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Lore of the Corps

A Battlefield Promotion and a “Jumping JAG” Too: The Amazing Story of Nicholas E. Allen in World War II (1924–1993)

Fred L. Borch III
Regimental Historian & Archivist

While many judge advocates (JAs) have soldiered well in combat, few equal the achievements of Nicholas E. Allen, who entered the Judge Advocate General’s Department (JAGD) as a second lieutenant (2LT) in 1942 and, when the fighting in Europe ceased in May 1945, was a lieutenant colonel (LTC) and the Division Judge Advocate, 82d Airborne Division. This is not because Allen made rank so quickly, although progressing from gold bars to silver oak leaves in such a short time is noteworthy. Rather, Allen stands apart from all other JAs in history because his superlative performance in combat earned him a battlefield promotion from major to LTC in November 1944—making Allen the only JA in history to have received such a distinction. Additionally, then LTC Allen made history again in March 1945 when he became the first JA to complete basic airborne training and earn the Army parachutist badge.¹

Born in Atlanta, Georgia on 24 July 1907, Nicholas Eugene “Nick” Allen graduated Phi Beta Kappa from Princeton University in 1929 and went straight to law school at Harvard. After passing the New Jersey bar in 1932, Allen went into private practice until 1936, when he took a job as an attorney in the Department of Labor in Washington, D.C.

After America’s entry into World War II, Allen applied for a commission in the JAGD and, on 1 April 1942, was sworn in as an Army Reserve 2LT. He then worked in the contracts division in The Judge Advocate General’s Office in Washington, D.C. His officer efficiency report from this period describes him as “a pleasant, likeable, quietly efficient officer; gentlemanly in bearing, conscientious, loyal, very willing and always ready to do any job that needs to be done.”²

After attending the Eleventh Officer’s Class at The Judge Advocate General’s School in Ann Arbor, Michigan, from April to July 1943, Allen accepted a Regular Army commission and was promoted to captain. He then served briefly in Texas before being promoted to major (MAJ) in

January 1944 and sailing for England. There, he worked in the Military Justice Division in the Branch Office of the Judge Advocate General, where he was the chief examiner of court-martial records of trial. His boss, Brigadier General E. C. McNeil, lauded Allen as “keen, alert, adaptable, loyal, cooperative, thorough . . . a top notch officer in every way.”³

With a little more than two years in uniform, Allen was then chosen to join the 82d Airborne Division as its one and only lawyer. Although MAJ Allen had superb legal skills, he had never served as a legal advisor to a division commander. He had no combat experience, much less time with paratroopers who had waded ashore in North Africa in May 1943 and subsequently experienced hard and bloody combat in Italy and France. Finally, at thirty-seven years of age, Allen was an old man in comparison to most of the officers and enlisted men in the division. One can only imagine that he knew that this job was going to be both a mental and physical challenge.

When Allen reported to the 82d Airborne in August, the division was only a month away from major combat operations as part of Operation *Market Garden*. This daring plan, which started on 17 September 1944, involved nearly 5000 aircraft and more than 2500 gliders. It called for a large American-British airborne force to parachute deep behind enemy lines and seize key bridges and roads in the Netherlands. Despite fierce German counterattacks, the 82d succeeded in capturing and holding the bridge over the Maas River at Grave. Three days later, in exceptionally brutal combat near Nijmegen, elements of the 82d captured a key bridge across the Waal River. Despite the division’s success, the defeat of other Allied units at Arnhem meant overall failure and, after fifty-six days of combat, the 82d was withdrawn to France.

During the early weeks of *Market Garden*, Allen was not in direct combat. On 7 October 1944, however, he joined the most forward elements of the 82d in Holland. Allen then coordinated and supervised investigations into claims for money made by Dutch civilians for damage or loss to their property caused by American paratroopers. Of course, the Army would not pay for property losses arising out of combat. But, when there was no fighting, and an American Soldier damaged a Dutchman’s home or

¹ A longer version of Nicholas Allen’s storied career appeared in print in 2007. See Fred L. Borch, *The 82d Airborne’s ‘Jumping JAG’: The Incredible Wartime Career of Nicholas E. Allen*, PROLOGUE 18–25 (Summer 2007).

² War Dep’t Adjutant Gen.’s Office (AGO) Form 67, Efficiency Report, Nicholas E. Allen, 1 July 1942 to 31 December 1942 (Historian’s files, The Judge Advocate Gen.’s Legal Ctr. & Sch. (TJAGLCS)).

³ War Dep’t AGO Form 67, Efficiency Report, Nicholas E. Allen, 1 January 1944 to 30 June 1944 (Historian’s files, TJAGLCS).

requisitioned food or some other item of personal property, a claim could be paid.

When it became clear that the 82d Airborne would be in Holland longer than had been expected and, not wanting the administration of justice to be interrupted by combat, Allen arranged for paratroopers in Belgium awaiting trial by court-martial to be flown to the Netherlands so that they could be tried there.

Allen also took on the additional duty of ‘voting officer.’ The War Department, at the urging of President Roosevelt, wanted as many Soldiers as possible to be able to cast a vote in the November 1944 presidential election. This meant that Allen had to enter the ‘Combat Zone’ (as it was then called), deliver paper absentee ballots to paratroopers fighting on the front lines, and then collect these ballots and arrange for their return to the United States in time for the election.

Major General (MG) James “Jumping Jim” Gavin, the Division Commander, later wrote that Allen’s work “enabled the Division to extend the voting privilege to combat troops actually in the forward lines under conditions that subjected [him] to hazards ordinarily alien to the exercise of his duties as Judge Advocate General [sic].”⁴

While *Market Garden* ultimately failed, and the 82d Airborne was pulled out of the Netherlands, MG Gavin was so impressed with Allen’s performance during the heavy fighting that he did something that no other commander had ever done before, or has done since that time: on 13 November 1944, he recommended a “battlefield promotion” for Allen. According to the recommendation for promotion, MG Gavin thought Allen should be wearing silver oak leaves because his JA had enhanced mission success by arranging for Soldiers to vote, investigating claims, and ensuring that military discipline was enforced through the courts-martial process. In short, Allen had gone beyond what was ordinarily expected of a lawyer—even one who was in uniform.

Under Army Regulation 405-12, which governed officer promotions, MG Gavin could recommend a promotion for any officer who had “clearly demonstrated his fitness of promotion by his outstanding performance in actual combat.”⁵ Such a recommendation for a battlefield promotion had to be for superlative duty performance in combat and there had to be a vacancy in the manpower organization of the division. As the 82d Airborne was short

one LTC, MG Gavin could have selected any one of a number of officers to be promoted. But he chose Nicholas Allen, and MG Matthew Ridgway, the XVIII Airborne Corps commander, approved the choice. Major Allen was promoted to LTC on 7 December 1944.

While the 82d Airborne enjoyed a brief period of rest and relaxation after its withdrawal from the Netherlands, it was back action again in December, when the German launched a surprise attack in the Ardennes forest of eastern Belgium. Thrown into battle, the paratroopers fought hard over the next month in what is now popularly known as the Battle of the Bulge.

During the bloody fighting and bitterly cold conditions, Allen proved that Gavin’s trust and confidence in him had not been misplaced. The citation for the Bronze Star Medal, awarded to Allen in June 1945, says it all:

In the Ardennes campaign, Lt. Col. Allen voluntarily went into the Combat Zone to expedite the work of his section, at time entering the forward CP [Command Post] of the Division. The devotion to duty, competence, and indifference to danger shown by Lt. Col. Allen in the prosecution of his activities reflects great credit upon him and is in the highest traditions of the military service.⁶

Other governments also recognized LTC Allen’s contributions to the Allied cause. For his service in the Netherlands, the Dutch Government awarded him the Military Order of William. The Belgian Government decorated Allen with their “Fourragere 1940” for his efforts in the Battle of the Bulge.⁷

After the Germans were defeated in the Ardennes, the 82d went back on the offensive. The division moved through the Hurtgen Forest, passed through the Siegfried Line, and was on the Roer River in February. At the end of April 1945, the 82d conducted an assault across the Elbe River near Blekede, Germany and, on 2 May 1945, MG Gavin accepted the surrender of 150,000 German troops. The following week, after six campaigns and 442 days in combat, the war ended for the paratroopers of the 82d Airborne Division.⁸

Allen had remained as the Division Judge Advocate (DJA) the entire time; he did not leave for a new assignment

⁴ Memorandum from Major General James Gavin, to Commanding General, XVIII Airborne Corps, subject: Battlefield Promotion of Officer (13 Nov. 1944) (Historian’s files, TJAGLCS).

⁵ Memorandum from Office of the Division Command, Headquarters, 82d Airborne Division (Forward), subject: Battlefield Promotion of Officer (13 Nov. 1944) (Historian’s files, TJAGLCS).

⁶ Headquarters, 82d Airborne Division, Gen. Orders No. 84 (4 June 1945).

⁷ War Dep’t AGO Form 53-98, Military Record and Report of Separation/Certificate of Service, Nicholas E. Allen para. 29 (21 Nov. 1946) (Historian’s files, TJAGLCS).

⁸ For more on the 82d division in World War II, see FORREST W. DAWSON, *SAGA OF THE ALL AMERICAN* (1946). See also GERARD M. DEVLIN, *PARATROOPER!* (1979).

until June 30, 1945. His final officer efficiency report from MG Gavin contained the following words:

This officer is a hard-working and thoroughly informed Judge Advocate. His work has been outstanding. Coming into this Division after it had been overseas and through combat might have presented a serious problem to another officer, but he succeeded in quickly establishing a wholesome respect from the unit commanders and a feeling of confidence throughout the entire staff.⁹

Lieutenant Colonel Allen's officer efficiency report also indicated that he was now a "qualified parachutist" and he had, in fact, completed the Division's ten-day parachute school in March 1945. An April 1945 article published in *The Advocate* gives some of the details of this event, which had come from a dispatch from the public relations officer of the 82d Airborne. It seems that Allen had volunteered for jump training even though his job as DJA was "usually considered strictly 'chairborne.'" The article continues:

The jump school course included a grueling physical conditioning program, instruction in manipulation of parachute harness and control of the 'chute in the air, and the correct manner of leaving the door of a plane.

During the course, Col. Allen made five jumps, two of which were made clad in full combat equipment worn for jumping over enemy territory. He finished the course with a night jump into inky blackness, and later received his jump wings from Maj. Gen. James M. Gavin, division commander.¹⁰

On the last day of June 1945, LTC Allen left the 82d Airborne Division for a new job with the 78th Infantry Division. That unit was in Berlin as part of the occupation forces, and Allen assumed duties as Staff Judge Advocate, U.S. Headquarters, Berlin. Six months later, he became the executive officer at the Judge Advocate Division, U.S. Forces European Theater. Allen left Europe to return to the United States in June 1946 and was released from active duty at the end of the year.

What happened to Allen? He worked briefly in private practice before becoming a civilian attorney in the Office of the General Counsel, Department of the Air Force, in 1948. As the Air Force had only recently become an independent service, Allen was involved in formulating legal policy and handling issues for a brand-new military organization. He remained with the Air Force as an associate general counsel until 1951, when he moved to the Department of Commerce to accept an appointment as acting assistant secretary for international affairs. In 1953, Allen left the Government to enter private practice. He had clients in Maryland and the District of Columbia and continued to practice law until shortly before his death.

As for his military career, Allen remained in the Army Reserve after World War II but, in June 1949, requested a transfer to the Air Force Judge Advocate General's Department. His rationale was that as he was then working in the Air Force General Counsel's office, it made sense for him to be an Air Force Reserve JA should an emergency arise that would require Allen to be called to active duty. The Army and Air Force agreed, and Allen was appointed a colonel in the Air Force Reserve in 1949. Not surprisingly, he excelled as an Air Force lawyer and, in March 1961, Allen was promoted to brigadier general. He retired in August 1967, with more than twenty-five years total service in the Army and the Air Force.

Nicholas E. Allen died in Maryland in 1993.

*More historical information can be found at
The Judge Advocate General's Corps
Regimental History Website*

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

⁹ War Dep't AGO Form 67, Efficiency Report, Nicholas E. Allen, 1 July 1944 to 31 December 1944 (Historian's files, TJAGLCS).

¹⁰ *First JAG Parachutist*, THE ADVOCATE (13 Apr. 1945).

Litigating Article 32 Errors After *United States v. Davis*

Major John R. Maloney*

Introduction

The defense counsel reviewed the investigating officer's (IO) report of the Article 32 investigation with mounting frustration. Not only had the IO improperly determined that several defense witnesses were not "reasonably available" during the investigation, he failed to note the defense's objections to this determination. To make matters worse, the IO refused to consider or refer to any of the evidence offered by the defense in his report. Consequently, the convening authority could not review any favorable information that the defense counsel had painstakingly collected and presented during the Article 32 investigation in deciding how to dispose of the charges. The defense counsel considers what to do next. How and when would he be able to obtain relief for his client and to enforce his client's rights under Article 32 of the Uniform Code of Military Justice (UCMJ)?

This scenario is undoubtedly familiar to any judge advocate who has served as a defense counsel, along with the confusion in trying to determine the best course of action for protecting a client's rights. For many years, that confusion was largely the result of competing standards of review of Article 32 errors in the appellate courts and widespread inconsistency among the trial courts as to how to implement those standards. In 2006, the Court of Appeals for the Armed Forces (CAAF) resolved this conflict in the case of *United States v. Davis*.¹

In *Davis*, the CAAF held that an Article 59(a), UCMJ, harmless error analysis applies to all Article 32 errors considered on direct review of the findings and sentence of a court-martial. Prior to the *Davis* decision, case law diverged on the appellate standard of review for Article 32 defects. One standard set by the court allowed a case to be reversed without any specific showing of prejudice if the accused made a timely objection to the defect,² while a second standard of review required that appellate courts test Article 32 errors for prejudice.³ The CAAF resolved this conflict in

Davis by distinguishing between two standards of review. For Article 32 errors raised prior to trial, the trial court can grant relief without a showing of prejudice, and the appellate courts can grant relief before trial on a petition for extraordinary relief. In contrast, for Article 32 errors considered on direct review of the findings and sentence of a court-martial, the court must determine whether those errors resulted in material prejudice to an accused's substantial rights in accordance with Article 59(a).⁴

Demonstrating prejudice under Article 59(a) for an Article 32 error, however, is easier said than done. In *United States v. Von Bergen*,⁵ the CAAF signaled that the threshold for such prejudice is very high because the court found no prejudice to an accused who had been denied an Article 32 investigation altogether.⁶ *Von Bergen* involved an accused who asserted his right to an Article 32 investigation when he was retried after his conviction was overturned on appeal. In denying the accused a pretrial investigation, the government relied upon a conditional waiver in the pretrial agreement the accused entered into in his original trial. Notwithstanding the fact that the accused was no longer bound by the pretrial agreement, the trial court erroneously found that his right to a pretrial investigation had been extinguished by the previous waiver. On appeal from conviction at his retrial, the CAAF found no prejudice in the denial of a pretrial investigation. If outright denial of any pretrial investigation whatsoever fails to demonstrate actual prejudice, it seems unlikely that mere defects in an Article 32 investigation could ever rise to that threshold.

The requirement to demonstrate actual prejudice, in light of the CAAF's reluctance to find such prejudice, has all but eliminated the possibility of obtaining judicial enforcement of Article 32 rights on appeal. As a practical matter, the *Davis* decision means that if defense counsel hope to remedy Article 32 errors, they must do so at the trial level or not at all.⁷

This article will examine the issues surrounding errors in the Article 32 pretrial investigation, focusing specifically on the means by which defense counsel may obtain relief for

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¹ 64 M.J. 445 (C.A.A.F. 2007).

² See, e.g., *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958); *United States v. Holt*, 52 M.J. 173, 184 (C.A.A.F. 1999); *United States v. Johnson*, 53 M.J. 459, 462 (C.A.A.F. 2000); *United States v. Stirewalt*, 60 M.J. 297, 302 (C.A.A.F. 2004).

³ See, e.g., *United States v. Worden*, 38 C.M.R. 284, 286-87 (C.M.A. 1968); *United States v. Maness*, 48 C.M.R. 512, 518 (C.M.A. 1974); *United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); *United States v. Chestnut*, 2 M.J. 84, 85 (C.M.A. 1976); *United States v. Chuculate*, 5 M.J. 143, 144-45 (C.M.A. 1978).

⁴ *Davis*, 64 M.J. at 449.

⁵ 67 M.J. 290 (C.A.A.F. 2009).

⁶ *Id.* at 292. Note, however, that that case was a retrial after a remand, and the finding of no prejudice was partly based on the opportunities afforded the defense by the previous trial. *Id.* at 294-95. The court still found error in the military judge's denial of an Article 32 investigation. *Id.* at 291.

⁷ Nothing in this article should be taken to downplay the continued importance of the Article 32 investigation itself, or the duty of defense counsel to prepare for the hearing (or to make an informed decision about whether to waive it). In particular, the hearing is often a good opportunity to commit government witnesses to their stories and to useful cross-examination answers.

such errors in the aftermath of *Davis*. Starting with a review of the nature and purpose of the pretrial investigation and the rights afforded to an accused under Article 32, UCMJ, this article will then examine the CAAF's decisions in *United States v. Davis* and *United States v. Von Bergen*, together with the practical consequences that flow from them. Finally, this article will address the means by which defense counsel may obtain relief from Article 32 errors in light of the current state of the law.

The Nature and Purposes of the Article 32 Investigation

It is difficult to precisely define the nature of the Article 32 pretrial investigation because it has no exact equivalent in any civilian criminal jurisdiction.⁸ The Article 32 investigation has been characterized by courts as “judicial in nature,”⁹ “an integral part of the court-martial proceedings,”¹⁰ and a “substantial pretrial right.”¹¹ Defects in the Article 32 investigation, however, are not jurisdictional.¹² Though the Article 32 investigation is an important element of the military justice process, it is not considered a part of the court-martial.¹³ Indeed, an Article 32 investigation precedes, and is intended to inform, the convening authority's decision with respect to disposition of the charges.¹⁴ In essence, the Article 32 pretrial investigation is a proceeding with a judicial character, but one that is entirely distinct from the actual trial and therefore can survive a greater degree of error.

At the highest level of abstraction, the goals of the Article 32 investigation are to “[operate] as a discovery proceeding for the accused and [stand] as a bulwark against baseless charges.”¹⁵ These broad goals are instantiated through the five specific purposes of the military pretrial investigation, three of which are statutory: (1) to inquire into the truth of the matters set forth in the charges; (2) to consider the form of the charges; and (3) to obtain a

recommendation as to the disposition that should be made of the case.¹⁶ The two remaining purposes, though not precisely articulated in the statute, are implicated by the *Manual for Courts-Martial*: (4) defense discovery¹⁷ and (5) preservation of testimony.¹⁸

The accused is afforded a number of rights at the Article 32 investigation. The first of these involves notice of the charges against him.¹⁹ Specifically, the accused should be notified of the name of his accuser, the names of witnesses against him, and that the charges against him are about to be investigated.²⁰ The accused also has the right to counsel²¹ and to be present throughout the investigation, though this right is not absolute.²² The accused has the right to confront and cross-examine the witnesses against him who are “reasonably available.”²³ In addition to the right to confront witnesses, the accused has the right to examine real and documentary evidence.²⁴ The accused also has the right to have available witnesses produced at the investigation who can give relevant, noncumulative testimony.²⁵ In addition to requesting the presence of witnesses, the accused is permitted to present anything in defense, extenuation, or

¹⁶ UCMJ art. 32(a) (2008).

¹⁷ MCM, *supra* note 14, R.C.M. 405(a) (2008) discussion (“The investigation also serves as a means of discovery.”).

¹⁸ *Id.* MIL. R. EVID. 613 (impeachment with prior inconsistent statements); *id.* R.C.M. 801(d)(1) (prior inconsistent statements of witnesses admissible as substantive evidence when given under oath “at a trial, hearing, or other proceeding”); *id.* R.C.M. 804(b)(1) (former testimony of unavailable witnesses admissible as substantive evidence when given under oath subject to cross-examination by the same opposing party).

¹⁹ *Id.* R.C.M. 405(f)(1), (2).

²⁰ *Id.* R.C.M. 405(f)(1), (3), and (5); *United States v. DeLauder*, 25 C.M.R. 160, 161 (C.M.A. 1958) (findings and sentence set aside where defense counsel, prior to the pretrial investigation, was not provided a copy of the charges, was not told of the time and place of the pretrial investigation, and was directed not to communicate with the principal prosecution witnesses).

²¹ MCM, *supra* note 14, R.C.M. 405(f)(4). The accused is entitled to be represented at the investigation by: (1) a civilian lawyer provided by the accused at no expense to the government, if the lawyer's appearance will not unduly delay the proceedings, *id.* R.C.M. 405(d)(2)(C); (2) an individually requested military lawyer if reasonably available and whose appearance will not unduly delay the proceedings, *id.* R.C.M. 405(d)(2)(B); (3) a lawyer appointed by the appropriate authority, *id.* R.C.M. 405(d)(2)(H); or (4) the accused may decide to represent himself. *United States v. Bramel*, 29 M.J. 958, 965–66 (A.C.M.R. 1990) (holding that accused's right to represent himself at the Article 32 investigation is coextensive with, and just as limited as, his right to represent himself at trial. MCM, *supra* note 14, R.C.M. 506(d)).

²² MCM, *supra* note 14, R.C.M. 405(f)(3). The Rule provides that an accused is entitled to be present “except in circumstances described in R.C.M. 804(b)(2) [sic]” Rule for Court-Martial (RCM) 804(c)(2), the rule to which RCM 405(f)(3) was apparently intended to refer, provides that an accused shall be considered to have waived the right to be present when “[a]fter being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.” *Id.*

²³ *Id.* R.C.M. 405(g)(1)(A).

²⁴ *Id.* R.C.M. 405(f)(10).

²⁵ *Id.* R.C.M. 405(f), (g).

⁸ Major Larry A. Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 MIL. L. REV. 49, 83 (1986).

⁹ *United States v. Payne*, 3 M.J. 354, 355 n.5 (C.M.A. 1977).

¹⁰ *United States v. Nichols*, 23 C.M.R. 343, 348 (C.M.A. 1957).

¹¹ *United States v. Davis*, 62 M.J. 645, 647 (A.F. Ct. Crim. App. 2006) (citing *United States v. Chuculate*, 5 M.J. 143, 144–45 (C.M.A. 1978)).

¹² Uniform Code of Military Justice (UCMJ) art. 32(e) (2008).

¹³ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

¹⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(a) (2008) [hereinafter MCM] (requiring a thorough and impartial investigation of every charge or specification prior to referral to a general court-martial); *id.* R.C.M. 407(a)(5) (authorizing a commander exercising general court-martial jurisdiction to direct a pretrial investigation); *id.* R.C.M. 601(d)(2)(A) (prohibiting a convening authority from referring a specification to a general court-martial unless there has been substantial compliance with the pretrial investigation requirements of Rule for Courts-Martial (RCM) 405).

¹⁵ *United States v. Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959).

mitigation.²⁶ Finally, the accused is afforded the right to remain silent during the pretrial investigation.²⁷

On its face, Rule for Court Martial (RCM) 405 appears to provide a significant body of rights to an accused during the pretrial investigation. It is important to bear in mind, however, that rights are only as good as the means available to enforce them. If an accused can be deprived of a right casually and without consequence, the right becomes meaningless. Within this framework, “rights” seem comparable to privileges that the government may extend or withdraw at will. As the enforcement of Article 32 rights resides with the courts, the standard of review applied to such errors will largely determine whether the provisions of RCM 405 amount to more than mere privileges. As discussed in the next section, the appellate courts struggled to define the appropriate standard of review for Article 32 errors for nearly fifty years, until CAAF’s 2007 decision in *United States v. Davis*.²⁸

***United States v. Davis* and Appellate Review of Article 32 Errors**

In *United States v. Davis*, the CAAF resolved the conflicting standards of review for Article 32 errors raised on appeal. In order to place the *Davis* decision in context, however, it is necessary to first examine the decision of the Court of Military Appeals (CMA) in *United States v. Mickel*.²⁹ *Mickel* was one of the earliest cases to deal with the appropriate standard of review for Article 32 errors, and it figures prominently at both levels of appellate review in *Davis*.

The central issue in *Mickel* was whether the failure to provide the accused with qualified counsel at the Article 32 constituted reversible error.³⁰ The *Mickel* court initially noted that although the pretrial investigation is an integral part of general court-martial proceedings, and the right to counsel is a fundamental part of the pretrial investigation, there is a substantial difference between defects in the pretrial proceedings and defects in the trial. In the court’s view, when the accused objects to substantial pretrial errors

before trial, he is entitled to pretrial “judicial enforcement” of those rights, irrespective of whether they would actually benefit him at trial.³¹ After trial, pretrial errors require reversal only if the errors materially prejudiced the accused at trial.³² The court reasoned that once an accused is tried at court-martial, the pretrial proceedings are superseded by the trial proceedings, and pretrial rights then merge with trial rights. Consequently, if there is no reason to believe that an accused’s trial rights were adversely affected by an error in the pretrial proceedings, there is no reason to set aside his conviction on appeal.³³ Based on the facts in *Mickel*, the court determined that the accused had not been adversely affected at trial by his defense counsel’s lack of qualifications at the pretrial investigation, and concluded that the failure to provide the accused with qualified counsel at the Article 32 did not constitute reversible error.³⁴

Returning to *United States v. Davis*,³⁵ the central issue in the case was the IO’s decision to close the Article 32 investigation to the public during the testimony of two victim witnesses.³⁶ Shortly before the start of the pretrial investigation, the IO decided to close the proceedings while two of the alleged victims testified. Defense counsel objected to closing the investigation, noting that neither victim had expressed any embarrassment or timidity during his previous interviews with them.³⁷ Despite the fact that the IO had not spoken with either witness, and that there was no evidence to suggest that either witness was reluctant to testify in a public forum, the IO nevertheless overruled the objection and closed the investigation to the public during their testimony.³⁸

²⁶ *Id.* R.C.M. 405(f)(11).

²⁷ *Id.* R.C.M. 405(f)(7).

²⁸ 64 M.J. 445 (C.A.A.F. 2007).

²⁹ 26 C.M.R. 104 (1958).

³⁰ *Id.* at 106. Prior to the pretrial investigation, the accused had requested either of two officers to serve as his defense counsel, but both were unavailable. The defense counsel who was ultimately detailed to represent the accused was not yet a member of the bar nor certified by The Judge Advocate General of the Air Force in accordance with Article 27(b), UCMJ. Though the accused did not object to his defense counsel’s lack of qualifications at trial, the court did not deem the issue waived because they did not believe that the accused could have fully understood his right to qualified counsel.

³¹ *Id.* at 107 (“At that stage of the proceedings, [the accused] is perhaps the best judge of the benefits he can obtain from the pretrial right.”). In *Mickel*, the accused did not raise the issue of his counsel’s qualifications at the Article 32 hearing until after trial. The court held that “[i]f there is no timely objection to the pretrial proceedings or no indication that these proceedings adversely affected the accused’s rights at the trial, there is no good reason . . . to set aside his conviction.” The court did not say whether it would have tested for prejudice on appeal if the accused had made a timely objection, but the trial court had refused judicial enforcement. That was the issue finally settled by *Davis*.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 107–08.

³⁵ 64 M.J. 445 (C.A.A.F. 2007).

³⁶ The misconduct at issue in the case involved the alleged rape, indecent assault, and battery of one woman, the alleged rape of a second woman, and the alleged battery of a third woman. *United States v. Davis*, 62 M.J. 645, 646 (A.F. Ct. Crim. App. 2006).

³⁷ *Id.* Prior to the pretrial investigation, both witnesses had made sworn written statements to Air Force investigators; at trial, the defense counsel represented to the military judge that he had interviewed both alleged victims prior to the Article 32 hearing and “neither had evinced any embarrassment or timidity regarding the alleged events.”

