almost immediately launched by ship after USARAF's receipt of mission, and the JFC-UA had roughly thirty-five to forty days to identify the plots of land and negotiate and execute the leases. With the DoD, the authority to lease land in foreign countries is granted to the Secretaries of Military Departments per 10 U.S.C. § 2675.<sup>153</sup> The Secretary of the Army has delegated that authority to the Assistant Secretary of the Army (Installations, Energy and Environment)<sup>154</sup> and actual acquisition of land is executed by the U.S. Army Corps of Engineers.<sup>155</sup> Even though the U.S. Army Corps of Engineers is responsible for acquiring land for the Department of the Army, it is essential for the judge advocate on the ground to proactively establish a working relationship with the real estate officer.<sup>156</sup> In OUA, the Operational Law Chief and the USARAF Real Estate Officer worked closely as a team, visiting sites, negotiating terms with managers, and drafting provisions.

## 3. Leases with Private Corporations

JFC-UA executed subleases with private corporations for the right to use their land. Because Liberia's constitution only allows Liberian citizens to own real estate,<sup>157</sup> corporations

secure real property rights to real property through concession agreements or leases with a government entity. As a threshold issue, it was therefore imperative to review a corporation's underlying concession or lease to determine whether and to what extent a sublease to the United States was permitted.<sup>158</sup>

Firestone Tire and Rubber Company was one of the primary corporations with whom the JFC-UA executed subleases. The company has deep roots in Liberia as it is a major economic driver in the country.<sup>159</sup> Prior to the establishment of the JFC-UA, Firestone had initiated its own EVD response to prevent the spread of the disease within its rubber plants. To assist in the EVD crisis response, Firestone offered the JFC-UA, at no charge, any of its available property and buildings on its 185-square-mile rubber farm in the "company town" of Harbel, Liberia.<sup>160</sup> Ultimately, Harbel's closed schools were used as an LSA, its golf course clubhouse was used as an LSA and sustainment brigade headquarters, and a soccer field was used to stage shipping containers.<sup>161</sup>

Despite Firestone's initial offer of any available land, the JFC-UA was not authorized to simply accept the land. Leases detailing the transaction were still required under 10 U.S.C. § 2675.<sup>162</sup> Negotiations between JFC-UA and Firestone's general counsel (located in Nashville, Tennessee) ensued and revealed there were some costs that needed to be reimbursed. For example, Firestone requested that the JFC-UA reimburse the proprietor and employees of an independently owned

<sup>153</sup> 10 U.S.C. § 2675 (2016). Under this section, "[a]ppropriations available to the Department of Defense for operation and maintenance or construction may be used for the acquisition of interests in land." *Id.*

<sup>154</sup> Department of the Army, Gen. Order No. 2012-01, at 10 (11 June 2012) [hereinafter DAGO 2012-1].

<sup>155</sup> Though they are contracts, leases are not subject to the Federal Acquisition Regulation (FAR). See FAR 2.101 (2016).

<sup>156</sup> See U.S. ARMY CORPS OF ENG'RS., REG. 405-1-12, REAL ESTATE HANDBOOK ch. 5 sec. V (20 Nov. 1985) [hereinafter ENG'R. REG. 405-1-12].

<sup>157</sup> Liberia's constitution only allows Liberian citizens to own real estate. CONSTITUTION OF THE REPUBLIC OF LIBERIA, Jan. 6, 1986, art. 22.

<sup>158</sup> Additional threshold issues included determining the country law applicable to the subleases. For example, UNMARCO, a French subsidiary of Bolloré Africa Logistics, initially insisted that French law apply to a sublease regarding land for an Intermediate Staging Bases (ISB). MAJ Robson's Professional Experiences, *supra* note 76. However, the JFC-UA argued that the exchange of Diplomatic Notes in 2005 between the United States and Liberia specified that U.S. law will apply to contracts the DoD enters in Liberia. *Id.* This issue was not ultimately resolved when USARAF transferred command of the JFC-UA to the 101st Airborne Division. *Id.*

<sup>159</sup> In 1926, Firestone entered into a lease with Liberia for 6 cents an acre and built the largest rubber farm in the world. Miller & Jones, *supra* note 44. Firestone continued as the largest employer in the country and influenced the politics and economy. *Id.* When Charles Taylor reached the rubber farm, the expatriates evacuated leaving 8,000 Liberian employees and their families to the murder, torture, and rape that followed Taylor's forces. *Id.* Firestone and Taylor eventually agreed to allow the company to operate, saving the farm from destruction and providing employment. *Id.* Firestone had to recognize Taylor's government as legitimate and pay taxes. *Id.* The farm also became a base for Taylor's headquarters and attacks on

Monrovia. *Id.* This led to the bombing and strafing of a company soccer game by Nigerian peacekeeping forces on November 2, 1992, killing 42 and injuring 200. *Id.* Firestone then abandoned the farm again until peacekeeping forces pushed Taylor out and workers were hired to clear weeds and prepare for production in 1996. *Id.*

<sup>160</sup> Firestone operates a massive natural rubber plantation in Harbel, the quintessential company town, named after Firestone's founder and his wife, Harvey and Idabelle Firestone. *Id.* The farm has 27 schools, a private police force, and a hospital with housing for its 8,500 employees and families. *Id.* Located next to Roberts International Airport, it is a community of approximately 80,000. *Id.* Firestone did require that any added structures be removed by the JFC-UA at the end of its operation. MAJ Robson's Professional Experiences, *supra* note 76. Therefore, the removal costs of any structures would have to be included in any purchase request submitted for validation to the Joint Requirements Review Board in order to validate the true cost of installation and properly obligate funds. *Id.*

<sup>161</sup> See *Firestone Did What Governments Have Not: Stopped Ebola in its Tracks*, NATIONAL PUBLIC RADIO (Oct. 6, 2014), <http://www.npr.org/sections/goatsandsoda/2014/10/06/354054915/firestone-did-what-governments-have-not-stopped-ebola-in-its-tracks>. Firestone built an ETU using a prefab annex to the hospital. *Id.* Schools were already closed by Presidential decree so the farm management, led by the General Director Ed Garcia, established comfortable voluntary isolation areas for family members and others who shared a household with an EVD victim. *Id.* By October, seventy-two cases had been reported, forty-eight treated in the hospital, and eighteen survived. *Id.* Mr. Garcia and his management team established the equivalent of a Tactical Operations Center in a conference room located in the same wing as Mr. Garcia's office. *Id.* Phones, two-way radios, maps, overlays, and charts established communications and situational awareness throughout the property. *Id.* By the middle of October, the community only had two reported cases and those came from outside the property. *Id.*

<sup>162</sup> ENG'R. REG. 405-1-12, *supra* note 162, para. 5-115.

restaurant that operated within the golf clubhouse required to be closed during the JFC's occupation of the building. Because there is no fiscal authority permitting the JFC-UA to directly pay the proprietor or employees, the cost was included in the lease and the responsibility shifted to Firestone for the compensation.<sup>163</sup>

Another issue for Firestone involved claims. Firestone general counsel requested that the JFC-UA indemnify the company for any third-party claims filed during the JFC's use of the company's property. However, the JFC-UA lacked any such indemnification authority. As an acceptable compromise, JFC-UA and Firestone agreed to a lease provision that simply reiterated the United States would pay any and all claims authorized by the Foreign Claims Act.

#### 4. Use What You Have: The Power of a DipNote

The JFC-UA also negotiated leases with the Government of Liberia. Leases were deemed acceptable alternates to entering into land use international agreements with Liberia that would have triggered onerous and time-consuming requirements.<sup>164</sup> At the outset of OUA, MG Williams repeatedly reminded the JFC that President Sirleaf assured him and the Chief of Mission that the United States could have whatever it needed to accomplish the mission. Accordingly, the Real Estate Officer set out with a plan to use a "No Cost Lease" to formalize terms and conditions of such use.

However, obstacles arose. For example, the property site managers requested compensation or improvements to the

property as a condition of use. Furthermore, any contract with a government entity was required to be reviewed by the Ministry of Justice before approval. The first such review included heavily edited text, the inclusion of onerous terms, and a demand for compensation. When the first proposed lease came back from the Ministry of Justice redlined, rewritten with onerous terms, and a demand for compensation, an alternate solution became necessary.<sup>165</sup> Moreover, as in many such situations, the absence of authority for host nation directorates or ministers to enter into such leases became an issue for the Liberians and the JFC.

A solution was found by reverting back to the 2005 Diplomatic Exchange of Notes.<sup>166</sup> Two provisions within the DipNote were key to resolving the problem. First, the agreement provided the United States access to and use of transportation, storage facilities and training facilities that may be required to implement this agreement.<sup>167</sup> Second, both countries agreed to "waive any and all claims, other than contractual claims, against each other for damage to, loss or destruction of the other's property or injury or death to personnel of either party arising out of the performance of their official duties under this agreement."<sup>168</sup>

Accordingly, all Liberian government property used or identified for potential use for OUA was categorized as transportation, storage facilities, or training facilities.<sup>169</sup> The Chief of Mission, Ambassador Malac, sent a letter to President Sirleaf notifying the President of all the property the JFC intended to use cost free and with unimpeded access.<sup>170</sup> Subsequently, the JFC also drafted an "Implementation Arrangement" for each site and used that to notify each site manager that JFC-UA was using the site in accordance with

<sup>163</sup> A complicating factor was that Liberian law requires that 10% of any sublease be paid to the government. MAJ Robson's Professional Experiences, *supra* note 76. Therefore, choosing appropriate language governing this reimbursement became important to Firestone's corporate legal office in Nashville, Tennessee. *Id.* Thus, the lease was still labeled a "No Cost Lease" and the payment to Firestone became a provision of costs incurred by Firestone associated with the lease. *Id.* The method was also used with AccelorMittal, a worldwide mining and steel production company operating an iron ore mine near the city of Buchanan. *Id.*

<sup>164</sup> AccelorMittal was willing to allow use of a rudimentary dirt (thick mud during the rainy season) airfield for rotary wing aircraft. *Id.* The only stipulation was AccelorMittal wanted to perform the work necessary to bring the site operational. *Id.* Although the reduction in rotary wing aircraft assets made the site unnecessary, the concept of including the improvement requirements as a term in the lease and describing the performance as a cost of the lease was agreed to. *Id.*

<sup>165</sup> See U.S. DEP'T OF ARMY, REG. 405-10, ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN ch. 3 (1 Aug. 1970). Per DoD Directive, personnel shall neither initiate nor conduct the negotiation of an international agreement, nor request another U.S. Government organization to negotiate an international agreement, without prior written approval. U.S. DEP'T OF DEF., DIR. 5530.3, INTERNATIONAL AGREEMENTS para. 8.2 (11 June 1987) (C1, 18 Feb. 1991). Additionally, all international agreements must be coordinated through Department of State using "Circular 175" process. *Id.* para. 8.2. The term "Circular 175 procedures" refers to Department of State Circular No. 175, Dec. 13, 1955, governing the proper process for concluding international agreements that bind the United States government. "Circular 175" or "C175" refers to the State Department's procedures for prior coordination and approval of treaties and

other international agreements. Although the current procedures have been codified at 22 C.F.R. 181.4 and 11 FAM 720, the "C175" reference remains as the descriptor for those procedures. See generally *Circular 175 Procedure*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/index.htm> (last visited May 15, 2016).

<sup>166</sup> The Minister of Justice resigned on October 6, 2014, declaring President Ellen Johnson Sirleaf blocked her investigation into fraud allegations against the country's National Security Agency (NSA), which is headed by the president's son. James Giahayue, *Liberia Justice Minister Quits, Says President Blocked Investigation*, REUTERS (Oct. 7, 2014) <http://www.reuters.com/article/2014/10/07/us-liberia-politics-idUSKCN0HW17220141007>. It is likely the acrimonious relationship between President Sirleaf's administration and the Ministry of Justice impacted the legal review in order to impede the administration's efforts to respond to the EVD.

<sup>167</sup> DipNote, *supra* note 99.

<sup>168</sup> *Id.* at 2.

<sup>169</sup> *Id.*

<sup>170</sup> This property included airports and seaports used as ISBs, as well as property controlled by the Ministry of Defense such as the Barclay Training Center, Edward Binyah Kesselly Military Barracks (EBK), and the National Police Training Center. MAJ Robson's Professional Experiences, *supra* note 76.

<sup>171</sup> Memo from Ambassador to President Sirleaf (Oct. 17, 2014) (on file with authors).

the 2005 Diplomatic Note and the notice of use sent to President Sirleaf. Attached to each Implementation Arrangement was the description of the property being used and a survey map drafted by the Real Estate Officer, items normally included in any lease.

Using this approach allowed the JFC to continue the mission without delay or impediment. Additionally, using the government land pursuant to international agreement, rather than obtaining a real property interest in it through a lease, precluded disposition issues when OUA ended.<sup>171</sup> Instead of needing to seek approval for the disposition of U.S. real estate interests, the JFC-UA simply notified the government that the temporary and specific use of the land was complete.

### C. How Are We Going to Pay for That? JFC-UA Fiscal Law Issues

With land secured for housing, staging, and training, the JFC-UA was able to exclusively focus on its main mission of combating Ebola and preventing its further spread. This mission primarily depended upon the efficient use of Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) funds to support USAID's lead efforts. Those funds were both limited in amount<sup>172</sup> and subject to underdeveloped guidance.

<sup>171</sup> Real property is any interest in land, together with the improvements, structures, and fixtures on the land. 41 C.F.R. § 102-71.20 (2016). Normally, the military requires a specific delegation of authority from the U.S. Secretary of Defense (USD) for Acquisition, Technology and Logistics (AT&L) to dispose of Foreign Excess Real Property (FERP) on foreign land. U.S. DEP'T OF DEF., DIR. 4165.06, REAL PROPERTY para. 5.1.3.3 (18 Nov. 2008). The Joint Staff determined FERP authority was not necessary for JFC-UA and authorized the JFC-UA Foreign Excess Personal Property disposal authority only. Memorandum from Assistant Secretary of Defense David J. Berteau, to Commander, Joint Forces Command—United Assistance, subject: Request for Delegation of Authority to Transfer Foreign Excess Personal Property to the Government of Liberia (28 Jan. 2015) [hereinafter, Request for Delegation of Authority to Transfer Foreign Excess Personal Property to the Government of Liberia Memo] (on file with authors).

<sup>172</sup> By August 2014, the WHO estimated that the EVD would cost roughly \$500 million to contain. TIJAJI SALAAM-BLYTHER, CONG. RESEARCH SERV., R43697, U.S. AND INTERNATIONAL HEALTH RESPONSES TO THE EBOLA OUTBREAK IN WEST AFRICA (Oct. 29, 2014), <http://fas.org/sgp/crs/row/R43697.pdf>. One month later, they revised that estimate, settling on a number closer to \$1 billion. John Heilprin and Krista Larson, *\$1 Billion Needed for Ebola Response*: WHO, HUFFINGTON POST (Sept. 16, 2014) [http://www.huffingtonpost.com/2014/09/16/ebola-response\\_n\\_5828162.html](http://www.huffingtonpost.com/2014/09/16/ebola-response_n_5828162.html). To put these numbers into perspective, in 2014, Congress provided the DoD only \$109.5 million to finance all DoD humanitarian assistance and foreign disaster relief initiatives worldwide. Consolidated Appropriations Act Pub. L. No. 113-76 (2014). Congress appropriated \$109.5 million to the Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) programs. Of this relatively small amount, the Secretary of Defense authorized only \$7.5 million for the initial round of funding for OUA. Memorandum from Sec'y of Defense, to Commander, USAFRICOM, subject: Humanitarian Assistance in Response to the Ebola Virus Outbreak (27 Aug. 2014) [hereinafter SecDef HA Response Memo].

<sup>173</sup> JOINT PUB. 3-29, *supra* note 67. Foreign assistance is defined as "Assistance to foreign nations ranging from the sale of military equipment to donations of food and medical supplies to aid survivors of natural and

### 1. Funding Framework for Humanitarian Assistance Missions

Generally, the DoD has limited authority to expend funds to conduct foreign assistance.<sup>173</sup> Rather, the DoD normally participates in foreign disaster relief and humanitarian assistance only under the direction of the Department of State,<sup>174</sup> which has the executive responsibility and funding to conduct such assistance.<sup>175</sup> The DoD is allowed to provide this assistance under certain limited statutory authorities, including: general humanitarian assistance,<sup>176</sup> the excess property program,<sup>177</sup> humanitarian demining assistance,<sup>178</sup> the Denton program,<sup>179</sup> and Funded Transportation, Foreign Disaster Assistance.<sup>180</sup> Each year, Congress appropriates money to the DoD to execute missions in line with these operational authorities.<sup>181</sup> Since 1995, however, Congress has accomplished this in a single appropriation: Overseas Humanitarian, Disaster, and Civic Aid (OHDACA).<sup>182</sup>

Once congressionally appropriated to the DoD, OHDACA funds are allocated to Combatant Command program offices, who are responsible for managing their respective foreign assistance activities.<sup>183</sup> Combatant Commands accomplish this task by submitting annual plans to the Defense Security Cooperation Agency, which acts as the DoD agency tasked with programmatic oversight of all OHDACA-funded activities.<sup>184</sup> The combatant command

man-made disasters; that may be provided through development assistance, humanitarian assistance, and security assistance." *Id.*

<sup>174</sup> JOINT PUB. 3-29, *supra* note 67. Action by the DoD still occurs at the direction of the President or the U.S. Secretary of Defense.

<sup>175</sup> The Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012)); *see also* Exec. Order No. 10973, 26 C.F.R. 639 (1961) (delegating authority to conduct foreign assistance to the Department of State).

<sup>176</sup> 10 U.S.C. § 2561 (2011).

<sup>177</sup> *Id.* § 2557.

<sup>178</sup> *Id.* § 407.

<sup>179</sup> *Id.* § 402. The Denton Program allows private individuals and organizations to access space on U.S. military cargo planes on a space-available basis to transport humanitarian goods to countries in need. *Id.* § 402.

<sup>180</sup> *Id.* § 404.

<sup>181</sup> Humanitarian assistance is a subset of "foreign assistance." JOINT PUB. 3-29, *supra* note 67, para. I-5 3.

<sup>182</sup> Prior to 1995, the programs were individually funded. The National Defense Authorization Act of 1995 established a single funding account within the Operations and Maintenance funds for funding these OHDACA Programs. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337. Overseas Humanitarian, Disaster, and Civic Aid is a stand-alone appropriation within the DoD's operation and maintenance budget.

<sup>183</sup> U.S. DEF. SECURITY COOP. AGENCY, 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL, ch. 12, para. 12.3.1 (30 Apr. 2012) [hereinafter SAMM].

<sup>184</sup> *Id.* para. C12.2.1. While Defense Security Cooperation Agency (DSCA) has program oversight responsibilities, policy guidance comes from the

(COCOM) submissions are requests to the Defense Security Cooperation Agency to fund pre-packaged missions in advance of Congressional appropriation. Once Congress appropriates funds to OHDACA, those funds are allocated to Defense Security Cooperation Agency, and sub-allocated to COCOMs in accordance with a Defense Security Cooperation Agency's approved budget plan.<sup>185</sup>

To guide the COCOMs in this programming and budget cycle, the Defense Security Cooperation Agency created and published the Security Assistance Management Manual (SAMM), which provides the implementing policy for how to request, receive, and spend OHDACA funds as part of the annual appropriations cycle. Toward that end, the SAMM addresses the humanitarian assistance funding process in terms of what the Defense Security Cooperation Agency expects COCOMs to submit for their pre-programmed humanitarian assistance missions. The COCOM submissions are vetted as part of this cycle such that by the time a project is at the execution phase, the command should have little question about the fiscal constraints and restraints.<sup>186</sup> This, however, is not the case with emergent humanitarian assistance missions like OUA.

While OHDACA funds are not pre-programmed for emergent missions, fiscal and budgetary laws allow federal dollars to be reprogrammed<sup>187</sup> or reallocated<sup>188</sup> as Congress or the DoD, respectively, deem appropriate. This allows OHDACA funds to flow to the COCOMs in an expeditious manner such that the COCOM has the money to conduct its emergent mission. Consequently, the COCOM and the subordinate command will receive funds allocated for a

corresponding emergent crisis within their AO, but for which no new fiscal guidance is issued. The SAMM currently does not contain guidance on how OHDACA funds can or should be spent in an emergent HA mission like OUA. Eventually, the COCOMs can expect to receive some rudimentary fiscal guidance from Joint Staff orders but the expedited nature of these events inevitably creates a void in fiscal guidance.

## 2. Filling the Fiscal Void in an Emergent Humanitarian Assistance Mission

Despite the SAMM's lack of specific policies regarding the use of OHDACA in emergent humanitarian assistance missions, it does provide some analogous guideposts. The SAMM's overall policy is summed up early in Chapter 12: "DoD's OHDACA-funded activities are intended to directly address humanitarian needs, augment Combatant Commander (CCDR) capabilities to respond to humanitarian crises, help generate long-term positive perceptions and goodwill for the DoD, and promote cooperation with foreign militaries and their civilian counterparts."<sup>189</sup> From this policy, the Defense Security Cooperation Agency derives two primary purposes of the OHDACA appropriation: (1) OHDACA money should be spent for the ultimate benefit of host nation civilians,<sup>190</sup> and (2) OHDACA spending should complement, but not duplicate, efforts by the local civil authorities and U.S. Government agencies that have primary responsibility for providing support.<sup>191</sup> These two basic purposes should therefore direct the fiscal analysis in emergent humanitarian assistance missions such as OUA.

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Office of the Under Secretary of Defense for Policy Special Operations & Low Intensity Conflict (SOLIC). *See also* U.S. DEP'T OF DEF. DIR. 5132.03, DOD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION (24 Oct. 2008) (establishing DoD policy and assigning responsibilities under the Guidance for Employment of the Force, Guidance for the Development of the Force, and titles 10 and 22 of the United States Code, and statutory authorities, Executive orders, and policies relating to the administration of security cooperation, including security assistance).

<sup>185</sup> *See* SAMM, *supra* note 189, para. C 12.3.5.

<sup>186</sup> *Id.* para. C12.4.2.2 (noting COCOMs must vet funding submissions through their legal offices).

<sup>187</sup> "Military Departments must submit proposed DD 1415 (reprogramming) actions formally by memorandum addressed to the Under Secretary of Defense (Comptroller) from the Assistant Secretary (Financial Management and Comptroller) of the Military Department." U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 3, ch. 6, para. 060407 (Aug. 2012) [hereinafter DoD FMR]. The component comptroller will forward a formal request to the DoD Comptroller explaining the details of the reprogramming request. *Id.* The DoD Comptroller will forward the request to Congress for consideration by the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee. *Id.* The DoD Comptroller will receive letters from each of these committees and will notify the Component Comptroller if its request has been approved or disapproved. *Id.* If the request is denied, then the Component Comptroller will not reprogram the funds.

<sup>188</sup> *Id.* For the purposes of budgeting, an allocation means a delegation, authorized in law, by one agency of its authority to obligate budget authority and outlay funds to another agency. U.S. GOV'T

ACCOUNTABILITY OFFICE, GAO-05-734-SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (Sept. 2005).

<sup>189</sup> *See* SAMM, *supra* note 189, para. C12.1.3. These OHDACA-funded activities take the form of local infrastructure construction, disaster preparedness measures, or refugee repatriation. *See* CONT. & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 10-34 (2015) [hereinafter FISCAL LAW DESKBOOK]. *See also* SAMM, *supra* note 173, para. C12.1.3 (discussing how OHDACA-funded activities provide direct benefits to civilian populations by improving the basic living conditions of the civilian populace in a country susceptible to extremism, enhancing the legitimacy of the host nation government by improving or building its capacity to provide essential services (such as health care or education) to its populace, and promoting stability in the host nation or region).

<sup>190</sup> SAMM, *supra* note 189, para. C12.4.10. OHDACA-funded projects should not directly benefit foreign militaries or paramilitary groups. *Id.* However, on a case-by-case basis, foreign militaries may be involved so long as the ultimate beneficiary is the civilian populace and the military unit has a humanitarian assistance or disaster first-responder mission. *Id.* All such project nominations will clearly spell out the rationale for and scope of these projects, to include the direct benefit to the civilian populace. *Id.* Human rights vetting, per the requirements of the Leahy amendment, must occur before conducting OHDACA-funded training activities with host nation military elements. *Id.*

<sup>191</sup> *Id.*

Additionally, spending OHDACA dollars in a humanitarian assistance mission is different than other DoD-funded missions. Over the past fourteen years of counterinsurgency operations the military has grown accustomed to seeing USAID and other humanitarian agencies as a part of the fight but in a subordinate role. The DoD's reversed role as a subordinate element rather than the lead element affects the fiscal limitations of the military's efforts because of the process for spending approval that corresponds to a USAID-led mission.

The systemic process of approving requirements in a humanitarian assistance mission provided some inherent fiscal security. As previously discussed, JFC-UA received requests for assistance, or requirements, through the MITAM system, which provided a link with the OFDA. The OFDA reviewed and prioritized requirements, and only sent requests that could not be fulfilled by another agency to JFC-UA. As a result, by the time the request arrived at JFC-UA, it had been vetted as a legitimate need by USAID and confirmed to require a unique DoD solution.<sup>192</sup> This process was helpful to ensure compliance with Defense Security Cooperation Agency's second purpose element—complementing the efforts of civilian authorities and other U.S. government agencies—which, in turn, fed the bona fide need portion of the fiscal law analysis, discussed in detail below.<sup>193</sup> The bulk of the discussion in this section will focus on the “purpose” analysis, whether a particular expenditure is a proper use of OHDACA. The “time” element was inconsequential because of OHDACA's two-year period of availability.<sup>194</sup> Similarly, the “amount” element was not an issue other than the continued availability of OHDACA funds.

### 3. Specific Operational and Funding Guidance

#### a. Operational and Funding Authority—The Limits of §2561

On August 27, 2014, the Secretary of Defense authorized AFRICOM to spend up to \$7.5 million in OHDACA funds “to support U.S. Government disaster response operations in West Africa to save lives and alleviate human suffering

caused by the Ebola virus disease . . . .”<sup>195</sup> Recognizing the DoD's limited role in foreign assistance matters, the U.S. Secretary of Defense tied the use of this funding directly to one of the humanitarian assistance authorities discussed above—the “Humanitarian Assistance” statute, 10 U.S.C. § 2561 (section 2561).

Under section 2561, the DoD may spend appropriated funds for two basic purposes: (1) for transportation of humanitarian relief, and (2) for “other humanitarian purposes.”<sup>196</sup> The first purpose allows the DoD to use its logistic capabilities to ship donated humanitarian supplies on a funded basis. Therefore, the DoD can transport humanitarian assistance supplies as a stand-alone mission rather than moving supplies on a space-available basis. The second purpose in section 2561 is very broad, presumably by design. The phrase, “other humanitarian purposes,” allows flexibility, which is vital for emergent humanitarian assistance missions.

Within the general funding cycle guidance and general guideposts discussed above, the SAMM contains several instructions with regard to section 2561 authority. Specifically, section 2561 allows the DoD to construct or refurbish local infrastructure facilities<sup>197</sup> and to complete “construction, expansion, and improvement of [disaster preparedness] facilities.”<sup>198</sup> Further, section 2561 allows, but does not require, the DoD to execute construction by contract.<sup>199</sup> At the very least then, section 2561 authority allows the DoD to fund certain types of construction projects and to contract with local supply sources for these efforts in lieu of the DoD handling them directly. Overseas Humanitarian, Disaster, and Civic Aid-funded projects are even allowed to indirectly benefit foreign militaries so long as the ultimate beneficiary is the civilian populace, and the military unit has a humanitarian assistance or disaster first-responder mission.<sup>200</sup>

#### b. OHDACA: May We Use It for This?

With such a nebulous fiscal landscape, JFC-UA needed a coherent, concise, and reliable approach to fiscal issues.

<sup>192</sup> This assumes that all requests find their way into the mission tasking matrix (MITAM) process, which is not necessarily the case.

<sup>193</sup> FISCAL LAW DESKBOOK, *supra* note 180. Generally, appropriated funds must be obligated only: (a) for a proper purpose (31 U.S.C. § 1301), (b) within the time limits applicable to the appropriation (e.g., operations and maintenance (O&M) funds are available for obligation for one fiscal year) (31 U.S.C. § 1502), and (c) within the amounts appropriated by Congress (31 U.S.C. § 1341). *Id.* at 1-6. As most judge advocates learn in their officer basic course, fiscal laws do not come with deployment exceptions and, therefore, the basic purpose, time, and amount fiscal analysis is a proper way to approach OHDACA issues.

<sup>194</sup> Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (19 Dec 2014). Overseas Humanitarian, Disaster, and Civic Aid funds have a two-year period of availability. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2241 (16 Dec 2014). Congress could, in theory, modify the period of availability

in future years, but historically it has appropriated OHDACA dollars with a two-year window. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, 127 Stat. 286 (26 Mar. 2013).

<sup>195</sup> SecDef HA Response Memo, *supra* note 178. This memorandum also directs that the DoD's humanitarian assistance activities will be those that are requested and validated by USAID and the Center for Disease Control and Prevention. *Id.*

<sup>196</sup> 10 U.S.C. § 2561(1)(a) (2011).

<sup>197</sup> SAMM, *supra* note 189, para. C12.5.3.

<sup>198</sup> *Id.* para. C12.5.3.2.3.1.

<sup>199</sup> *Id.* para. C12.4.13.

<sup>200</sup> *Id.* para. C12.4.10.