³⁸ *Id.*

After the conclusion of the pretrial investigation, the defense counsel presented written objections to the IO, and requested that he reopen the investigation so that the two alleged victims could testify in a public forum.³⁹ The IO refused to reopen the investigation.⁴⁰ The defense counsel subsequently raised the issue in a pretrial motion for appropriate relief, and moved the court to dismiss the charges.⁴¹ While the military judge determined the right to an open Article 32 investigation had been violated, he nevertheless declined to grant any relief as there had been no articulable harm to the accused.⁴²

On appeal, the Air Force Court of Criminal Appeals (AFCCA) reviewed the military judge's ruling under an abuse of discretion standard. The court also addressed the subsidiary issue of whether the accused was entitled to relief from a violation of his Article 32 rights without regard to prejudice.⁴³ The court concurred with the military judge's determination that the IO had improperly closed the pretrial investigation and violated the accused's right to a public pretrial investigation.⁴⁴ However, the court determined that the military judge erred in requiring the accused to demonstrate prejudice as a result of the violation in order to obtain relief.⁴⁵ The court relied on *Mickel* for the proposition that an accused who establishes a violation of his substantial pretrial rights at trial is entitled to judicial enforcement of those rights, without taking into consideration whether the enforcement will benefit him at trial, or whether he suffered prejudice as a result of the violation.⁴⁶ Having decided that the military judge should have dismissed the affected charges and ordered a reinvestigation under Article 32, the court then addressed the appropriate standard of review on appeal.⁴⁷

The court rejected the notion that they should apply a per se rule of reversal, and instead looked to Article 59(a) to resolve the issue.⁴⁸ Article 59(a) requires "material prejudice" to the "substantial rights" of the accused as a prerequisite to setting aside the findings or the sentence.⁴⁹ Consequently, the Article 32 error must result in material prejudice to the accused's rights at trial to warrant relief and

justify setting aside the findings and sentence. Similar to the pretrial enforcement of Article 32 rights, the court relied on *Mickel* to analyze this issue.⁵⁰ In *Mickel*, the CMA had stated that the accused's pretrial rights merge with his rights at trial, and that the question on appeal is whether the denial of a pretrial right adversely affected the accused's trial rights.⁵¹

In *Davis*, the AFCCA concluded that the IO's decision to close the pretrial investigation had no adverse impact on the accused's trial rights because, in addition to other factors,⁵² there was no evidence to suggest that the defense counsel's trial preparation was impeded or that the testimony of the two victim witnesses would have changed.⁵³ The court affirmed the findings and sentence, concluding that the military judge's error in denying the accused's motion for appropriate relief did not prejudice him at trial.⁵⁴

In its review of the case, the CAAF considered the law relating to the right of an accused to a public pretrial investigation, the decision of the IO to close part of the investigation to the public, and the AFCCA's prejudice analysis as applied to a violation of a pretrial right raised on appeal.⁵⁵ The CAAF determined that there were two issues before the court: (1) whether the AFCCA was correct in determining that the military judge's erroneous denial of relief should be tested for prejudice; and (2) whether the AFCCA correctly determined that the accused had not been prejudiced by the military judge's decision.⁵⁶

Before dealing with the substance of these issues, the CAAF identified two conflicting standards of review for evaluating errors in Article 32 proceedings.⁵⁷ The first, beginning with *Mickel*, held that Article 32 errors must be tested for prejudice.⁵⁸ As discussed previously, this line of authority is consistent with the approach taken by the AFCCA in the *Davis* case. The second line of authority,

³⁹ *Id.* Rule for Courts-Martial 405(h)(2) requires that objections be made to the investigating officer "promptly upon discovery," and provides that the investigating officer may require that they be filed in writing.

⁴⁰ *Id.*

⁴¹ *Id.* at 647.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 648.

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *United States v. Mickel*, 26 C.M.R. 104, 107 (1958)).

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *Mickel*, 26 C.M.R. at 107).

⁴⁹ UCMJ art. 59(a) (2008).

⁵⁰ *Davis*, 62 M.J. at 648.

⁵¹ *Mickel*, 26 C.M.R. at 107.

⁵² The court also considered the following: the fact that both witnesses had repeated their allegations a number of times, and these allegations remained consistent throughout the process; the fact that the defense counsel had the written statements of both witnesses, had interviewed both witnesses prior to the Article 32, and had cross-examined both witnesses at the Article 32; and the fact that the defense counsel conducted detailed cross-examinations of both witnesses at trial and effectively challenged their testimony, resulting in the accused's acquittal on the rape and sexual assault charges. *Davis*, 62 M.J. at 648-49.

⁵³ *Id.* at 648.

⁵⁴ *Id.* at 649.

⁵⁵ *United States v. Davis*, 64 M.J. 445, 446-48 (C.A.A.F. 2007).

⁵⁶ *Id.* at 448.

⁵⁷ *Id.*

⁵⁸ *Id.* (citing *Mickel*, 26 C.M.R. 107; *United States v. Holt*, 52 M.J. 173, 184 (C.A.A.F. 1999); *United States v. Johnson*, 53 M.J. 459, 462 (C.A.A.F. 2000); and *United States v. Stirewalt*, 60 M.J. 297, 302 (C.A.A.F. 2004)).

beginning with *United States v. Worden*,⁵⁹ called for reversal of the case without any showing of prejudice if there was a timely objection to the error.⁶⁰ Unable to identify a theory that would justify the conflicting standards of review, the CAAF held that the *Mickel* line of authority would apply to appellate review of Article 32 errors.⁶¹ Consequently, the CAAF's analysis of the issues in *Davis* closely mirrored that of the AFCCA, with the same result.

The essential holding in *Davis* declares that the test for prejudice found in Article 59(a) applies to all Article 32 errors considered for direct review of the findings and sentence in a court-martial, but not to Article 32 errors considered at the trial level.⁶² This is because Article 59(a) establishes an appellate standard of review of the findings and the sentence, and not a trial level standard for ruling on motions.⁶³ Thus, the requirement to show prejudice depends on when the error is raised: if the error is raised before trial, there is no need to show prejudice; but if the error is raised on appeal, the accused must show prejudice unless it is a "structural" error.⁶⁴

The U.S. Supreme Court defined structural errors in *Arizona v. Fulminante*.⁶⁵ The Court described structural errors as those "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself,"⁶⁶ and include a total deprivation of the right to counsel at trial,⁶⁷ the presence on the bench of a judge who is not impartial,⁶⁸ a deprivation of the right to self-representation at trial,⁶⁹ and a deprivation of the right to a public trial.⁷⁰ All of these errors specifically implicate trial rights which affect the fundamental fairness of a trial from beginning to end. As the Article 32 investigation is entirely separate and distinct from the trial itself, it is difficult to conceive of an Article 32 error that could have the same kind

of impact on the fairness of a trial as the errors identified by the Supreme Court.

The CAAF reached this conclusion in *Davis*, stating that "the Article 32 investigation is not so integral to a fair trial that an error in the proceeding necessarily falls within the narrow class of defects treated by the Supreme Court as structural error subject to reversal without testing for prejudice."⁷¹ In support of this conclusion, the CAAF noted that special courts-martial are tried without any formal pretrial investigation.⁷² This is consistent with the CMA's reasoning in *Mickel*, where the court stated that "[o]nce the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial."⁷³

Although the *Davis* decision fundamentally altered the landscape of appellate review of Article 32 errors, it was by no means a revolution. To the contrary, the *Davis* decision represents little more than an incremental advance of established legal principles. Faced with the dilemma of reconciling two divergent lines of cases regarding the appellate review of Article 32 errors, the court embraced one and abandoned the other. Though the CAAF did not expressly overrule *United States v. Worden* and its progeny, the CAAF has, in effect, done precisely that.

The question then arises, what does *Davis* mean for practitioners? In essence, it means that Article 32 errors raised on appeal will never be structural errors as defined by the Court. Structural errors are those which impact the fundamental fairness of the entire trial, but the Article 32 proceeding is not considered to be part of the trial at all. As a result, an accused who raises Article 32 errors on appeal will always need to demonstrate material prejudice to his substantial rights. This raises a second, related question: what types of Article 32 errors will result in material prejudice?

The CAAF's decision in *United States v. Von Bergen*⁷⁴ may provide the answer to the question of prejudice. *Von Bergen* involved retrial of a guilty plea which was reversed on appeal because it was improvident as a matter of law.⁷⁵

⁵⁹ 38 C.M.R. 284 (1968).

⁶⁰ *Davis*, 64 M.J. at 448 (citing *United States v. Worden*, 38 C.M.R. 284, 287 (C.M.A. 1968); *United States v. Maness*, 48 C.M.R. 512, 518 (C.M.A. 1974); *United States v. Donaldson*, 49 C.M.R. 542, 543 (C.M.A. 1975); *United States v. Chestnut*, 54 C.M.R. 290 (C.M.A. 1976); and *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978)).

⁶¹ *Id.*

⁶² *Id.* at 448-49.

⁶³ *Id.*

⁶⁴ *Id.* at 449.

⁶⁵ 499 U.S. 279, 309-10 (1991).

⁶⁶ *Id.* at 310. The structure of *Fulminante* is a little complicated. It consists of two opinions, each of which is partly the opinion of the court and partly dissent. The section discussed here—Part II of the opinion of Chief Justice Rehnquist—is the opinion of the court.

⁶⁷ *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

⁶⁸ *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)).

⁶⁹ *Id.* (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)).

⁷⁰ *Id.* (citing *Waller v. Georgia*, 467 U.S. 39 (1984)).

⁷¹ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

⁷² *Id.*

⁷³ *United States v. Mickel*, 26 C.M.R. 104, 107 (C.M.A. 1958).

⁷⁴ 67 M.J. 290 (C.A.A.F. 2009).

⁷⁵ *Id.* at 292. At trial, the accused pled guilty to one specification of knowingly possessing a computer disk containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(A) (2006), a provision of the Child Pornography Prevention Act of 1996 (CPPA), and one specification of knowingly and wrongfully distributing child pornography in interstate or foreign commerce by means of a computer in violation of Article 134, UCMJ. The CPPA provision was charged under clause 3 of Article 134, but not clauses 1 or 2. The accused committed the possession offense while stationed in the United Kingdom. On appeal, the Court of

The guilty plea was made pursuant to a pretrial agreement which included a conditional waiver of the accused's right to an Article 32 investigation. The waiver was conditioned upon acceptance of the accused's guilty plea.⁷⁶ After the CAAF determined the plea to be improvident and remanded the case, the accused withdrew from the pretrial agreement.⁷⁷ When the case was referred to a general court-martial without a pretrial investigation, the accused took the position that his Article 32 waiver had been conditional (a position that was supported by the original guilty plea colloquy) and moved the trial court to order a new Article 32 hearing. The government took the position that the accused had received the benefit of his pretrial agreement when the convening authority took action following his original trial, and thus the Article 32 waiver continued to be effective.⁷⁸ The military judge denied the motion, and the accused was convicted, contrary to his plea.⁷⁹ On appeal, the AFCCA found that the Article 32 waiver in the pretrial agreement was effective and approved the findings and sentence.⁸⁰

When the CAAF took up the issue, it disagreed with the lower court's reasoning, but affirmed the result.⁸¹ The CAAF held that when the case was remanded, the parties had been returned to the *status quo ante*, and the accused therefore had the right to withdraw from his pretrial agreement and demand an Article 32 investigation.⁸² Having determined that the military judge erred in denying the accused's motion for an Article 32 investigation, the CAAF evaluated the error in accordance with Article 59(a).⁸³ Despite the fact that the accused had been denied *all* of his substantial pretrial rights under Article 32, the CAAF found no prejudice.⁸⁴

On its face, it is difficult to conceive of a scenario in which an accused would be in a better position to demonstrate prejudice on appeal, and the CAAF's determination that the accused suffered no prejudice appears to signal that appellate relief from Article 32 errors is illusory. On closer examination, however, *Von Bergen* may

Appeals for the Armed Forces (CAAF) reversed the finding on the specification of possession on the basis of *United States v. Martinelli*. 62 M.J. 52 (C.A.A.F. 2005) (concluding that the CPPA does not apply extraterritorially; thus, the CPPA as incorporated into Article 134(3), UCMJ, does not apply extraterritorially).

⁷⁶ *Von Bergen*, 67 M.J. at 291.

⁷⁷ *Id.* at 292.

⁷⁸ *Id.* at 291–92.

⁷⁹ *Id.* at 292.

⁸⁰ *Id.* at 292–93.

⁸¹ *Id.*

⁸² *Id.* at 293–94. *Status quo ante* is a Latin phrase meaning “the way things were before.”

⁸³ *Id.* at 294–95.

⁸⁴ *Id.* at 295.

not be cause for defense counsel to despair. The court suggests that the facts of *Von Bergen* were unusual, and that this was a factor in their prejudice analysis. In discussing prejudice, the CAAF noted that the previous trial gave the accused some of the same protections as an Article 32 hearing, particularly since the same misconduct was at issue and the government relied on the same evidence (witnesses who testified at the contested trial had had their statements introduced or stipulated to at the original guilty plea). Although some evidence was destroyed between the trials, witnesses testified as to the nature of the evidence, how it was found, and how it was traced to the accused.⁸⁵ The CAAF expressly stated that in a different context, the destruction of evidence and passage of time might well be prejudicial.⁸⁶

Interestingly, the CAAF did not view the denial of the investigation as being inherently prejudicial; additional factors, such as destruction of evidence or diminished witness memories would need to be present.⁸⁷ Extrapolating from these factors identified by the court, the loss or destruction of evidence might be prejudicial in the absence of an adequate substitute (e.g., testimony describing the evidence). Similarly, prejudice might be found where critical witnesses were no longer available or no longer had any recollection of the relevant facts. While it may be premature to render final judgment on the availability of judicial relief from Article 32 errors on appeal, it is fair to say that at this point the CAAF has set a very high bar for proving prejudice.

Litigating Article 32 Errors

As a preliminary matter, the first step in obtaining relief from an Article 32 error is to ensure that the error is properly preserved. Unfortunately, RCM 405 is far from a model of clarity when it comes to the issue of objections to Article 32 errors and preservation of the same. Rule for Courts-Martial 405 and the associated discussion sections identify several stages at which objections must be made or renewed, or additional steps that must be taken, if Article 32 errors are to be properly preserved.

The first stage occurs during the pretrial investigation itself.⁸⁸ Rule for Courts-Martial 405(h)(2) provides that “any objection alleging failure to comply with [R.C.M. 405]”⁸⁹ must be made to the IO “promptly after discovery.”⁹⁰ The IO may require that objections be made in writing,

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ MCM, *supra* note 14, R.C.M. 405(h)(2).

⁸⁹ *Id.*

⁹⁰ *Id.*

though he is not required to actually rule on or resolve objections.⁹¹ These objections are to be noted in the report of investigation upon request of a party.⁹² Failure to object will be treated as waiver unless the accused can later show good cause for that failure.⁹³ Even if a defense counsel promptly objects to the IO and requests that the objection be noted in the report, the objection might still be waived if the IO fails to reference the objection in his report.⁹⁴ The discussion to RCM 405(k) indicates that defense counsel must not only object during the investigation and request that the objection be noted in the report, but he must also ensure that every objection is referenced in the report.⁹⁵ Defense counsel must raise objections to the IO's report with the commander who ordered the investigation within five days of the receipt of the report by the accused.⁹⁶ Failure to object to an omitted objection will result in the waiver of that objection.⁹⁷

There is, however, at least one class of objections whose preservation will require a defense counsel to take steps beyond all of those described above. As noted previously, an accused has the right to confront and cross-examine witnesses who are reasonably available,⁹⁸ as well as the right to have reasonably available witnesses produced.⁹⁹ Consequently, an accused has the right to the personal appearance of any reasonably available witness, regardless of whether that witness's testimony would be favorable or adverse. If a defense request for the personal appearance of such a witness is erroneously denied, the accused not only must object to the error and ensure the IO records the objection in his report, but should also request a deposition, as the discussion to RCM 405(k) states that "[e]ven if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."¹⁰⁰ This was the

position taken by the AFCCA in *United States v. Simoy*.¹⁰¹ In *Simoy*, the IO erroneously denied a defense request for the personal appearance of two government witnesses who were alleged co-conspirators facing charges related to the accused's felony-murder charge.¹⁰² The court found the error harmless, and noted "[a]n accused who wants to preserve the right to the personal attendance of a witness at a pretrial investigative hearing must move to take the witness's testimony by deposition under RCM 702."¹⁰³

As a result, objections to Article 32 errors must first be raised with the IO during the pretrial investigation itself, and defense counsel must request that they be noted in the report of investigation.¹⁰⁴ Objections made during the pretrial investigation must then be referenced in the report. To the extent the objection is not referenced in the report, defense counsel must object to the report and renew the objections with the convening authority within five days of receipt.¹⁰⁵ If the objection concerns the personal appearance of a reasonably available witness, defense counsel must also request a deposition.¹⁰⁶ To the extent that a defense counsel is successful in shepherding an Article 32 objection through the rough terrain of RCM 405, the next stage is to raise the objection with the military judge.

If objections to defects in the Article 32 investigation have been preserved, the accused may be entitled to relief before trial by making a motion for appropriate relief.¹⁰⁷ Such a motion must be made prior to the entry of pleas.¹⁰⁸ Failure to move the court for relief prior to entering pleas will result in waiver of the error absent a showing of good cause for relief from waiver.¹⁰⁹ If the military judge denies the motion, defense counsel must take steps to preserve the only remaining pretrial avenue of relief: an extraordinary writ. The first step is to move the court to reconsider when the military judge's findings of fact or law appear clearly erroneous. If that fails, defense counsel should notify the court of counsel's intent to file a petition for extraordinary relief, request that the military judge make written findings of facts and conclusions of law, and authenticate the record of trial. Assuming a successful petition will result in either a

⁹¹ *Id.* The discussion to RCM 405(h)(2) provides that the investigating officer (IO) may take corrective action in response to an objection when he believes it to be appropriate. In addition, when the objection raises a substantial question concerning a matter within the authority of the commander who ordered the investigation, the IO should promptly inform that commander of the objection.

⁹² *Id.*

⁹³ *Id.* R.C.M. 405(k).

⁹⁴ *Id.* The discussion to RCM 405(k) states "[i]f the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver."

⁹⁵ *Id.*

⁹⁶ *Id.* R.C.M. 405(j)(4).

⁹⁷ *Id.*

⁹⁸ *Id.* R.C.M. 405(g)(1)(A).

⁹⁹ *Id.* R.C.M. 405(f), (g).

¹⁰⁰ *Id.* R.C.M. 405(k) discussion.

¹⁰¹ 46 M.J. 592 (A.F. Ct. Crim. App. 1996), *findings aff'd, sentence rev'd on unrelated grounds*, 50 M.J. 1, 3 (C.A.A.F. 1998).

¹⁰² *Id.* at 608.

¹⁰³ *Id.* (citing *United States v. Chuculate*, 5 M.J. 143, 145-46 (C.M.A. 1978)) (holding that the absence of certain witnesses at the Article 32 hearing "deprived the accused of a substantial pretrial right," but holding the error harmless "where a defense counsel fails to timely urge appellant's substantial pretrial right[;] in this instance, the opportunity to depose. . .")

¹⁰⁴ MCM, *supra* note 14, R.C.M. 405(k).

¹⁰⁵ *Id.* R.C.M. 405(j)(4).

¹⁰⁶ *Id.* R.C.M. 405(k) discussion.

¹⁰⁷ *Id.* R.C.M. 905(b)(1).

¹⁰⁸ *Id.* R.C.M. 905(e).

¹⁰⁹ *Id.*

reopening of the previous Article 32 investigation or a new investigation altogether (depending upon the nature of the error at issue), defense counsel would be wise to also request that the proceedings be stayed until the appropriate appellate court has decided whether or not to grant extraordinary relief. If the military judge denies any of these requests, the denials may be included in the petition for extraordinary relief.¹¹⁰

As the CAAF noted in *Davis*, an accused who has been denied relief from an Article 32 error by the military judge may file a petition for extraordinary relief.¹¹¹ An extraordinary writ is generally disfavored, and is reserved for cases where the petitioner has “a clear and indisputable entitlement to relief.”¹¹² Issuance of a writ constitutes “a drastic instrument which should be invoked only in truly extraordinary situations.”¹¹³ Military courts are empowered to consider extraordinary writs through the All Writs Act.¹¹⁴ Jurisdiction under the Act is narrowly circumscribed, and military courts may only issue process to the extent that doing so is in aid of its existing statutory jurisdiction.¹¹⁵

The jurisdiction of the Army Court of Criminal Appeals (ACCA) is defined by Article 66, and includes cases with an approved sentence that extends to death, dismissal of a commissioned officer or cadet, dishonorable or bad conduct discharge, or confinement for one year or more.¹¹⁶ The CAAF’s jurisdiction, defined by Article 67, includes cases in which ACCA has affirmed a sentence of death, or the Judge Advocate General orders a case sent to the CAAF for review, or cases reviewed by ACCA.¹¹⁷ It is not entirely clear which of the two courts is the most appropriate venue for a petition for extraordinary relief. While the ACCA would ordinarily be the proper venue, the CAAF has been willing to entertain such petitions in the context of an Article 32 error.¹¹⁸ In either case, a strict reading of the jurisdiction of either court does not appear to include authority to

address Article 32 errors. Nevertheless, military appellate courts have been willing to find that a petition for extraordinary relief is in aid of their jurisdiction on a variety of issues, despite there being no adjudged sentence in a case.¹¹⁹ They do so based on the theory that the All Writs Act includes petitions in aid of their actual or *potential* jurisdiction,¹²⁰ or even their “supervisory jurisdiction” over courts-martial in general, which extends to cases that lie outside their ordinary appellate jurisdiction.¹²¹ To the extent that a petition is in aid of the jurisdiction of either the ACCA or the CAAF, it is necessary to next consider the specific type of writ appropriate to the relief sought.

There are four types of writs commonly heard by military appellate courts: mandamus, prohibition, habeas corpus, and *coram nobis*.¹²² At issue in the case of an Article 32 error is the writ of mandamus. Mandamus, meaning “to command,” is used “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”¹²³ As ACCA noted in *Dew v. United States*, “[b]ecause of their extraordinary nature, writs are issued sparingly, and a petitioner bears an extremely heavy burden to establish a clear and indisputable entitlement to extraordinary relief.”¹²⁴ Indeed, during the three-year period from 2005 through 2007, the CAAF granted only four of the ninety petitions for extraordinary relief filed with them.¹²⁵ This fact suggests that the likelihood of obtaining relief from an Article 32 error through such petitions is small.

To the extent that an accused is unsuccessful in pursuing an extraordinary writ, his only remaining option is to preserve the issue for appeal by pleading not guilty, and to

¹¹⁰ Captain Patrick B. Grant, *Extraordinary Relief: A Primer for Trial Practitioners*, ARMY LAW., Nov. 2008, at 30, 36. Captain Grant also recommends consulting with the writs coordinator at the Defense Appellate Division before filing any such petition.

¹¹¹ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

¹¹² *McKinney v. Jarvis*, 46 M.J. 870, 874 (A. Ct. Crim. App. 1997).

¹¹³ *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983) (referring specifically to writ of mandamus).

¹¹⁴ 28 U.S.C.A. § 1651 (LexisNexis 2011); *Dettinger v. United States*, 7 M.J. 216, 218–20 (C.M.A. 1979).

¹¹⁵ *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999).

¹¹⁶ UCMJ art. 66 (2008).

¹¹⁷ *Id.* art. 67.

¹¹⁸ *See ABC, Inc. v. Powell*, 47 M.J. 363, 364 (1997). The court stated that it required the Petitioners to show why they should not first have petitioned the Army Court of Criminal Appeals (ACCA), and ultimately accepted the case, in part because the issues being decided applied to all the services, and in part to save the time associated with an extra appeal and possible appeal from ACCA to the CAAF.

¹¹⁹ *See McPhail v. United States*, 1 M.J. 457, 462–63 (C.M.A. 1976) (holding that the court’s power to issue writs “in aid” of its jurisdiction was not limited to its appellate jurisdiction as defined by Article 67, but encompassed its supervisory power over the court-martial process); *McKinney v. Jarvis*, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997) (finding that ACCA had jurisdiction to review cases at the Article 32 stage because the proceeding is “judicial in nature”); *San Antonio Express-News v. Morrow*, 44 M.J. 708–09 (A.F. Ct. Crim. App. 1996) (same holding for Air Force Court of Criminal Appeals).

¹²⁰ *Dew v. United States*, 48 M.J. 639, 645 (A. Ct. Crim. App. 1998).

¹²¹ *Id.* at 646 (citing *McPhail*, 1 M.J. at 642).

¹²² C.A.A.F. R. P. 4(b)(1) (2011), available at <http://www/armfor.us/courts.gov/newcaaf/rules.htm> (noting that the court may entertain petitions including, but not limited to, these four).

¹²³ *Dew*, 48 M.J. at 648 (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)).

¹²⁴ *Id.* (citing *McKinney v. Jarvis*, 46 M.J. 870, 873 (A. Ct. Crim. App. 1997)).

¹²⁵ *Grant*, *supra* note 110, at 30 (citing U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2005, sec. 2, at 6 (2006); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2006, sec. 2, at 4–5 (2007); U.S. COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE, FISCAL YEAR 2007, sec. 2, at 7 (2008)).

attempt to build a record of specific prejudice to his rights at trial. Generally speaking, a guilty plea at trial will waive any defects in the Article 32 investigation.¹²⁶ However, pleading not guilty alone will not preserve an objection to an Article 32 error; an accused must still raise the objection prior to entering pleas. When an accused with a properly preserved Article 32 error fails to move the trial court for a remedy prior to arraignment, pleads not guilty, and is able to demonstrate good cause for relief from waiver, courts have considered the Article 32 defects as having merged with the trial, and will grant relief only if the accused can demonstrate that he was prejudiced at trial.¹²⁷

Conclusion

In the aftermath of *Davis* and *Von Bergen*, it appears that defense counsel have little cause to celebrate the fact that the CAAF has resolved the conflict regarding the role of prejudice on review of Article 32 errors. While the CAAF indicated that Article 32 errors raised before trial should be remedied without regard to prejudice, an accused who is nevertheless denied relief at trial is generally left with no effective means of vindicating his rights. The right to petition for extraordinary writ is little comfort to an accused when the granting of such writs is disfavored as a matter of

law and rare in practice. Similarly, the application of Article 59(a) to Article 32 errors on appeal has rendered post-trial appellate review an empty exercise. Article 59(a) permits appellate courts to set aside the findings and sentence of a court-martial only where the substantial rights of the accused have been materially prejudiced. As only structural errors are inherently prejudicial, and Article 32 errors are not, by their nature, structural errors, defense counsel litigating Article 32 errors on appeal have a near impossible hurdle to clear to demonstrate prejudice and obtain relief. Unfortunately, the CAAF set the bar for prejudice so high in *Von Bergen* that it may well be unreachable for any Article 32 error. Consequently, if defense counsel wish to remedy Article 32 errors, they must do so at the trial level, or risk obtaining no remedy at all.

¹²⁶ See *United States v. Lopez*, 42 C.M.R. 268, 270 (C.M.A. 1970). Given the remote likelihood of appellate relief from Article 32 errors, preserving such errors should not be a major consideration in advising a client on whether to plead guilty.

¹²⁷ See *United States v. Cruz*, 5 M.J. 286, 289 (C.M.A. 1978).

Knowing When to Say No and Providing a Way Forward: The Commander's Emergency Response Program and the Advising Judge Advocate

Major Marlin Paschal*

I. Introduction

After several weeks of sustained “combat operations,” U.S. Forces from a brigade combat team (BCT) have successfully created a small pocket of relative peace within an unnamed province in Afghanistan. The commander of this BCT has managed to forge a fragile but budding trust between the troops under his command and the local civic leaders. Unfortunately for the commander and the local leaders, routine violence, unchecked criminal activity, and widespread corruption has led to chronic deficiencies within the local government, hampering its ability to provide basic but essential services to the local population. The BCT commander recognizes this problem and employs the resources of the Commander's Emergency Response Program (CERP) to address these shortcomings. Within a few days, local contractors start refurbishing schools, digging wells, installing generators, and cleaning rubble from the streets. Within weeks, a sense of normalcy returns to the province and the budding trust continues to flower.

Unfortunately, the “normal” doesn't last long. While out on patrol, a platoon from the BCT is ambushed along a desolate route on the edge of the province. Four Soldiers are killed and an equal number are wounded. The next day, two Soldiers from the BCT are killed by a sniper attack while manning a checkpoint on the outskirts of an unnamed town. The BCT commander has received no viable intelligence to effectively locate and terminate this old but reemerging threat. The BCT commander is convinced that the local leaders know something. In response, the commander plans to order the suspension of all CERP projects in the area until the local populace begins to “cooperate,” by providing some actionable intelligence regarding the location of these militants. The BCT commander requests a meeting with the local leaders so that he can formally outline his ultimatum. Prior to the meeting he turns to you, his Brigade Judge Advocate (BJA), and asks, “So what do you think, Judge?”

Well Judge, what do you think?