Again, JTF-Haiti's experience provided an effective starting point. As part of that response, the JTF-Haiti evaluated the propriety of spending OHDACA funds to undertake debris removal.<sup>201</sup> In evaluating the action, the Secretary of Defense Office of General Counsel established three criteria for analyzing OHDACA spends: (1) What is the ultimate intent of the project (i.e., is it truly humanitarian assistance for the benefit of the civilian population?); (2) What is the unique military capability that is needed to accomplish the project?; (3) Would the need go unfilled if military assets did not step forward?<sup>202</sup> These criteria guided the funding analysis in the absence of instructions within the mission orders.<sup>203</sup>

One of the first fiscal questions from the command was whether the JFC could use OHDACA to fund construction of Ebola treatment units,<sup>204</sup> which would be used to provide care to patients infected with the EVD. The AFRICOM EXORD dictated JFC-UA build treatment units and the JFC-UA logistics team derived a set of requirements. The requirements consisted of the following categories: (1) a bill of materials, and (2) rental equipment (e.g., backhoes, front-loaders) along with the corresponding labor to operate such equipment.<sup>205</sup> The total estimated expenditure, with the materials and equipment used to support the Armed Forces of Liberia and U.S. Military efforts to construct one Ebola treatment unit in Liberia was \$740,000. The analysis seemed straightforward—the JFC was ordered to eradicate the EVD, in part through building Ebola treatment units.<sup>206</sup> However, a fiscal analysis required more scrutiny.

While the SMM contemplates certain forms of construction, the usual DoD-funded response to humanitarian assistance missions is in the form of delivering supplies and

aid. Constructing semi-permanent medical facilities raised whether the Ebola treatment units were a proper use of OHDACA funds and whether any construction thresholds would apply. The foundational fiscal tenet of “unless the law says you can, you cannot” still applied.<sup>207</sup>

The first step of the analysis evaluated the DoD's mission. For OUA, AFRICOM assigned JFC-UA with the mission of providing humanitarian assistance to USAID for the ultimate benefit of the civilian populace throughout Western Africa, and the world.<sup>208</sup> Specifically, AFRICOM tasked JFC-UA to build certain treatment units. Additionally, the SMM states that OHDACA-funded activities are intended to address humanitarian needs, augment combatant command capabilities to respond to humanitarian crises, help generate long-term positive perceptions and goodwill for DoD, and promote cooperation with foreign military and civilian counterparts.<sup>209</sup> Accordingly, JFC-UA concluded that the use of OHDACA funds to pay for the construction of Ebola treatment units pertained to the OHDACA appropriation, was not prohibited by law, and was not otherwise provided for by another appropriation.<sup>210</sup>

This requirement, however, was not just the purchase of materials. JFC-UA was constructing new facilities in Liberia and thus wary of military construction thresholds. Considering the cost of one Ebola treatment unit was originally estimated as approximately \$740,000, it was within a minor modification of surpassing the \$750,000 threshold set by Congress.<sup>211</sup> Furthermore, the original EXORD called for JFC-UA to construct seventeen Ebola treatment units, which raised questions about the units being interdependent or interrelated.<sup>212</sup> Consequently, in addition to the basic purpose

<sup>201</sup> *Id.* at 27. The basic issue was whether the debris removal was part of the humanitarian assistance (HA) mission, or constituted reconstruction which would fall outside of the JTF's OHDACA authority.

<sup>202</sup> *Id.*

<sup>203</sup> The AFRICOM Execute Order states, “OHDACA funds made available will be used to cover all costs of this operation, except that actual cost of training Liberian health care workers, which will be reimbursed by USAID.” AFRICOM EXORD, *supra* note 116.

<sup>204</sup> The fact that Ebola treatment units were one of the original requirements should give the reader an idea of how fast legal advisors were moving. USARAF had been officially on the ground for approximately one week and the command was seeking funding authorization to execute a building contract. MAJ Robson's Professional Experiences, *supra* note 76.

<sup>205</sup> E-mail from Major William Muraski, Operational Contract Support, USARAF G4, to CPT Joshua C. Dickinson, subject: ETU Site #1 (Tubmanburg) Construction Material Procurement PWS and IGCE (Sept. 22, 2014, 0705 EST) (on file with authors).

<sup>206</sup> AFRICOM EXORD, *supra* note 116, at 1.A.1.

<sup>207</sup> This rule is stated with more eloquence in *United States v. MacCollom*, providing that “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.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

<sup>208</sup> See AFRICOM EXORD, *supra* note 116.

<sup>209</sup> SMM, *supra* note 189, para. C12.1.3.

<sup>210</sup> This is the “necessary expense” doctrine. Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, *Principles of Federal Appropriations Law*, vol. I, ch. 4, 4-21 (3d ed. 2004). First, the expenditure must bear a logical relationship to the appropriation sought to be charged. *Id.* In other words, it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available. *Id.* Second, the expenditure must not be prohibited by law. Third, the expenditure must not be otherwise provided for. *Id.* That is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.

<sup>211</sup> 10 U.S.C. § 2805(c) (2014). In the 2015 NDAA, Congress increased this threshold to \$1,000,000. Carl Levin and Howard P. ‘Buck’ McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (19 Dec. 2014).

<sup>212</sup> U.S. DEP'T OF ARMY, REG. 415-32, ENGINEER TROOP UNIT CONSTRUCTION IN CONNECTION WITH TRAINING ACTIVITIES (15 Apr. 1998). The regulation defines “interrelated facilities” differently. Section II, terms, defines “interrelated facilities” as “facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities.” In contrast, the glossary, section II, defines “interdependent facilities” as

analysis, the JFC Command had to ensure it was clear of any construction threshold issues.

Construction thresholds are tied to the use of operations and maintenance funds.<sup>213</sup> Because the OHDACA appropriation is located within the defense-wide operations and maintenance appropriation, there were concerns whether the construction thresholds apply to OHDACA funding. Nonetheless, the OHDACA appropriation is in fact, a wholly separate appropriation which has no corresponding statutory threshold. Additionally, the JFC-UA did not have operational control of the Ebola treatment units, which meant the facilities fell outside the statutory definition of “military construction.”<sup>214</sup> Thus, the construction thresholds were not applicable to the OHDACA-funded projects.<sup>215</sup> For this reason the Ebola treatment unit construction was a proper expenditure of OHDACA funds and JFC-UA had the proper fiscal authority to execute the contracts. Even so, the proper operational authority remained an issue because of four words in the EXORD.

Although the U.S. Secretary of Defense memorandum<sup>216</sup> passed section 2561 authority to AFRICOM, the JFC still needed the orders from the U.S. Joint Chiefs of Staff and AFRICOM to convey the operational authority. At the time JFC-UA completed the funding request for approval, this had not occurred. The applicable U.S. Joint Chiefs of Staff EXORD only tasked the JFC to “be prepared to execute” Ebola treatment unit construction.<sup>217</sup> “Be prepared to execute” plainly means plan and prepare to execute, but do not actually execute until receiving orders or additional guidance from a higher command.<sup>218</sup> The effect was JFC-UA could perform preparation work, but it did not have the authority to execute contracts and obligate funds. Ultimately, AFRICOM had to request a modification to the EXORD from the U.S. Joint Chiefs of Staff to clearly articulate this necessary authority. Once the U.S. Joint Chiefs of Staff issued its modification, the JFC was clear to execute its

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“facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction project.” *Id.*

<sup>213</sup> 10 U.S.C. § 2805(c) (2009) (“Secretary concerned may spend from appropriations available for operation and maintenance amounts necessary to carry out an unspecified minor military construction project costing not more than \$750,000.”).

<sup>214</sup> 10 U.S.C. 2801(a) (2009) (defining “military construction” as “any construction, development, conversion, or extension of any kind carried out with respect to a military installation”). Section 2801(c)(4) defines “military installation” as an “activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.” *Id.* § 2801(c)(4).

<sup>215</sup> The Office of General Counsel later agreed with this conclusion. See E-mail from Bill Moxley, title, to Monique L. Dilworth, OSD, Lt. Col. Christopher Supernor, DSCA, Edwin Castle, OSD OGC, COL Michelle Ryan, Joint Staff Subject: OHDACA/HA References (6 Oct. 2014) (on file with authors).

assigned task with OHDACA funds, but the delay was avoidable.

Funding and building an Ebola treatment unit is an example of a project purely for the benefit of the civilian populace. The Ebola treatment units were built on Liberian soil and with the intent for the facilities to remain after OUA was complete.<sup>219</sup> However, the civilian nexus required by OHDACA is not always so direct and incontrovertible.

c. “Living”: Funding Force Providers with OHDACA

A force of 3,000 requires living accommodations and JFC-UA accomplished that using “force provider” kits.<sup>220</sup> Funding force providers with OHDACA required a slightly different analysis than that used for the treatment units. The command’s intent was to have the Logistics Civil Augmentation Program (LOGCAP)<sup>221</sup> provide force providers and corresponding site preparation, often referred to collectively as a “life support area” or “LSA”. Unlike construction of Ebola treatment units, the LSAs were ultimately for the servicemembers’ benefit, seemingly diametric to OHDACA’s basic purpose of benefitting the host nation. Likewise, the need to improve the physical space where the force providers were to be located required an analysis of whether any military construction restraints applied. A review of the necessary expense doctrine was requisite to assess whether funding a LOGCAP-based contract for LSAs had a valid relationship to the OHDACA appropriation.<sup>222</sup>

The JFC addressed the purpose issue by focusing on the benefit derived by Liberian people from the LSAs. Conceptually, this was a classic “but for” analysis: but for the need to provide support to USAID and the Liberian Government, the LSAs would be unnecessary. Further, the

<sup>216</sup> SecDef HA Response Memo, *supra* note 178.

<sup>217</sup> AFRICOM EXORD, *supra* note 116.

<sup>218</sup> The JFC-UA OSJA took the position that “be prepared to execute” is not sufficient authorization to execute and spend money even though there was no dispute that JFC-UA was ultimately supposed to build ETUs. See JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING, II-34-35 (11 Aug. 2011) for doctrinal definitions of joint operation orders.

<sup>219</sup> AFRICOM EXORD, *supra* note 116, para. 3.C.1.A.4.D.

<sup>220</sup> TECHNIQUES PUB. 4-45 *supra* note 155.

<sup>221</sup> Logistics Civil Augmentation Program (LOGCAP) is a “DA Regulatory Program to provide full-spectrum logistics and base support services through the use of contracts.” U.S. DEP’T ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM para. 3-3 (28 Dec. 2012) (noting LOGCAP is a major subset of Operational Contract Support as described in Army Regulation 715-9).

<sup>222</sup> See GAO-04-261SP, *supra* note 219 and accompanying text (describing the necessary expense doctrine).

limited nature of the DoD mission and the portability of the LSAs equated with logically related to the purpose of the OHDACA appropriation. Consequently, the LSAs temporary nature and their necessary correlation to the ultimate humanitarian assistance goals of the mission fit within the broad purpose of OHDACA funding.<sup>223</sup> Thus, funding force providers was a proper use of OHDACA money. The next step was an analysis of construction thresholds.

Once JFC-UA secured land where the LSAs were to be located, the command had sufficient operational control to allow the minor construction necessary to create the LSAs. Obtaining operational control for the LSAs, however, required further review of military construction thresholds. As discussed previously, the fiscal analysis for Ebola treatment units relied, in part, on the assumption that JFC-UA would *not* have operational control over the facilities.<sup>224</sup> The command now had operational control of the LSA sites, planned to perform site preparation on the land (e.g., moving gravel), the primary beneficiary of which was the DoD. Moreover, neither the OHDACA appropriation itself nor the SAMM discussed the propriety of this type of funding support.

Therefore, to justify funding the LSAs with the OHDACA appropriation, JFC-UA focused on their temporary nature and their need in relation to the DoD's assistance mission. JFC-UA had only the minimum control necessary to accomplish its mission, and the mission was to support USAID and the Government of Liberia. Further, the DoD did not intend to leave any portion of the LSAs behind when it left Liberia—the LOGCAP team would set up and disassemble the entire LSA. The Command proceeded with LOGCAP contracting, and ultimately received concurrence

from the Joint Chiefs of Staff, who instructed the JFC that LSAs do not constitute "military construction."<sup>225</sup>

Additional fiscal issues that required further analysis revolved around incremental costs. The OPORD directed the JFC to report its incremental costs of the mission in accordance with the DoD Financial Management Regulation.<sup>226</sup> However, the SAMM did not provide any relevant guidance.<sup>227</sup> The broad authority of section 2561 combined with the absence of other guidance beyond the general tenets of "for the Liberian benefit" appeared to allow such an expense.<sup>228</sup> "Incremental costs" are defined as additional costs JFC-UA would not have been incurred but for their support of the contingency operation.<sup>229</sup> As an example of such costs, the DoD Financial Management Regulation lists the following: "[m]ilitary entitlements such as premium pay, hazardous duty pay, family separation allowance, or other payments made *over and above the normal monthly payroll costs*" (emphasis added) and "[t]ravel and per diem of active military personnel and costs of Reserve Component personnel, called to active duty by a federal official, who are assigned solely to support the contingency."<sup>230</sup> Accordingly, active duty pay and allowances for Soldiers assigned to OUA were not properly funded with OHDACA dollars. Generally, Soldiers receive base pay and a base set of allowances without regard to their respective missions.<sup>231</sup> Nevertheless, OHDACA could fund any special pay (e.g., hazard pay, family separation) directly related to a Soldier's deployment to OUA. Similarly, temporary duty costs (e.g., per diem) could be funded with OHDACA money to the extent the temporary duty is incurred for an official trip in conjunction with OUA.<sup>232</sup>

Likewise, the JFC-UA OSJA concluded that OHDACA could fund the base pay and allowances for Reserve Component servicemembers assigned to OUA.<sup>233</sup>

<sup>223</sup> Notably, the "nexus to the DoD mission" analysis could be stretched far enough to render the limits on OHDACA meaningless. See Dep't of the Army, 63 Comp. Gen. 422 (June 22, 1984) (discussing construction of a joint task force headquarters in Honduras which the GAO deemed to be "military construction" despite the DoD's arguments to the contrary).

<sup>224</sup> Recall that the regulatory directive is that OHDACA-funded construction only be done on land wholly owned or controlled by the host government. SAMM, *supra* note 189, para. C12.4.4.

<sup>225</sup> CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], OPERATION UNITED ASSISTANCE, MODIFICATION 3 para. 3.B.1.U. (Oct. 7, 2014).

<sup>226</sup> JS MOD 1 to OUA EXORD, *supra* note 4, para. 4.A.1. Actual language of the EXORD simply cites to the portion of the DoD Financial Management Regulation discussing incremental costs in a contingency operation.

<sup>227</sup> Defense Security Cooperation Agency Office of General Counsel (OGC) recognized this fact in his memo to Humanitarian Assistance, Disaster Relief, and Mine Action Division. Memorandum from DSCA Office of General Counsel, to Humanitarian Assistance, Disaster Relief, and Mine Action Division, subject: Proposed Use of Overseas Humanitarian Disaster and Civic Aid (OHDACA) Funds for Reserve Base Pay and Allowances (1 Oct. 2014) [hereinafter DSCA OGC Memo] (on file with authors).

<sup>228</sup> DoD FMR, *supra* note 193, vol. 12, ch. 23, para. 230902.

<sup>229</sup> DoD FMR, *supra* note 193, vol. 12 ch. 23 para. 230902. Notably, OUA fits the definition of "contingency operation" as used in the DoD Financial Management Regulation. See *id.* para. 230101. These might include but are not limited to, support for peacekeeping operations, major humanitarian assistance efforts, noncombatant evacuation operations (NEO), and international disaster relief efforts. Note that the term "contingency operation" as used in this chapter refers to the above activities, is more universal than the specific definition contained in Title 10, United States Code, section 101(a), para. 13. Explicitly excluded from this chapter are peacetime civil emergencies occurring within the United States, the guidance for which is included in DoD Directive. See U.S. DEP'T OF DEF., DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) (15 Jan. 1993).

<sup>230</sup> DoD FMR, *supra* note 193, vol. 12 ch. 23 para. 230902.C.

<sup>231</sup> See generally *id.* vol. 7A ch. 1.

<sup>232</sup> Once a mission transitions to a more enduring nature, the analysis might well change.

<sup>233</sup> Notably, this would not include Active Guard and Reserve since there is no incremental cost to their mobilization. See DoD FMR, *supra* note 193, vol. 12, ch. 23 tbl.23-1 para 1.1.1.

Subsequent to the JFC-UA OSJA publishing this guidance on Reserve pay and allowances, the Defense Security Cooperation Agency Office of General Counsel published its guidance, which directly conflicted with the JFC-UA OSJA's guidance. While the Defense Security Cooperation Agency Office of General Counsel agreed that section 2561 can allow OHDACA to fund Reserve base pay and allowances, it disapproved of such use based on historical precedent and policy concerns.<sup>234</sup> The opinion rationalized that the OHDACA appropriation is a limited resource, allowing for Defense Security Cooperation Agency's conclusion that if it authorizes OHDACA-funded reserve salaries, significantly fewer resources will be available to pay for other humanitarian assistance missions.<sup>235</sup>

The Defense Security Cooperation Agency opinion also discussed Congressional expectations with regard to OHDACA spending.<sup>236</sup> However, authority to conduct humanitarian and civic assistance is a wholly separate operational authority that just happens to be funded with OHDACA.<sup>237</sup> Humanitarian and civic assistance authority merely allows the DoD to conduct humanitarian assistance activities "in conjunction with authorized military operations" based on the activities benefit to the "operational readiness skills of the members of the armed forces."<sup>238</sup> Pragmatically, humanitarian and civic assistance is performed when there is already a military mission in mind, and with a planned and direct benefit to DoD troops. These projects involve sending military engineers to build wells and sending military doctors to provide care in underserved areas (i.e., servicemembers performing functions within their military occupational specialty with a planned benefit of reinforcing that base skill set).

For this reason, funding pay and allowances with O&M (and not OHDACA) under a humanitarian and civic assistance mission is more appropriate. The servicemember is performing his or her occupation-specific tasks that, given the location of the mission, benefit a civilian population. In this manner, a humanitarian and civic assistance mission more closely resembles a traditional military mission. Contrast this to a section 2561 mission where the primary purpose is to support other federal agencies with the direct benefit going to the civilian population. Consequently, Reserve pay is more

of an "incremental expense" with section 2561 authority than it is under the humanitarian and civic assistance statute.

*d. Property Disposition: What to Do with All of This Stuff When It's Over*

After handing over command of JFC-UA to 101st Airborne Division, USARAF continued its role as an ASCC, tracking the disposition and retrograde of property out of the theater. One complicated issue involved identifying the rules and processes governing the disposition of OHDACA-funded property. Because OHDACA funds are specifically purposed for addressing overseas humanitarian needs and not to benefit U.S. forces, redeploying units leaving the JOA could not simply take with them OHDACA-funded equipment or personal property (e.g., generators, printers, refrigerators, etc.). Indeed, the related Office of the Secretary of Defense guidance instructed that "if any property procured with [OHDACA] funds is retained by a DoD unit to conduct U.S. Government activities after the completion of OUA, the OHDACA account used to fund the purchase of such property must be reimbursed by the gaining unit or Military Department."<sup>239</sup>

The reimbursement requirement coupled with the added cost of shipping property from West Africa caused much of the OHDACA funded personal property to be unclaimed by departing units. The subsequent JFC-CDR consequently sought authority from the Office of the Secretary of Defense to transfer such property to Liberia and Senegal per 40 U.S.C. chapter 7, Foreign Excess Property and 10 U.S.C. §2557. Those statutory provisions allow the head of an executive agency to "dispose of foreign excess property in a manner that conforms to the foreign policy of the United States" (informally called "FEPP" authority for "foreign excess personal property," or "FERP" authority for "foreign excess real property").<sup>240</sup> Without securing such authority before disposing of U.S. taxpayer purchased property to a foreign entity, the JFC-CDR would have engaged in improper foreign assistance. The Office of the Secretary of Defense ultimately granted JFC-UA the authority in accordance with 10 U.S.C. § 2557 and 40 U.S.C. § 703 to make the determination and approve transfer of up to \$30 million (depreciated value) and \$10 million (depreciated value) of foreign excess personal property to Liberia and Senegal, respectively.<sup>241</sup>

<sup>234</sup> DSCA OGC Memo, *supra* note 236.

<sup>235</sup> This, in essence, is a command decision of how the DoD spends its resources. From the Congressional level, the apparent policy concern is not limited OHDACA money, but the potential shifting of USAFRICOM's mission from countering transnational threats to a humanitarian mission. *See, e.g.*, Letter from U.S. House of Representatives Committee on Armed Services to The Honorable Michael McCord, Under Secretary of Defense, Comptroller (Sept. 19, 2014) [hereinafter Committee Letter to USD, Comptroller].

<sup>236</sup> DSCA OGC Memo, *supra* note 238.

<sup>237</sup> Humanitarian and civic assistance (HCA) is also funded via O&M. *See* Department of Defense Appropriations Act, 2014, H.R. 2397, 113th Cong. § 8011 (2013-2014).

<sup>238</sup> 10 U.S.C. § 401(a)(1) (2016).

<sup>239</sup> *See* Memorandum from Assistance Sec'y of Defense, to Commander, USAFRICOM, subject: Request for Delegation of Authority to Transfer Foreign Excess Personal Property to the Government of Liberia (28 Jan. 2015) [hereinafter SecDef FERP Delegation Memo].

<sup>240</sup> 40 U.S.C. §701(b)(2)(B) (2006)

<sup>241</sup> *See* SecDef FERP Delegation Memo, *supra* note 251; Memorandum from Assistance Sec'y of Defense to Commander, USAFRICOM, subject:

*e. A Little Help Here: Recommendations for Defense Security Cooperation Agency*

As of the writing of this article, total DoD funding for the global Ebola response is expected to exceed \$1 billion.<sup>242</sup> Humanitarian assistance missions will continue to affect the DoD's operations in all theaters. The dearth of guidance on emergent OHDACA-funded humanitarian assistance missions makes effective communication paramount to mission success. The Defense Security Cooperation Agency, along with the other agencies and units involved, must keep their respective personnel informed of new guidance, or risk confusion and inconsistency in applying OHDACA policy.<sup>243</sup> For example, the JFC-UA OSJA received the Defense Security Cooperation Agency opinion on Reserve pay only after publishing its own analysis with a different conclusion.<sup>244</sup> The Defense Security Cooperation Agency opinion, which provides the controlling law and precedent for this particular subject, was published only via email. While the original email transmission was a necessary byproduct of a need to have information communicated quickly to select individuals, the information is still not publicly available.<sup>245</sup>

In light of the inevitability of disasters and the commonalities between the DoD's responses to such disaster, the authors recommend the Defense Security Cooperation Agency amend the SAMM to include a basic framework for OUA-type missions within which commands can operate.

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Request for Delegation of Authority to Transfer Foreign Excess Personal Property to the Government of Senegal (26 Feb. 2015). The Secretary of Defense may make available for humanitarian relief purposes any nonlethal excess supplies of the Department of Defense. 10 U.S.C. §2557 (2006). An executive agency may donate medical materials or supplies. 10 U.S.C. §703 (2006).

<sup>242</sup> See Committee Letter to USD, Comptroller, *supra* note 247.

<sup>243</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-359, HUMANITARIAN ASSISTANCE AND DEVELOPMENT ASSISTANCE, PROJECT EVALUATIONS AND BETTER INFORMATION SHARING NEEDED TO MANAGE THE MILITARY'S EFFORTS 28 (2012) ("Until DoD issues an instruction and updated guidance for the ODHACA humanitarian assistance program, there could be continued confusion or inconsistency in how the combatant commands implement the program confusion or inconsistency in how the combatant commands implement the program.").

<sup>244</sup> The Joint Forces Command OSJA sent its opinion on October 2, 2014. The DSCA memo was signed October 1, 2014, and it was published to JFC on October 2, 2014. E-mail from MAJ Marvin McBurrows, Operational Law Attorney, USAFRICOM to CPT Joshua Dickinson, subject DSCA OGC Memo on use of OHDACA for Reserve Pay (Oct. 2, 2014, 12:45 EST) (on file with authors).

<sup>245</sup> It has not been incorporated into the SAMM.

<sup>246</sup> Policy Memorandum from Under Sec'y of Defense (USD) for Personnel and Readiness (P&R), subject: Pre-Deployment, and Post-Deployment Training, Screening, and Monitoring Guidance for the Department of Defense Personnel Deployed to Ebola Outbreak Areas (Oct. 10, 2014). [hereinafter DoD Guidance for Personnel Deployed to Ebola Outbreak Areas] (on file with authors). When this initial guidance was issued it was applicable to both Service members and civilian employees. However, it did not address contractor employees.

Ideally the amended guidance would cover the common issues commands are likely to face in humanitarian assistance missions (e.g., basic "purpose" issues, FPKs, construction thresholds, pay and allowances, etc.). The SAMM must remain flexible, but a basic framework will commanders on the ground ability to find pragmatic solutions in a timely manner.

D. "21-day Controlled Monitoring"—An Unexpected Redeployment

On October 10, 2014, the Under Secretary of Defense for Personnel and Readiness issued "Pre-Deployment, Deployment, and Post-Deployment" guidance for DoD personnel deployed to Ebola outbreak areas.<sup>246</sup> The guidance required health monitoring both during deployment and twenty-one days post deployment.<sup>247</sup> Additionally, the guidance mandated a twenty-one day "quarantine at a DoD facility for those individuals re-deploying with a possible risk of exposure."<sup>248</sup> However, use of the term "quarantined" became problematic. The principal federal agency responsible for declaring a national public health emergency to include imposing a "quarantine" is the Secretary of the Department of Health and Human Services (DHHS).<sup>249</sup> Although there were a small number of events in the United States involving EVD infected individuals in October 2014, DHHS did not declare a public health emergency in the United States.<sup>250</sup> Instead, DHHS through its implementing

<sup>247</sup> *Id.* (paragraph titled "Deployment Monitoring").

<sup>248</sup> *Id.* (paragraph titled "Post-Deployment Monitoring" subparagraph 2 titled "Regulated movement secondary to exposure risk").

<sup>249</sup> The federal government derives its authority for isolation and quarantine from the Commerce Clause of the U.S. Constitution. U.S. CONST. art.1, §9, cl. 3. The U.S. Secretary of Health and Human Services is authorized to take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between states. Public Health Service Act, 42 U.S.C. § 264 (2016). The CDC is authorized to detain, isolate, quarantine, or allow conditional release of individuals, for the purpose of preventing the introduction, transmission, and spread of the communicable diseases. 42 C.F.R. § 70.6 (2012). Neither the Public Health Service Act nor the Code of Federal Regulations provides for delegation of this quarantine authority to the DoD.

<sup>250</sup> On October 8, 2014, Thomas E Duncan, who had traveled from Liberia to Texas to get married, died of the EVD in Dallas. Mark Berman & DeNeen L. Brown, *Thomas Duncan, the Texas Ebola Patient, has Died*, WASH. POST (Oct. 8, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/10/08/texas-ebola-patient-has-died-from-ebola/>. Two nurses, Nina Pham and Amber Vinson, who treated Duncan, were also infected. They were treated in Bethesda and Atlanta, respectively, and survived. Prior to being diagnosed with the EVD, Amber Vinson flew on a commercial aircraft from Texas to Ohio and back following guidance from the CDC—despite a temperature of 99.5 Fahrenheit (F) which placed her below the threshold of 100.4 F. Even though she had treated an EVD infected patient because of the precautions (wear of protective suit) she had taken, she fell into the category of "uncertain risk." Per the existing CDC guidance she was being "actively monitored" which was the national policy for all travelers returning from Ebola infected areas who had contact with Ebola patients. The logic for the CDC policy was that an individual is not believed to be contagious until symptoms appear. *Ebola Nurse Nina Pham Goes from Good to Fair After Trip to NIH*, ABC NEWS (Oct. 17, 2014), <http://abcnews.go.com/Health/ebola-nurse-nina-pham-fair-condition-trip-dallas/story?id=26266763>. In another U.S. incident in late October 2014,

agency, the Center for Disease Control (CDC) issued Interim Guidance advocating “active monitoring.”<sup>251</sup> Nevertheless, “a military commander, in consultation with their Public Health Emergency Officer, may declare a DoD public health emergency and implement relevant emergency medical powers [to include quarantine and isolation] to achieve the greatest public health benefit while maintaining operational effectiveness.”<sup>252</sup> However, USARAF personnel did not re-deploy to the United States, but returned to Italy. Therefore, USARAF Chief of Staff and the U.S. Army Garrison Vicenza Commander provided notification to the Italian Base Commander and local host nation authorities.<sup>253</sup> Furthermore, the U.S. Air Attaché and the U.S. Sending State Office (USSSO) in Rome, in consultation with USEUCOM, coordinated directly with the Ministry of Defense, in particular the Italian Air Force (ITAF), and the Ministry of Health, in order to obtain authorization and implement a procedure for U.S. military aircraft and U.S. DoD personnel to enter the country following their deployment to Liberia.

While U.S. authorities were coordinating with the Italian authorities, the Joint Staff re-examined the post-deployment procedures set forth by DoD. As a result, in a memorandum to the Secretary of Defense, dated October 28, 2014, the Chairman of the Joint Chiefs of Staff (CJCS) advised that the Joint Chiefs of Staff had “decided to implement a program of 21 days of supervised monitoring in a controlled environment following deployment” and requested that SECDEF “confirm this approach.”<sup>254</sup> The Joint Chiefs of Staff approach was

intended to address the safety of the military personnel responding to the Ebola crisis to ensure they did not introduce the infection into the U.S., and allay any concerns of military families and local communities.<sup>255</sup> Nonetheless, the CJCS emphasized that such the twenty-one day controlled monitoring could not be legally mandated for DoD civilians or contractors.<sup>256</sup> On October 29, 2014, the Secretary of Defense confirmed the “more conservative” approach.<sup>257</sup>

The subsequent change in policy raised concerns among Italian authorities that U.S. personnel were being “quarantined” in Vicenza because they had contracted the EVD. Although the local Italian authorities, including the Mayor of Vicenza, favored the imposition of such a measure, the Italian press and others highlighted that this approach was inconsistent with existing Italian national health protocols for persons returning to Italy from the EVD-infected areas, and it was inconsistent with the interim guidance issued by the U.S. CDC for individuals returning to the United States from the EVD infected areas.<sup>258</sup> Moreover, the hospital in Vicenza, was originally willing and prepared to treat an infected patient. However, the national Italian health authorities changed this protocol directing that any infected DoD member would be sent to the United States for treatment.<sup>259</sup> Ironically, when one of the U.S. military personnel in “controlled monitoring” required treatment for a possible heart attack, the hospital’s director followed all nationally directed notification procedures and infectious disease testing and ultimately conducted the necessary surgical procedure.<sup>260</sup>

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Kaci Hickox, a nurse who had worked with Ebola patients in Sierra Leone, was quarantined by the State of New Jersey upon her arrival at Newark Airport. Despite having an initial temperature reading of 101 F and then a subsequent temperature reading of 98.6 F and a negative test for the EVD, she was quarantined for four days. (Subsequently, New York, Connecticut, and Illinois, all, for a period of time, implemented mandatory quarantine which they are authorized to do, i.e., implement measures which are stricter than what the CDC has recommended.) Anemona Hartocollis & Emma G. Fitzsimmons, *Tested Negative for Ebola, Nurse Criticizes Her Quarantine*, N.Y. TIMES (Oct. 25, 2014), [http://www.nytimes.com/2014/10/26/nyregion/nurse-in-newark-tests-negative-for-ebola.html?\\_r=0](http://www.nytimes.com/2014/10/26/nyregion/nurse-in-newark-tests-negative-for-ebola.html?_r=0).