Wrestling with the above question is no easy affair, but it serves to illustrate a conflict that lies at the heart of stability and counterinsurgency (COIN) operations.¹ In

some regards, such operations transform a commander from a traditional war fighter into a modern day feudal lord.² In this latter role, a commander must function as both a warrior and civic planner.³ More to the point, a unit's success during stability and COIN operations is contingent on its ability to effectively balance divergent yet interwoven security, information, economic, and political concerns.⁴ For many commanders and logisticians, the security mission seems relatively straightforward.⁵ Commanders and Soldiers generally understand the right and left limits of an armed engagement and the capabilities of the weapon systems they have at their disposal. Unfortunately, they may not have much familiarity with executing economic and humanitarian operations or the contract and fiscal rules that govern such missions.⁶ Too often, the Soldier in the field

¹ See U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS ¶ 4 a & b (16 Sept. 2009) [hereinafter DoDI 3000.05] (describing stability operations as “a core U.S. military mission,” in which military commanders must be prepared to (1) establish civil security and civil control; (2) restore or provide essential services; (3) repair critical infrastructure; and (4) provide humanitarian assistance); see also U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ¶ 1-2 (15 Dec. 2006) [hereinafter FM 3-24] (defining “counterinsurgency” as those political, economic, military, paramilitary, psychological, and civic actions taken by a government to defeat an insurgency).

² *Id.* In this context, the term “feudal” is meant to describe the transitory period from anarchy to a functioning government. In the current conflicts of Iraq and Afghanistan, the modern day U.S. military commander often stands as a “stop-gap sovereign” between the period of fully fledged combat operations and host nation government legitimacy.

³ Statement based on interviews with civil affairs officers, Major Eugene Hwangbo, 2d Brigade, 10th Mountain Division, S-9, Camp Hammer, Iraq (May 2010) & Captain Thomas Eddy, 2d Brigade, 10th Mountain Division, Deputy S-9, Camp Hammer, Iraq (May 2010) [hereinafter Hwangbo & Eddy Interviews] (These officers routinely described the Commander's Emergency Response Program (CERP) project selection process as a real life version of *Sim City*. *Sim City* is a computer game that lets the player design and build his own city, which must be administered well if it is to thrive.).

⁴ U.S. INTERAGENCY COUNTERINSURGENCY INITIATIVE, U. S. GOV'T COUNTERINSURGENCY GUIDE 2 (Jan. 2009) [hereinafter COIN GUIDE] (defining COIN as “[a] blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes. Unlike conventional warfare, non-military means are often the most effective elements, with military forces playing an enabling role. COIN is an extremely complex undertaking, which demands of policy makers a detailed understanding of their own specialist field, but also a broad knowledge of a wide variety of related disciplines”).

⁵ See FM 3-24, *supra* note 1, ¶ 8-1 (noting that “[l]ogistic providers are often no longer the tail but the nose of a COIN force. Some of the most valuable services that military logisticians can provide to COIN operations include the means and knowledge for setting up or restarting self-perpetuating sustainment designs”).

⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-615, MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE OVERSIGHT AND INTERAGENCY COORDINATION FOR THE COMMANDER'S EMERGENCY RESPONSE PROGRAM IN AFGHANISTAN 10 (May 2009) [hereinafter GAO-09-615]. This Government Accountability Office (GAO) audit found that

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regards these rules as unnecessary bureaucratic impediments that neither support nor complement the mission.⁷ Such beliefs, justified or not, can alienate the leaders an attorney must advise. For instance, in the scenario described at the beginning of this article, the answer is likely a resounding “no.” A commander may not conditionally withdraw CERP funding to advance the unit’s intelligence-gathering efforts. To advise his commander effectively, the Judge Advocate (JA) must fully understand why the answer is “no,” and what other options are available.

The CERP is often described as an unconventional “fiscal weapon system,” but efforts to portray it as such are often at odds with the way the CERP must be implemented.⁸ Specifically, the Department of Defense Financial Management Regulation (DoDFMR) and the theater-specific J8 Standard Operating Procedures (Money as a Weapon System, or MAAWS) state that CERP **may not** be used (1) to provide a direct or indirect benefit to U.S., coalition, or supporting military personnel, or (2) to conduct psychological operations, information operations, or other U.S., coalition, or Iraqi/Afghan Security Force operations.⁹ With these prohibitions in mind, it seems counterintuitive to regard the CERP as a natural extension of a commander’s

“personnel assigned to manage and execute CERP had little or no training on their duties and responsibilities.” The report added that “[o]ne of the attorneys responsible for reviewing and approving CERP projects received no CERP training before deploying. Unsure of how to interpret the guidance, the attorney sought clarification from higher headquarters, which delayed project approval.”

⁷ United States Forces–Iraq (USF–I) CERP conferences held from 9–10 February 2010 and 7–8 July 2010 at Victory Base Complex (VBC), Iraq [hereinafter CERP Conference Insights] (statement based on insights gained from the conference). The conference attendees included representatives from the brigade combat team (BCT) civil affairs teams and BCT commanders, CERP project purchasing officers and pay agents, the division CERP teams, various general officers, and the USF–I CERP staff, to include the USF–I Chief of Staff. Attorneys, at all command levels, involved in the CERP process were also in attendance. At both conferences, commanders and staff officers routinely suggested that the CERP process from project approval to implementation was often too cumbersome and unnecessarily document intense.

⁸ See Andrew Wilder & Scott Stuart Gordon, *Money Can’t Buy American Love*, FOREIGN POL’Y, 9 Dec. 2009, available at http://www.foreignpolicy.com/articles/2009/12/01/money_cant_buy_america_love (noting that “[m]arketing aid as a strategic ‘weapons system’ is clearly a more effective way to convince Congress to appropriate funds than calling to alleviate human suffering and poverty in far-flung corners of the developing world”); see also Colonel Rick L. Tillotson, *The Commander’s Emergency Response Program: A Versatile Strategic Weapon System Requiring an Azimuth Adjustment* (4 Jan. 2010) (describing CERP as a versatile non-kinetic weapon system) (submitted as a research report to the faculty of the Air War College in partial fulfillment of graduation requirements) (on file with author).

⁹ U.S. DEP’T OF DEF., REG. 7000.14-R, VOL. 12, CH. 27, ¶ 270301A (Jan. 2009) [hereinafter DoDFMR]; U.S. FORCES–IRAQ (USF–I) J8, STANDARD OPERATING PROCEDURES (SOP), MONEY AS A WEAPON SYSTEM, at B-3 (Mar. 2010) [hereinafter MAAWS] (This is the primary SOP for Iraq.); U.S. FORCES–AFGHANISTAN J8, PUB. 1-06, MONEY AS A WEAPONS SYSTEM—AFGHANISTAN, COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) STANDARD OPERATING PROCEDURES (SOP) 3 (Feb. 2011) [hereinafter MAAWS–A] (This is the primary SOP for Afghanistan.).

warfighting ability. The purpose of this article is to explore this difficulty and workable approaches for negotiating problems confronting the CERP practitioners and the JAs who advise them.

With these questions in mind, this article begins by describing the fiscal law landscape giving rise to the CERP, including the CERP’s initial policy impetus and the current state of the law. Next, this article examines the primary field references available to the CERP end user, the DoDFMR and the MAAWS, as they relate to CERP projects. In particular, this article takes a look at the past and current regulatory guidelines related to spending CERP funds and implementing CERP funded projects. Finally, this article examines the right and left limits of the CERP as a non-lethal targeting tool and explores the possible challenges that may emerge as a result of specific statutory and regulatory limitations. But rather than treating these limitations as bureaucratic impediments, this article seeks to offer advising JAs potential solutions.

II. The Fiscal Landscape

The CERP originally emerged as a creature of opportunity, but it quickly became a rising star among Department of Defense (DoD) “mainstay” appropriations.¹⁰ Generally speaking, the very idea of the CERP cuts against and redefines the textbook division of labor between the DoD, Department of State (DoS) and other U.S. Government international aid organizations (e.g., the United States Agency for International Development (USAID)).¹¹ In years past, a newly minted JA was taught that the DoD fights wars and everyone else cleans up the mess. America’s recent engagements in Iraq and Afghanistan have necessitated an abrupt departure from this convention and a renewed focus on civil capacity-building and effect-based operations.¹² The

¹⁰ See Lieutenant Colonel Mark S. Martins, *No Small Change of Soldiering: The Commander’s Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, 1, 3 n.14 (providing an invaluable historical primer on the origins and early successes of CERP in Iraq); Captain Charles Bronowski & Captain Chad Fisher, *Money as a Force Multiplier: Funding Military Reconstruction Efforts in Post-Surge Iraq*, ARMY LAW., Apr. 2010, at 50 (discussing in some detail the use of CERP in Iraq from January 2008 through April 2009).

¹¹ See EXEC. OFFICE OF THE PRES. OF THE U.S., NAT’L SEC. PRESIDENTIAL DIRECTIVE/NSPD-44, at 2 (Dec. 7, 2005) (requiring the Secretary of State to coordinate and lead “stabilization and reconstruction activities”); see also *The Honorable Bill Alexander*, 63 Comp. Gen. 422, 423 (1984) (“DOD has no separate authority to conduct civic action or humanitarian assistance activities, except on behalf of other Federal agencies (such as U.S. Agency for International Development (USAID)) . . . or (for minor projects) as incidental to the provision of security assistance”); Foreign Assistance Security Act of 1961, 22 U.S.C. § 2151(b) (2006) (giving USAID, under policy guidance from the Secretary of State, “responsibility for coordinating all U.S. development-related activities”).

¹² See, e.g., Captain Adam Scher, *Political Advisors: Harnessing the Soft Power of the Brigade Commander*, MIL. REV., Jan. 1, 2010, at 73, 74, available at http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20100228_art013.pdf. Captain Scher noted that

“clean-up aspect” of the mission can no longer wait until the fighting has stopped. In fact, in COIN operations, the “clean-up aspect” may be the most vital component of mission success.¹³ Inevitably, a renewed focus on the manner in which the DoD fights our nation’s wars has also necessitated a renewed focus on how the DoD pays for them. The CERP, as noted above, is a unique departure from past practices and a tacit recognition of an evolving military mindset.¹⁴ In order to understand the CERP and its present day challenges, it is important to generally understand the fiscal landscape from which it emerges and the direction it is currently heading.

A. The Statutory Purpose

1. The Early Stages

In the early stages of the Iraq war, before Congress provided a statutory basis for the CERP, commanders in the field were making use of the CERP concept.¹⁵ At first, the CERP was financed by the mountains of cash uncovered after the fall of Sadaam Hussein and his Ba’athist regime.¹⁶

[M]oney is the most significant weapon system. The brigade combat team can effectively command, control, and apply funds to each of its subordinate elements using the arts and science of nonlethal operations. . . . During the deployment of the 3d Brigade Combat Team, 101st Airborne Division (Air Assault), in support of Operation Iraqi Freedom from 2007 to 2009, the brigade combat team continually used money as an instrument of combat power by targeting critical aspects of society. . . .

Id.; see also Seth G. Jones, *Stabilization from the Bottom Up: Testimony Before the Commission on Wartime Contracting in Iraq and Afghanistan* (Feb. 5, 2010) [hereinafter Jones Testimony], available at http://www.rand.org/pubs/testimonies/2010/RAND_CT340.pdf (containing the testimony of Seth G. Jones, a senior political scientist at the RAND Corporation). Mr. Jones, relying on a memorandum from General Stanley McChrystal to Secretary of Defense Robert Gates citing General McChrystal as saying that “our strategy cannot be focused on seizing terrain or destroying insurgent forces; our objective must be the population.”

¹³ See DoDI 3000.05, *supra* note 1, ¶ 4a (Department of Defense (DoD) policy is that the DoD must now be as proficient in conducting stability operations as combat operations.).

¹⁴ See *id.* ¶ 4a(3) (DoD policy is that the DoD shall “lead stability operations to establish civil security . . . repair and protect critical infrastructure, and deliver humanitarian assistance until such time as it is feasible to transition lead responsibility to other U.S. Government agencies, foreign government, or international governmental organizations”—policies in keeping with the uses of CERP.).

¹⁵ See Martins, *supra* note 10, at 3.

¹⁶ *Id.* (describing how the initial resources for CERP were initially funded with “ill-gotten Ba’athist Party cash” from seized assets).

A *vested asset* refers to former Iraqi regime assets held in U.S. financial institutions that the President confiscated in March 2003 and vested in the U.S. Treasury. The United States froze these assets shortly before the first Gulf War. The USA PATRIOT Act of 2001 amended the International Emergency Economic Powers Act to empower the President to confiscate, or take ownership of, certain property of designated entities, including these assets, and vest ownership in an agency or individual. The President has the

The Coalition Provisional Authority (CPA), acting as the *de facto* sovereign,¹⁷ quickly put the uncovered cash to work by empowering local commanders to execute “humanitarian relief and reconstruction requirements within their areas of responsibility” by carrying out programs that could “immediately assist the Iraqi people.”¹⁸ The early projects varied in size and complexity but most were small, low-dollar projects that could be quickly implemented.¹⁹ In providing cash directly to field commanders, the CPA sought to take advantage of the tactical commander’s unique vantage point, resulting in significant strategic and tactical gains.²⁰ However, the confiscated cash soon grew scarce, prompting commanders to take their case to Washington.²¹ Commanders asserted that the CERP provided results that

authority to use the assets in the interests of the United States. In this case, the President vested the assets in March 2003 and made these funds available for the reconstruction of Iraq in May 2003. *Seized assets* refer to former regime assets seized within Iraq. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-902R, REBUILDING IRAQ: RESOURCE, SECURITY, GOVERNANCE, ESSENTIAL SERVICES, AND OVERSIGHT ISSUES 10 n.3 (June 2004) [hereinafter GAO-04-902R].

¹⁷ See L. ELAINE HALCHIN, CONG. RESEARCH SERV., THE COALITION PROVISIONAL AUTHORITY (CPA): ORIGIN, CHARACTERISTICS, AND INSTITUTIONAL AUTHORITIES 5, 32 (2004) (stating that the origin of the CPA’s authority was unclear, but The report states, *inter alia* that

[t]he status of this organization [the CPA] remains open to question. While a letter exists that states that the United States, and the United Kingdom, created the authority, in 2005 Justice Department attorneys identified General Franks as the individual who established CPA. No explicit, unambiguous, and authoritative statement has been provided that declares how CPA was established, under what authority, and by whom, and that clarifies the seeming inconsistencies among alternative explanations for how CPA was created.

Id. at CRS-39. In any event, the CPA vested itself with executive, legislative, and judicial authority over the Iraqi government from 21 April 2003 until 28 June 2004).

¹⁸ Martins, *supra* note 10, at 11.

¹⁹ See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM IN IRAQ FUNDS MANY LARGE SCALE PROJECTS, SIGIR-08-006, at 6 (Jan. 25, 2008) [hereinafter SIGIR-08-006] (noting that in 2004 less than 1% of CERP projects cost more than \$500k, though this climbed to 3.8% by fiscal year (FY) 2006).

²⁰ See Martins, *supra* note 10, at 3. According to now Brigadier General Martins, “a multitude of emergency needs developed in the vacuum of functioning Iraqi civil institutions” and U.S. combat forces were often closer to the problems affecting the indigenous population than any other U.S. or Iraqi government agency. *Id.* He also explained that

[f]rom early June to mid-October, Iraqis benefited noticeably from the seized funds entrusted to commanders. More than 11,000 projects were completed in this time, resulting in the purchase of \$78.6 million of goods and services, mostly from local economies that were being brought to life after decades of centralized rule from Baghdad.

Id. at 8.

²¹ See *id.* at 10 (noting that the assets used to support CERP would “not last beyond 2003 if the accelerated rate of spending continued”).

people could see; and, without it, Soldiers in the field would be deprived of a critical tool for shaping a stable security environment.²²

In response to commanders' requests and reports of battlefield success, Congress adopted the CERP as an American- rather than Iraqi-funded obligation.²³ But unlike most other funding sources, Congress authorized the Secretary of Defense to suspend the normal statutory and regulatory requirements traditionally needed to spend taxpayer money.²⁴ This allowed the CERP to remain true to its roots as an easily-accessible, user-friendly money store. In essence, Congress simply codified what was already taking place on the ground, and on 6 November 2003, President Bush signed the bill into law and the CERP became a formal DoD appropriation, securing the DoD's role in the "clean up" business for the long haul.²⁵

2. New Law—Same Purpose

In February 2010, President Obama submitted his Fiscal Year (FY) 2011 budget request to Congress. He sought \$1.3 billion in CERP funds.²⁶ On 16 September 2011, the Senate Committee on Appropriations recommended this be reduced to \$900 million, with \$100 million committed to Iraq, and

²² CERP Conference Insights, *supra* note 7 (Commanders, who had done multiple deployments in Iraq and had experience with CERP, asserted that it was a critical tool for shaping the security environment.); *see also* Dana Hedgpeth & Sarah Cohen, *Military Says Special Case Buys a Lot of Goodwill in Iraq*, WASH. POST, 11 Aug. 2008, available at http://o.seattletimes.nwsources.com/html/nationworld/2008107036_iraqcash12.html. Marine Colonel John A. Koenig, who oversaw \$160 million worth of CERP projects in Anbar province last year, was quoted as saying that "you can't shoot yourself out of an insurgency . . . a rifle only gets you so far. It shows you have some force. The CERP allows you to develop our answer to al-Qaeda." *Id.*

²³ Martins, *supra* note 10, at 11. In 2008, the Government of Iraq (GOI) transferred \$270 million of its own funds to the United States for spending under the Iraqi CERP (I-CERP) program, separate from but similar in concept to CERP (U.S.-funded CERP spending for FY 2008 was \$1.2 billion). Bronowski & Fisher, *supra* note 10, at 50–51, 57–58. This article focuses on CERP rather than I-CERP.

²⁴ *See* Memorandum for Sec'y of the Military Dep'ts, et al, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for Fiscal Year 2010 (Mar. 24, 2010) [hereinafter Waiver Memo] (on file with author) (An identical memorandum has been signed by the Secretary of Defense (SECDEF) each year the CERP appropriation has been effect. The memorandum effectively waives the application of the Federal Acquisition Regulation (FAR) to all contracts issued under the CERP.).

²⁵ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215 (2003) (establishing a CERP fund of \$180 million from DoD operation & maintenance funds, which commanders in Iraq could use "notwithstanding any other provision of law . . . to respond to urgent humanitarian relief and reconstruction requirements," but requiring quarterly DoD reports to Congress on the use of those funds).

²⁶ OFFICE OF THE UNDERSECRETARY OF DEFENSE (COMPTROLLER), FISCAL YEAR 2011 BUDGET REQUEST 11 (Feb. 2010) (PowerPoint slideshow), available at <http://www.defense.gov/news/d2010rolloutbrief1.pdf>

\$800 million to Afghanistan.²⁷ In part, this recommendation reflected the operational shift from Iraq to Afghanistan.²⁸ It also reflected a larger problem. For years, factions within the State and Defense departments had vied for control of the "post-war" reconstruction effort and the money financing that undertaking.²⁹ However, commanders managed the security environment, controlled the battle space, and most importantly, commanders had CERP funds, and a broad mandate for using them. At first, they concentrated on small-scale, immediate-impact projects, but as the CERP evolved, large-scale, high-dollar projects had become a normal part of a commander's non-lethal targeting regimen.³⁰ Congress now sought to constrain what commanders could do with CERP funds. The Senate Appropriations Committee stated:

CERP Projects.—The Committee includes new language in the Commander's Emergency Response Program [CERP] general provision that requires all projects executed under this authority shall be small scale, and shall not exceed

²⁷ S. REP. NO. 111-295, at 207 (2010), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt295/pdf/CRPT-111srpt295.pdf>.

²⁸ *Id.*; *see also Report of the Committee on Armed Services, House of Representatives, on H.R. 1540*, H. REP. NO. 112-78, at 240 (2011), available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hprt78/pdf/CRPT-112hprt78.pdf> (Committee report on the FY 2012 DoD Appropriations Bill, discussing CERP in Afghanistan):

The committee notes that this section does not authorize the use of the Commanders' Emergency Program in Iraq, as previously authorized...The remaining U.S. forces in the Republic of Iraq are operating in a strictly training and advisory capacity to Iraqi Security Force units. The committee believes that any immediate humanitarian needs such units encounter should be addressed through Iraqi funding sources.

Id.

²⁹ CERP Conference Insights, *supra* note 7. During the July 2010 CERP conference, a rather heated discussion took place between military civil affairs officers and representatives from the USAID concerning the relative value of micro-lending versus micro-grants. The micro-lending concept relies on the issuance of small repayable interest-bearing loans to private business owners, while the micro-grant program delivers interest-free, non-repayable cash grants. Military commanders favored the latter, but USAID was a firm supporter of the former, and wanted military commanders to use the CERP to help strengthen the micro-lending concept. These representatives further argued that issuing micro-grants to business owners was actually retarding the reconstruction effort. *See also* Rajiv Chandrasekaran, *U.S. Military, Diplomats at Odds Over How to Resolve Kandahar's Electricity Woes*, WASH. POST, 23 Apr. 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/22/AR2010042206227.html>.

³⁰ *See Recurring Problems in Afghan Construction: Hearing Before the Commission on Wartime Contracting*, 110th CONG. 6 (2011) [hereinafter Fields Statement] (statement by Arnold Fields, Special Inspector General for Afghanistan Reconstruction). Major General (Retired) Fields noted that "SIGAR found that while large-scale projects accounted for only 3% of all CERP projects, they consumed more than 67% of CERP funds" from 2005 through the first three quarters of 2009.

\$20,000,000 in cost (including any ancillary or related elements in connection with such project). The Committee believes it is necessary to alter current authorities because this program has been used and is being considered as a means to pay for large-scale reconstruction projects and other Department of Defense efforts that are outside the scope of the purpose of CERP. The proper role of the CERP program is to enable commanders in the field to respond to urgent, small scale, humanitarian relief projects that provide an immediate benefit to the local population and the coalition troops serving in the area. The program was not designed to fund large-scale reconstruction projects that are the responsibility of the Department of State and the U.S. Agency for International Development [USAID]. This provision also prohibits spending funds on projects that are identified separately but are clearly related to other projects and collectively exceed the \$20,000,000 threshold.³¹

Thus, it seems Congress wants to refocus the CERP back to funding small scale immediate-impact projects like digging wells and supplying portable generators to existing facilities, and return the reconstruction mission to the traditional stakeholders (i.e., DoS and USAID). Practically, however, a \$20 million cost ceiling is still pretty high: a commander could fund the construction of a 100-room Baghdad hotel for \$4.2 million and many other seemingly large projects for a lot less.³² Congress needs to be stricter if it intends to return the CERP to a small-project focus and shift the bulk of the DoD's reconstruction mission back to its civilian counterparts.

The National Defense Authorization Act (NDAA), signed by President Obama on 7 January 2011, made some effort to bridge the gap between congressional intent and actual reform. Specifically, the NDAA retained the committee's \$20 million limit for projects, reduced the CERP funding to \$500 million for FY 2011, and added additional notification requirements for projects expected to cost \$5 million or more.³³ More importantly, the NDAA

shifted \$400 million in proposed CERP funds, roughly half of the DoD's reconstruction budget set aside for Afghanistan, to create the Afghanistan Infrastructure Fund (AIF).³⁴

The AIF is a "CERP-like funding source" created to fund large scale projects in Afghanistan. But unlike the CERP, use of the AIF **mandates** both DoS involvement and approval.³⁵ For many, this effort represents a long awaited step in the right direction, because it more concretely provides for interagency involvement. But in other ways, it mostly serves as a duplicative funding source that commanders *might* initially be reluctant to use. Put another way, since a \$450,000 hydraulic lift for a water treatment plant could be purchased and installed under either CERP or AIF authority, a commander will likely purchase it under the former authority if it is more convenient to do so. However, since the implementation of AIF essentially places half of the DoD reconstruction-COIN budget under "interagency control," commanders will ultimately have to cede ground to the DoS and the USAID. This means that even if a military commander could *unilaterally* complete a \$450,000 hydraulic lift project with just CERP funds, he should only do so as a matter of last resort. This point is especially relevant considering Congress's renewed interest in limiting the CERP to funding small scale quick win projects.

Despite this interest, Congress placed no specific restrictions on the types of projects a commander can independently pursue. In fact, the CERP's statutory purpose is still rather vague: "to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within [commanders'] areas of responsibility" and "provide an immediate and direct benefit to the people of Iraq or Afghanistan."³⁶ Thus, Congress left commanders considerable leeway in using CERP funds. But, as will be discussed below, the DoD has implemented more stringent self-imposed rules.

Afghanistan; (2) the budget and implementation timeline for the proposed project; and (3) a plan for the sustainment of the proposed project. *Id.* Of the \$500 million set aside for CERP, \$100 million could be used for operations in Iraq, while the remaining \$400 million would be set aside for programs in Afghanistan. *Id.* § 1212(a)(3).

³⁴ *Id.* § 1217. The Afghanistan Infrastructure Fund (AIF) is a two-year appropriation. The funds set aside under the NDAA remain available until 30 September 2012.

³⁵ *Id.*; See Policy Memorandum for U.S. Embassy Kabul and USFOR-A Consolidated Policy for Executing Afghanistan Infrastructure Fund (AIF) Procedures (12 Feb. 2011) (on file with author). The memorandum is signed by Karl Eikenberry, U.S. Ambassador to Afghanistan, and General David H. Petraeus, Commander, International Security Assistance Force/U.S. Forces—Afghanistan. The memorandum further discusses the DoD and the Department of State (DoS) working groups and the types of projects suitable for funding under the AIF.

³⁶ See NDAA FY11, *supra* note 33, § 1212(d)(2). However, even this language was not present in earlier versions of the program; its addition emphasizes the Congressional concerns noted earlier in this article. The practical meaning of the change is still unclear, but it does denote a meaningful shift away from the use of the CERP as a "nation building" fund source.

³¹ S. REP. NO. 111-295, at 207 (2010).

³² See OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER'S EMERGENCY RESPONSE PROGRAM: HOTEL CONSTRUCTION COMPLETED, BUT PROJECT MANAGEMENT ISSUES REMAIN, SIGIR-09-026, at 1 (26 July 2009).

³³ Ike Skelton National Defense Authorization Act for Fiscal Year (FY) 2011, Pub. L. No. 111-383, § 1212(c)(2), 124 Stat. 4137, 4389-90 (2011) [hereinafter NDAA FY11] (One-Year Extension and Modification of CERP). The notification (to Congress) of projects exceeding \$5 million must include (1) the location, nature, and purpose of the proposed project, including how the project is intended to advance the military campaign for

B. The CERP as a Necessary Expense

A basic tenet of fiscal law is that appropriated funds may only be used for the purposes for which they are formally designated.³⁷ Under the Necessary Expense Doctrine, appropriations are available for expenses which are necessary or incident to the proper execution or achievement of the object of the appropriation.³⁸ This doctrine recognizes that when Congress makes an appropriation for a particular purpose, by implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose.³⁹ The application of the doctrine is, in most cases, a matter of a commander's discretion.⁴⁰ This discretion is not unfettered. In order to determine if a proposed expenditure falls within an authorized purpose or function, a commander must consider the following: (1) the expenditure bears a reasonable relationship to the purpose of the appropriation sought to be charged, (2) the expenditure is not prohibited by law, and (3) the expenditure is not provided for by another appropriation.⁴¹

For FY 2011, Congress provided the DoD a discretionary budget of approximately \$685 billion, including about \$159 billion for Overseas Contingency Operations (down from \$163 billion in 2010).⁴² Of this, CERP represented \$500 million (down from \$1.2 billion in FY 2010).⁴³

³⁷ 31 U.S.C. § 1301(a) (2006). This requirement was originally enacted in 1809. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. 1, at 4-6 (3d ed. 2004).

³⁸ See Internal Revenue Serv. Fed. Credit Union-Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (For an expense to be proper under the "necessary expense" test, the expense must be "reasonably necessary in carrying out an authorized function" or "contribute materially to the effective accomplishment of that function.").

³⁹ See Customs and Border Protection—Relocation Expenses, B-306748, 1997 WL 56937, at *2 (6 July 2006) (The "necessary expense" doctrine reflects a respect for an agency's legitimate exercise of discretion to determine how best to accomplish the objects of its appropriation. Although not unlimited, it is a rule of reason and of deference.).

⁴⁰ Department of the Air Force—Purchase of Decals for Installation on Public Utility Water Tower, B-301367, 2003 WL 22416499, at *2 (Oct. 23, 2003) (noting that necessary expense doctrine is, in the first instance, "a matter of agency discretion," and commander's use of funds lie within his discretion); see also Matter of: Customs Service, 1997 WL 56937, at *2 (July 6, 2006) (The "necessary expense" doctrine reflects a respect for an agency's legitimate exercise of discretion to determine how best to accomplish the objects of its appropriation, and is a rule of reason and of deference.).

⁴¹ The Honorable Bill Alexander, 63 Comp. Gen. 422, 427-28 (1984).

⁴² OFFICE OF THE UNDERSEC'Y OF DEF. (COMPTROLLER), UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2012 BUDGET REQUEST 1-1 (2011), available at http://comptroller.defense.gov/defbudget/fy2012/FY2012_Budget_Request_Overview_Book.pdf.