<sup>251</sup> CENTER FOR DISEASE CONTROL INTERIM U.S. GUIDANCE FOR MONITORING AND MOVEMENT OF PERSONS WITH POTENTIAL EBOLA VIRUS EXPOSURE, Oct. 27, 2014, <http://www.cdc.gov/vhf/ebola/exposure/monitoring-and-movement-of-persons-with-exposure.html> [hereinafter CDC guidance].

<sup>252</sup> U.S. DEP’T OF DEF., INST. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT WITHIN THE DEPARTMENT OF DEFENSE para. 4.h.(3) (5 Mar. 2010) (C2, 2 Oct 2013) [hereinafter DoDI 6200.03]. Such authority should be exercised in close coordination with the Department of Health and Human Services (DHHS), the CDC, host nation emergency management planners, and other public health authorities. *Id.* encl. 3 para 2.a.

<sup>253</sup> Technical Arrangement between the Ministry of Defense of the Italian Republic and the Department of Defense of the United States of America Regarding the Installations/Infrastructure in Use by the U.S. Forces in Vicenza, Italy, April 16, 2008 [hereinafter Vicenza TA], the location of the “Controlled Monitoring Area” (CMA) is “an installation placed under Italian Command.” *Id.* para. VI. Command subpara 1. Caserma Del Din. “The U.S. Commander has full military command over U.S. personnel equipment, and operations. He will notify in advance the Italian Commander of all significant U.S. activities, with specific reference to the operational and training activity, to the movements of materiel, weapons, and civilian/military personnel, and to any events/incidents that should

occur.” *Id.* para. vi-3. The arrangement further elaborates on the obligations of the Italian and U.S. commander respectively and jointly, highlighting the notification requirement. *Id.* annex 5 (Command Relationships). Annex 5 states that “the term ‘significant’ is intended to exclude all routine activities.” *Id.* annex 5 para. 2.b. Arguably, the establishment of a CMA was not routine; therefore, the U.S. Commander notified the Italian Base Commander.

<sup>254</sup> Rear Admiral John Kirby, Press Sec’y, Dep’t of Defense, Press Briefing at the Pentagon Briefing Room (Oct. 31, 2014), <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/606956> [hereinafter Adm. Kirby press briefing] (referring to Memorandum from the Chairman of the Joint Chief of Staff to the Sec’y of Def., subject: 21-Day Controlled Area Monitoring by the Services (Oct. 28, 2014) [Hereinafter CJCS Info Memo] (on file with authors)).

<sup>255</sup> CJCS Info Memo, *supra* note 249. The CJCS noted that the majority of military personnel deployed to Ebola infected areas were “younger, not volunteers, and not trained medical personnel” inferring that given these facts precautionary measures would be prudent. *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> Adm. Kirby press briefing, referring to Memorandum from Secretary of Defense to the Service Secretaries, CJCS, and Joint Staff, subject: 21-Day Controlled Monitoring by the Services (Oct. 29, 2014) (on file with author).

<sup>258</sup> *Id.*

<sup>259</sup> Piero Erle, *Zaia: Quarantine? Send them home*, IL GIORNALE DI VICENZA, Oct. 31, 2014 at 22; see also Franco Pepe, *In case of contagion US Soldiers will be transferred to the United States*, IL GIORNALE DI VICENZA, Oct. 31, 2014, at 22.

<sup>260</sup> Franco Pepe, *In quarantine for Ebola, ends up in cardiology department*, IL GIORNALE DI VICENZA, Nov. 5, 2014 at 14.

As one member of the Italian press concluded, perhaps this situation points to “the uselessness of the quarantine at Del Din.”<sup>261</sup>

Medical personnel from USARAF and the Air Attaché at the U.S. Embassy in Rome, in coordination with the attorneys at the USSSO, coordinated with the Italian authorities to establish the procedure U.S. personnel redeploying from Liberia would follow upon entering Italy.<sup>262</sup> Such aircraft exercising the right of transit passage may not enter national airspace or land in the sovereign territory of another nation without its consent.<sup>263</sup> This consent can be predicated on compliance with certain host nation health reporting requirements. In the instant case, prior to departing Liberia the U.S. military medical personnel had to complete and sign an Italian declaration indicating the health status of each individual—whether symptomatic or asymptomatic.<sup>264</sup> Additionally, at the time of aircraft’s departure from Liberia, the U.S. military aircrew was required to notify the Italian Air Force (ITAF) telephonically that all on board the U.S. military aircraft were asymptomatic. Once the required notification was made, the U.S. military aircraft was then given final clearance to route to Practica di Mare, a military airfield outside Rome where the U.S. military aircraft landed and parked at the far end of the tarmac.

The Italian authorities initially insisted on boarding the U.S. military aircraft at Practica di Mare, to conduct a medical assessment of the returning U.S. personnel rather than conducting it on Italian soil. However, military aircraft are “state aircraft” and as such enjoy sovereign immunity from foreign search and inspection.<sup>265</sup> As a compromise, the U.S. military aircraft commander gave consent to the Italian medical authorities to board along with a U.S. representative, a U.S. Navy doctor. Once on board they conducted a joint medical assessment, which entailed conducting a temperature check of each individual on board and completion of the medical declaration by the Italian and U.S. medical authorities. The U.S. military aircraft then resumed its flight to Aviano Air Base from where the redeploying individuals

were transported by bus to the “controlled monitoring area” on Del Din in Vicenza.

## V. Conclusion

On October 25, 2014, the USARAF Commander relinquished command of JFC-UA to the 101st Airborne Division Commander.<sup>266</sup> At that time, all eighteen Ebola treatment unit construction projects supported by the U.S. government were already in progress and one was completed. The 101st Airborne Operations Center was operational and the LSA for the JFC was also operational. One hundred seventy-five people had completed the classroom and simulated Ebola treatment unit training for health care workers.<sup>267</sup> Two mobile labs to test for the EVD were operating and a twenty-five bed medical unit exclusively for health care workers was completed.<sup>268</sup> The JFC received 51 strategic lift flights of over 1,500 short tons within the joint operations area, while over 750 additional twenty-foot equivalents were en route by sea.<sup>269</sup> Through the whole-of-government approach, Liberia reopened its borders on February 22, 2015, and only had one new confirmed case of the EVD between February 19, 2015, and March 20, 2015.<sup>270</sup> Collaborative and creative legal problem solving and flexible use of international agreements and OHDACA were essential to the early success of the mission and demonstrate the critical role a well-integrated legal team is to the Commander.

<sup>261</sup> Marino Smiderle, *The unforeseen guarantee of security*, IL GIORNALE DI VICENZA, Nov. 5, 2014, at 16.

<sup>262</sup> E-mail from Lieutenant Colonel Gibson, U.S. Sending State Office in Rome to Colonel Arnold, subject: SOFA or other agreements on quarantines (Oct. 8, 2014) (detailing current guidelines the Italian Air Force shared with him as to the procedures aircraft returning from Ebola infected areas (Guinea, Nigeria, Sierra Leone, and Democratic Republic of the Congo as designated by the Italian authorities) must follow) (on file with authors).

<sup>263</sup> Convention on International Civil Aviation, art. 1, art. 3.c., Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295, [hereinafter Chicago Convention].

<sup>264</sup> Bilingual Declaration, Public Health Passenger Locator Card.

<sup>265</sup> Chicago Convention, *supra* note 263, art. 3.b. Restatement (Third) of the Foreign Relations Law of the United States, ch. 5 at 390 (ALI 1986)

[hereinafter Restatement Foreign Relations]. *See also* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).

<sup>266</sup> *Operation United Assistance/Facts*, UNITED STATES AFRICA COMMAND, <http://www.africom.mil/operation-united-assistance/facts> (last visited May 15, 2016).

<sup>267</sup> *West Africa – Ebola Outbreak, Fact Sheet #4, Fiscal Year 2015*, U.S. AGENCY FOR INT’L DEV. (Oct. 22, 2014), <https://www.usaid.gov/ebola/fy15/fs04>.

<sup>268</sup> CPT Ross M. Hertlein, *Operation UNITED ASSISTANCE: Joint and Strategic Partners Enabling Success* (2015) (unpublished information paper) (on file with authors).

<sup>269</sup> *Id.*

<sup>270</sup> *West Africa – Ebola Outbreak, Fact Sheet #26, Fiscal Year 2015*, U.S. AGENCY FOR INT’L DEV. (Mar. 25, 2015), <https://www.usaid.gov/ebola/fy15/fs26>.

## Equipped for Combat: Jumping the Gun on Reporting under Section 4(a)(2) of the War Powers Resolution

Colonel Jonathan Howard\*

Since passage of the War Powers Resolution in 1973,<sup>1</sup> each President, despite lingering questions about its constitutionality,<sup>2</sup> has submitted reports to Congress consistent<sup>3</sup> with the legislation. While the resolution does not require the Executive Branch to specify the basis for the report,<sup>4</sup> the circumstances surrounding a deployment normally demonstrate if it was made under section 4(a)(1),<sup>5</sup> involving introduction of forces into actual or imminent hostilities,<sup>6</sup> or under section 4(a)(2), the provision concerning introduction of forces into the territory of another state while “equipped for combat.”<sup>7</sup>

Those seeking to safeguard Congress’s involvement on decisions of war stand on firmer ground when requiring the President to report deployments involving hostilities, imminent hostilities, or, at least, the strong potential for hostilities. Yet, Congress’s authority “to declare War,” the constitutional justification for the War Powers Resolution, has little relevance to the President’s decision to deploy forces into foreign territories, where U.S. forces do not intend or are unlikely to encounter hostilities. Successive administrations, while recognizing the questionable basis for applying the resolution to situations not involving hostilities or potential hostilities, have opted not to press the issue and liberally report in order “to keep Congress fully informed.”<sup>8</sup> While

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<sup>1</sup> War Powers Resolution, 50 U.S.C. § 1541 *et seq.* (1994).

<sup>2</sup> Much has been written on the constitutionality of the resolution, particularly on the necessity to obtain congressional approval within sixty days for deployments involving hostilities. On the one hand, Article I, Section 8 of the U.S. Constitution gives Congress the power to declare war, raise and support armies (to include a militia), to provide and maintain a Navy and to make rules to govern and regulate these forces. U.S. CONST. art. II, § 8. On the other hand, Article II, Section 2 states the President is the “Commander in Chief of the Army and Navy of the United States and of the Militia of the several states, when called into the actual service of the United States.” U.S. CONST. art. II, § 2. This paper does not intend to rehash these constitutional arguments, but seeks to examine the practice of reporting solely on the basis of the weapons carried by U.S. forces.

<sup>3</sup> From the very start, the legislation was met with disagreement by the Executive Branch, who considered the resolution an unconstitutional infringement on the President’s war powers. Whenever a report is filed with Congress, the common practice of recent administrations state is to state that the report is being filed “consistent” with the War Powers Resolution, so as to make clear that the administration does not believe the resolution is binding law. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 184 (2007).

<sup>4</sup> *Id.* at 183. Former National Security Council Legal Advisor James E. Baker stated “As a matter of longstanding practice, the executive branch does not indicate under what section a report is filed. This reflects the factual difficulty, and therefore the legal difficulty, that executive actors have in distinguishing among ‘imminent hostilities,’ ‘ongoing hostilities,’ and situations where forces are ‘equipped for combat,’ particularly where it is hoped that the latter will deter the former.” *Id.* at 182–83. Whether the administration’s report is being filed solely because forces are equipped for combat or because they are equipped for combat and being introduced into actual or imminent hostilities is not always clear. For instance, a surveillance aircraft could be equipped for combat (e.g., have a crew-served weapon for self-defense purposes) in order to provide non-lethal intelligence support to an allied nation who is directly involved in counterterrorism operations. It is difficult to determine whether the report is being filed under a theory that the United States is participating in the hostilities by virtue of the intelligence support to another nation involved in ongoing hostilities or merely because the forces are equipped for combat. Section 8(c) defines the term “introduction of United States Armed Forces” as “the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such

military forces are engaged, or there exists and imminent threat that such forces will become engaged, in hostilities.” 50 U.S.C. § 1547.

<sup>5</sup> 50 U.S.C. § 1543(a)(1).

<sup>6</sup> In his most recent unclassified, consolidated War Powers Resolution report, submitted in June 2016, the President identified fifteen geographic areas where the United States deployed forces to conduct military operations. Letter from the President of the United States to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution>. A month later, the President informed Congress of the deployment of forces “equipped for combat” “to support the security of U.S. personnel” at the embassy in South Sudan. Letter from the President of the United States to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, July 13, 2016, <https://www.whitehouse.gov/the-press-office/2016/07/13/letter-president-war-powers-resolution>. Of the operations in the consolidated report, eleven squarely meet the first prong of the reporting requirement because they involve situations where U.S. forces were directly involved in actual or imminent hostilities. These can be further divided into deployments in support of ongoing combat operations, to include direct action operations (Afghanistan, Iraq, Syria, Somalia, Yemen, and Libya); staging areas for combat operations (Turkey and Djibouti); and countries, of varying degrees of stability, where U.S. forces were deployed to deter hostilities (Kosovo, Egypt, and Jordan). While the Cuba report was most likely made under the theory that the deployment of troops to support detention operation is an integral part of ongoing hostilities, authorized by the 2001 Authorization to Use Military Force, the remaining three either involve Intelligence, Surveillance, and Reconnaissance (Niger and Cameroon) or Advice and Assistance (counter-LRA) missions. Professor Robert Chesney explains that the Executive Branch has interpreted hostilities to mean “sustained hostilities,” where U.S. forces are “actively engaged in exchanges of fire with opposing units,” not “episodic,” “sporadic,” or “intermittent military engagements.” Robert M. Chesney, *White House Clarifies Position on Libya and the WPR: US Forces Not Engaged in “Hostilities,”* LAWFARE BLOG (June 15, 2011), <https://www.lawfareblog.com/white-house-clarifies-position-libya-and-wpr-us-forces-not-engaged-hostilities>.

<sup>7</sup> 50 U.S.C. § 1543(a)(2). Significantly, the 60-day clock for obtaining congressional authorization for military deployments only applies to situations involving actual or imminent hostilities and would not be triggered by merely being equipped for combat. *Id.* § 1544.

<sup>8</sup> Robert F. Turner, *The War Powers Resolution: An Unnecessary Unconstitutional Source of “Friendly Fire” in the War Against International Terrorism*, THE FED. SOCIETY FOR LAW & PUB. POL. STUDIES (Feb. 15, 2005), <http://www.fed-soc.org/publications/detail/the-war-powers->

some democratic benefit may be achieved by this practice, valid policy reasons exist for why congressional notification should be limited, particularly when outside the scope of Congress's purview. Not only does unnecessary reporting erode presidential authority and create a precedent for subsequent administrations, but it also may create a risk to operational security, while unduly politicizing matters that should be confined to the chain of command.<sup>9</sup>

This paper examines how various administrations have decided to notify (or not notify) Congress of military deployments under section 4(a)(2) of the War Powers Resolution solely based on the type of arms carried by U.S. forces, and not on the potential for the forces to be involved in hostilities. This paper discusses what it means to be "equipped for combat" in the context of section 4(a)(2) of the War Powers Resolution by looking at two deployments where the weapons carried played the determining factor on whether to make a report. The paper then discusses the wisdom of rigidly applying section 4(a)(2) based solely on the presence of certain weapons and argues that the Executive Branch should review the entirety of the circumstances surrounding the deployment, not just the weapons carried, to include the operational mission, purpose for the weapons (e.g., offensive versus defensive), potential for forces to be engaged in hostilities, and rules of engagement.

Section 4 of the War Powers Resolution requires the President to report to Congress within 48 hours, absent a congressional declaration of war, any time U.S. forces are introduced:

- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
- (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a

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resolution-an-unnecessary-unconstitutional-source-of-friendly-fire-in-the-war-against-international-terrorism.

<sup>9</sup> The operational chain of command runs from the President to the Secretary of Defense (through the Chairman of the Joint Chiefs of Staff) to the Combatant Commanders. 10 USC § 162(b) (1996). See Frederick S. Berry, *The Impact of the 1973 War Powers Resolution on the Military* (April 7, 1989) (unpublished study project, U.S. Army War College) (on file with the U.S. Army War College Library). The author illustrates the impact that the War Powers Resolution played in the security measures taken by the Marines in Lebanon, based on a concern that heightened security would indicate to Congress that the Marines were being introduced into a situation of hostilities or imminent hostilities.

<sup>10</sup> 50 U.S.C. § 1543(a).

<sup>11</sup> *Id.* at § 1544(b).

foreign nation . . . .<sup>10</sup>

Significantly, the 60-day clock for obtaining congressional authorization for military deployments under the resolution only applies to section 4(a)(1), which involves situations of actual or imminent hostilities. A report under section 4(a)(2) would not involve circumstances that would trigger the 60-day clock.<sup>11</sup>

The resolution itself neither explains nor defines the term "equipped for combat," but states the resolution, in its entirety, is intended to apply to operational deployments of U.S. forces into "hostilities, or into situations where imminent involvement of hostilities is clearly indicated by the circumstances . . . ." <sup>12</sup> Since its passage, neither the Executive or Legislative Branches have provided any official guidance or clarification on what it means to be combat-equipped, but two historical examples provide insight into how the Executive Branch's application of section 4(a)(2) has evolved.

The first public debate over section 4(a)(2) surrounded the deployment of U.S. forces to El Salvador in the early 1980s, part of the United States strategy to prevent the spread of communism in Central America. In November 1979, President Carter sent the first military advisors to El Salvador to support the Salvadoran government in their ongoing civil war.<sup>13</sup> By March 1981, the Reagan Administration had agreed to a 55-person limit on the number of military advisors that could be deployed to El Salvador.<sup>14</sup> In explaining the role of the advisors, President Reagan stated, "We're sending and have sent teams down there to train. They do not accompany them into combat. They train recruits in the garrison area."<sup>15</sup> Additionally, the State Department made clear that the forces in El Salvador were armed with "personal sidearms, which they [were] only authorized to use in their own defense or the defense of other Americans," and were not "equipped for combat" for purposes of section 4(a)(2) of the War Powers Resolution.<sup>16</sup>

The Reagan Administration concluded that the War Powers Resolution reporting requirements were not triggered in El Salvador because U.S. forces were (1) not involved in hostilities or imminent hostilities, i.e., only training foreign forces in areas where they would not be involved in hostilities

<sup>12</sup> *Id.* at § 1541(a).

<sup>13</sup> Paul P. Cale, *The United States Military Advisory Group in El Salvador, 1979-1992*, 13 SMALL WARS JOURNAL 14-16 (1996), <http://smallwarsjournal.com/documents/cale.pdf>.

<sup>14</sup> *Id.*

<sup>15</sup> *Reagan Orders Inquiry into Report U.S. Aides in Salvador Had Rifles*, N.Y. TIMES, Feb. 13, 1982, <http://www.nytimes.com/1982/02/13/world/reagan-orders-inquiry-into-report-us-aides-in-salvador-had-rifles.html> [hereinafter *Reagan Inquiry*]. See also Richard Halloran, *Envoy to El Salvador Urges U.S. to Allow Advisor to Carry Rifles*, N.Y. TIMES, Feb. 20, 1982.

<sup>16</sup> 127 CONG. REC. E901 (daily ed. March 5, 1981) (statement of Rep. Broomfield).

or potential hostilities; and (2) not combat-equipped because they were only allowed to carry personal sidearms. While some in Congress contended from the outset that the chaotic situation in El Salvador required the Administration to make a report, these protests gained more traction when five U.S. military advisors were videotaped, in February 1982, carrying M-16 rifles in an “insecure” area of El Salvador.<sup>17</sup> The Administration conceded that the Soldiers had violated the sidearm policy and would be disciplined, but explained that the M16s were for purely defensive purposes for U.S. forces training Salvadorans to build bridges destroyed by the guerillas.<sup>18</sup> The incident sparked several reactions. Senator Paul Tsongas argued that if the M-16 was considered a combat weapon, the Administration would need to consider the implications under the War Powers Resolution.<sup>19</sup> Secretary of Defense Caspar Weinberger defended the decision to carry M16s, “Trainers down there have to have some kind of personal protection. It is essential in that kind of a situation.”<sup>20</sup> Despite a request by the U.S. Ambassador to El Salvador to permit advisors to carry rifles for defensive purposes,<sup>21</sup> the Reagan Administration stood by its policy of limiting the military advisors to the use of sidearms<sup>22</sup> and maintained that the situation did not warrant congressional notification under the War Powers Resolution. The reluctance to allow U.S. forces to carry M16s for purely defensive purposes can be attributed to two principle concerns: (1) armaments greater than a personal sidearm would be considered “equipped for combat” under section 4(a)(2); and (2) the mission would be limited to training in areas not involving hostilities.

<sup>17</sup> *Reagan Inquiry*, *supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Halloran, *supra* note 15.

<sup>22</sup> *United States Policy in the Western Hemisphere: Hearings on S.J. Res. 144, S. 2179 & amend 1334, S. 2243, S. 2370 Before the S. Comm on Foreign Affairs, 97th Cong., 2d Sess. 99 (1982)* (State Department’s responses to questions submitted for the record following testimony of Stephen Bosworth, Deputy Assistant Secretary for Inter-American Affairs).

<sup>23</sup> Barbara Starr, *Troops to Africa: Not Your Typical Advise and Assist Mission*, CNN.COM BLOGS, (Oct. 18, 2001) <http://security.blogs.cnn.com/2011/10/18/troops-to-africa-not-your-typical-advise-and-assist-mission/>.

<sup>24</sup> *Id.*

<sup>25</sup> Jack Goldsmith, *The Uganda Intervention and the WPR 60-Day Clock*, LAWFARE BLOG, (Dec. 14, 2011) <https://lawfareblog.com/uganda-intervention-and-wpr-60-day-clock> (quoting testimony of Mr. Alexander Vershbow).

<sup>26</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov. 2010) (as amended thru 15 Feb. 2016).

<sup>27</sup> Starr, *supra* note 23.

<sup>28</sup> BAKER, *supra* note 3, at 362 n.20.

Thirty years later, the deployment of U.S. forces to assist African regional forces in countering the Lord’s Resistance Army demonstrates how the Executive Branch’s application of section 4(a)(2) had matured. In October 2011, President Obama informed Congress of his decision to send U.S. forces to Uganda to advise and assist in the mission to counter the Lord’s Resistance Army (LRA).<sup>23</sup> At the time of the report, defense officials stated that the report was required due to the introduction of forces into a country while “equipped for combat,” not because of actual or imminent hostilities.<sup>24</sup> Testifying before Congress, the Assistant Secretary of Defense for International Security Affairs Alexander Vershbow stated, the President submitted the report “based on one simple fact: that the nature of the weapons that our forces are carrying for self-defense . . . make those forces considered to be equipped for combat . . . .”<sup>25</sup> Another Department of Defense (DoD) representative said that the presence of “crew-served” weapons<sup>26</sup> with the forces triggered the reporting requirement, despite the fact that they would only be used if “the need to fight arises.”<sup>27</sup> This interpretation of section 4(a)(2) is not new. In 2007, former National Security Council Legal Advisor James E. Baker wrote, “[f]or some time the executive branch applied an informal rule of thumb that ‘equipped for combat’ meant armed with crew-served weapons.”<sup>28</sup> Taken together, the evidence points to an ongoing practice of reporting deployments of U.S. forces, in situations not involving hostilities or imminent hostilities, purely based on the presence of crew-served weapons.<sup>29</sup>

On the one hand, the Executive Branch’s more recent approach to section 4(a)(2) makes for a fairly easy

<sup>29</sup> The International Committee of the Red Cross (ICRC), in its recently published Commentary on the First Geneva Convention, took a similar “crew-served weapon” approach to the issue of weaponry carried by medical personnel in discriminating between offensive and defensive weapons. In concluding that medical personnel, responsible for protecting a medical unit or establishment, may be armed with “light individual weapons” or “individual portable weapons, such as pistols or rifles” without losing their protected status, the ICRC states:

[I]t must always be borne in mind that the use of light individual weapons by medical personnel must not result in the commission of an act harmful to the enemy. The scope of defence would not cover cases of enemy military advances aimed at taking control over the area where the medical establishments or units are located, nor would the use of force to prevent the capture of their unit by the enemy be permitted. . . . Similar considerations apply to mounting weaponry, for instance on mobile military medical units. On this basis, heavy weapons, such as ‘crew-served’ machine guns (requiring a team of at least two people to operate them), could not be mounted on a mobile military medical unit without that unit losing its specific protection [footnotes omitted].

International Committee of the Red Cross, *Commentary of 2016 on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ¶¶ 1867-68, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>. The ICRC’s rationale is grounded on three primary concerns: (1) that the weapons only be those required for strictly defensive purposes; (2) that the weapons not give the perception that the medical unit is armed for offensive purposes; and (3) that the weapons only be employed against unlawful attacks. *Id.* ¶ 1864. The ICRC further clarified that “carrying weapons which are portable by one individual yet which go beyond the purpose of self-defence, such as man-portable missile or an anti-tank missile, would

determination of when notification is required in situations not involving hostilities—the presence of crew-served weapons. On the other hand, the position that forces are combat-equipped based solely on the armaments carried, without consideration of any other factors, results in unnecessary reporting<sup>30</sup> and erosion of presidential authority over foreign affairs.<sup>31</sup> It also risks political considerations, at any level of command, driving the decision on the type of weapons carried by U.S. for defensive purposes, a framework that invites disaster.

Take the following hypothetical. If U.S. forces are conducting an advice and assistance mission with local forces in areas not involving hostilities, and mission commanders would like to introduce an aircraft or ground vehicle, equipped with a crew-served weapon, into the territory of a foreign state (e.g., for the purpose of transportation of U.S. or foreign forces; assistance in intelligence, surveillance, or reconnaissance; logistics support; or casualty evacuation) then the current policy would mandate a report, regardless of the purpose of the equipment. The vehicle may be armed in such a manner because it is its normal configuration or U.S. military commanders are simply taking routine force protection measures to minimize risk and promote safety in the event of unforeseen circumstances (likely in a military culture that seeks to minimize risk and prepare for all eventualities). When DoD informs the administration that introduction of the vehicle would trigger a report, White House policy advisors will either (1) recommend the President make a report, fraught with a number of political and national security considerations; (2) ask that the crew-served weapon be removed, placing political pressure on a tactical commander's force protection decision; or (3) suggest that the deployment be scuttled. Requiring a report, purely based on the presence of a crew-served weapon, makes a routine force protection decision in support of a foreign assistance mission, conducted under the President's Article II authority, into a potential political hot potato. Understandably, the operations may occur in regions with varying degrees of law and order, but the Executive Branch should not limit its examination to purely the armaments

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lead to a loss of specific protection. *Id.* ¶ 1865. It also stated that personnel would lose their protection if the weapons “cannot easily be transported by an individual and which have to be operated by several persons . . . .” *Id.* ¶ 1868.

While informative, the comparison of the Department of Defense's approach to how the ICRC's characterizes defensive versus offensive weapons for the purpose of Geneva Convention protections actually demonstrates the shortcomings in the Department of Defense's, and, by extension, the Administration's current approach. The ICRC is concerned with the protection of medical personnel and units during a time of war, and seeks rules that will increase respect for international humanitarian law in the heat of combat. It makes sense that the ICRC would believe that allowing a medical unit to carry heavy weapons would be inconsistent with their function, create confusion in targeting, and erode justification for protection from attack. This rationale does not readily translate to peacetime situations outside the context of an ongoing armed conflict.

<sup>30</sup> In this instance, the term “hostilities” is used in its broadest sense, i.e., exposing U.S. forces to the likelihood of hostile fire, but not in the context of section 4(a)(1), which would trigger the sixty-day reporting requirement under section 5(b) of the resolution. See *supra* note 6 and accompanying

carried by U.S. forces; rather it should examine the totality of the circumstances surrounding the deployment with the most important factors being the likelihood that the forces will encounter hostilities, the nature of the mission, and whether the weapons are carried for purely defensive purposes.<sup>32</sup>

The “equipped for combat” language in section 4(a)(2) should be read in conjunction with both the situations covered in section 4(a)(1) and the overall stated purpose of the legislation.<sup>33</sup> Read together, the sections form a spectrum of hostilities, with deployments under section 4(a)(1) involving situations where troops will most likely be exposed to hostilities, and section 4(a)(2) covering circumstances where exposure to hostilities is less likely, but probable enough that the forces should expect and prepare for them—which would not include all situations where forces may be carrying crew-served weapons for purely defensive purposes. Ultimately, a binary determination, are they carrying a crew-served weapon or not, while easy to apply, risks the unnecessary expansion of the War Powers Resolution into areas that should be exclusively within the President's foreign affairs and Commander-in-Chief powers.

text. This paper argues that submitting reports under section 4(a)(2), where troops will not be in situations of actual or imminent hostilities, is not required merely because of the presence of a certain weapon, although that may be a factor to be considered.

<sup>31</sup> Former National Security Council Legal Advisor James E. Baker, in fact, recognizes the problems with the Executive Branch's approach to section 4(a)(2). He states: “This presented an absurd hair-trigger as crew-served weapons, like machine guns and mortars, are organic to most ground units, whether or not those units anticipate hostile circumstances or are engaged in routine training or deployments. BAKER, *supra* note 3, at 362 n.20.