⁴³ See 155 CONG. REC. H15007-02, at H15346 (Dec. 16, 2009) (explanatory statement for amendments to DoD Appropriations Act, FY 2010) (noting that the President requested \$1.5 billion in CERP funding but Congress reduced that amount by \$300 million). This congressional statement also

The CERP, at first glance, seems small compared to the rest of the DoD budget. However, its flexibility greatly increases its standing compared with other funding sources. For example, the Overseas Humanitarian Disaster and Civic Aid (OHDACA) program also provides the DoD a funding mechanism for demining support, humanitarian assistance, and foreign disaster relief.⁴⁴ The OHDACA, however, has a couple of impracticalities that make it less than ideal for COIN and stability operations. First, OHDACA is a DoD worldwide resource, designed with a level of generality that is not normally suited for brigade level implementation in Iraq and Afghanistan. Second, in addition to DoD-wide availability, the total OHDACA budget was roughly a \$110 million funding source that is rationed among several theaters of operation. The CERP, on the other hand, is a half-billion dollar Iraq- and Afghanistan-centered funding source specifically designed for BCT level execution. As such, it is ideally suited for current and future stability operations, provided commanders understand its purpose and the limits of their discretion.

III. Implementing Guidance

Currently, the CERP has two primary sources of implementing guidance, the DoDFMR and the MAAWS (the MAAWS-A in Afghanistan). The DoDFMR is promulgated by the DoD and provides policy guidance and the overall strategic framework for CERP spending. The MAAWS, on the other hand, is issued by the theater commanders for Iraq and Afghanistan, and serves as the tactical level blueprint for day-to-day CERP project implementation and administration. Both the DoDFMR and the MAAWS have evolved considerably throughout the history of CERP. The rules that govern the program are creatures of trial and error that reflect the DoD's ever-changing operational pace and lessons learned from past engagements. As a consequence, today's BCT commander serving in Afghanistan may not recognize the very program he helped to craft as a battalion commander during Operation Iraqi Freedom (OIF) in 2005. This section explores the evolution of these two sources and what they look like today.

A. The DoDFMR

1. 2003–2008

On 25 November 2003, the Undersecretary of Defense (Comptroller) issued implementing guidance on using appropriated funds for the CERP. As expected, this

warned the DoD that it needed "to greatly improve its management and oversight of CERP and its justifications of CERP budget requests."

⁴⁴ 10 U.S.C. § 401 (2006); Major Timothy Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 1, 15.

guidance held close to the CERP's pre-legislative origins. For example, it relied on a similar set of permissible project categories and practice procedures as established by the CPA.⁴⁵ More importantly, it kept the CERP as a BCT-centric program with a minimalist approach to higher level oversight.⁴⁶ In April 2005, the Comptroller's guidance was replaced by Volume 12, Chapter 27 of the DoDFMR. The DoDFMR formally codified prior practices, while adding slightly more program direction. In particular, it spelled out fifteen permissible CERP categories and seven prohibited purposes. The permissible uses included:

- A. Water and sanitation;
- B. Food production and distribution;
- C. Agriculture;
- D. Electricity;
- E. Health care;
- F. Education;
- G. Telecommunications;
- H. Economic, financial and management improvements;
- I. Transportation;
- J. Rule of law and governance;
- K. Irrigation;
- L. Civic cleanup activities;
- M. Civic support vehicles;
- N. Repair of civic and cultural facilities; and
- O. Other urgent humanitarian or reconstruction projects.⁴⁷

⁴⁵ See Memorandum from Undersec'y of Def. (Comptroller), to Commander, U.S. Central Command and Sec'y of the Army, subject: Guidance on the Use of Appropriated Funds for the Commander's Emergency Response Program (CERP) (25 Nov. 2003) (on file with author).

⁴⁶ *Id.*; see also HALCHIN, *supra* note 17, at 32 n.109. Halchin quotes Lawrence Di Rita, Principal Deputy Assistant Secretary of Defense for Public Affairs:

We're in a war; we're in a global war on terror. We have—many of the restrictions on how money is appropriated and spent are based on rules and statutes that have developed over a course of time that was not a period of war. So we've got a certain disconnect between the need to spend money quickly now, and we've got certain funds available to do that—the CERP [Commanders Emergency Response Program] is a pot of money that's got fewer restrictions, relatively speaking, attached to it. It is certainly understandable that a military commander who just knows if he had \$10 million he can address some issues, isn't going to necessarily be the one who's patient enough to sort through all the peacetime restrictions on the use of funds. That's somebody else's job. . . .

⁴⁷ U.S. DEP'T OF DEF. REG. 7000.14-R., vol. 12, ch. 27, ¶ 270202 (Apr. 2005), available at http://comptroller.defense.gov/fmr/12/12arch/12_27.pdf. (This version of the DoDFMR described the designated categories as a representative list of possible project areas. However, the word "representative" was struck from the September 2010 version of the DoDFMR.) The historical versions of volume 12, chapter 27 of the DoDFMR referred to in this article are available at *DOD Financial Management Regulation 7000.14-R, Volume 12: Archived Sections*, OFFICE

The prohibited purposes included:

- A. Direct or indirect benefit to U.S. or Multi-National Force-Iraq (MNF-I) personnel;
- B. Entertainment;
- C. Weapons buy-back programs, or other purchases of firearms or ammunition;
- D. Reward programs;
- E. Removal of unexploded ordnance;
- F. Duplication of services available through municipal governments; and
- G. Salaries of Iraqi or Afghan military or civilian government personnel.⁴⁸

In its first few years, the language of the DoDFMR offered no further details concerning the program's scope or limitations, and it failed to define terms like "small-scale," "urgent," or "immediate."⁴⁹ Thus, the category of "other urgent humanitarian or reconstruction projects," could be interpreted to mean any additional category not already covered *or* essential needs such as food, water, clothing, and shelter.⁵⁰ In essence, a commander could treat the aforementioned category as a "catch-all" provision to cover any project idea he deemed appropriate.⁵¹ This was not necessarily a bad thing, but it did make it much more difficult to effectively measure program performance from one commander to the next or to integrate specific CERP projects into a broader humanitarian and reconstruction effort.⁵²

OF THE UNDER SEC'Y OF DEF. (COMPTROLLER), <http://comptroller.defense.gov/fmr/12/12arch/>.

⁴⁸ *Id.* ¶ 270401.

⁴⁹ The DoDFMR did not define the terms "small-scale" and "urgent" until 2008.

⁵⁰ Hedgpeth & Cohen, *supra* note 22. In the absence of detailed guidance, some highly unusual purchases were made.

\$48,000 was spent on 6,000 pairs of children's shoes; an additional \$50,000 bought 625 sheep for people described in records as 'starving poor locals' in a Baghdad neighborhood. Soldiers ordered \$100,000 worth of dolls and \$500,000 in action figures made to look like Iraqi Security Forces. About \$14,250 was spent on 'I Love Iraq' T-shirts. More than \$75,000 sent a delegation to a women's and civil rights conference in Cairo. And \$12,800 was spent for two pools to cool bears and tigers at Zawra Park Zoo in Baghdad.

Id.

⁵¹ In practice, the term "other urgent humanitarian or reconstruction projects" has been construed to mean "essential needs," such as food, water, temporary shelter, and clothing. The more recent versions of the MAAWS explicitly provide the aforementioned definition.

⁵² See Hedgpeth & Cohen, *supra* note 22. Relying on statements from Gen. Peter W. Chiarelli, the authors noted, "the military may not be equipped to maintain the schools, clinics and water projects it builds with CERP money. In one case in 2005, he [Gen. Chiarelli] said he brought water to 220,000 houses in the Sadr City section of Baghdad using CERP funds. But when he went back a year later to check on whether the program had been expanded to more houses, it hadn't. 'The problem is follow-through.'" This

In September 2005, the DoDFMR was amended to include four more permissible categories:

O. Repair of damage that results from U.S. coalition, or supporting military operations and is not compensable under the Foreign Claim Act.

P. Condolence payments to individual civilians for the death, injury, or property damage resulting from U.S. coalition, or supporting military operations.

Q. Payments to individuals upon release from detention.

R. Protective measures, such as fencing, lights, barrier materials, berming over pipelines, guard towers, temporary civilian guards, etc., to enhance the durability and survivability of a critical infrastructure site (oil pipelines, electric lines, etc.).⁵³

Additions O, P and Q formally permitted commanders to provide CERP funds to private individuals. More specifically, it provided commanders with the ability to offer relief to Iraqi citizens harmed as a result of coalition combat activities.⁵⁴ The last addition, protective measures, expanded the use of the CERP beyond “normal” humanitarian and reconstructive purposes. Now commanders were permitted to use the CERP to harden non-military critical infrastructure sites through the use of barrier material or hiring civilian personal security forces. The DoDFMR also provided some guidance as to what it meant by “critical infrastructure sites” by including supporting examples such as oil pipelines and electric lines. This suggested that the DoD intended to restrict the funding of protective measures to those defending areas or facilities that are critical to the orderly functioning of civil society or the

problem was also echoed by the 2d Brigade, 10th Mountain Division civil affairs team stationed in Camp Hammer, Iraq, in 2010. Captain Eddy, the deputy S-9, explained that much of his frustration centered around integrating the diverse desires of the battalion commanders with the brigade and division command intent. Lack of uniform and meaningful performance measures made coordination difficult. See Hwangbo & Eddy Insights, *supra* note 3.

⁵³ U.S. DEP’T OF DEF. REG. 7000.14-R vol. 12, ch. 27 ¶ 270103 (Sept. 2005) [hereinafter DoDFMR September 2005], available at http://comptroller.defense.gov/fmr/12/12arch/12_27-Sept2005.pdf.

⁵⁴ See Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander’s Emergency Response Program*, ARMY LAW., Feb. 2004, at 39, 41–42 (Even before the 2005 amendment to the DoDFMR, CERP was used to pay claims that could not be settled under the Foreign Claims Act (FCA) because the damage resulted from Coalition combat activities or for other reasons.).

government’s ability to provide essential services to its people.⁵⁵

In addition to the new permissible categories, the September 2005 DoDFMR expanded the prohibitions (the additions are in boldface):

A. Direct or indirect benefit to U.S. **coalition or other supporting personnel.**

B. Providing goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces.

C. Entertainment.

D. Except as authorized by law and separate implementing guidance, weapons buy-back programs, or other purchases of firearms or ammunition.

E. Reward programs.

F. Removal of unexploded ordnance.

G. Duplication of services available through municipal governments.

H. Salaries, bonuses, or pensions of Iraqi or Afghan military or civilian government personnel.

I. Training, equipping, or operating costs of Iraqi or Afghan security forces.

J. Conducting psychological operations, information operations, or other U.S. coalition, or Iraqi/Afghanistan Security Force operations.⁵⁶

The September 2005 DoDFMR thus offered a fairly clear distinction between using the CERP for the benefit of the indigenous population (allowed) and using the CERP for the benefit of local security forces (forbidden).⁵⁷ Also

⁵⁵ In 2009, the U.S. Army used CERP funds to build a protective wall to defend the Khadimiya Mosque, reasoning that it was “critical infrastructure” because the mosque had both cultural and religious significance to the Iraqi people and Shi’a Muslims. In 2010, the Commander of Multinational Forces–Iraq (MNF–I), declared that polling stations in Iraq could be treated as “critical infrastructure” sites during the Iraqi national elections of March 2010, and CERP funds could be spent protecting them. Thus, in practice, the term “critical infrastructure” was fluid and adaptable to the situation on the ground.

⁵⁶ DoDFMR September 2005, *supra* note 53, ¶ 270301. Separate appropriations under the Iraqi Security Forces Fund (ISFF) and the Afghan National Security Force Funds (ANSF) were established to equip, train, and support the host nation national armies and police forces. Major Kathryn M. Navin, *Herding Cats II: Disposal of DOD Personal Property*, ARMY LAW, Apr. 2010, at 25, 32.

⁵⁷ See *id.*; see also U.S. DEP’T OF DEFENSE INSPECTOR GENERAL, IMPLEMENTATION OF THE COMMANDERS’ EMERGENCY RESPONSE PROGRAM IN AFGHANISTAN 5–6 (28 Feb. 2007) [hereinafter DOD IG REPORT]. The report noted the following violations:

eliminated was the ability to use CERP funds to finance Information Operations (IO) for either U.S. Forces or Iraqi or Afghan Security Forces.

In November 2007 and May 2008, the DoDFMR was amended again. Neither version differed significantly from the September 2005 DoDFMR. The November 2007 version simply clarified when a condolence payment could be made. Commanders were formally permitted to use CERP to make condolence payments to the surviving kin of fallen Iraqi or Afghan security force personnel (“martyr payments”). The May 2008 version added the term “physical” in connection with the word “injury” under the condolence payment category, suggesting that non-physical injuries (e.g., combat-related psychological damage) would not be compensable under CERP.⁵⁸

2. May 2008–August 2008

Over the years, CERP-funded projects grew in size and complexity (Appendix, Table 1). What started out as “walking-around money for commanders to achieve a desired effect in their battle space,” slowly became “a de facto reconstruction pot of money.”⁵⁹ This meant that rather than focusing on small-scale, urgent, immediate-impact projects, commanders were gradually moving into nation building.

Sorkh Parsa District Center (\$240,000). According to the unit Project Purchasing Officer, the building will house district officials, a court, and the Afghan National Police. The project is a prohibited use of funds because it is funding an operating cost of Afghan security forces.

Repair of National Police Vehicles (\$10,000). The project was to provide funding to enhance the mechanical and repair capabilities of the Afghan National Police vehicles. The project was a prohibited use of CERP funds because it provided services to the police.

Oruzgan Afghan National Police Building Prep (\$9,600). The project was to clean up and prepare the site for the future Afghan National Police Station. The project was a prohibited use of CERP funds because it provided services to the police.

Emergency Medical Technician Course (\$21,800). The course was offered only to the Afghanistan National Army and Afghanistan National Police. The project was prohibited because it provided services to the national army and police.

Id.

⁵⁸ U.S. DEP’T OF DEF., REG. 7000.14-R vol. 12, ch. 27, ¶ 270103P (Nov. 2007); U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270103P (May 2008).

⁵⁹ Ernesto Londono, *U.S. “Money Weapon” Yields Mixed Results—Review of Military Program Sought*, WASH. POST, July 27, 2009, available at <http://www.uscloseup.com/content/us-money-weapon-yields-mixed-results> (citing a statement given by Ginger Cruz, a Deputy Inspector General in the Office of the Special Inspector General for Iraq Reconstruction).

The key factor driving this shift was the lack of affirmative guidance from the DoD as to what constituted a small-scale and urgent project, leaving commanders with the responsibility for developing their own definitions.⁶⁰ A Government Accountability Office (GAO) investigation in 2008 revealed that this lack of guidance led to myriad on-the-ground interpretations. Specifically, the GAO found:

[O]ne commander told us that he would not execute projects that cost more than \$200,000, whereas another commander told us that he executed projects that cost more than \$1 million. Another commander focused on projects that cost from \$20,000 to \$100,000 that would immediately provide drinking water to the local population, while other CERP-financed water projects have cost more than \$5 million. Yet another commander chose to execute projects that would be completed while his unit was deployed. Furthermore, our review of the quarterly reports to Congress demonstrated the wide spectrum in size and costs of projects. For instance, projects ranged from a waterline repair costing slightly more than \$100 to an electrical distribution system costing more than \$11 million. In addition, during our visit to Iraq, we observed three projects: a multimillion-dollar sewage lift station, a several hundred thousand dollar sports center and community complex, and a fruit and vegetable stand that had been renovated with a \$2,500 grant. Commanders typically defined urgent as restoring a basic human need, such as water and electricity, or projects identified by the local Iraqi government as its most pressing requirement for the area. As a result, the scale, complexity, and duration of projects selected vary across commands.⁶¹

The GAO concluded that “without a clearer definition of small-scale and urgent, commanders are developing a wide range of interpretations such that it is difficult to determine whether the projects being selected by the commanders in fact are consistent with DoD’s intent for the program.”⁶² In response, the DoD stated that its use of broad selection criteria for CERP projects was intentional. More

⁶⁰ See DoDFMR September 2005, *supra* note 53.

⁶¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-736R, *MILITARY OPERATIONS: ACTIONS NEEDED TO BETTER GUIDE PROJECT SELECTION FOR COMMANDER’S EMERGENCY RESPONSE PROGRAM AND IMPROVE OVERSIGHT IN IRAQ 3* (23 June 2008) [hereinafter GAO-08-736R].

⁶² *Id.* at 4.

specifically, DoD officials asserted that “any modification, specifically defining small-scale and urgent, might affect the program’s flexibility, which is a large part of what makes it such an attractive tool for commanders to use.”⁶³ Despite this position, the DoD considered the GAO’s criticisms and made several substantive changes to the DoDFMR in June 2008. Of note, the DoD offered, for the first time, formal definitions of “small-scale” and “urgent”:

270102. The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the indigenous population. As used here, urgent is defined as any chronic or acute inadequacy of an essential good or service which, in the judgment of a local commander, calls for immediate action. In addition, the CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government. Small-scale would generally be considered less than \$500,000 per project.⁶⁴

This definition provided some clarity, but it was not dispositive. What constituted “urgent” was still a matter of the commander’s discretion, and the term “small-scale,” with the inclusion of the word *generally*, could still apply to projects that exceeded \$500,000. In essence, this definition provided a response to GAO criticism, without actually constraining how commanders selected and funded projects.

The June 2008 DoDFMR also prohibited using CERP for providing “[s]upport to individuals or private businesses (except for condolence, detainee, or martyr/hero payments; battle damage payments or micro-grants).”⁶⁵ Taken literally, this provision had far-reaching implications, because it precluded commanders from providing CERP funds directly to non-government organizations (NGOs) and other private actors such as sheiks and religious leaders.⁶⁶ This meant that

in order to properly finance many CERP projects, a commander had to work by, with, and through the Afghan or Iraqi government. This issue is explored in greater detail later in this article.

The June 2008 DoDFMR also, for the first time, required commanders to coordinate all CERP-funded projects costing more than \$50,000 with the interagency provincial reconstruction teams (PRTs) or provincial support teams (PSTs) prior to project execution.⁶⁷ This requirement responded to criticisms that DoD reconstruction projects were insufficiently coordinated with other agencies.⁶⁸ Since this requirement was short on details, commanders were left to tailor the level of coordination on their own. The June 2008 DoDFMR further required military commanders to “[e]stablish and publish a command CERP policy that includes subordinate approval authority levels and detailed procedures as necessary to ensure commanders carry out CERP in a manner consistent with mission requirements, applicable laws, regulations and guidance.”⁶⁹ In essence, this provision mandated the creation of standard operating procedures (SOPs) for executing CERP-funded projects. The Joint Task Force commands of Iraq and Afghanistan (Multi National Corps–Iraq (MNC–I) and Commander Joint Task Force (CJTF) in Afghanistan) had already codified local policies for administering and spending CERP dollars (i.e., the MAAWS). This provision made it a DoD directive. In addition to a formal SOP, the DoD also required oversight instructions and the establishment of performance metrics. Each of these requirements was loosely defined, providing the command considerable flexibility in terms of actual execution.⁷⁰

In August 2008, the DoDFMR was amended yet again.⁷¹ This revision included one major change:⁷² it added

⁶³ *Id.* at 3.

⁶⁴ U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27, ¶ 270102 (June 2008) [hereinafter DoDFMR June 2008].

⁶⁵ Micro-grants are gifts to disadvantaged entrepreneurs. Under the January 2009 MAAWS, to qualify, an entrepreneur had to present evidence that the money would be used for a proposed business, demonstrate that he lacked wealth or available credit, and provide evidence of his character, education, or trustworthiness. The micro-grant program has been characterized as “one of the most successful components of the CERP.” Bronowski & Fisher, *supra* note 10, at 56.

⁶⁶ See CERP Conference Insights, *supra* note 7. This was a very contentious issue at USF–I in the winter of 2009–2010, especially for commanders who served in Iraq prior to this rule. Many commanders simply preferred to work through non-governmental power brokers such as sheiks, former SOI leaders, and influential religious figures.

⁶⁷ DoDFMR June 2008, *supra* note 66, ¶ 270302C; see also Furin, *supra* note 44, at 17–21 (providing detailed discussion on the role of Provincial Reconstruction Teams (PRTs) in conducting stability operations). Provincial Reconstruction Teams included civilian personnel from the U.S. Departments of State, Agriculture, and Justice, as well as USAID and military personnel. In Iraq, the Department of State held lead authority over the PRTs; in Afghanistan, the DoD held lead authority. *Id.* at 17–18.

⁶⁸ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 07-549, MILITARY OPERATIONS: ACTIONS NEEDED TO IMPROVE DOD’S STABILITY OPERATIONS APPROACH AND ENHANCE INTERAGENCY PLANNING 24–25 (May 2007). The report noted that Combatant Commanders have achieved limited interagency participation in development of military plans because: (1) DoD has not provided specific guidance to commanders on how to integrate planning with non-DoD organizations; (2) DoD practices inhibit the appropriate sharing of planning information with non-DoD organizations; and (3) DoD and non-DoD organizations lack an understanding of each other’s planning processes and capabilities, and have different planning cultures and capabilities. *Id.*

⁶⁹ DoDFMR June 2008, *supra* note 64, ¶ 270204C.

⁷⁰ *Id.* ¶¶ 270314, 270315.

⁷¹ U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27 (Aug. 2008) [hereinafter DoDFMR August 2008].

⁷² This version also took into account the fact that Congress had appropriated CERP funds for use in the Philippines. Military Construction,

two instructive annexes (A & B). Annex A listed nineteen categories of permissible CERP projects, each with “preamble language” and a list of project types. For example, the CERP category of “transportation” was described as follows:

[Preamble Language]

18. Transportation: Includes infrastructure and operations. Infrastructure includes the transport networks (roads, railways, airways, canals, pipelines, etc.) that are used as well as the nodes or terminals (such as airports, railway stations, bust stations and seaports). The operations deal with the control of the system, such as traffic signals and ramp meters, railroad switches, air traffic control, etc.

[Project Types]

- A. Transportation infrastructure, including roads, railway tracks, airports, ports, etc.
- B. Roads (including gravel cobblestone, etc.)
- C. Culverts
- D. Bridging
- E. Traffic control measures⁷³

Generally speaking, the preamble language served as a categorical definition, while the project types provided a sampling of potential project concepts.⁷⁴ Annex B provided

guidance for writing the Commander’s Narrative needed to satisfy the congressionally mandated quarterly reporting requirements.⁷⁵

3. January 2009

The January 2009 version of the DoDFMR (which is current as of 1 November 2011) included a few more changes, including a twentieth permissible CERP category:

T. Temporary contract guards for critical infrastructure.⁷⁶

According to Annex A, this project category included funding the “Sons/Daughters of Iraq and similar initiatives in Afghanistan guarding critical infrastructure, including neighborhoods and other public areas.”⁷⁷ In fact, MNC–I had previously been funding the Sons of Iraq (SOI) using CERP funds,⁷⁸ and U.S. funding of the program was already being phased out under a memorandum of agreement with the Government of Iraq (GOI).⁷⁹ This did not forbid similar initiatives in Afghanistan. Nor did it preclude the issuance of non-SOI security efforts in Iraq (such as providing female security guards to search female voters at polling stations).

Another addition to the 2009 DoDFMR was a cost-sharing requirement for CERP-funded projects exceeding \$750,000. In an effort to obtain more GOI buy-in, the DoD now required the GOI to provide supporting funds for such projects.⁸⁰ No such requirement applied to Afghanistan.

Veterans’ Affairs, and Related Agencies Appropriations Bill, 2008, Pub. L. No. 110-252, 122 Stat. 2323, 2404. The DoDFMR designated the Department of the Navy as the Executive Agency in charge of CERP in the Philippines. *Id.* ¶ 270202.

⁷³ DoDFMR August 2008, *supra* note 71, annex A, ¶ 19.

⁷⁴

The DoDFMR described these Annexes as “guidance” rather than an exhaustive list of permissible projects, DoDFMR August 2008, at ¶ 270103, and commanders treated them as such. For instance, Multinational Corps–Iraq (MNC–I) authorized the phased construction of the Baghdad International Airport Economic Zone (BEZ) from February 2005 to February 2008. The main BEZ initiative consisted of four projects—a business center, a convention center, a hotel, and an office tower—intended to be used by for-profit businesses run by the Iraqi Ministry of Transportation (MOT). These projects were approved under the CERP category of “economic, financial, and management improvements.

See SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM: PROJECTS AT BAGHDAD AIRPORT PROVIDE SOME BENEFITS, BUT WASTE AND MANAGEMENT PROBLEMS OCCURRED 2–3 (26 Apr. 2010) [hereinafter SIGIR-10-013]. However, Annex A listed only three project types under Economic, Financial, and Management Improvements: marketing assistance programs, bazaars, and micro-grants. DoDFMR August 2008, *supra* note 71, annex A, ¶ 7. None of these described the BEZ. The current (January 2009) version of Annex A adds “refurbishment of district centers” to this project

category, DoDFMR, *supra* note 9, annex A, ¶ 6D, perhaps acknowledging the propriety of the BEZ project.

⁷⁵ DoDFMR August 2008, *supra* note 71, annex B.

⁷⁶ DoDFMR, *supra* note 9, ¶ 270104T.

⁷⁷ *Id.* annex A, ¶ 17.

⁷⁸ Bronowski & Fisher, *supra* note 10, at 53–55. On 8 September 2008, the Prime Minister of Iraq issued executive order 118-C, which mandated that all Sons of Iraq (SOI) members under contract with U.S. Forces move from U.S. control to the GOI payroll, beginning on 1 October 2008. Prime Ministerial Order Number 118C (8 Sept. 2008) (on file with author).

⁷⁹ Bronowski & Fisher, *supra* note 10, at 53; *see also* Memorandum of Understanding for Implementing the Transfer and Transition Responsibilities of the Sons of Iraq (Sahwa) from the Multi-National Corps–Iraq to the Government of Iraq According to His Excellency the Prime Minister’s Order 118C (Oct. 2008) (on file with author). However, as the GOI was not always able to retain the SOI on its payroll, CERP funds could be and were used to hire former SOI as laborers on otherwise valid reconstruction projects, and to provide job training for them. Stipends to support them while they trained, however, were not authorized. Bronowski & Fisher, *supra* note 10, at 54–55.

⁸⁰ DoDFMR, *supra* note 9, ¶ 270205A. Cost sharing could be omitted on an exception basis if the command could show that the effort directly supported the U.S. security mission in Iraq. This exception seems rather vacuous and no further explanation is provided to illustrate the type of missions that would qualify for such an exception.

Another change was the addition of the words “repair,” “restore,” and “improve” to the preamble language of some of the CERP categories in Annex A.⁸¹ The inclusion of these qualifiers suggested a shift in DoD emphasis. Words like “repair” and “restore” seemed to limit CERP projects to the betterment of existing structures rather than the construction of new facilities. But the words were not added to every section. The preamble for “education” continued to provide for “projects to repair or reconstruct schools,” but the list of project types included projects to “[b]uild, repair, and refurbish schools.”⁸² The preamble language seems to limit construction to improving an existing footprint, but the project list suggests a broader mandate. This lack of clarity left local JAs to make “best guess” efforts regarding the right and left limits of project permissibility. However, the proposed changes offered in the draft 2010 publication of the DoDFMR provide some invaluable insight concerning the DoD’s intent.

4. Proposed DoDFMR Changes

In April 2010 the Office of the Undersecretary of Defense (Comptroller) (OUSDC(C)), distributed a draft edition of the DoDFMR to the CERP-practicing world of the DoD’s subordinate commands.⁸³ The proposed changes have not been finalized,⁸⁴ but this article examines the proposed changes and their likely effects on the CERP-practicing universe.

The proposed changes eliminate the clumsy qualifiers concerning what constitutes a “small scale project.” The draft section reads as follows:

The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist as the Iraqi and Afghan people, respectively. As used here, urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate

⁸¹ *Id.* annex A, ¶¶ 8 (electricity), 11 (healthcare), 14 (protective measures), 18 (telecommunications), 19 (transportation), 20 (water & sanitation). Thus, the preamble for “electricity,” went from “electrical production, distribution, and secondary distribution infrastructure” to “[p]rojects to repair, restore, or improve electrical production, distribution and secondary distribution infrastructure.”

⁸² *See id.* annex A, ¶ 7 (This paragraph was unchanged from the August 2008 version.) Paragraph 1 of Annex A (Agriculture) also remained mostly unchanged, and seemed to allow for outright new construction in that area.

⁸³ U.S. DEP’T OF DEF., REG. 7000.14-R, vol. 12, ch. 27 (forthcoming late 2011) [hereinafter DoDFMR 2011] (draft publication on file with author).

⁸⁴ As of 1 November 2011.

action. In addition, the CERP is intended to be used for small-scale projects that can be sustained by the local population or government. For purposes of the CERP, “small-scale” means less than \$500,000 per project. Projects using appropriated funds of \$500,000 or more should be the exception, though the Afghanistan area of operations is understood to require some larger projects to address infrastructure development.⁸⁵

The word *generally* has been removed, so that “small-scale” actually means projects under \$500,000. Furthermore, the term *optimally* has been omitted, suggesting that commanders *must* seek projects that *can* be sustained by the Iraqi and Afghan people. This is an interesting deletion, and highlights a key source of contention between diplomats and generals concerning the direction of the CERP.⁸⁶ By the former, the CERP is regarded as a reconstruction or developmental funding source, but by the latter, it is generally thought of as a counterinsurgency or warfighting tool.⁸⁷ In practice, most commanders are not purists of either camp and most have wrestled with this duality on a project-by-project basis.⁸⁸ In any event, new language in the DoDFMR suggests that if a commander chooses to integrate the CERP into his warfighting mission, he must do so with an eye toward promoting projects that can be sustained in the long run.⁸⁹ Other key proposed changes are as follows:

1. The term “representative” is eliminated from the list of permissible categories, suggesting that the list of project types is now comprehensive. (Section 270206)
2. All new construction in Iraq above \$200,000 requires CENTCOM approval. (Section 270204D)
3. All new construction requires a detailed sustainment plan. (Section 270205 A & B)

⁸⁵ DoDFMR 2011, *supra* note 83, ¶ 270102.

⁸⁶ *See* Chandrasekaran, *supra* note 29 (discussing a dispute between DoS officials and commanders in Afghanistan over how to spend reconstruction dollars. One U.S. military official noted that “this is not about development—it’s about counterinsurgency.” However, Karl Eikenberry of the State Department wrote “proposals to buy generators and diesel fuel for Kandahar would be expensive, unsustainable and unlikely to have the counterinsurgency impact desired”). *Id.*

⁸⁷ *Id.*; *see also* SIGR-10-013, *supra* note 74, at 8 n.6 (MNC-I funding of the BIAP Economic Zone was partly designed “to recognize the GOI’s contribution to the war effort.”).

⁸⁸ In 2010, the IAD in Iraq routinely made a distinction between civil military operations (CMO) and capacity building. The former were described as short-term “quick win” projects, while the latter represented long-term endeavors to enhance institutional stability. Both were financed with CERP funds.

⁸⁹ This point is discussed further *infra* Part IV.

4. Former detainee payments⁹⁰ have been eliminated as a CERP category. (Section 270206)
5. A new CERP category, Internally Displaced Person (IDP) Payments, has been added.⁹¹ (Section 270206L)
6. Micro-lending and micro-lending capitalization is prohibited. (Section 270401M)⁹²
7. Support to International Organizations (IO) or Non Governmental Organizations (NGO) is prohibited, except for execution of approved CERP projects. (Section 270401L)
8. Only a “commander” in the U.S. chain of command is authorized to approve use of CERP funds. (Section 270205C)
9. Only DoD personnel may serve as Project Purchasing Officers and Pay Agents. (Section 270205C)⁹³
10. Eliminates language authorizing CERP payments to SOI as contract guards. (Appendix A)
11. Condolence, battle damage, hero payments and micro-grants are capped at \$2,500. (Appendix A)⁹⁴ Exceptions to these limits require approval from Commander, USCENTCOM.

In addition to these added controls, the proposed changes provide a more consistent use of language in the supporting annexes (or appendices).⁹⁵ For instance, words like “repair” and “restore” are consistently used to describe instances where CERP is limited to the betterment of an existing footprint, like repairing the roof on a jail or

⁹⁰ As the name suggests, these are “Payments to individuals upon release from Coalition . . . detention facilities.” DoDFMR, *supra* note 9, annex A, ¶ 10.

⁹¹ One-time payment of up to \$500 to facilitate transportation and/or subsistence for Afghans displaced by United States or coalition operations.

⁹² In Iraq, the issue of micro-lending versus micro-grants has been the subject of a long-running debate. The reasons are two-fold. First, most BCTs lack the technical expertise to effectively manage CERP micro-lending projects. Second, although micro-lending might help to bolster the banking industry, the interest rates are generally too high for small farmers, because the cost of the loan usually exceeds the average farmer’s profit margin.

⁹³ Prior guidance had not been clear on this point.

⁹⁴ Under previous guidance, commanders were permitted to issue micro-grants to “individuals.” However, the word “individual” has been deleted from the 2011 draft version. The deletion of the word “individual” from the micro-grant category now seems to preclude that option. Instead, the field of potential beneficiaries seems to be limited to “existing” small business owners. See DoDFMR 2011, *supra* note 83, app. A.

⁹⁵ The supplemental sections are no longer referred to as Annexes A and B. Instead, they are called Appendices A and B.

restoring the damaged wall of a mosque.⁹⁶ Whereas the word “build” appears to logically denote the permissibility of new construction, such as building a new school or hospital in a place where one had not previously existed.⁹⁷ The word “improve” is used to denote instances where it is permissible to use CERP dollars to extend the capacity of an existing structure, such as building additional power lines or extending an existing road.⁹⁸

5. Role of the DoDFMR

Is the DoDFMR simply meant to provide guidance or to establish ironclad rules? In the early stages of the CERP, it was certainly more the former. Today’s version favors the latter course, with more reporting requirements and less deference to commanders. Despite these changes, the DoDFMR still provides commanders rather streamlined procurement, especially when compared to the traditional world of government contracting.⁹⁹ In any event, the

⁹⁶ See U.S. DEP’T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT 504-05 (28 Mar. 2009) [hereinafter AR 420-1]. This regulation defines repair as the

a. Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.

b. Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components.

c. A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.

Id. “Restore” and “repair” are used interchangeably throughout the regulation.

⁹⁷ See *id.* at 483. Army Regulation 420-1 generally describes new construction as the “erection, installation, or assembly of a new facility.” This would also include any “related site preparation, excavation, filling, landscaping, or other land improvements” needed to effectuate the erection of a new facility. *Id.*

⁹⁸ See *id.* at 492. Army Regulation 420-1 defines an improvement as

Alterations, conversions, modernizations, revitalizations, additions, expansions, and extensions for the purpose of enhancing rather than repairing a facility or system associated with established housing facilities or area(s).

Id. An improvement could be any construction short of the complete replacement of an existing facility. Put another way, as long as the “improvement” does not fundamentally alter the designated functional purpose of the RPF it is likely permissible, such as building a new wing on a public library. However, converting a library to a police station would likely qualify as a “build,” because the designated functional purpose of the RPF has been changed.

⁹⁹ See OFFICE OF FED. PROCUREMENT POL’Y, FEDERAL ACQUISITION REGULATION (FAR), 48 C.F.R. ch. 1 (21 Jan. 2010) [hereinafter FAR] (The FAR provides approximately 1900 pages of regulatory guidance for the government procurement process. But for the SECDEF waiver, the provisions under the FAR would be applicable for the CERP procurement process.).

DoDFMR is an authoritative regulation and none of its provisions may be waived without OUSD(C) approval. It is also a regulation grounded heavily in statute and many of its provisions are designed to keep commanders from committing statutory violations such as those related to the Antideficiency Act (ADA). For example, using the CERP to build a road on a U.S.-controlled installation or to support intelligence gathering efforts is prohibited under the DoDFMR and may also constitute an ADA purpose violation. Put another way, the specific permissible uses and prohibitions outlined in the DoDFMR help to properly frame the purpose of the CERP. Any deviations from these well established guidelines may expose the command to unnecessary legal risk and frustrate DoD intent.

B. Money as a Weapons System (MAAWS)

United States Forces–Iraq (USF–I) and United States Forces–Afghanistan (USFOR–A) are responsible for providing the tactical vision for the CERP in Iraq and Afghanistan, respectively. Relying on the DoDFMR, each command issues guidance for the selection and use of funds in the publication of the MAAWS.¹⁰⁰ The MAAWS includes CERP SOP for proposing projects, awarding contracts, and managing CERP-related activities. But the MAAWS is more than just an SOP. It is a day-to-day reference that combines regulatory standards with cradle-to-grave processes for initiating and closing out CERP projects. The procedural emphasis of the MAAWS is what distinguishes it from the DoDFMR. Whereas the DoDFMR sets the strategic tone, the MAAWS provides the mechanisms needed to bring that strategy to life. Unfortunately, in the operational arena, many commanders see the MAAWS as a bureaucratic impediment that can only be understood by lawyers.¹⁰¹ It should not be viewed that way. The MAAWS is supposed to be a user-friendly guide designed to help commanders get from point A to point Z in the CERP implementation and management process. The MAAWS as a CERP SOP seeks to integrate and provide guidance in the following areas:

- **Fiscal Law:** Some portions of the MAAWS directly correspond to the fiscal law principles of purpose, time and amount (PTA). In most instances, the fiscal law analysis is straightforward, and amounts to determining whether a given project falls under an authorized CERP category.

¹⁰⁰ As used in this paragraph, MAAWS refers to both MAAWS & MAAWS-A, *supra* note 9.

¹⁰¹ CERP Conference Insights, *supra* note 7. Although many commanders refer to the MAAWS as a tool created to keep lawyers employed, for the MAAWS and MAAWS-A, the J8 is the proponent of the both documents.

- **The Acquisition Process:** Normally the government procurement process is governed by the Federal Acquisition Regulation (FAR).¹⁰² In the CERP world, the FAR has been waived and replaced with the streamlined contracting rules encapsulated in the MAAWS.¹⁰³ The MAAWS generally describes how a commander must identify a need, specify the requirement, procure the good or service, and manage the acquisition process.

- **Financial Management:** This is the portion of the MAAWS that details how a commander obtains funding, pays for his project, accounts for those funds and closes out a completed CERP project.

- **Reporting Requirements:** Lastly, the MAAWS provides the administrative steps that commanders and program managers must take to satisfy congressionally mandated reporting requirements.

Despite its embrace of a user-friendly focus, the MAAWS is not written with the precision of a cookbook. It is mostly aspirational and provides few hard and fast rules. At its best, it provides a streamlined version of the government procurement process, designed to meet the intent of the DoDFMR, while providing commanders with maximal flexibility. At its worst, it is a cumbersome text written with a degree of generality that borders on the directionless. The MAAWS is strongest when dealing with low-dollar (less than 50k), low-complexity projects that take fewer than ninety days from need identification to close-out.¹⁰⁴ The MAAWS is at its worst when it is consulted for structuring complex, long-term endeavors.¹⁰⁵ Despite its imperfections, the MAAWS, as a CERP SOP, is the primary reference resource for CERP practitioners and advising JAs, who should be intimately familiar with it.¹⁰⁶ With this last point in mind, the rest of this article highlights legal issues that can arise in employing CERP funding in today's operational setting.

¹⁰² FAR, *supra* note 99.

¹⁰³ Waiver Memo, *supra* note 24.

¹⁰⁴ See Martins, *supra* note 10, at 9 (discussing how \$9600 in CERP funds was used to help repair the pediatric wing of a remote rural hospital).

¹⁰⁵ See SIGIR-10-013, *supra* note 74, at 27, 30–31 (finding that the pre-2008 MAAWS, which governed the BEZ project, provided inadequate controls for large-scale projects, so that only twenty-two of the forty-six individual projects, accounting for 54% of the funds spent, were successful).

¹⁰⁶ See GAO-09-615, *supra* note 6, at 10 (discussing a deployed attorney who was unprepared for fiscal law duties).

IV. CERP and Nonlethal Targeting: Practice Issues and Ways Forward

Generally, stability operations require a greater emphasis on nonlethal actions. Nonlethal actions expand the options available to commanders to achieve their objectives. . . . Nonlethal actions range from constructive activities focused on building institutional capacity and social well-being to coercive activities intended to compel certain behaviors. . . . By using nonlethal actions, forces can shape the broader situation to maintain or reestablish a safe and secure environment.¹⁰⁷

The CERP has become an indispensable tool in the planning regimen of the nonlethal targeteer. In most cases, the targeteer seeks to focus CERP funding on projects that complement stability operations. However, the manner in which the targeteer employs these resources must be nuanced, focused, and, above all, legally permissible. In this regard, the role of the JA can be a difficult one. The advising JA must help to balance the can-do attitude of the modern day warfighter with the statutory and regulatory constraints described in this article. This, at times, is easier said than done, especially when a commander wishes to integrate the unit's lethal and nonlethal capabilities into rapidly responsive synchronic actions. As suggested earlier in this article, there is a slight disconnect between the humanitarian emphasis of the CERP and how that emphasis fits with other aspects of a stability operation. This "disconnect" is mostly borne out of the regulatory constraints applied to the CERP process. Although most commanders view these constraints as impediments, they need not be considered as such. They define the DoD's intent and help protect a commander from unwittingly violating the law. This part focuses on these constraints.

A. Defining Direct and Indirect Benefits

The DoDFMR and the MAAWS explicitly preclude using CERP funds in a manner that provides a direct or indirect benefit to "U.S., coalition or other supporting personnel."¹⁰⁸ The comprehensive terms "direct and indirect benefits" must not be read too broadly. The nature of our missions in Iraq and Afghanistan is such that anything we do for the indigenous population provides some sort of benefit to U.S. Forces and our allies.¹⁰⁹ So the terms "direct" and

"indirect" must carry a more nuanced distinction that captures the intent of the DoDFMR without divorcing common sense from the CERP implementation process.

The term "direct benefit" is fairly straightforward. It necessarily applies to anything procured directly for the benefit of U.S. Forces. For instance, it would be impermissible to buy food, bullets or medical supplies for U.S. Forces or our allies with CERP funds. It would also be impermissible to use CERP funds to hire an Iraqi or Afghan contractor to perform janitorial services on a U.S.-controlled installation. Unfortunately, not all direct benefits are so easily discernable. In Iraq, the command sometimes hired Iraqi firms ("Red Zone Engineers") to perform routine quality assessment/quality control (QA/QC) on CERP-funded projects. Commanders thought it would be permissible to pay these contractors with CERP funds. However, QA/QC inspections are typically done by U.S. personnel,¹¹⁰ and are generally understood to be for the benefit of U.S. Forces. Put another way, if the command failed to procure Red Zone Engineering support, QA/QC would be done by a command representative. So, as a practical matter, any person hired to assist the project purchasing officers provides a direct benefit to U.S. Forces by saving labor. Thus, use of CERP funding for the described purpose is legally impermissible. Keep in mind, this does not mean that such support cannot be used; it simply means that it must be paid for with the proper funding source.¹¹¹ In any event, a direct benefit should be understood as anything purchased for or providing a service for U.S. or allied forces, or accomplishing a task these forces are ultimately responsible for doing.

The term "indirect benefit" is more elusive, and neither the DoDFMR nor the MAAWS provides much insight concerning its meaning. Taken literally, it refers to "any" benefit that inures to U.S. or allied forces, but such an interpretation, if followed, would render the CERP useless. For instance, suppose the command wants to repair a sewer system in Ramadi, Iraq, but a U.S. installation near Ramadi is also connected to that sewer system. Can an indirect benefit be avoided? The short answer is "yes," but only with a sensible understanding of the term "indirect benefit." This understanding should be grounded in the *purpose* of the project. By way of analogy, the relationship between a direct versus an indirect benefit is akin to the difference between direct and indirect fire. Direct fire, such as the bullet fired from an M4 Rifle, relies on a direct line of sight to engage a visible target. Indirect fire, on the other hand, means aiming and firing a gun without relying on a direct

¹⁰⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS AND SUPPORT OPERATIONS ¶ 2-13 (6 Oct. 2008) [hereinafter FM 3-07].

¹⁰⁸ See DoDFMR, *supra* note 9, ¶ 270301A.

¹⁰⁹ See FM 3-24, *supra* note 1, ¶ 2-5 ("COIN programs for political, social, and economic well-being are essential. . . ." to achieve "durable policy success.").

¹¹⁰ See DoDFMR, *supra* note 9, ¶ 270314 (progress may be monitored with the aid of "organic engineers or another unit's engineers"); MAAWS-A, *supra* note 9, annex E, § 8J (project manager, a command representative, is responsible for conducting periodic quality assurance inspections).

¹¹¹ In Iraq in 2010, the 1st Armored Division Office of the Staff Judge Advocate opined that an operation and maintenance-funded contract was a more suitable means to fund this type of endeavor.

line of sight between the gun and its target. The difference between the two is the difference between engaging a visible versus a nonvisible target. However, they are similar in that both acts are laden with a common purpose—hitting a specific target. For example, if the sewer systems in Ramadi are in need of repair, a commander could initiate a CERP project if his purpose is to benefit the Iraqi people. Purpose, in this case, has a subjective and objective component. Subjectively, the commander *must* identify a local need that he surmises is urgent.¹¹² Objectively, the commander must also:

- Coordinate the need through the local government (i.e., establish that the indigenous population actually wants the project—local buy-in).¹¹³
- Affirmatively determine that no other funding is available and that the governing body lacks the funds or ability to accomplish the task.¹¹⁴
- Establish that the indigenous population has the ability and intent to sustain the project after U.S. Forces have completed the effort.¹¹⁵

If both the subjective and objective components have been satisfied, any benefit to U.S. Forces should be treated as an “incidental” or “unintended” benefit.

Put another way, an indirect benefit occurs when U.S. Forces are the intended “target” of a particular project without directly receiving the good or service. An “incidental” benefit, on the other hand, occurs as the natural consequence of a project principally undertaken for the benefit of the indigenous population. For instance, if a commander authorizes a civic clean-up project in the streets of Baghdad without satisfying the two-part purpose test *and* he believes that clean streets will make it easier for U.S. Forces to spot improvised explosive devices (IEDs), the benefit to U.S. Forces is indirect and impermissible. However, if a commander satisfies the purpose test and orders a civic cleanup project to meet a preexisting need, any

¹¹² DoDFMR, *supra* note 9, ¶ 270102. The “subjective” component does contain a degree of objectivity, in that a need **cannot** be urgent (or subjectively reasonable) if it does not fall under a permissible CERP category.

¹¹³ *Id.* ¶ 270204B (requiring coordination with PRT for projects exceeding 50k); MAAWS, *supra* note 9, app. B, § 4B; MAAWS-A, *supra* note 9, § 4B (requiring commanders to coordinate with the local government prior to project execution to determine project needs).

¹¹⁴ MAAWS, *supra* note 9, app. B, § 3A; MAAWS-A, *supra* note 9, § 2A (requiring the command to ensure that no other funding source is reasonably available; this is especially relevant in Iraq, where DoS, USAID, and host nation funds are generally available).

¹¹⁵ DoDFMR, *supra* note 9, ¶ 270102; MAAWS, *supra* note 9, app. B § 4B3; MAAWS-A, *supra* note 9, § 4A(5), 5a (for projects costing over \$50,000, requiring written documents from host nation officials, indicating their intent to accept and sustain the projects).

improvement in IED spotting would be merely “incidental.” The goal is not to rid the project of all non-altruistic consequences, but rather to demonstrate a thought process that principally concerns the needs of the Iraqi or Afghan people.

B. CERP and IOs

According to the DoDFMR, using CERP funds to conduct IO and psychological operations (PSYOP) is prohibited.¹¹⁶ Unfortunately, neither the DoDFMR nor the MAAWS specifies the exact scope of this prohibition or the types of infractions it seeks to thwart. This is especially problematic when one considers the scope of IO in today’s operational environment.¹¹⁷ In Iraq and Afghanistan, IO is central to the military’s operational posture, with the explicit focus of moving millions of “undecided” Iraqi and Afghan onlookers closer to the U.S. viewpoint.¹¹⁸ At its most rudimentary level, IO refers to:

The integrated employment of the core capabilities of electronic warfare, computer network operations, psychological operations, military deception and operations security, in concert with specified supporting and related capabilities, to influence, disrupt, corrupt or usurp adversarial human and automated decision making while protecting our own.¹¹⁹

Psychological operations (or Military Information Support) is a species of IO, focusing on planned activities meant “to convey selected information and indicators to foreign audiences to influence their emotions, motives,

¹¹⁶ DoDFMR, *supra* note 9, ¶ 270301J.

¹¹⁷ See Colonel Ralph O. Baker, *The Decisive Weapon: A Brigade Combat Team Commander’s Perspective on Information Operations*, MIL. REV., May–June 2006, at 13, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA489185&Location=U2&doc=GetTRDoc.pdf>. The author states

Soon after taking command of my brigade, I quickly discovered that IO was going to be one of the two most vital tools (along with human intelligence) I would need to be successful in a counterinsurgency (COIN) campaign. COIN operations meant competing daily to favorably influence the perceptions of the Iraqi population in our area of operations (AO). I quickly concluded that, without IO, I could not hope to shape and set conditions for my battalions or my Soldiers to be successful.

Id.

¹¹⁸ See Renea Merle, *Pentagon Funds Diplomacy Effort Contracts Aim to Improve Foreign Opinion of United States*, WASH. POST, June 11, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/06/10/AR2005061001910.html> (The Pentagon awarded three contracts potentially worth up to \$300 million over five years to companies it hopes will inject more creativity into its psychological operations efforts.).

¹¹⁹ JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, INFORMATION OPERATIONS glossary, at GL-9 (Feb. 13, 2006).

objective reasoning, and behavior.”¹²⁰ The purpose of PSYOP “is to induce or reinforce foreign attitudes and behavior favorable to the originator’s objectives.”¹²¹ Much of what a commander does under the CERP is meant to influence the attitude and behavior of the local populace. When a commander rebuilds a road, repairs a mosque, or delivers medicine to a local clinic, he is hoping to shift the affections of the local populace toward U.S. Forces and the host government and away from its adversaries. However, there is a significant difference between using CERP funds to “conduct” IO activities, and funding a CERP project that incidentally produces an “IO effect.” With that said, a commander can avoid infringing on this prohibition by following the two-part (subjective/objective) purpose test discussed above, but must also satisfy a fourth objective element:

- Avoid the use of pro-U.S. or Iraqi/Afghan messaging.

The concept of messaging lies at the heart of the IO mandate. So, the inclusion of messages that have a pro U.S. or Iraqi/Afghan emphasis could turn a permissible CERP project into an impermissible “IO product.” For instance, handing out clothing to the local populace in response to a humanitarian need fits within a recognizable CERP category. However, the inclusion of words like “I Love U.S. Forces” or “I Love the ANA” on the clothing is an impermissible IO product that could undermine the legal sufficiency of the entire effort (and could also be counterproductive to the broader mission).

Explicit IO messaging is a clear prohibition, but a commander can also unwittingly violate the spirit of the rules by pushing projects that provide a short term boost in popular support but no meaningful evidence of long term survivability.¹²² Building a school in a neglected urban area

might provide a short term boost in employment and an immediate IO advantage for the sponsoring command, but if the GOI does not have teachers to fill it, its overall impact is negligible at best.

C. Support to Private Businesses and Individuals

The DoDFMR and the MAAWS explicitly prohibit using CERP funds to provide “support to individuals and private businesses.”¹²³ Neither more specifically describes the type of support that is prohibited, but both list several exceptions. Each publication states that CERP funds **may** be used to fund “condolence payments, Iraqi hero payments, battle damage payments, former detainee release payments, and micro-grants.”¹²⁴ Each of the exceptions permits a direct benefit to an otherwise impermissible class of recipients. This impermissible class includes Iraqi and Afghan persons in their private capacity, to include religious figures and sheiks. The prohibition also pertains to non-state business enterprises, such as NGOs and charities. In other words, a commander **may not** authorize the release of CERP funding to any entity acting in an “unofficial capacity,” unless an exception applies. This exclusion applies to both cash and in-kind payments. For instance, a commander could use CERP funds to repair or restore the roof of a mosque controlled and funded by the local Qada council,¹²⁵ but he could not use those same funds to repair the roof of a mosque owned and operated by a local, but influential, religious group.

This distinction becomes problematic when quasi-official entities, such as sheiks and religious leaders, serve as local power brokers.¹²⁶ In Iraq and Afghanistan, these unofficial local leaders may play a pivotal role in directing economic and social life in a given area. It is often unwise and impractical to ignore their influence.¹²⁷ This may also

¹²⁰ *Id.* at GL-11.

¹²¹ *Id.*

¹²² See Jones Testimony, *supra* note 12, at 4. Mr. Jones notes,

In general, counterinsurgency and sustainability should go hand-in-hand. Sustainable programs in eastern, southern, or western Afghanistan without a significant counterinsurgency impact can be tactically useful but strategically irrelevant. Yet programs with a positive counterinsurgency impact that are not sustainable can be counterproductive over the long run. Indeed, the U.S. Agency for International Development has established a framework to identify, prioritize, and mitigate the causes of instability—and to serve as a baseline for development aid—called the Tactical Conflict Assessment and Planning Framework (TCAPF). It includes a range of questions to ask villagers, such as: Have there been changes in the village population in the last year? What are the most important problems facing the village? Who do you believe can solve your problems? What should be done first to help the village?

Id.

¹²³ DoDFMR, *supra* note 9, at 270301K; MAAWS, *supra* note 9, app. B, § E.10; MAAWS-A, *supra* note 9, § 2.E.11.

¹²⁴ DoDFMR, *supra* note 9, at 270301K; MAAWS, *supra* note 9, app. B, § E.10; MAAWS-A, *supra* note 9, § 2.E.11.

¹²⁵ Qada (literally, “jurisdiction”) is a term for a sub-national entity in the Arab world and formerly throughout the Ottoman Empire. In Iraq, the term “Qada council” is loosely used to describe a local governing body similar to a county board.

¹²⁶ See HUSSEIN D HASSAN, CONG. RES. REP., RS22626, IRAQ: TRIBAL STRUCTURE, SOCIAL, AND POLITICAL ACTIVITIES, at CRS-2 to 3 (7 Apr. 2008). Sheiks are the principal tribal leaders in Iraq, where the tribal system plays a critical role. In the 19th century, some experts assert, the “tribal sheikh was at once a political leader, military general, chief educator, and manager of foreign affairs.” Thus, while in Western terms a sheik may be a private individual (because he does not hold a government office or act in a governmental “official capacity”), practically, his importance may equal or exceed that of an actual officeholder.

¹²⁷ See Montgomery McFate, *Iraq: The Social Context of IEDs*, MIL. REV., May–June 2005, at 37, 40. McFate asserts that

be the case with NGOs and local charity organizations. In some parts of Iraq and Afghanistan, the local government may be so inept and corrupt that an international NGO provides the only meaningful assurance that much-needed humanitarian aid reaches the local populace instead of the storehouse of a corrupt politician or local strongman. Despite this problem, there are ways for a commander to integrate private parties into his planning regimen.

In most regards, the CERP is about capacity building and legitimizing the host government and its security forces.¹²⁸ This is one reason the CERP is focused on restoring governmental institutions rather than developing the private sector. The hope is that once the host government is empowered, it will be able to foster civil society on its own terms. Further, by focusing on governing institutions, commanders can use CERP funds to encourage sympathetic outliers to join the governance-building process. If outliers are permitted to benefit from CERP dollars without being a part of the institution-building process, they could threaten it. Thus, each CERP project must have a tangible relationship to a governing entity. This means satisfying the two-part purpose test described earlier. But it also means ensuring the following:

- For Construction Projects – that the Iraqi or Afghan government has a legal proprietary interest in the land that the construction takes place either through lease or deed. In Iraq, USF-I has provided formal guidance shifting focus away from facility (brick and mortar) projects to “building GoI’s civil capacity through quickly implementable, small scale projects.”¹²⁹

[b]ecause the insurgency was connected to the Sunni tribal system, certain sheiks probably knew exactly where these explosives were stored. the sheiks are vulnerable in two ways: through their love of honor and through their love of money. Although they cannot be pressured to divulge the whereabouts of explosives through appeals to honor, because they see us as infidel adversaries, they are vulnerable to financial rewards. In Iraq, there is an old saying that you cannot buy a tribe, but you can certainly hire one.

Id.

¹²⁸ See SETH G. JONES, RAND COUNTERINSURGENCY STUDY VOL. 4: COUNTERINSURGENCY IN AFGHANISTAN 10 (2008). The study notes that:

An analysis of all insurgencies since 1945 shows that successful counterinsurgency campaigns last for an average of 14 years, and unsuccessful ones last for an average of 11 years. . . . Governments with competent security forces won in two-thirds of all completed insurgencies, but governments defeated less than a third of the insurgencies when their competence was medium or low.

Id.