<sup>32</sup> Other factors that should be considered include whether the forces employed are combat or service support forces (e.g., infantry, military police, Special Forces, or logistics), the stability of the area, the ability of the host nation to provide law and order, the nature and mission of the forces that U.S. forces may be accompanying or training, the proximity to potential hostilities of the U.S. forces, and type of weapons potential hostile forces in the area employ.

<sup>33</sup> 50 U.S.C. § 1541(a).

# Hamilton's Curse: How Jefferson's Arch Enemy Betrayed the American Revolution—and What it Means for Americans Today<sup>1</sup>

Reviewed by Major Caitlin Chiaramonte\*

*You can blame it on [Hamilton] cause [Hamilton] don't mind and [Hamilton] don't care. You got to blame it on something. Blame it on [Hamilton]. Blame it on the stars. Whatever you do don't put the blame on you. Blame it on [Hamilton] yeah, yeah. You can blame it on [Hamilton]. Girl. Ooh, ooh, ooh. Girl. I can't, I can't. I can't, can't stand [Hamilton].*<sup>2</sup>

## I. Introduction

Thomas DiLorenzo, a senior faculty member at the Ludwig von Mises Institute<sup>3</sup> in Alabama and a professor of economics at Loyola College in Maryland, chronicles the history of Alexander Hamilton's political and economic philosophy and the indelible mark his agenda left on America.<sup>4</sup> Similar to the blame and hatred Milli Vanilli place on the rain in their 1989 hit song, DiLorenzo faults Alexander Hamilton for almost everything that is currently ailing our government. DiLorenzo starts his work with the conclusion that Hamilton was a nationalist, which he defines as "an unhealthy love of one's government, accompanied by the aggressive desire to put down others—which becomes in deracinated modern men a substitute for religious faith."<sup>5</sup> He then takes the reader on a journey through time, outlining how actions that Hamilton took starting in 1780 have plagued America to the present day.

DiLorenzo's goal is to dispel the myths regarding Hamilton and denunciate the hero complex<sup>6</sup> that Hamilton has received in history and academic circles. He does this by taking his definition of Hamiltonianism<sup>7</sup> and applying it to national debt, taxes, the American banking system, the Supreme Court, the decrease in states power and the power of the President. He contends that the application of Hamilton's beliefs over time by his followers has resulted in a powerless people.<sup>8</sup>

Although a short read at 209 pages, *Hamilton's Curse* is packed with powerful assertions that assume a decent base in both the economics and history of the Jefferson and Hamilton eras. Instead of taking a few concentrated topics and conducting an in-depth study of Hamilton's impact, DiLorenzo makes sweeping assertions and applies their impact over a two-hundred-year time span. Reader beware, economic and history novices will not handle this book with the ease of a pop song. That being said, a history buff and true Jeffersonian will revel in delight as DiLorenzo takes hit after hit on Hamilton and champions Jefferson's beliefs that ultimately never prevailed.<sup>9</sup> With hindsight on his side, DiLorenzo takes his melodic refrain of "blame it on Hamilton" to look at a current evil and trace its lineage back to a Hamiltonian philosophy.

## II. Blame it on Hamilton: The Public Debt

Many have heard the famous Alexander Hamilton quote, "A national debt, if it is not excessive, will be to us a public blessing."<sup>10</sup> DiLorenzo argues that Hamilton's plan of subsuming all old government debt, issuing new bonds backed by tariff revenue and nationalizing the war debt, actually meant that he "*championed* the creation of a large national debt."<sup>11</sup> Jefferson, on the other hand, believed in limiting government debt, and if debt is necessary, it should be paid off by current taxpayers as opposed to future generations.<sup>12</sup> DiLorenzo takes Jefferson's word at face value but does not extend the same courtesy to Hamilton. That being

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<sup>1</sup> THOMAS J. DILORENZO, HAMILTON'S CURSE: HOW JEFFERSON'S ARCH ENEMY BETRAYED THE AMERICAN REVOLUTION—AND WHAT IT MEANS FOR AMERICANS TODAY (2008).

<sup>2</sup> MILLI VANILLI, BLAME IT ON THE RAIN (Arista 1989).

<sup>3</sup> See generally THE MISES INSTITUTE, <https://www.mises.org/about-mises> (last visited Feb. 15, 2017). The Mises Institute teaches the scholarship of Austrian economics, freedom, and peace. *Id.* Professors "seek a profound and radical shift in the intellectual climate: away from statism and toward a private property order. [They] encourage historical research, and stand against political correctness." *Id.*

<sup>4</sup> DILORENZO, *supra* note 1, at 246.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> See generally RON CHERNOW, ALEXANDER HAMILTON (2004). Hamilton was a founding father of the United States. He was arguably the foremost political figure in history who never attained the presidency, yet his legacy had a more prominent impact than those that did. See also ALEXANDER HAMILTON, <http://www.alexanderhamilton.org> (last visited Feb. 15, 2017). Hamilton was a member of the Continental Congress, an advocate of the

constitution and an author of the Federalist papers. *Id.* He was the first Secretary of the Treasury. *Id.*

<sup>7</sup> Defined as government consolidation, the elimination of federalism, increasing executive power and interventionist economics. DILORENZO, *supra* note 1, at 4.

<sup>8</sup> *Id.* at 4, 195.

<sup>9</sup> Each man's political and economy philosophy was markedly different. Jefferson advocated for strong state governments, a strict interpretation of the constitution, the elimination of taxes, paying off the national debt and did not support government aid for trade and manufacturing. Hamilton supported a strong central government, a loose interpretation of the constitution, tariffs, using the national debt to establish credit, and giving government assistance in areas of trade, finance and manufacturing. See, e.g., JOHN FERLING, JEFFERSON AND HAMILTON: THE RIVALS THAT FORGED A NATION (2013).

<sup>10</sup> DILORENZO, *supra* note 1, at 40.

<sup>11</sup> *Id.* at 40-47.

<sup>12</sup> *Id.* at 40.

said, Jefferson did reduce the national debt during his time as President.<sup>13</sup> DiLorenzo credits the debt reducing actions of successors James Monroe, John Quincy Adams, and Andrew Jackson as based in “Jeffersonian philosophy.”<sup>14</sup>

Although the United States was debt free in 1835<sup>15</sup> (thirty one years after Hamilton’s death), DiLorenzo sticks to his theory that Hamilton’s actions created a “[p]erpetual government debt.”<sup>16</sup> He attributes increasing debt during the tenures of Abraham Lincoln, Andrew Johnson, Woodrow Wilson, Warren G. Harding, Calvin Coolidge, Herbert Hoover, Franklin D. Roosevelt, Lyndon B. Johnson and George W. Bush to the philosophy of Hamilton.<sup>17</sup> Can everything good that has happened be a Jeffersonian legacy while everything negative that has created our fiscal cliff really be the fault of one man? It would take an in-depth understanding of economics and history to properly refute DiLorenzo’s assertions. But arguably Hamilton would not be a supporter of our current national debt, when his then-utopian idea of debt came with the caveat that it not be excessive.

John Steele Gordon, the author of *Hamilton’s Blessing: the Extraordinary Life and Times of Our National Debt*, speculated that Hamilton would be impressed with the size of our current debt but would not be happy with how politicians are choosing to spend the money.<sup>18</sup> Hamilton lobbied for increased debt only as a vehicle to pay for the most important things such as building infrastructure, financing war and handling dire economic situations.<sup>19</sup> Scott Bomboy, editor-in-chief of the National Constitution Center, hit this topic head on in his blog entry, *How Alexander Hamilton would View the Debt Ceiling*, stating that “Hamilton wouldn’t approve of a debt-ceiling concept, and he would be more than unhappy about any actions that would lower the global rating of the United States’ public credit.”<sup>20</sup> Bomboy explained that Hamilton’s imposition of tariffs to back government bonds made bonds an attractive investment for European markets and money once again flowed into the United States.<sup>21</sup> In fact,

the public debt shrunk and the United States established excellent credit until Hamilton’s death.<sup>22</sup> DiLorenzo fails to acknowledge this prospect, and concludes instead that Hamiltonian worshipers have created the “Leviathan State . . . under which Americans now slave.”<sup>23</sup>

Wasn’t Jefferson a sell-out too? Assuming, *arguendo*, Hamilton’s financial plan was detrimental to our nation and Jefferson vehemently opposed it, Jefferson ultimately struck a deal with Hamilton.<sup>24</sup> Jefferson supported Hamilton’s assumption bill in exchange for Hamilton’s support in moving the capital to Virginia.<sup>25</sup> This allowed the central government to absorb all the state war debts and our capital was created.<sup>26</sup> DiLorenzo glosses over this astonishing fact that runs counter to his Jeffersonian praise. Are we not all doomed if the hero of the book was swayed by a river view along the Potomac during a night out with Hamilton?<sup>27</sup>

## II. Blame it on Hamilton: A Central Bank

DiLorenzo spends no time explaining why Hamilton wanted a nationalized bank other than it being his attempt to “clone the British government system of centralized governmental power linked to mercantilism.”<sup>28</sup> DiLorenzo could have provided a few salient points in favor of a national bank, such as, increasing credit and stimulating the economy,<sup>29</sup> and then refuting those ideas. This would lend more credibility to his theory.

DiLorenzo explains Washington’s ability to create a national bank, based on the guidance of Hamilton, through the Necessary and Proper Clause and the implied powers of the Constitution.<sup>30</sup> At the time it was Washington who held the tough decision of whether to create a national bank. Just as a great commander would, he looked for guidance from his subordinate advisors. Washington took Jefferson’s anti-bank arguments to Hamilton and gave him one week to rebut the position.<sup>31</sup> DiLorenzo doesn’t discuss Washington’s

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 51.

<sup>15</sup> Robert Smith, *When the U.S. Paid off the Entire National Debt (and why it Didn’t Last)*, NATIONAL PUBLIC RADIO (Apr. 15, 2011), <http://www.npr.org/sections/money/2011/04/15/135423586/when-the-u-s-paid-off-the-entire-national-debt-and-why-it-didnt-last>.

<sup>16</sup> DiLORENZO, *supra* note 1, at 53.

<sup>17</sup> *Id.* at 52-53.

<sup>18</sup> John Steele Gordon, *Past & Present: Alexander Hamilton and the Start of the National Debt*, US NEWS (Sept. 18, 2008), <http://www.usnews.com/opinion/articles/2008/09/18/past-present-alexander-hamilton-and-the-start-of-the-national-debt>.

<sup>19</sup> *Id.*

<sup>20</sup> Scott Bomboy, *How Alexander Hamilton would View the Debt Ceiling*, CONSTITUTION DAILY (Jan. 11, 2013), <http://blog.constitutioncenter.org/2013/01/how-alexander-hamilton-would-view-the-debt-ceiling>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> DiLORENZO, *supra* note 1, at 57.

<sup>24</sup> *Id.* at 48.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 48-49.

<sup>27</sup> *Id.* at 48.

<sup>28</sup> *Id.* at 59.

<sup>29</sup> See generally *Alexander Hamilton*, PBS.ORG, [http://www.pbs.org/wgbh/amex/hamilton/peoplevents/e\\_bank.html](http://www.pbs.org/wgbh/amex/hamilton/peoplevents/e_bank.html) (last visited Feb. 15, 2017).

<sup>30</sup> DiLORENZO, *supra* note 1, at 60-61.

<sup>31</sup> ROBERT E. WRIGHT & DAVID J. COWEN, FINANCIAL FOUNDING FATHERS: THE MEN WHO MADE AMERICA RICH 10-37 (2006).

decision-making or reasoning; however, it seems there was a great debate on this issue and Washington carefully weighed both sides before he took action. Why then, is there no blame placed on Washington? Is it fair to blame a judge advocate (JA) for all of a commander's decisions? DiLorenzo gives the impression that Washington recklessly trusted Hamilton and that Congress blindly approved the plan. Perhaps Washington sided with Hamilton because a national bank was necessary for fiscal operations and in order to unify the nation's credit and capital markets?<sup>32</sup> We certainly will not know the answer by reading this book.

DiLorenzo looks at the failures of our current banking system through the lens of hindsight bias and traces its roots back to Hamilton.<sup>33</sup> He attributes the creation of the Federal Reserve System solely to Hamilton even though it was created over a hundred years after Hamilton's death.<sup>34</sup> Although Hamilton felt that his economic policy was in the name of public interest and for "the public good," DiLorenzo argues that it created "inflation, debasement of the currency . . . and perpetual economic instability through politically contrived boom-and-bust cycles in the economy."<sup>35</sup> Further, the author caveats that any great achievements that were made, were done "despite" Hamilton, rather than because of his ideas.<sup>36</sup>

### III. Blame it on Hamilton: War

Although a smaller section of the book, perhaps one of DiLorenzo's most astonishing claims is that numerous catastrophes such as the American Civil War, the Spanish-American War, World War I, and World War II have their origins in Hamiltonian philosophy.<sup>37</sup> He concludes that mercantilist economics, a monopolistic government and centralized power have led to these events.<sup>38</sup> DiLorenzo seems to neglect the numerous other factors that may have caused these wars and the fact that Hamilton certainly did not stand alone in his thoughts or theories.<sup>39</sup>

According to DiLorenzo, Hamilton failed to have the foresight to understand what his principles would become. One example provided is that increasing the power of the President has led to the ability of the President to enter war

without the consent of Congress.<sup>40</sup> Therefore, one could argue that President Obama's actions in Syria would be Hamiltonian in nature. This highlights the debate of whether the United States has either the constitutional right to act or a responsibility to protect.<sup>41</sup> Thankfully, DiLorenzo finally admits on page 173 of his book that "Hamilton, of course, is not responsible for every individual action that politicians and bureaucrats have undertaken in the two centuries since his death."<sup>42</sup>

### V. Conclusion

In a lecture that Thomas DiLorenzo gave on his book at the Austrian Scholars Conference, he expressed exasperation at Hamilton's cult-like following and scoffed at the notion "that there is this idea, that there is this one man, sort of like the Wizard of Oz behind a curtain, [that is] the architect of the whole economy."<sup>43</sup> DiLorenzo laughed at the idea that "one guy" could be responsible for capitalism.<sup>44</sup> Although DiLorenzo makes significant points that cause one to take pause and question what we know to be true about our founding fathers, he goes too far in the other direction, and hypocritically does what he despises in others. Just as one man cannot be responsible for capitalism, one man cannot be responsible for crony capitalism. Nor can one man take all the blame for the state of the economy or the political environment. In the end, despite a valiant effort, the author simply does not succeed in proving that Alexander Hamilton was the rainmaker he believes him to be.

<sup>32</sup> *Id.*

<sup>33</sup> DiLORENZO, *supra* note 1, at 73.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 172.

<sup>37</sup> *Id.* at 172-73.

<sup>38</sup> *Id.* at 173.

<sup>39</sup> Especially considering that every war listed occurred after Hamilton's death.

<sup>40</sup> *Id.* at 187.