¹²⁹ See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, COMMANDER’S EMERGENCY RESPONSE PROGRAM FOR

- For Supplies or Equipment—that the Iraqi or Afghan government retains an ownership interest in the CERP funded supply item or equipment purchase.
- For Projects valued above \$50,000—that the Iraqi or Afghan government formally agrees to sustain the project after project completion. The governing body should also provide a detailed sustainment budget describing these costs.¹³⁰

Satisfying the purpose test, establishing a proprietary interest, and determining the existence of an adequate sustainment budget are critical components to developing a legally sound CERP effort. And although each component requires direct government buy-in, private actors can play a critical role in the following ways:

- As Contractors—NGOs or private persons may serve as prime contractors. In fact, a unit could require the host government to use certain contractors as a condition for initiating a project. For instance, in cases where corruption is a concern, a commander would coordinate the project through the local government, but could insist that a local NGO manage the distribution or construction effort.¹³¹
- Through Use Agreements—Rather than being the direct beneficiary of a CERP-funded contract, private actors can indirectly benefit from a CERP project through a use agreement. For example, a unit could purchase tractors for the Ministry of Agriculture. The Ministry would maintain ownership of the tractors but agree to let private farmers or members of a local cooperative obtain the right to use the tractors. The key here is that the local government would maintain “ownership” and the “sustainment” obligation. But private citizens could make use of the purchase.

2011 SHOWS INCREASED FOCUS ON CAPACITY DEVELOPMENT, SIGIR-11-020, at 4 (July 29, 2011) [hereinafter SIGIR-11-020].

¹³⁰ MAAWS, *supra* note 9, app. B § 4B3; MAAWS-A, *supra* note 9, §§ 4A(5), 5a (for projects costing over \$50,000, requiring written documents from host nation officials, indicating their intent to accept and sustain the projects).

¹³¹ See CERP Conference Insights, *supra* note 7. Commanders and CERP program managers spoke of instances where local leaders and corrupt citizens learned to manipulate the CERP funding process to serve personal interest. Participants routinely suggested a need to continue to work through international organizations as a means of ensuring that projects were done properly and equitably.

The key to promoting private actor involvement is to ensure government buy-in and accountability. If the government wants a project and agrees to and has the ability to sustain it, the project will normally have the proper indicia of government involvement to survive external scrutiny. If it does not, the advising JA should help the command facilitate a different course of action.

V. Providing Sound Legal Advice and a Way Forward

This article opened with a hypothetical scenario that pitted a commander's desire to protect his Soldiers and quell an insurgency against the regulatory mandates of the CERP. When Soldiers' lives and mission accomplishment are at stake, it is generally not enough to simply tell a commander that his actions might violate some Army rule. An advising JA must be able to explain to that commander why his actions are impermissible and, if at all possible, offer another way forward. In the instant matter, our hypothetical commander made an initial determination that a need existed. After making that determination, he attained "buy-in" from the local government. The local government verified that they had no other means to initiate the project but they agreed to sustain the project once completed. After the project was started, local contractors broke ground and began to bring the concept to fruition. Unfortunately, several violent events occurred in the unit's area of operation, tempting the commander to withdraw humanitarian funding until the local population provided some useful intelligence to the BCT.

The commander's decision to initiate these CERP projects was mostly discretionary. However, once a project is initiated, it becomes a cooperative effort between the unit and the indigenous population. The commander, functioning as a quasi-sovereign entity, assumes the responsibility of a governmental body. In this instance, the commander is at a crossroads and views CERP funding as possible leverage. Unfortunately, if the commander moves forward with his proposed threat, he exposes his command to at least three legal pitfalls:¹³²

¹³² In the fiscal law universe, there are very few instances where a commander will be exposed to an explicit statutory violation, but that should not be the end-all-be-all of the legal analysis. For the fiscal law attorney, the term "legal" should not be limited to a statutory analysis. Instead, when an attorney says that a proposed course of action is "legally objectionable," he or she is saying, "I, as the command legal advisor, object to this course of action for the following reason(s). . . ." Those reasons could be constitutional, statutory, regulatory or policy-related. In most cases, regulatory and policy-related violations are not *per se* illegal, but that does not mean they are exempt from the "legally objectionable" tag. Judge Advocates (JAs), in addition to being attorneys, are also staff officers, and the advice we render to the command should be structured in a manner that exemplifies that point. Put another way, the term "legal" encompasses both the current state of the law and its future trajectory. As such, sound legal advice should be timely and accurate, but it should also anticipate the collateral consequences of a proposed course of action.

- **Violation of DoDFMR and MAAWS:** By making project funding contingent on operational support, the command is seeking a benefit to U.S. Forces, and is using CERP to fund a rewards program. Both of these purposes are expressly forbidden by the DoDFMR and the MAAWS. Put another way, the "quid pro quo" nature of this request muddies the humanitarian intent and exposes the command to unnecessary legal risk.¹³³

- **Possible Purpose Statute violation:** Under the above scenario, the command has essentially transformed the CERP into a rewards-based program,¹³⁴ and therefore spent funds appropriated for one purpose (humanitarian relief projects) for another (rewards in exchange for intelligence), in violation of the Purpose Statute.¹³⁵

- **Funds available from another appropriation:** The rewards program already established under 10 U.S.C. § 127b provides that:

The Secretary of Defense may pay rewards to persons for providing U.S. Government personnel or government personnel of allied forces participating in a combined operation with U.S. armed forces with information or non-lethal assistance that is beneficial to: (1) an operation or activity of the armed forces or of allied forces participating in a combined operation with allied forces conducted outside of the United States against international terrorism; or (2) force protection of the armed forces or allied forces participating in a combined operation with U.S. armed forces. This authority is useful to encourage the local citizens of foreign countries to provide information and other assistance, including the delivery of dangerous personnel and weapons, to U.S.

¹³³ DoDFMR, *supra* note 9, ¶ 270301A, E (forbidding use of CERP funds to benefit U.S. personnel, or for rewards programs); MAAWS, *supra* note 9, app. B, § 2.E.5; MAAWS-A, *supra* note 9, § 2.E.5.

¹³⁴ 10 U.S.C. § 127b (2006); MAAWS, *supra* note 9, at 8 (describing USCENCOM rewards program).

¹³⁵ The Purpose Statute, 31 U.S.C. § 1301, "provides that appropriations shall be 'applied' only to the objects for which the appropriations were made, except as otherwise authorized by law." Colonel James W. McBride, *Avoiding Anti-Deficiency Act Violations on Fixed-Price Incentive Contracts: The Hunt for Red Ink*, ARMY LAW., June 1994, at 3, 21.

Government personnel or government personnel of allied forces. The DoD Rewards Program makes available incentives that U.S. Government personnel of allied forces can use to encourage cooperation.¹³⁶

Put more succinctly, the DoD rewards program provides our hypothetical commander the funding leverage he seeks. This also means that if the command uses the CERP as a tool for exacting intelligence, it has essentially violated the third prong of the necessary expense doctrine. The third prong provides that an expense is necessary “if it is not provided for by another appropriation.”¹³⁷ Here, the command’s purpose is explicitly provided for by 10 U.S.C. § 127b, the DoD Rewards Program,¹³⁸ and therefore cannot be a legally permissible “necessary expense.”¹³⁹

With these limitations in mind, the role of the advising JA is critical. As noted at the outset, it is usually not enough for an advising JA to tell a commander what he cannot do. Instead, a JA must effectively explain why the commander’s proposed course of conduct is prohibited and if there are other options to accomplish his desired end state. In this instance, the commander may not directly or indirectly leverage CERP funding as an intelligence-gathering tool, but he is not without viable options. He could use the DoD Rewards Program to supplement his efforts, perhaps by approaching the tribal leaders and offering “communal or individual rewards projects” in exchange for useful intelligence.¹⁴⁰ Unlike CERP projects, these projects would not require need, urgency, or government coordination. Instead, the command could use this incentive-based approach to pay for things like a new mosque or new housing for private citizens. Rather than punishing the indigenous population by withdrawing CERP-funded support, the command could offer “additional” but “contingent” support in the form of communal or individual rewards.

The command could also tailor the acquisition process to favor only those contractors favorable to U.S. security interests. This means that any contractor with a history of

collaboration with insurgent forces could be effectively blacklisted by the command. In some ways, by controlling who can contract, the command is able to “incidentally” encourage local buy-in and potential cooperation. For instance, if contractors understand that the price of doing business with U.S. forces means “staying clean,” contractors will be less likely to support insurgent activity and more likely to report misdeeds.¹⁴¹ In any event, the command has options.

VI. Conclusion

The CERP is first and foremost a commander’s tool, but its contribution to the DoD’s mission is not commander-specific. Its successes and failures are felt from deployment to deployment—from one commander to the next. Consequently, the program’s aims cannot and are not wholly defined by the immediate desires of any particular commander. In testimony before the U.S. Senate, General David H. Petraeus, Commander, U.S. Central Command, called the CERP “a vital counter-insurgency tool for our commanders in Afghanistan and Iraq.”¹⁴² He added, “[s]mall CERP projects can be the most efficient and effective means to address a local community’s needs, and where security is lacking, it is often the only immediate means for addressing those needs.”¹⁴³ However, the manner in which we address those needs can be as important as addressing the needs themselves.

As previously discussed, the CERP is subject to more DoD-imposed restraints today than it has been in the past, but those restraints are often rooted in a history of trial and error and the military’s evolving needs. Today’s constraints are not aimed at frustrating a commander’s intent, but to maximize the effectiveness and long-term survivability of the program for current and future commanders. In fact, the DoD has consistently pushed for a “global CERP” that could be used to support stability operations beyond Iraq and Afghanistan.¹⁴⁴ However, the best way to increase the

¹³⁶ U.S. DEP’T OF DEF. REG. 7000.14-R., vol. 12, ch. 17, ¶ 170102 (July 2011) [hereinafter DODFMR Rewards].

¹³⁷ See The Honorable Bill Alexander, 63 Comp. Gen. 422, 427–28 (1984) (establishing three-part test for necessary expenses).

¹³⁸ See DODFMR Rewards, *supra* note 136; MAAWS, *supra* note 9, at 8 (describing USCENTCOM rewards program).

¹³⁹ While the MAAWS is more detailed than the DoDFMR, both contain useful specifics setting the left and right limits of CERP spending, and both should be studied by advising JAs.

¹⁴⁰ See DODFMR Rewards, *supra* note 136, § 170309 (In-kind payments, including “communal rewards,” are allowed under the DoD rewards program. Thus, rather than rewarding specific individuals, commanders could tailor a rewards program to incentivize specific communities or groups of people.).

¹⁴¹ See Bronowski & Fisher, *supra* note 10, at 57 (noting that contract competition requirements under the Federal Acquisition Regulation do not apply to CERP contracts).

¹⁴² Hearing Before the U.S. Senate Armed Services Committee on the Afghanistan-Pakistan Strategic Review and the Posture of U.S. Central Command, 2009 WLNR 6098361 (Apr. 1, 2009) (statement of David H. Petraeus, commander, USCENTCOM), available at <http://www.centcom.mil/from-the-commander/commanders-statement-to-senate-armed-services-committee-april-1-2009>.

¹⁴³ *Id.*

¹⁴⁴ See *supra* note 72 (discussion of CERP in the Philippines); Furin, *supra* note 44, at 23 (in 2007, DoD requested “Global CERP” from Congress, but Congress declined); Major Jose A. Cora, Appendix A Department of Defense Legislation for Fiscal Year 2008 FY 2008 Department of Defense Appropriations Act, ARMY LAW, Jan. 2008, at 114, 115 (Global CERP one of three top priorities for Secretary of Defense); see also OFFICE OF THE UNDER SEC’Y OF DEFENSE FOR POL’Y, INTERIM PROGRESS REPORT ON DOD DIRECTIVE 3000.05 MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS 23 (Aug. 2006).

possibility of such expansion is to ensure that the authority we have today is used responsibly, intelligently, and within the spirit and letter of the law.

The report states that “CERP has proven to be a key tool in addressing near-term stabilization, reconstruction, and humanitarian requirements in Iraq and Afghanistan. The military needs a global CERP so it can meet urgent local needs and positively assist and influence the populace. OSD Policy and Legislative Affairs continue to push for this authority.” *Id.*

Appendix

CERP Projects in Iraq	FY 2004	FY 2005	FY 2006	FY 2007	Total
Number of projects	771	7423	3886	6301	18381
Percentage of projects costing \$500,000 or more	<1	2.5	3.8	2.8	2.8
Percentage of total obligations for projects costing \$500,000 or more	8	26.9	48.1	40.1	36.8

Table 1. Obligations Associated w/ Large Dollar-Value CERP Projects (2004–2007)¹⁴⁵

¹⁴⁵ SIGIR-08-006, *supra* note 19, at 6; *see also* Fields testimony, *supra* note 35, at 6 (noting that as of third quarter FY2009, large scale CERP projects accounted for 67 percent of obligated funds).

Advancing Advocacy

Major Jay Thoman*

The Necessity of Advancing Advocacy Skills

Teaching trial advocacy is one of the most critical duties of a supervising attorney in the trial arena. Great advocacy does not just happen because excellent advocates are not spontaneously generated. Even advocates with finely honed trial advocacy skills will soon lose their edge and in time grow downright dull if training is neglected; hence the need for an experienced adviser to keep advocates at their best, even when they are not regularly in court. Given what is at stake when trial advocates employ their skills and how rapidly advocacy skills deteriorate when one is not on one's toes, the importance of skilled mentoring in this area is undeniable. To support this endeavor, I recently attended a workshop on teaching advocacy presented by the National Institute of Trial Advocacy (NITA).¹ The purpose of this article is to pass along what I learned from the course, plus some of my own experience, to assist readers in mentoring advocates within their zones of influence.²

For a training program to prove successful, a leader must examine his plan to ensure it supports his objectives. Is there a written training plan in place? This provides clear direction and strategic goals, as well as avoids the human tendency to let training devolve into story time or a discussion of everyone's weekend plans. Furthermore, if training is scheduled and time has been invested in a specific program, it is far less likely to fall victim to a current "crisis" that will push training to tomorrow or next week, only to have the cycle repeat itself. Without early planning and commitment, good intentions easily slip into unfulfilled wishes.

Prior scheduling also allows for maximum participation and affirms the importance of advocacy training. This is particularly true for the chief of justice who is responsible

for trial counsel assigned to a separate brigade.³ Units have training calendars of their own and are much more agreeable to your plan if it is developed in advance, rather than thrown together *ad hoc* at the last minute. Accidents happen and productive instruction can still take place in the absence of a schedule, but failing to plan and instead relying on spontaneity is essentially a commitment not to educate in any purposeful way those you are accountable for supervising.⁴

As part of developing teaching goals, leaders should observe attorneys in court. Active interest in your counsels' actual skill levels permits you to tailor your instruction to their needs, while emphasizing that professional growth is a priority.⁵ Committing the time to sit through trial, even if simultaneously working on something else such as reviewing a record of trial, also provides an opportunity for meaningful input about how the attorney may improve. An assessment based solely on an adjudged sentence will lack real substance beyond "good result." Even the best result may not correlate to counsel's performance in the courtroom. Additionally, observing where counsel need improvement can inform a more relevant training program.

The NITA Teaching Methodology

The NITA teaches a four-part review for advocacy trainers. The review occurs after a student has completed a required demonstration, e.g., an opening statement or direct exam. The first step is to clearly identify one issue through the use of a "headline," a simple statement, such as "I want to talk to you about using leading questions on cross." This

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¹ The National Institute for Trial Advocacy (NITA) (website: <http://www.nita.org>) is a nonprofit organization based on Louisville, Colorado. With an average student to faculty ratio of 4 to 1 and an all-volunteer faculty of judges, law professors, and practicing attorneys, the NITA's multi-day "boot camps" train nearly 6000 attorneys each year.

² Though written well over a decade ago, two *Army Lawyer* articles are still well worth consulting on the supervisor's role in advocacy, as well as the many other responsibilities of a criminal law manager. Major David L. Hayden, Major Willis C. Hunter, & Major Donna L. Wilkins, *Training Trial and Defense Counsel: An Approach for Supervisors*, ARMY LAW., Mar. 1994, at 21; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15.

³ While TJAG Policy Memorandum 08-1, dated 17 April 2008, makes this task easier by directing the brigade trial counsel (TC) to work in the Office of the Staff Judge Advocate while in garrison, their location is still a source of tension in some units. Providing a training plan to the brigade that accounts for their TC's training may help to improve this dynamic. If not, it may be necessary to procure orders from the division commander to acquire the needed control. If things have to go this far, a training plan can help to justify and retain such control.

⁴ As an Army leader, you have an inherent obligation to mentor your subordinates. Additionally, as a supervising Judge Advocate, you have an ethical obligation under Army Regulation 27-26, which specifically mandates that "[a] supervisory Army lawyer is responsible for making appropriate efforts to ensure that the subordinate lawyer is properly trained and is competent to perform the duties to which the subordinate lawyer is assigned." U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 5.1(d) (1 May 1992).

⁵ This does not mean the chief of justice and senior defense counsel should sit right behind their trial attorneys and pass notes or whisper to them about the next question to ask. This practice is distracting, undermines counsel's credibility before the tribunal, and saps his confidence.

focuses the group and the instructor on a specific point. Even when more than one issue needs addressing, sticking to one teachable point per person, in the group setting, keeps the information to be absorbed at a manageable level and prevents anyone from feeling singled out.⁶ While certainly there is no magic language, starting off with, “I want to talk to you about using open-ended questions,” will effectively focus the group and the instructor about a specific point. Avoiding negative and vague comments, such as “you did it wrong,” will keep students receptive to what the instructor has to say and not place them on the defensive and closed off to constructive criticism that may follow.

Identifying the issue with a headline is followed by step two, the “playback,” where the leader reads back verbatim three examples highlighting the issue identified in the headline. This requires some rapid transcribing by the instructor, but is the key to an effective playback. Reading back three examples in the speaker’s own words prevents junior counsel from defensive rationalization. It is not unusual for the person being critiqued to think, “I did not do that, or if I did, it was only once.”

Following the playback is the “prescription” NITA’s step three. The leader explains how to solve the problem. In some cases, this is best done by example since some things are easier to show than describe. Modeling by the leader demonstrates that the principle being taught works in practice. The instructor must not critique junior counsel on a topic for which he has no solution, as this will greatly undermine the credibility of the senior attorney.

The final step of the critique is to explain the “rationale” for the needed change and why the proposed prescription is the best solution. This helps the students understand the reason for the prescription and identify related issues in the future. They will want to make the change when they realize the logic extends beyond “because I said so.”

When reviewing counsel’s presentations in a group setting, keep the group learning concept in mind. Make constructive points to benefit the group and do not focus solely on the shortcomings of an individual. Provide lessons that multiple members of the group can apply in future cases. Recognize that different students are at different levels, and vary your critiques accordingly, so that whoever just went can grasp the point being made. The instructor should make eye contact with the entire group throughout the critique, but particularly during the prescription and rationale steps, so the entire group understands it is a lesson for all of them. Just as an attorney making argument should avoid the using the word “I” during argument—“I think this”

⁶ Only as students develop should the instructors consider addressing more than one critique point per training session. The exception to this is if the instructor observes a violation of the ethical rules, such as the use of improper argument or a misstatement of the facts or law. Such a violation should always be brought to the students’ attention and corrected immediately, no matter the topic of the day.

or “I believe that” —so too should the instructor during prescription and rationale, because it implies the solutions are just one person’s opinion and not actually the correct way to do things. Instructors must also understand that while group training provides a shared learning experience where everyone learns from others’ successes or missteps, student comments can quickly derail the schedule, and may be counterproductive.

In addition to teaching to the group, other practices can maximize the teaching value to the individual participants. The instructor should create an environment that excludes all distractions. He must keep the group to a manageable size, so that each attorney has a chance to participate. He may need to subdivide the group or limit the material assigned to each counsel. Typically, a five to seven minute block provides the participant enough time to develop a flow and let everyone see what needs to improve. When each participant is limited to five to seven minutes, each critique should take two to three minutes, to keep the instruction moving.

Before a student takes his turn, the instructor can use questions to focus his attention on important teaching points. Thus, if the exercise is direct examination, the instructor can ask, “What points will the witness make that you will argue in your closing?”, “Are you planning to get any answers you know you will not use later?”, and “Why are you asking those questions, then?”⁷ The use of humor can help keep the attention of counsel, as can implementing an “all-object” rule where everyone is responsible for objecting so that no one “tunes out” during someone else’s turn in the rotation.⁸

It is important to be respectful of all participants and create an environment without distractions. While respectful, the feedback should be forthright and not sugar-coated. An occasional positive critique of an exemplary performance can emphasize the value of something done well, but the most productive comments will focus on improving, not maintaining the status quo. While the form of the critique is important, it is the substance that matters most. Before the students begin, ask them questions about their upcoming cases that will focus them on the end goal, such as, “What points do you want the panel to come away with when you cross the victim in *Smith*?”

If other instructors are participating, they must understand what is expected of them. If the leader is using

⁷ Asking the questions prior to a student’s in-training performance eliminates the controversial feel to the questions, since they are directed toward what trainees are about to do as opposed to what they have already done.

⁸ While one counsel can be tasked as “opposing counsel” and given responsibility for making objections, with an “all-object” rule, more individuals can work on spotting objectionable matter and *concisely* stating their objections to the judge. An “all-object” rule also generates more objections, providing counsel on their feet more chances to respond succinctly to objections and move on, without losing focus.

the four-step NITA method, they need to understand it. They must appreciate the importance of not contradicting other instructors in front of the students. They must come prepared so that training time can be dedicated to training.⁹ While “war stories” can occasionally be helpful, generally they are a distraction and seldom fit the skill-specific nature of the NITA method.

As the students become more proficient and begin to master the skills, encourage them to attempt novel ideas. Emphasize that a training session is the ideal place to try something new. The only downside to greatly improved counsel is the increased difficulty of finding something meaningful to critique. Hopefully, that is a problem a leader will relish as his or her junior counsel’s advocacy skills improve.

Self-Reflection with Video Review

The use of video review can add a whole new dimension to the methods discussed above. Such review is best done in private by a different instructor while the rest of the group continues training.¹⁰ It focuses on the junior counsel’s physical actions. If the student is feeling discouraged from the review in the main room, the instructor should encourage him about what he did well before proceeding with the video review. After all, the goal is to improve the student’s advocacy, not cause him to loathe it and request a transfer to claims. If the student is still in denial about a particular problem highlighted in the headline and detailed in three examples, the video review provides irrefutable proof of the critique’s accuracy. Video review gives students a chance to benefit from self discovery, internalizing lessons they would have been reluctant to receive if delivered by someone else. Also, some issues—such as problems with tone, pacing, or body movement—can be difficult and embarrassing to repeat in playback before a group, these are better left unmentioned during the main session and addressed during the video review.

⁹ For example, if the courtroom is unavailable for your advocacy training, prepare another location as similar as possible to give the entire exercise a more realistic feel. This avoids wasting valuable training time on interior decorating and will allow the instructor to provide feedback on the attorney’s movement within the courtroom, such as how they interact with the witness and panel. Additionally, exhibits, diagrams, and maps should be available for counsel to practice with, as should PowerPoint presentations incorporated into arguments, if these are allowed by the local judge. If the judge has yet to embrace this technology, flip charts, enlarged elements worksheets, or blown up copies of the instructions are a workable alternative.

¹⁰ If two instructors in the main room with a third conducting the video review does not work because your only instructors are “me, myself, and I,” or if you have only a few counsel, consider running the main room by yourself and tasking a student with starting and stopping the camera. Then do individualized video sessions later in the day or whenever fits your schedules. If there are only a couple of counsel, consider adding a second headline, playback, prescription, and rationale so they still have multiple points to take away from the session.

An effective video review differs from a successful live critique. An obvious difference is the private setting offered by video review. The attention is focused on the individual rather than making points for the benefit of the group at large. The individual can explain his objectives and share insights from the group instruction.¹¹ If time allows, the student can redo a portion of his performance to reinforce the lesson taught. This chance should not take priority over other students who may be waiting outside the video review room. To keep the program on schedule, it is necessary to talk over the recording. As tempting as it may be to repeatedly pause the tape to address valid points, this unfairly takes time from other students. The resulting backlog keeps students out of the main classroom and unable to learn from the points made there for the benefit of the group.

A variation of a video review is to turn off the sound to isolate particular mannerisms or observe the student’s overall movement.¹² Alternatively, the instructor could cover the screen to center the attention on the audio portion. Ensure that the room setup allows the student an unobstructed view of the screen, particularly if the performance is being watched on a laptop computer that inhibits watching from an angle. As the student is about to leave, give him one thing to work on for next time, be it pacing, gestures, eye contact, overreliance on notes, or demeanor—particularly when opposing counsel objects or the judge asks a question.

Use of Drills in Advocacy

To introduce some variety, one possible variation in the training program is advocacy drills. These can not only reenergize the group, but allow the instructor to focus on a specific pre-determined lesson, as opposed to whatever issues pop up as the students rotate through opening, direct, or closing exercises.

If the instructor has seen counsel rush through the details to get to their final point, only to produce an anticlimactic result because there was no build-up to the climax, perhaps an Elongation Drill is in order. In this drill, the instructor performs a simple act, such as putting on a beret, and then each member of the group makes a single statement to describe the act. The temptation is for the first one to say, “You put on your beret,” and the second to ask, “What else is there?” At this point, remind them the objective is to describe what happened along the way and to

¹¹ Due to the importance of privacy for this section, it is better to perform the video review in a separate office with the door closed. This maintains privacy as the next student arrives for his video review session, so that the current student can self-critique in private or ask a question that might be uncomfortable to ask in front of others.

¹² This lesson will be greatly magnified if carried out in “fast forward” mode, which will exaggerate or emphasize movements.

not rush to the end. Start them with, “You were seated in a chair—behind your desk—you slid the chair back—you stood up—your left arm began moving—the fingers on your left hand extended—they made contact with the handle to your upper left desk drawer—the fingers closed around the handle—you pulled your arm back, opening the drawer—you released the handle—you raised your hand over the drawer—you again extended your fingers—they came into contact with the beret—your fingers closed around the beret . . .” Hopefully the group has the idea and continues with the details of the beret rising to your head and being placed there after the rank is centered over the left eye. Now that they have the idea, perform another simple action. By using an uncomplicated action, this drill highlights how they can draw even more details out of something more complex that is in dispute.

Along with the Elongation Drill, another effective tool is the Looping Drill. The point of a Looping Drill is to emphasize certain words, images, or concepts. This is done by “looping” portions of a witness’s previous answer into the next question. While this should not be done constantly because it will lose its effect, it is a great tool to emphasize important testimony. The drill is performed with the facilitator playing the role of the witness. The first participant asks a question, and after the “witness” answers the question, the next participant asks a follow-up question incorporating a portion of the previous answer.

Q: What did you do this morning when you woke up?

A: I brushed my teeth.

Q: *After you brushed your teeth*, what else did you do to get ready for the day?

Another drill is a variant of the game Twenty Questions. Instead of asking only “yes-no” questions to identify a person, place, or thing, participants ask questions beginning with “who,” “what,” “when,” “where,” “why,” or “how” to encourage open-ended questions on direct (they are not allowed to ask the “ultimate” question of “who is he?” or “what is it?”). Alternatively, the instructor can provide a few brief facts, such as “Something happened to me yesterday at noon. What was it?” Students then use the same basic open-ended questions, prefaced with interrogatory words, and under the same limitation, to fill in the details. Call it the “W” Drill.

To demonstrate how individuals remember things by breaking information down into smaller parts, have the students try a Chunking Drill. Instruct the group to recite the Pledge of Allegiance together. Presumably, none of them had ever recited it with anyone else in the training group, yet each paused at the same spots because they learned it in “chunks” to make it easier to remember. This demonstrates how a pause can break a large volume of information into manageable pieces for the listener.

Another effective drill involves students saying the phrase, “I never told you I loved you.” The idea is to see how many different meanings they can obtain from the same phrase by placing the emphasis on different words or pausing at different points to illustrate the importance of proper emphasis when asking questions. To get students thinking about incorporating gestures in their work, use the same sentence and see how many gestures they can work into it. For a different gesture drill, have counsel play charades, with one attorney “telling” the facts of a case in pantomime format. Follow up by asking the “panel” about the case for which they just “heard” the “opening” and see how that meshes with what counsel attempted to convey.

If counsel are not listening to their witnesses’ answers because they are reading their notes for the remaining questions, incorporate the Tennis Ball Drill into your training. Participants play the role of the witness and questioner. Each participant can only talk when holding the tennis ball. After asking a question, the attorney tosses the ball to the witness, who answers the question and tosses the ball back to the attorney, who asks another question before returning the ball. If the witness sees the attorney looking down at his notes while the witness has the ball, the witness should immediately throw the ball at the distracted counsel. (Remember, it is the Tennis Ball Drill, not the Baseball Drill—unconscious counsel do not retain information.) The lesson being, if the counsel is not paying attention to the witness, the witness has the ability to inflict “pain” on the questioner. This focuses the attorney’s attention where it should be, squarely on the witness. If questioners need to consult their notes, they need to learn to do it when they have the ball, i.e., when the witness has finished speaking.

To promote concise, specific questions, try the Picture Drawing Drill. Ask one or two volunteers to leave the room. When they leave, draw a simple picture on butcher block paper, show it to everyone remaining in the room, and turn the picture over. Then have the students return, ask questions about the drawing you made (as few as possible), and attempt to replicate it. This is good practice for dealing with the unhelpful witness, who leaves out vital details unless the questions “pin him down.” A variation of this game is to divide the group into teams of two. Pass out the same picture to one member of each team, and then have the other member ask questions, and draw what is being described. The teammate with the picture may not volunteer information, but can only answer questions; the teammate doing the drawing cannot show his picture to the other teammate; and the questions cannot include the “ultimate” question—“please describe the whole picture.” After five or ten minutes, compare the pictures to determine which team had the best communication. Find out what they did differently from the team with the worst likeness and see what lessons the group can “draw” from the experience. This adaptation of the original drill concentrates on developing a shared perspective with the witness rather than incisiveness in questioning.

If the goal is to focus counsel's arguments, especially in coming up with concise themes and identifying essential facts, try the Telegram Drill. Each counsel gets ten words to describe a case he is currently assigned. Alternatively, have the group work collectively on the same case. If all participants are not familiar with one fact pattern, use a common story such as "Goldilocks and the Three Bears" as the basis for the drill. The group then needs to come up with ten words framing the case to prosecute or defend Goldilocks. For example, Goldilocks' defense team may come up with: helpless child, lost wilderness, famished, storm, sought shelter, arrested—release. The prosecution team has their own perspective: truant teen invaded home, theft, violated privacy, societal threat—confine.

A drill to work on the basics is to have the group form a circle with the facilitator throwing out topics, such as laying a foundation for a particular piece of evidence, impeaching a witness, or refreshing recollection. The first member of the group says the first step to whatever the facilitator started with and then the person next to them says the second step, and so on with those that are unable to remember removed from the circle until the next round. The last one remaining in the circle wins.

Other drills can help counsel engage the panel. If an attorney speaks a foreign language, have him deliver his opening to the group in that language. After a few minutes, stop him and see what the group understands from his body language, tone, and gestures. If the group did not get an appreciation for what was conveyed, have the speaker start over with greater emphasis on the nonverbal language.

When eye contact is a problem, have the group form a notional panel. As counsel is delivering an opening or closing, "panel members" should raise their hands if the speaker is making eye contact with them. This is a good way to see if the speaker's attention to his listeners flows naturally from one to another, lingers uncomfortably in one place, or is missing altogether. If counsel is having trouble getting hands to rise because of a lack of eye contact, take a more direct approach. During counsel's presentation, the speaker must hold the hand of the person he is making eye contact with and cannot release one hand until he has another in his grasp. After he seems to have developed a flow, allow him to release hand contact while continuing the performance and the eye contact. If the eye contact starts to deteriorate, have the speaker reengage the hand contact until it seems less forced.

For the group to understand what they find engaging at a personal level, have two or three individuals start giving opening statements at the same time to the group. After a couple of minutes, stop the speakers and have them immediately start telling the group about their worst airline experiences, best high school memories, favorite Saturday activities, or any other one topic the facilitator chooses that anyone can speak about extemporaneously. After a few minutes of these stories, have them pick back up with their openings wherever they left off before the interruption. Again, after a few minutes have passed, interject with a new topic such as what they would do if they won all-expense-paid vacations, only to take it back to the original opening again after a few minutes. After ten minutes or so of the simultaneous openings and stories stop the speakers and ask the group who listened to which speaker and for how long. Ask what caused the observers to listen to one particular person. Ask what caused them to stop focusing on one speaker and begin listening to another. What caught the audience members' attention so that they were not distracted by the other ongoing presentations? Did the speakers change tone when they stopped talking about someone else's problems in the opening or closing and began speaking about something personal? Quickly poll the group about who received eye contact and how much from each speaker. Ask the speakers how they felt. For those who were able to maintain focus, how were they able to do that with the competing voice or voices? Would that help in maintaining one's focus despite repeated objections or a difficult witness attempting to redirect the testimony?

Conclusion

Just like advocacy itself, this article is more art than science. It offers suggestions on ways to train. Use what is effective and change or ignore what does not work for you or your group. The important thing is that you plan it and do it. It has been my experience, as a practicing and supervising attorney, that the hardest thing about training is making it happen. As the Chinese proverb says, "The more you sweat in peace, the less you bleed in war."¹³ Make sure your counsel are prepared the next time they enter the courtroom to avoid a bloodbath.

¹³ Chinese proverb, *quoted in* ROBERT DEBS HEINL, JR., *DICTIONARY OF MILITARY AND NAVAL QUOTATIONS* 330 (Naval Inst. Press 1966).

Claims Report
U.S. Army Claims Service

Affirmative Claims Note

2009 Agreement with TRICARE

*Tom Kennedy**

In January 2009, the Office of the Judge Advocate General (OTJAG), TRICARE Management Activity (TRICARE),¹ and the Army Medical Command (MEDCOM) entered into an agreement² to establish how TRICARE will reimburse MEDCOM for a portion of the costs associated with recovering TRICARE claims from tortfeasors, insurers, and workman's compensation programs under the Army's Medical Affirmative Claims program. This article will explain the purpose of the agreement, its provisions, history, implementation, and the opportunities it presents to Army Medical Affirmative Claims offices wishing to establish or expand agreements with Military Treatment Facilities (MTFs).

Background

The Army Medical Affirmative Claims program allows the Army to recover costs of medical care provided to Soldiers, retirees, and their Family members by MTFs and civilian hospitals. Reimbursement for this care from tortfeasors and their insurers is authorized under the Federal Medical Claims Recovery Act (FMCRA).³ It is also permitted by 10 U.S.C. § 1095. The latter statute allows recovery against an injured party's insurer when medical care is provided or funded by the Army, even though that insurer is designated by law as the "primary payer." The

FMCRA authorizes recovery in states requiring tortious conduct as the proximate cause of injury, as well as in states that have a "no fault" system of insurance. Title 10 U.S.C. § 1095 provides a remedy against the providers of the injured party's automobile insurance, workers' compensation, and common carrier coverage.⁴ Claims for medical care provided at MTFs frequently involve TRICARE, tortfeasors, and insurers. To economize resources, OTJAG agreed to assert TRICARE claims for medical expenses arising under the FMCRA as well as under 10 U.S.C. § 1095b⁵ for claims involving automobile insurance, workers' compensation, and common carrier coverage.

The memorandum of agreement (MOA) is the most recent effort to encourage the recovery of medical affirmative claims and facilitate cooperation between the Army legal community and the health providers (military and civilian) on whose behalf claims are asserted and collected.

Title 10 U.S.C. § 1095 has profoundly affected medical care recovery procedures. Money recovered under this statute must be credited to the appropriation supporting the operation and maintenance (O&M) account of the facility that provided the care. Funds recovered under this statute can be used to support the local hospital commander's mission. Before this, recovered funds were deposited in the miscellaneous receipts fund of the General Treasury. Once they were authorized to deposit recovered funds into their own accounts, many MTFs entered into agreements with claims field offices to fund additional personnel to support medical affirmative claims recovery efforts. The results were tangible and immediate: by fiscal year (FY) 1995, more than \$7 million in medical care recoveries were deposited into MTF O&M accounts.⁶

In 1996, the FMCRA was revised to authorize recovery of injured Soldiers' lost pay⁷ and to mirror the language in

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¹ For simplicity, both the TRICARE program and the TRICARE Management Activity (TMA), which oversees that program, will be referred to in this article as "TRICARE." The TMA is a field activity of the Undersecretary of Defense for Personnel and Readiness, and was formally established under Department of Defense Directive (DoD) 5136.12, *TRICARE Management Activity (TMA)* on 31 May 2001. Since February 1998, TMA leadership has managed the TRICARE health care program for active duty members and their Families, retired servicemembers and their Families, National Guard/Reserve members and their Families, survivors and others entitled to DoD medical care. TMA is the preferred acronym for the agency formerly known as "CHAMPUS" and operates under the authority of the Assistant Secretary of Defense for Health Affairs. *About TMA*, TRICARE MGMT.ACTIVITY PORTAL, <http://tricare.mil/tma/AboutTMA.aspx> (last visited Oct. 24, 2011).

² The signatories to the Memorandum of Agreement (MOA) were The Judge Advocate General (TJAG); Commander, U.S. Army Medical Command (MEDCOM); General Counsel, TRICARE Management Activity; and the (Acting Commander) Department of the Army Secretary of Defense (A)DASD, Health Budgets and Financial Policy, TRICARE Management Activity.

³ 42 U.S.C. §§ 2651–2653 (2006).

⁴ Excluded for purposes of this discussion are third-party health benefits claims for health insurance and Medicare supplemental made under title U.S.C § 1095, as these claims are processed separately within Medical Treatment Facilities and medical centers under the aegis of the "Third Party Collection Program" (TCPC).

⁵ 10 U.S.C. § 1095(b) (2006).

⁶ Kristi Jedlinski, *1995 Affirmative Claims Report*, ARMY LAW., Aug. 1996, at 37.

⁷ Congress for the first time authorized the recovery of the Soldier's pay from the tortfeasor, and deposit of that pay in the local operation and

10 U.S.C. § 1095, which allows deposit of recovered funds in an MTF's account.⁸ Before these separate pieces of legislation were brought into harmony, Army claims office personnel took pains to distinguish funds recovered under the FMCRA from recoveries under section 1095,⁹ as only the latter were authorized for deposit into MTF O&M accounts.

In FY 2002, the Department of Defense required that monies recovered in TRICARE Medical Affirmative Claims be credited to TRICARE's fund-cite, known as a Defense Health Program (DHP) account, rather than the General Treasury Account.¹⁰ Although private sector care costs were paid by TRICARE and gave rise to affirmative claims which could be collected by OTJAG, no agreement existed between TRICARE and OTJAG through which TRICARE contributed to OTJAG's recovery effort.

As shown in Table 1 of the Appendix, TRICARE collections have increased steadily since regulations authorized crediting deposits back to TRICARE. In 2002, TRICARE accounted for approximately one-third of all medical affirmative claims-related deposits. In 2010, it accounted for about 65% of such deposits.

Notwithstanding the emergence of TRICARE as a major source of recovered funds, Army hospitals remained the sole source of additional funding for medical affirmative claims operations and personnel. As medical affirmative claims personnel divide their attention between military hospital and TRICARE collections, that is, between the collection of funds expended by MTFs for the care of patients and by TRICARE for treatments provided at civilian hospitals, MEDCOM has long expressed interest in establishing a means of sharing these costs with TRICARE.

In discussions leading to the final version of the MOA, the parties looked at ways to reimburse each of the organizations that fund Medical Affirmative Claims personnel.¹¹ Arguably, TRICARE should reimburse all

maintenance (O&M) account that supports "the command, activity, or other unit to which the soldier was assigned at the time of the injury." This legislation, as integral as any other to the Medical Affirmative Claims program, has contributed relatively modest sums to the overall military affirmative claims effort. According to the Affirmative Claims Management Program, the database that records all Army Medical Affirmative Claims activity, claims offices have recovered approximately \$290,000 in Soldier pay annually since the legislation became effective in FY02. "Recovered lost pay" will likely remain the third and shortest leg of the Medical Affirmative Claims tripod for some time to come.

⁸ See 42 U.S.C. § 2651(b); Pub. L. No. 104-201, § 1075, 110 Stat. 2422, 2661-62 (1996).

⁹ Colonel Jack F. Lane, Jr., *Policy Memorandum—Recovery of Medical Care Costs*, ARMY LAW., Aug. 1991, at 48.

¹⁰ 32 C.F.R. § 537.14 (c) (2) (2011).

¹¹ Information Management Command (IMCOM) and Forces Command (FORSCOM), in addition to MEDCOM, also pay salaries of select civilian and military Medical Affirmative Claims employees.

Army agencies for their expenditures on TRICARE collections. However, the attempt to establish a means to reimburse "all" Medical Affirmative Claims costs was determined to be impracticable¹² and not cost effective. The parties agreed that the most direct and workable option available was for TRICARE to reimburse MEDCOM for its outlay of funds to provide additional Medical Affirmative Claims personnel.

Another issue involved the manner in which reimbursements were made. The parties decided that the most sensible approach was for TRICARE to reimburse MEDCOM, and then have MEDCOM apportion payment to its MTFs and Army Medical Centers (AMCs). Because the MOA requires TRICARE to reimburse incremental direct costs (that is, costs associated with additional outlays of funds to assert and process Medical Affirmative Claims), MTFs may receive reimbursement only if they execute MOUs with their servicing Staff Judge Advocate Offices (OSJAs).

Some thought was given to deducting TRICARE's share of Medical Affirmative Claims costs directly from each recovered claim before completing the deposit of funds. However, such additional administrative computations would violate Federal law.¹³ Moreover, these computations, if compounded over thousands of claims at dozens of offices, would inevitably lead to erroneous calculations and wasted time. Using data from the Affirmative Claims Management Program, the Army Claims Service can perform these calculations more efficiently.

The Memorandum of Agreement

The MOA became effective on 14 January 2009. It will remain in effect indefinitely and may be modified upon the approval of all parties. The MOA establishes the method by which TRICARE will reimburse the Army for the incremental direct costs assumed by MTFs and medical centers for recovering claims on behalf of TRICARE. This is not a fixed-rate payment for services rendered.¹⁴ It is a reimbursement to the Army for the estimated costs incurred by Medical Affirmative Claims personnel in asserting claims on behalf of TRICARE. "Incremental direct costs" are

¹² The costs of military personnel, for example, are not reimbursable under the MOA because those costs are centrally funded. Medical Affirmative Claims-related military labor constitutes less than ten percent of the total Medical Affirmative Claims program costs.

¹³ Monies recovered for TRICARE claims must be deposited to TRICARE's account under title 10 U.S.C. § 1079a ("All refunds and other amounts collected in the administration of the Civilian Health and Medical Program of the Uniformed Services shall be credited to the appropriation available for that program for the fiscal year in which the refund or amount is collected.")

¹⁴ Fixed rate agreements potentially violate the Economy Act which requires that payments be made "on the basis of the actual cost of goods or services provided." 31 U.S.C. § 1535 (2006).

simply those costs that have been incurred in addition to the costs that already exist with respect to administering a military affirmative claims program. They are the costs assumed by MTFs and medical centers to supplement efforts to recover Medical Affirmative Claims, such as the cost of specific additional personnel from an OSJA who otherwise would not be engaged in Medical Affirmative Claims collection activities. The salaries of additionally-assigned noncommissioned or commissioned officers are not eligible for reimbursement. MEDCOM shall not be asked to pay for them via a MOU, and TRICARE shall not be asked to reimburse such costs.

TRICARE's reimbursement to a medical center in the current year is subject to its Medical Affirmative Claims staff having deposited sums on behalf of TRICARE in the previous year. For TRICARE to reimburse MTFs other than AMCs for work performed by employees it funded, the reimbursement formula—described in detail below—is the same, but a MOU between the MTF and OSJA must be in effect as of 31 January in the year in which reimbursement is calculated and must identify the positions to be funded as well as any fixed costs. An "Installation Support Agreement" between the MTF and Army installation may substitute for a MOU, but must be similarly precise in identifying the funded positions and other fixed costs to be funded by the MTF.

The calculation begins by determining the total cost of legal support services that are provided by the AMC or MTF to the Medical Affirmative Claims program during the current fiscal year. Costs include the salaries and "locality pay" of the civilian positions assigned to process medical affirmative claims, salaries of contract claims personnel, and fixed costs related to supplies, training, postage, and equipment associated with supporting the Medical Affirmative Claims mission. Not included in this figure are the salaries of military claims personnel or of civilian or contract claims personnel that are not paid out of AMC or MTF funds. Costs of any billing clerks or other positions that have only a tangential relation to the Medical Affirmative Claims process are also not included.¹⁵

The salaries of the attorney, paralegal, and claims assistant who work Medical Affirmative Claims at (hypothetical) Fort Courage are shown in Table 2 of the Appendix. To determine what share of these costs (if any) should be reimbursed by the TRICARE Management Activity, look at the following:

- Determine the employee's base salary. For FY11, the Army Claims Service surveyed field offices by asking for each Medical Affirmative Claims employee's GS or NSPS pay grade.¹⁶
- Include the benefits associated with the employee's salary. An employee's benefits package is estimated to be 36.25% of his salary,¹⁷ a percentage that accounts for social security, health coverage, and other costs. This figure is added to the employee's salary to obtain a "Total Personnel Cost."
- The total personnel cost is then multiplied by the amount of time that employee spends processing Medical Affirmative Claims actions, expressed as a percentage of that employee's work week.
- If the MTF agrees to fund a position under the terms of a MOU or Interagency Service Agreement, then a portion of that employee's salary and benefits is eligible for reimbursement by TRICARE. If the position is not addressed in the memorandum, then that employee's salary is not reimbursable, even if the employee's time is devoted exclusively to the Medical Affirmative Claims program.
- The sum of all eligible employees' salaries and benefits, adjusted for the time they dedicate to Medical Affirmative Claims work, is considered the Total Army Medical Command Medical Affirmative Claims cost; that is, it is the total Medical Affirmative Claims cost borne by MEDCOM through its MTF or AMC.

Once the AMC's or MTF's Medical Affirmative Claims-related costs in the current year are determined, the next step is to calculate—at that location—the percentage of recoveries deposited on behalf of TRICARE in the previous year. Once the "TRICARE Management Activity Share of Collections" is calculated, multiply this percentage by the AMC's or MTF's Medical Affirmative Claims-related costs in the current year. The product equals the incremental direct cost to that AMC or MTF to provide medical care recovery services to TRICARE.

¹⁵ The funding decision respecting whether a position is reimbursable will be made by Army Claims Service, after consultation with the medical center or MTF. Because TRICARE provides its own bills, the cost of Army medical centers (AMC) or MTF billing clerks will not be reimbursed by TRICARE unless a substantial portion of that employee's daily activity is devoted to asserting Medical Affirmative Claims on behalf of TRICARE as well as the hospital.

¹⁶ In the past, some offices provided the employee's YA, YB, YC, or GS designation, while others supplied specific dollar figures. When specific figures were not provided, the salary was determined to be at the "step-5" level of the GS-equivalent rate, even when the employee was rated under the NSPS system. In subsequent years, specific salary figures will be requested of all offices.

¹⁷ This percentage was provided by the Civilian Personnel Office at Fort Meade.

Based on the data in Table 2, the local MTF/OSJA MOU addresses only the attorney and claims assistant positions, so the costs associated with funding these employees are eligible for partial reimbursement by TRICARE. The attorney's total personnel cost is \$120,000. She devotes one-quarter of her work week to Medical Affirmative Claims. Thus, her "Medical Affirmative Claims personnel cost" is \$30,000. Of all the funds recovered during the previous year, TRICARE received 60%. Therefore, TRICARE will reimburse MEDCOM in the amount of:

$$[\$30,000 \times 60\%] = \$18,000$$

MEDCOM will then deposit these funds in the O&M account of the Fort Courage MTF.

Similarly, the claims assistant's total personnel cost is \$50,000. He spends 90% of his time working Medical Affirmative Claims, so his Medical Affirmative Claims personnel cost is \$45,000. Because TRICARE received 60% of all recovered funds the previous year, TRICARE will reimburse MEDCOM in the amount of:

$$[\$45,000 \times 60\%] = \$27,000$$

TRICARE will therefore reimburse MEDCOM for both positions in the amount of:

$$[\$18,000 + \$27,000] = \$45,000$$

As explained above, TRICARE may be required to reimburse MEDCOM if either an AMC or MTF incurred additional administrative costs (supplies, training, equipment, etc.) associated with the Medical Affirmative Claims program. In the case of MTFs, a fixed amount¹⁸ must be stipulated in the Installation Support Agreement or MOU between the MTF and OSJA. These administrative costs are then added to the MEDCOM Medical Affirmative Claims costs to arrive at the total amount due from TRICARE.

The Army Claims Service will calculate Medical Affirmative Claims costs in January of each year and submit the figure to TRICARE. Field claims offices must provide these costs to the Army Claims Service by 15 January. Field offices are cautioned to adhere to this January deadline, as the MOA does not permit end-of-year reconciliations. TRICARE will execute a funds transfer via a funding authorization document to MEDCOM no later than 30 April.¹⁹ This is intended to provide MEDCOM

¹⁸ A "fixed" amount is a sum certain, not a percentage or other variable. OSJAs are urged to review the particulars of their local memoranda of understanding with MTFs to ensure that any fixed amounts for equipment, supplies, training, etc. are set forth in actual dollars.

¹⁹ Subject to the availability of funds, this MOA obliges TRICARE to transfer appropriated funds for each fiscal year the MOA is in effect.

sufficient time to redistribute funds to its hospitals (in apportioned amounts based on the Army Claims Service's earlier calculations), enabling hospitals to obligate the funds before the funds expire at the end of the year. Payment for medical care recovery for legal support services must be made using funds from the fiscal year in which the services are performed. Judge Advocates are reminded that one method of obligating funds is to hire Medical Affirmative Claims employees, whenever the addition of such employees is expected to add value to the Medical Affirmative Claims program.

Field claims offices are urged to review their current MOU with their MTFs to ensure these agreements address their current personnel needs in the context of a vigorous Medical Affirmative Claims program. Field claims offices that have not yet negotiated agreements are urged to consider doing so. These agreements are a prerequisite to participation in this reimbursement program. In certain limited instances, however, such as when both TRICARE and MTF recoveries are minimal and the funds that might be recovered by hiring an additional employee are unlikely to exceed his salary, agreements may not be advantageous either to your office or your local MTF. Review your office's recovery history, current performance, and future trends before electing whether to pursue reimbursement through this program. OSJAs wishing to initiate or revise agreements with MTFs must do so before 31 January of the year in which they contemplate TRICARE reimbursement.

Making the MOA Work for Your Office: Three Scenarios

The new MOA affords offices considerable leeway with respect to the kind of agreement an OSJA forges with a local Army hospital. The Staff Judge Advocate must determine the state of the Medical Affirmative Claims program in his or her office. Review your office's historical data in the affirmative claims management program. Look at whether you have a persistent backlog of actions and whether your office is taking on more TRICARE (or MTF) claims than ever before. Consider whether you have sufficient personnel to process claims at their current or expected rates over the next several years. The MOA provides additional incentive to MTFs to fund positions in your Medical Affirmative Claims program. Exploit your knowledge of your program to persuade the MTF to invest, or invest more generously, in the Medical Affirmative Claims recovery mission.

Scenario 1

Table 3 of the Appendix shows an office with Medical Affirmative Claims activity weighted entirely toward TRICARE. The absence of MTF deposits suggests that this field office is remotely located from any MTF or co-located with a clinic that is not equipped to address traumatic injuries. The trend-lines from FY05 through FY08 suggest

that TRICARE is in a continuing growth phase at this location. The OSJA should consider hiring an additional employee. Before the advent of the TRICARE MOA, crafting a MOU with any hospital, remote or otherwise, would have been impossible because the hospital would have had no incentive to invest in personnel whose activities are exclusively devoted to asserting TRICARE claims.

Now, however, the OSJA should pursue the funding of additional positions through a MOU with any hospital or clinic that agrees to underwrite these positions. Even if an OSJA is unlikely ever to recover funds for a remotely-located MTF or co-located Army clinic, the MOA ensures that whichever entity agrees to fund additional Medical Affirmative Claims positions will be reimbursed for virtually the entire cost of the additional hire. The “selling point” to the MTF/clinic is not that the OSJA will recover more funds for the hospital, but that, in the course of assisting the Army recovery effort on behalf of TRICARE, the MTF will be reimbursed in full and will have effectively paid “nothing” while furthering the overall Medical Affirmative Claims program. The data in Table 3 suggests very limited recoveries on behalf of the MTF related to TRICARE, so TRICARE will pay for most of the MTF’s costs: the high ratio of TRICARE to MTF recoveries indicates the MTF will be reimbursed approximately 85 cents for every dollar it invests in the local Medical Affirmative Claims recovery program.

Scenario 2

Table 4 of the Appendix shows an office in which MTF recoveries are gradually diminishing, while TRICARE—after five years of modest activity—has become the predominant area of activity. If this MTF already has an agreement with the local OSJA, it might seriously consider withdrawing participation and discontinuing funding of Medical Affirmative Claims positions, given the diminishing returns on its investment. But under the new MOA, the surge in TRICARE recoveries is good news for the field office,

which can negotiate either a continuation of its current MOU with the local hospital or an expanded agreement in light of the significant upswing in TRICARE activity. The argument to make to the MTF is that it will be reimbursed by TRICARE in proportion to TRICARE’s percentage of overall deposits. At this office, TRICARE accounted for about 90% of all FY10 Medical Affirmative Claims activity; therefore, TRICARE will reimburse MEDCOM (which in turn will reimburse this MTF) for 90% of the Medical Affirmative Claims costs shouldered in FY11 by the MTF.

Scenario 3

Table 5 of the Appendix shows an office in which TRICARE is not a significant player. The hospital will receive only a small reimbursement from the TRICARE Management Activity because so few deposits are made on behalf of TRICARE. While this state of affairs means that the new MOA will not help this office, the continuing strength in MTF deposits should prompt the OSJA to obtain a MOU with the hospital or revise the existing agreement to ensure the OSJA is adequately staffed to process the steady volume of claims.

Conclusion

In virtually all instances, whether TRICARE and MTF deposits are diminishing or at historic highs, the new TRICARE MOA provides an opportunity to revitalize or expand your office’s Medical Affirmative Claims program. Claims attorneys and Judge Advocates are urged to review their office’s current and historical performance and assess for themselves the benefits that might accrue from obtaining additional Medical Affirmative Claims personnel funded by their local military hospitals. The Army Claims Service stands ready to assist.