<sup>41</sup> Compare Ashley Deeks & Marty Lederman, *Would Airstrikes Against Assad be Lawful and Effective?: Reactions to the State "dissent cable"*,

JUST SECURITY (June 20, 2016, 8:58 AM), <https://www.justsecurity.org/31532/but-would> (stating that the U.N. Charter does not recognize a humanitarian intervention exception for the use of force), with Harold Hongju Koh, *Another Legal View of the Dissent Channel Cable on Syria*, JUST SECURITY (June 20, 2016, 12:55 PM), <https://www.justsecurity.org/31571/legal-view-dissent-channel-cable-syria> ("neither Article 2(4) [of the UN Charter] nor the [War Powers Resolution] are so black and white that they clearly forbid the President from lawfully backing his diplomacy with a threat of force in the most dire humanitarian crises.").

<sup>42</sup> DiLORENZO, *supra* note 1, at 187.

<sup>43</sup> Thomas J. DiLorenzo, Professor of Econ., Loy. U. Md., Address at the Austrian Scholars Conference (Mar. 12-14, 2009), <https://www.youtube.com/watch?v=Uox8hvMFTOE>.

<sup>44</sup> *Id.*

# Dead Wake: The Last Crossing of the Lusitania<sup>1</sup>

Reviewed by Major Eddie M. Gonzalez\*

“We were still looking upon war in the light of Victorian and previous wars,” Morton wrote later, adding that he and his brother had failed to appreciate that the “nature and method of war had changed for all time in August 1914 and that no war in the future would exclude anybody, civilians, men, women or children.”<sup>2</sup>

## I. Introduction

On a September morning 15 years ago I awoke to news that an American Airlines flight struck the North Tower of the World Trade Center. It was my second year of law school, and like most of my classmates, I spent the day trying to absorb the hurricane of information about what just occurred. Twenty-four-hour news channels became the primary source and reports were steady, even if not always current.<sup>3</sup> Slowly, over the subsequent days, weeks, and months, the stories became less about what had occurred and why, and more about the “who”: Who perished and who survived, who were the heroes and who were the villains.<sup>4</sup> Even now, half way through the second decade post 9/11, stories continue to fill in the pieces of a tragedy that changed the world and how it fought.<sup>5</sup>

Nearly a century earlier, Britons and Americans awoke to a similar setting as they received telegrams or read rushed newspaper headlines reporting that the RMS *Lusitania* was struck by a German torpedo and sunk 11 miles off the shore of Ireland.<sup>6</sup> In his latest work, *Dead Wake*, Erik Larson pieces together, through extensive research, the story of another disaster that changed the world.<sup>7</sup> As with any story, the most compelling version is one told through the people who shaped it: the heroes, the villains, and the helpless stuck in between. This approach is not lost on Larson. He tells the tale of the *Lusitania* through a myriad of characters, some on the ship as it left New York for the last time and others off the ship but no less critical to the tragedy.<sup>8</sup>

Where *Dead Wake* is a carefully crafted, suspenseful retelling of human tragedy through the stories of the human’s themselves, it’s important, especially for military law practitioners, to understand what it is not. Larson stops short, presumably intentionally, of providing any substantial critical analysis or conclusions for the legal issues raised by the attack.<sup>9</sup> There are points where the book may feel incomplete to a legal practitioner. Little detail about the laws of war in place at the time and their applicability is given, but Larson does not fail the reader in providing considerable details about the decisions and their consequences throughout the final voyage of the *Lusitania*. These details can serve the practitioner in creating context for international law and law of war issues left in the wake of the sunken ocean liner.

## II. The Sinking of the *Lusitania*

Larson begins his story where one would expect, on board the majestic *Lusitania*.<sup>10</sup> It is an ocean liner belonging to the Cunard Steam-Ship Line and even with its incredible size, displacing 44,000 tons when fully loaded, it was built for speed.<sup>11</sup> By the spring of 1915, it had completed 202 transatlantic voyages at speeds faster than any other ocean liner before it.<sup>12</sup> When the book begins, it is the day before the *Lusitania* sinks. The captain of the ship, William Thomas Turner, is in the first class cabin conveying news to his passengers.<sup>13</sup> The next afternoon Captain Turner would be outside the entry to his room when a torpedo launched by a German U-Boat struck the ship; it sank in eighteen minutes.<sup>14</sup> One thousand and eighty eight of the 1,962 aboard were

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<sup>1</sup> ERIK LARSON, *DEAD WAKE* (2015).

<sup>2</sup> LARSON, *supra* note 1, at 71. The Morton quoted by Larson is Leslie Morton, an eighteen-year-old hired hand for the final voyage of the *Lusitania*. His brother, Cliff Morton, was hired as well and they were among the few experienced mariners on the crew of the ship. *Id.*

<sup>3</sup> See *Understanding 9/11*, INTERNET ARCHIVE, <https://archive.org/details/911> (last visited Feb. 6, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> See Steven Brill, *Is American Any Safer*, *THE ATLANTIC* (Sept. 2016), <http://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761>; see also Michael Gerson, *What Did 9/11 Mean? Fifteen Years Later, We’re Still Finding Out*, *THE WASH. POST* (Sept. 8, 2016), [https://www.washingtonpost.com/opinions/what-did-911-mean-fifteen-years-later-were-still-finding-out/2016/09/08/0fff1c76-7600-11e6-8149-b8d05321db62\\_story.html?utm\\_term=.5b619061020a](https://www.washingtonpost.com/opinions/what-did-911-mean-fifteen-years-later-were-still-finding-out/2016/09/08/0fff1c76-7600-11e6-8149-b8d05321db62_story.html?utm_term=.5b619061020a).

<sup>6</sup> LARSON, *supra* note 1, at 282.

<sup>7</sup> *Id.* at 375. In a footnote describing the depth of some of the research he completed, Larson discusses the moment when he was able to hold the German codebook that the British Admiralty had obtained and used to thwart German attacks during World War I. *Id.*

<sup>8</sup> *Id.* at xix.

<sup>9</sup> *Id.* at 443. In an interview with Larson provided at the end of the book, he speaks specifically about Great Britain’s failure to provide information about the risk to *Lusitania* on its final voyage. He stated that his intent was to provide “strands of evidence” and leave the rest for the reader to decide. I make the presumption that he intentionally uses this strategy throughout this book.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 278.

killed, 123 of them were Americans.<sup>15</sup> There were warnings by the Germans that they were willing to commit such an attack.<sup>16</sup> They had in fact already done so with other commercial ships.<sup>17</sup> But as the book begins, Captain Turner is still a day away from this disaster. He's reporting to first class passengers a warning received of submarine activity in the area he will be navigating that next day, but uses his announcement to "provide reassurance" rather than fear.<sup>18</sup> As the reader, we know that reassurance is misplaced.

Here in lies the greatest challenge for Larson. His goal is to weave together stories for the reader that build suspense, but the payoff is known well before the first page is turned. Larson nevertheless prevails, not by expecting the reader to forget that the ship goes down, but by using extensive research to make us feel like we are living it for the first time through the people who experienced personally. Telegrams, personal letters, diaries, depositions, and more are used by Larson to help retell each person's story with their own words.<sup>19</sup> Larson's assumption that the reader comes to this book with significant knowledge of the subject matter is what drives him to tell a deeper story and the book is better for it. This style is not without its faults however. By providing so many stories, from so many people on their transatlantic journey or in some other way related to the *Lusitania*, the story at times feels disconnected. Larson's rapid jumps from one storyline to the next certainly helps to build suspense, but at time can leave the reader frustrated by a desire to continue on one single narrative.

The sources for all of these stories are not simply from those on the ship. In fact, it is largely the characters off the ship that provide the most compelling accounts. Although the story starts as expected, with the captain aboard his ship, it quickly jumps to a despondent President Woodrow Wilson mourning the loss of his wife.<sup>20</sup> With that first leap, Larson puts the reader on notice, that in his mind, understanding the sinking of the *Lusitania* demands more from the reader than simply knowing the how and the why. Each piece is placed perfectly to paint the tragic picture: Wilson's personal turmoil, British desperation on one front of the war and clandestine strides on another, Germans changing the terms of war, and the cold, skilled U-Boat captains on the hunt.

It is through the latter, specifically U-20 captain Schwieger, that Larson most successfully pulls the reader into the story and doesn't let go until, through Captain Schwieger's periscope, you become the an eye witness to the brutal sinking of the *Lusitania*.

The ship was sinking with unbelievable rapidity. There was a terrific panic on her deck. Overcrowded lifeboats, fairly torn from their positions, dropped into the water. Desperate people ran helplessly up and down the decks. Men and women jumped into the water and tried to swim to empty, overturned lifeboats. It was the most terrible sight I have ever seen.<sup>21</sup>

Captain Schwieger presents a fascinating character study for the reader. Here again, Larson does not lazily lean on assumptions of the readers knowledge to present an overly simple narrative. Instead, he challenges the reader to know that this U-Boat captain is directly responsible for the death of hundreds of civilians and yet the reader may still feel possibly compelled by his humanity.<sup>22</sup> What Larson shows you through Captain Schwieger are of the many members of a cavalcade of human beings who lined up perfectly to create a tragic moment exactly as it occurred, "where even the tiniest alteration in single vector could have saved the ship."<sup>23</sup>

That moment, the sinking of the *Lusitania*, is cited often as triggering United States direct involvement in the First World War.<sup>24</sup> This was not completely accurate, as it would be nearly two years before the United States declared entry in the conflict, which was more directly triggered by the news that Germany attempted to enlist Mexico as an ally.<sup>25</sup> Following the attack by Germany, President Wilson publicly refused to allow the *Lusitania* to pressure the United States into World War I.<sup>26</sup> He was both applauded and criticized for that decision.<sup>27</sup> The misconception about the role of the *Lusitania* in America's entry into World War I, does not minimize the questions it raised and the impact the answers could have on the rest of the war and wars beyond. While Larson doesn't provide such critical analysis, he does provide well supported details for a military law practitioner to

<sup>15</sup> *Id.* at 300. Larson notes there are disagreements about the true number of casualties. He uses Cunard's official tally. *Id.* at 403.

<sup>16</sup> *Id.* at 2 (citing the New York Times's publication of a German warning the morning the *Lusitania* departed from America. N.Y. TIMES, May 1, 1915, at 19.)

<sup>17</sup> LARSON, *supra* note 1, at 112. On May 1, 1915, the same day the *Lusitania* set sail from New York City, a German U-Boat sank the *Gulflight*, an American oil tanker. *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at xix, 441.

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.* at 264.

<sup>22</sup> *Id.* at 60, 264.

<sup>23</sup> *Id.* at 326.

<sup>24</sup> *Id.* at 450.

<sup>25</sup> *Id.* at 340.

<sup>26</sup> *Id.* at 331. In his speech addressing America's response, Wilson famously declared, "[T]here is such a thing as a man being too proud to fight." *Id.* The sentiment was not well received and Larson gives us insight into Wilson's own confusion regarding the statement, which he attributes to being distracted by his love interest and future second wife, Edith Bolling. *Id.*

<sup>27</sup> *Id.* at 329-30. Teddy Roosevelt was among a boisterous group calling for war, but Larson cites that, although there was anger regarding the attack, the call for war was less prevalent. *Id.*

consider and apply to both the world as it was in 1915 and now.

### III. Legal Issues to Consider

By the time the Germany sunk the *Lusitania* on May 7, 1915, Germany had put Great Britain and its allies on notice about their intent to with regard to commercial ships. Germany published in the New York Times the morning of the *Lusitania*'s departure a reminder that "vessels flying the flag of Great Britain, or of any of her allies, are liable to destruction."<sup>28</sup> Still, that notice was not sufficient for most to consider the *Lusitania* a lawful target. As the *Lusitania* made its way to Liverpool, England, it and other ships like it were protected by the "Prize Rules."<sup>29</sup> These rules governed the seizure of merchant ships during wartime and required warships to warn passengers and crew prior of any attempts to sink the ship.<sup>30</sup> With no record of such a warning given to the *Lusitania*, it appears that Germany violated the laws of war in place at the time. Of course nothing is that simple. Laws, military and otherwise, will almost always be outpaced by technology. In this case, the technology that made the "Prize Rules" difficult to apply were submarines. A concern before the sinking of the *Lusitania* was that the strengths and limitations of submarines would make their use as a weapon against unarmed merchant ships "unescapable."<sup>31</sup> Again, while Larson does not provide his own conclusions to these type of issues, he does give the reader firsthand account details, such as Captain Schwinger's log entries prior to his order to sink the *Lusitania*.<sup>32</sup> Practitioners can peel through these layers to come to their own conclusions regarding the legality Germany's attack at the time and how current laws would view it.<sup>33</sup>

A legal issue that could not have been addressed publicly in 1915, but Larson makes ripe for current practitioners, is the action, or lack of action, by Great Britain given the intelligence they had at the time the *Lusitania* was sunk. Larson spends many of his chapters on the people inside of Great Britain's Room 40, a clandestine intelligence unit, who had secretly obtained a German naval codebook and used it to, among other things, track the movement of German U-Boats.<sup>34</sup> What is known now, but was not at the time to anyone outside a select members of the British Admiralty,

was that Room 40 was aware on May 7th of U-20's position in the waters where it sunk the *Lusitania*.<sup>35</sup> The British Admiralty went to great strides, both before and after the sinking of the *Lusitania*, to ensure their control of the codebooks were not discovered.<sup>36</sup> They used the codebooks to protect and target enemy ships and U-Boats, but they used them sparingly, for "[i]f the British navy acted in response to every forced movement of the German fleet, it risked revealing to Germany that its codes had been broken."<sup>37</sup> Can that need to protect such a vital tool extend to acts that place civilian lives in danger? Does our law of armed conflict or international law address a State's right to place its own citizens in danger in order to protect a mission or asset? Those are questions that the story of the *Lusitania* can continue to inform as wars grow more complex.

### IV. Conclusion

Rudyard Kipling advises, "if history were taught in the form of stories, it would never be forgotten."<sup>38</sup> If Kipling is right, then the history of the final voyage of the *Lusitania*, 100 years later and beyond, is in safe hands with Erik Larson. *Dead Wake* serves as a good example of history told through a captivating story. Larson weaves together, often using their own words, the stories of the people impacted by and impacting the sinking of the *Lusitania*. Those people and their stories shape history and Larson does a masterful job of crafting that history in a continuously suspenseful way. This book is recommended for any reader that simply wants an absorbing retelling of a fascinating part of history. Yet, military law practitioners should not ignore the value of understanding how history and the stories that fill it impact the laws that govern us and the way we fight and so it is recommended in that light as well.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 31.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 31, 32.

<sup>32</sup> *Id.* at 370.

<sup>33</sup> Additional Protocol I of the Geneva Convention is a logical start for curious readers that want to theorize how an attack like the one against the *Lusitania* might be viewed by international law today. Article 52 of that Protocol defines a legitimate military target as one "which by [its] nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Protocol Additional to the Geneva Conventions of 12 August 1949, and*

*relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3. Would a modern *Lusitania* fit that description? Does the answer change with the knowledge that the *Lusitania* was carrying munitions for Great Britain? See LARSON, *supra* note 1, at 20, 21.

<sup>34</sup> LARSON, *supra* note 1, at 77-87.

<sup>35</sup> *Id.* at 189.

<sup>36</sup> *Id.* at 82, 323.

<sup>37</sup> *Id.* at 82

<sup>38</sup> Alison Weir, *Stories Never to be Forgotten*, SIGNATURE (Feb. 11, 2015), <http://www.signature-reads.com/2015/02/stories-never-to-be-forgotten-alison-weir-on-historical-fiction/>.

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