Appendix

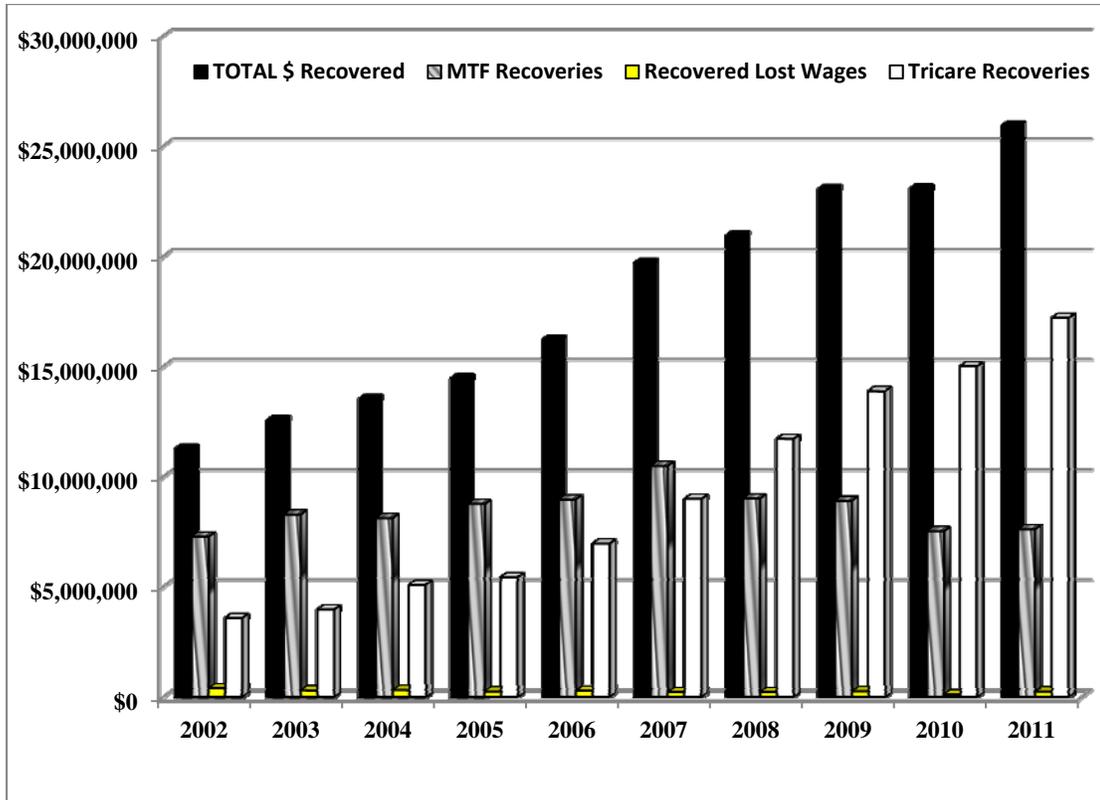


Table 1: Army-Wide Medical Affirmative Claims Deposits, FY 2002 thru FY 2011 (Actual)

Grade	Position	Salary with locality	Benefits	Total Personnel cost	% Effort devoted to Medical Affirmative Claims	Total Medical Affirmative Claims Personnel Cost	MOU with OSJA?	Total Army MEDCOM Medical Affirmative Claims Cost	TRICARE Mgmt Activity % share of collections	TRICARE Mgmt Activity share of Medical Affirmative Claims costs
FORT COURAGE CLAIMS OFFICE				\$250,000		\$115,000		\$75,000		\$45,000
GS-13	Attorney	\$88,074	\$31,926	\$120,000	25	\$30,000	Y	\$30,000	60%	\$18,000
GS-10	Paralegal	\$58,716	\$21,284	\$80,000	50	\$40,000	N	\$0	60%	\$0
GS-6	Claims Assistant	\$36,697	\$13,303	\$50,000	90	\$45,000	Y	\$45,000	60%	\$27,000

Table 2: Fort Courage Medical Affirmative Claims Personnel Costs

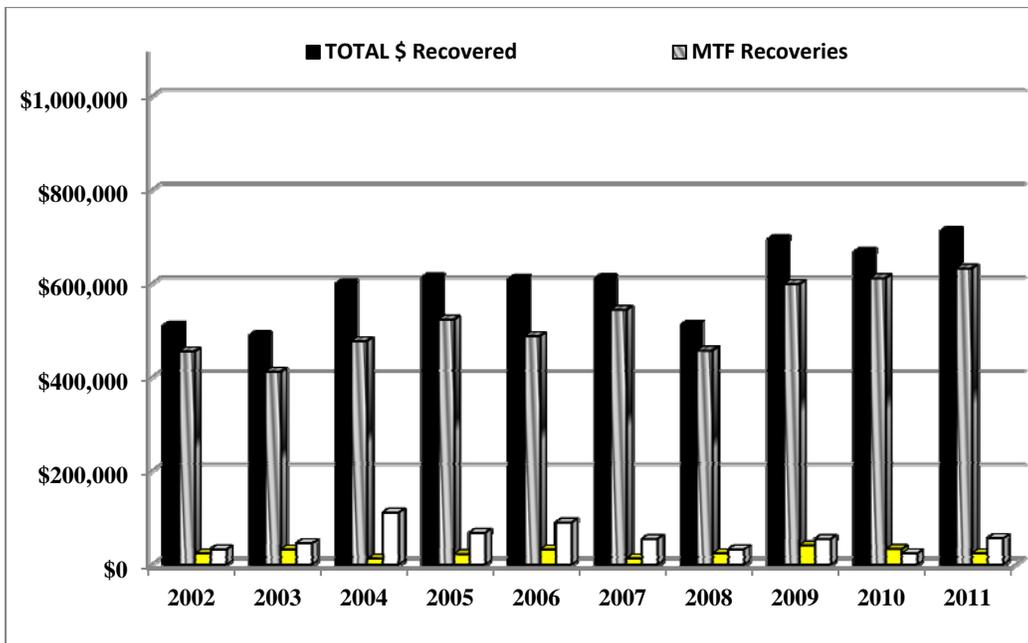


Table 3: TRICARE-Centric Activity (Example)

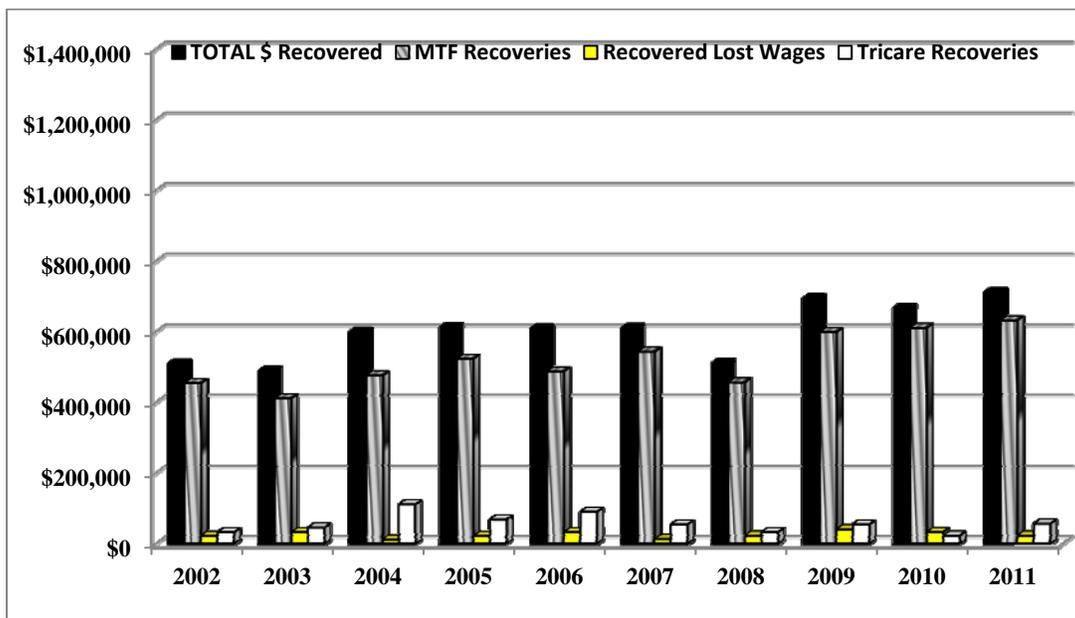


Table 4: Increasing TRICARE and Declining MTF Deposits (Example)

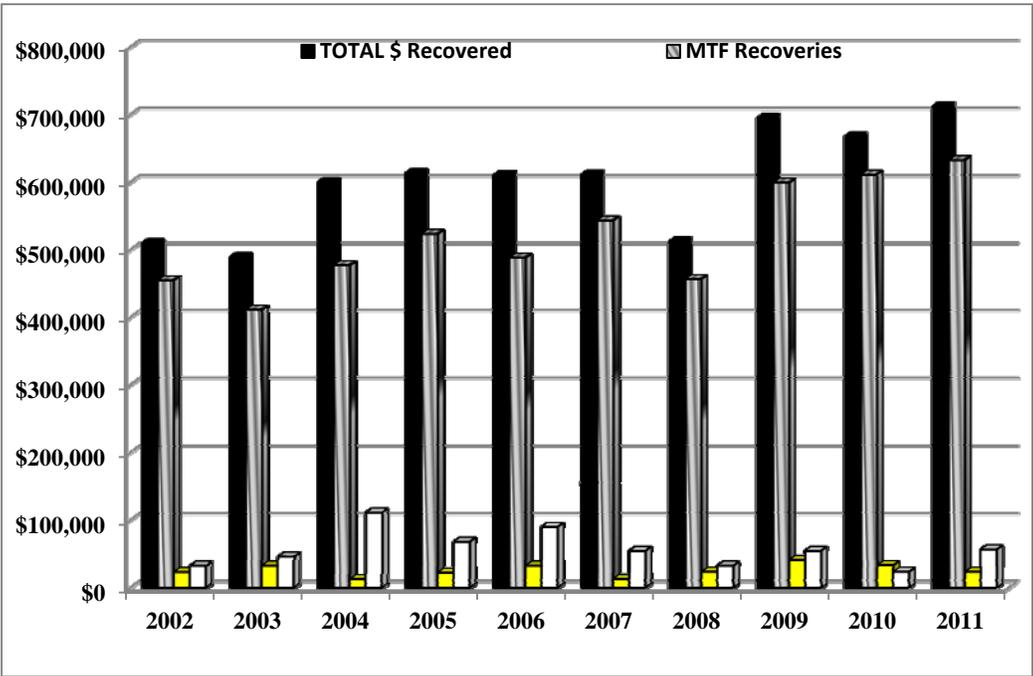


Table 5: Robust MTF and Declining/Static TRICARE Deposits (Example)

Claims Report

U.S. Army Claims Service

Claims Office Management

Colonel R. Peter Masterton*

Introduction

Several years ago I wrote an article on claims office management.¹ This article is intended to update the information provided in my previous article and to assist staff judge advocates (SJAs) and other legal leaders to manage claims operations, both in garrison and when deployed.

Many Soldiers first visit the installation legal office when they turn in their notice of loss or damage to their household goods to the claims section.² The service they receive from claims personnel can determine the reputation of the entire legal office.³ As a result, claims office management can be critical to success or failure of an SJA. Fortunately, most claims offices are staffed by dedicated and experienced professionals that need little supervision. However, even the best run claims offices can benefit from the involvement and support of their senior legal leaders.

During the past several years there have been a number of changes affecting claims offices. One of these changes is the decrease in the number of household goods claims as a result of new transportation programs that encourage Soldiers to file such claims directly against the carriers responsible for the losses.⁴ Although the number of claims has gone down, the workload of Army claims offices has not: Army claims professionals now spend less time adjudicating claims and more time advising Soldiers who have filed claims against carriers.⁵ A second change is the increasing reliance on foreign claims as a combat multiplier

as operational tempo has increased.⁶ A third change is the increasing reliance upon automation as new claims computer programs are fielded.⁷

Although SJAs face many new challenges, they also deal with challenges that have been around for decades.⁸ How to best educate potential claimants, motivate and train claims staff, and fairly settle and pay claims are issues legal leaders have dealt with since the creation of the Army claims system. The goal of this article is to provide tips for dealing with both the new and the old challenges.

Overall Management

Staff judge advocates should require their chiefs of claims to prepare monthly reports on claims operations⁹ and review the reports when they arrive. When individual claims are forwarded to SJAs for approval or signature, they should use this as an opportunity to review the file with their claims professionals.¹⁰ Staff judge advocates should also take the time to visit their claims offices regularly to assess the morale and professionalism of their personnel.¹¹

Claims offices should be housed in professional facilities that are easily accessible to Soldiers and other claimants. Office hours should allow for access by claimants at the times most convenient for them but also allow for the office to be closed to customers at certain times during the week so claims professionals can work on claims

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¹ Colonel R. Peter Masterton, *Managing a Claims Office*, ARMY LAW., Sept. 2005, at 29.

² A Soldier is required to provide notice of loss or damage to household goods before filing a claim. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 11-21c(1) (8 Feb. 2008) [hereinafter AR 27-20]; U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 11-21g (21 Mar. 2008) [hereinafter DA PAM. 27-162].

³ R. Kathie Zink & Lieutenant Colonel R. Peter Masterton, *Managing Personnel Claims*, ARMY LAW., Aug. 1999, at 74. See also Henry Nolan, *An Open Letter to Staff Judge Advocates, Area Claims Officers, Claims Attorneys and Claims Professionals*, ARMY LAW., Apr. 2010, at 68 (pledging to pay meritorious claims and resolve doubts in favor of claimants to improve Soldiers' morale).

⁴ See *infra* notes 52–69 and accompanying text.

⁵ See *infra* note 70 and accompanying text.

⁶ See *infra* notes 156–86 and accompanying text.

⁷ See *infra* notes 15–21 and accompanying text.

⁸ The Army claims system began early in World War II. DA PAM. 27-162, *supra* note 2, para. 1-8.

⁹ Management reports can be automatically generated by the specialized computer programs used to file and track claims. AR 27-20, *supra* note 2, para. 13-1e.

¹⁰ The senior judge advocate of a legal office can be designated as the head of an Area Claims Office. *Id.* para. 1-5e. These officers have the authority to settle claims within their monetary limits. *Id.* para. 1-11a(4). In some cases, their authority may not be delegated to subordinate attorneys. For example, they are the only persons in local claims offices authorized to act on requests for reconsideration of personnel claims. *Id.* para. 11-20d. They are also the only persons in local claims offices authorized to waive maximum allowable limits for certain types of property in paying personnel claims. *Id.* para. 11-14b.

¹¹ Staff Judge Advocates are required to supervise the settlement of claims and ensure they have adequately trained and qualified claims personnel. *Id.* para. 1-11a.

that have been turned in.¹² If the claims office is co-located with the legal assistance office, the receptionist must be properly trained on the different missions: claims personnel can advise claimants¹³ but are prohibited from representing them.¹⁴

Staff judge advocates should ensure their personnel are taking advantage of the specialized computer programs for tracking Army claims.¹⁵ Personnel claims are filed using the Personnel Claims Army Information Management System (PCLAIMS). Fielded in October 2009, this computer program permits Soldiers and civilian employees to file personnel claims through the Internet, either at their personal or work computers.¹⁶ Tort claims are tracked using the Tort and Special Claims Application.¹⁷ All Army tort claims and supporting documents must be uploaded into this computer program. Affirmative claims (claims asserted on behalf of the Army) are tracked using the Affirmative Claims Management Program.¹⁸ The Claims Discussion Board is an internet bulletin board that provides important information to Army claims professionals and allows them to ask questions of personnel in other claims offices.¹⁹ All Army claims professionals should access the discussion board daily.²⁰ All of these computer resources can be accessed through the U.S. Army Claims Service (USARCS) internet site.²¹

Army claims offices should reach out to their local communities through installation newspapers, command information television channels, local installation internet

sites and similar resources.²² Articles providing claims advice for departing personnel should be published each spring; similar articles with advice for incoming personnel should be published in the fall.²³ Claims personnel should become involved in post briefings for outgoing and incoming personnel.²⁴ Claims personnel should also conduct customer satisfaction surveys to see how they can improve their performance.²⁵

Staff judge advocates should ensure their claims offices maintain fiscal integrity. The Army claims budget is managed centrally.²⁶ Each installation claims office must request funds from the USARCS Budget Office and must ensure that they have enough funds to pay claims.²⁷ In 2011, the Army fielded a new program for the management of the Army claims budget: the General Fund Enterprise Business System (GFEBS). This new program requires a great deal of training by personnel responsible for paying claims. Because the training burden is significant, the USARCS has issued guidance and “job aids” which are available on the Claims Discussion Board on JAGCNET.²⁸ Staff judge advocates should ensure that their personnel are properly trained for their roles in this new system.

Another aspect of fiscal integrity is safeguarding the funds that claims offices collect on behalf of the government, either through affirmative claims asserted against those who damage government property or injure military personnel²⁹ or through the carrier recovery process.³⁰ Checks collected through these programs must be secured in a safe and properly deposited and accounted for.³¹

¹² Zink & Masterton, *supra* note 3, at 77.

¹³ DA PAM. 27-162, *supra* note 2, para. 2-4a (giving guidance on how to advise claimants).

¹⁴ Claims personnel represent the United States and are prohibited from representing individual claimants. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.13 (1 May 1992).

¹⁵ See AR 27-20, *supra* note 2, para. 13-1a(1) (listing some of these programs and access requirements).

¹⁶ Colonel R. Peter Masterton, *New Personnel Claims Computer Program: PCLAIMS*, ARMY LAW., Nov. 2009, at 46.

¹⁷ AR 27-20, *supra* note 2, para. 13-1a(1).

¹⁸ *Id.* para. 13-1a(3).

¹⁹ The Claims Discussion Board is split into four categories: the general discussion board, for announcements of general interest to all claims practitioners; the Personnel Claims Discussion Board; the Tort Claims Discussion Board; and the Affirmative Claims Discussion Board.

²⁰ Daily access to the Claims Discussion Board is one of the criteria for The Judge Advocate General's Award for Excellence in Claims. Reynold P. Masterton, *TJAG's Award for Excellence in Claims—Criteria for 2011 Award*, General Claims Discussion Board, JAGCNET (Apr. 8 2011), <https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=CF047E49201182228525786C00551749&Count=30&ExpandSection=0> [hereinafter Claims Award Criteria Posting].

²¹ This website is available at <https://www.jagcnet.army.mil/8525752700444FBA> (last visited June 27, 2011).

²² Publishing claims information to the local military community is included in the criteria for The Judge Advocate General's Award for Excellence in Claims. See Claims Award Criteria Posting, *supra* note 20.

²³ Masterton, *supra* note 1, at 33. Timing the publicity in this way takes advantage of the summer moving season.

²⁴ Participation in these briefings is included in the criteria for The Judge Advocate General's Award for Excellence in Claims. See Claims Award Criteria Posting, *supra* note 20.

²⁵ Conducting such surveys is included in the criteria for The Judge Advocate General's Award for Excellence in Claims. See *id.*

²⁶ *Id.* para. 13-6.

²⁷ *Id.* para. 13-6c.

²⁸ See, e.g., Kathy Charvat, *Updated Vendor Request GFEBS Job Aid*, Personnel Claims Discussion Board (29 Mar. 2011), <https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=DF26FCCFC926E4E85257862007C92EC&Count=30&ExpandSection=0>.

²⁹ See AR 27-20, *supra* note 2, para. 14-14.

³⁰ See *id.* para. 11-24b.

³¹ *Id.* para. 11-24b(2).

Personnel Claims

Staff judge advocates should further ensure that their claims professionals are properly trained.³² Personnel claims training conferences are held annually in the Fort Meade, Maryland, area. A tort claims training conference is held each fall at or near Fort Meade. One day of this conference is now dedicated to affirmative claims instruction. The USARCS currently hosts two Deployment Claims Conferences each year at Fort Meade. Overseas claims conferences are held each fall in both Korea and Germany. Other training is available on the USARCS internet site and JAG University.³³ Quarterly claims video-teleconferences are currently held on the second Thursday of September, December, March, and June.

Staff judge advocates should also ensure that their offices receive regular claims assistance visits by personnel from the USARCS.³⁴ Overseas offices receive such visits by personnel from the U.S. Army Claims Service Europe or the Armed Forces Claims Service Korea.³⁵ The focus of these visits is to assist offices, rather than to inspect them.³⁶ After a visit, the SJA will receive an assessment of the office's strengths and weaknesses and suggestions for improvement.³⁷

All SJAs should require their offices to apply for The Judge Advocate General's Award for Excellence in Claims.³⁸ The application, which is due each January,³⁹ asks offices to assess the quality of their claims operations. The questions include the adequacy of facilities, staff, training, automation equipment, and the extent to which the offices reach out to the community by participating in briefings to incoming and departing personnel and publishing articles in installation newspapers.⁴⁰ The application must be endorsed by the SJA.⁴¹ Staff judge advocates should review the application to determine how their offices are performing. Whether an office wins the award or not, the application process is an excellent management tool.⁴²

³² See *id.* para. 1-11a(8).

³³ Colonel R. Peter Masterton, *Claims Training on JAG University*, ARMY LAW., Apr. 2009, at 61.

³⁴ AR 27-20, *supra* note 2, para. 1-22.

³⁵ DA PAM. 27-162, *supra* note 2, para. 1-22e, f.

³⁶ *Id.* para. 1-22a.

³⁷ *Id.* para. 1-22d.

³⁸ AR 27-20, *supra* note 2, para. 1-23. See Colonel R. Peter Masterton, *The Judge Advocate General's Award for Excellence in Claims*, ARMY LAW., July 2010, at 38.

³⁹ See Claims Award Criteria Posting, *supra* note 20.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Lieutenant Colonel Cheryl E. Boone, *The Judge Advocate General's Excellence in Claims Award*, ARMY LAW., Sept. 2009, at 45.

Staff judge advocates must ensure their claims offices are settling personnel claims fairly and promptly.⁴³ The Personnel Claims Act⁴⁴ is a gratuitous payment statute that authorizes claims offices to pay for damage to or loss of personal property incident to service.⁴⁵ The intent of the act is to compensate Soldiers and civilian employees to the maximum extent possible,⁴⁶ to improve morale,⁴⁷ and to lessen the hardships of military life, such as frequent moves and assignments to areas with limited police and fire protection.⁴⁸ Military claims personnel should always look for ways to pay fair amounts on meritorious claims and resolve doubts in favor of claimants.⁴⁹

The Personnel Claims Act is primarily used to pay service members and civilian employees for losses to personal property incurred during government-sponsored shipments.⁵⁰ The statute can also be used to compensate for on-post losses due to theft, vandalism, fire, flood, hurricanes, and other unusual occurrences.⁵¹

A number of transportation programs have affected the use of the Personnel Claims Act to compensate claimants for shipment-related losses.⁵² Staff judge advocates should keep apprised of developments in these programs, since they will affect claims office staffing and operations.⁵³ The Full Replacement Value (FRV) Program, which began in fall 2007, encourages claimants to file shipment-related claims

⁴³ DA PAM. 27-162, *supra* note 2, para. 1-8.

⁴⁴ 31 U.S.C. § 3721 (2006).

⁴⁵ AR 27-20, *supra* note 2, para. 11-3a.

⁴⁶ DA PAM. 27-162, *supra* note 2, para. 11-1b.

⁴⁷ See *id.* para. 1-8; Nolan *supra* note 3.

⁴⁸ DA PAM. 27-162, *supra* note 2, para. 11-1a.

⁴⁹ Nolan, *supra* note 3; see also DA PAM. 27-162, *supra* note 2, para. 11-1b ("The Army Claims System intends that . . . Soldiers and civilian employees will be compensated for such losses to the maximum extent possible.").

⁵⁰ See AR 27-20, *supra* note 2, para. 11-5e.

⁵¹ *Id.* para. 11-5. The rules for compensation under the Personnel Claims Act are complex. Losses are compensable only if due to theft, vandalism, or unusual occurrence, which includes fire, flood, hurricane, earthquake, and weather phenomena that are unusual for the area. *Id.* para. 11-5c, d. The Personnel Claims Act can be used in certain situations to compensate for off-post losses, such as losses at authorized off-post quarters overseas. *Id.* para. 11-5d(2).

⁵² Major Daniel J. Sennott, *Families First and the Personnel Claims Act*, ARMY LAW., Dec. 2008, at 44, 45-48. This article prospectively described implementation of the full replacement value program (FRV) and Defense Personal Property Program (DP3) and the resulting issues for claims practitioners. The DP3 was initially called "Families First." The name was changed to DP3 before it was fielded.

⁵³ *Id.* at 45.

directly with the carriers responsible for their losses.⁵⁴ As long as such a claim is filed within nine months of delivery, the carrier is contractually obligated to pay full replacement value for lost and destroyed items. This means that the carrier must replace the property or provide compensation for it without deducting for depreciation.⁵⁵ In addition, the carrier is responsible for obtaining all of the necessary estimates for items that can be repaired.⁵⁶ Claimants who are dissatisfied with the carrier's offers can transfer their claims to a military claims office.⁵⁷

The Defense Personal Property Program (DP3), which began in fall 2008, also encourages claimants to file directly with carriers. Most military personal property shipments are now covered by this program. As with the FRV Program, carriers are contractually obligated to pay full replacement value if the claim is filed within nine months.⁵⁸ Claimants file their claims with the carriers using a special computerized claims module.⁵⁹ Claimants who are dissatisfied with a carrier's offer can transfer their claims to a military claims office.⁶⁰ The DP3 is a comprehensive program that covers every aspect of a move, including the initial counseling, pickup, and delivery of personal property as well as the filing of claims.⁶¹ It is designed to improve quality of moves by paying for performance; carriers who score higher on customer satisfaction surveys are awarded more business.⁶² Unfortunately, the customer satisfaction survey associated with the claims module does not currently work: it is not being used to score the performance of carriers.⁶³

Customer satisfaction with the claims aspects of these new transportation programs has been mixed.⁶⁴ In response to a survey conducted by the USARCS in 2010, only half of

claimants indicated that they were "satisfied" or "very satisfied" with the new programs.⁶⁵ Less than half of claimants indicated that the new claims procedures were better than the former procedure of filing claims with the military.⁶⁶ Only forty percent of claimants who responded to the survey indicated that the DP3 claims module was "user friendly."⁶⁷ Only a little over a third of claimants indicated that the claims process under the new programs was quick.⁶⁸

As a result of these new transportation programs, the number of personnel claims filed with military claims offices has decreased dramatically.⁶⁹ However, the USARCS has found that the workload at most installation claims offices is the same under the new claims procedure as it was under the former procedure where claims were filed with the military. Although military claims professionals now spend less time adjudicating claims, they spend more time

⁵⁴ *Id.* at 47; Karen Jowers, *As Full Replacement Coverage Kicks in, Confusion Remains*, ARMY TIMES (Dec. 11, 2007), http://www.armytimes.com/benefits/housing/military_moving_071211w/.

⁵⁵ Sennott, *supra* note 52, at 45–46.

⁵⁶ *Id.* at 46.

⁵⁷ *Id.* at 46–47.

⁵⁸ *Id.* at 45.

⁵⁹ *Id.* at 47–48.

⁶⁰ *Id.* at 46.

⁶¹ *Id.* at 45.

⁶² *Id.*

⁶³ Jeffrey J. Flemming, *DPS—Persistent Problems and Issues*, Personnel Claims Discussion Board, JAGCNET (11 May 2010), <https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=54FED3EA3E8D271385257720005E8BAE&Count=30&ExpandSection=4>.

⁶⁴ See Lisa Novak, *Movers Beware: No Guarantee of Full Reimbursement for Lost Goods*, STARS & STRIPES, Apr. 26, 2009, at 3.

⁶⁵ U.S. Army Claims Service Full Replacement Value Program Claims for Loss/Damage Customer Satisfaction Survey (Sept.–Nov. 2010) [hereinafter Customer Satisfaction Survey] (Betis Group, Inc. was the General Contractor and the survey was designed and managed by Leland Gallup, the Chief of the U.S. Army Claims Service Recovery Branch). In response to the question, "How would you rate your overall satisfaction with Full Replacement Value claims process?" 94 (17%) of the responses were "very satisfied," 182 (33%) of the responses were "satisfied," 49 (8%) of the responses were "neither satisfied nor dissatisfied," 81 (15%) of the responses were "dissatisfied" and 151 (27%) of the responses were "very dissatisfied" (survey results are on file with the Recovery Branch, U.S. Army Claims Service, 4411 Llewellyn Avenue, Fort Meade, Maryland 20755).

⁶⁶ *Id.* In response to the question, "How would you rate your satisfaction with the Full Replacement Value Claims Process compared with your satisfaction with the previous military claims process (where claims were filed solely with military claims offices)?" 96 (23%) of the responses were "the FRV process is much better," 91 (22%) of the responses were "the Full Replacement Value process is better," 95 (23%) of the responses were "the Full Replacement Value process is about the same," 44 (11%) of the responses were "the Full Replacement Value process is worse" and 86 (21%) of the responses were "the Full Replacement Value process is much worse."

⁶⁷ *Id.* In response to the question, "To what extent do you agree or disagree that the DPS claims module is user-friendly?" 21 (11%) of the responses were "strongly agree," 56 (29%) of the responses were "agree," 65 (34%) of the responses were "somewhat agree/somewhat disagree," 21 (11%) of the responses were "disagree," 30 (16%) of the responses were "strongly disagree."

⁶⁸ *Id.* In response to the question, "Was the claims process quick" (in describing "your experience with settling claims with the Transportation Service Providers [carriers]?" 36 (8%) of the responses were "strongly agree," 132 (28%) of the responses were "agree," 96 (21%) of the responses were "somewhat agree/somewhat disagree," 72 (15%) of the responses were "disagree," 129 (28%) of the responses were "strongly disagree."

⁶⁹ The dollar amount of personnel claims paid has declined steadily over the past four years. In Fiscal Year (FY) 2007 the Army paid a total of \$32.6 million; in FY 2008 it paid \$27.5 million; in FY 2009 it paid \$18.4 million; and in FY 2010 it paid \$6.1 million. During the same period the number of carrier recoveries also declined. In FY 2007 the Army recovered \$10.6 million from carriers responsible for loss or damage to personal property shipments; in Fiscal Year 2008 it recovered \$10.3 million; in FY 2009 it recovered \$4.4 million; and in FY 2010 it recovered \$3.3 million (statistics on file with U.S. Army Claims Service, 4411 Llewellyn Avenue, Fort Meade, Maryland 20755).

providing advice to claimants who have filed against carriers. Staff judge advocates should monitor the workload in their claims offices to ensure that this new work is being accurately accounted for.⁷⁰

Army claims offices are currently prohibited from paying full replacement value.⁷¹ However, a new statute, 10 U.S.C. § 2740,⁷² will soon change this. The statute permits military claims offices to pay claims based on full replacement value for shipment-related losses where the carrier is unable to provide compensation, such as when the loss occurred as a result of an act of God for which the carrier is not liable. The USARCS is working to obtain a delegation to enable claims offices to use this new authority.

Staff judge advocates should also examine the personnel claim payment, denial, and appeal rates in their offices. In Fiscal Year 2009, the average payment on personnel claims Army-wide was 49 percent of the total amount claimed. In the same fiscal year 5.5 percent of personnel claims were denied completely and 6.0 percent of claimants submitted requests for reconsideration (appeals).⁷³ Payment rates between 45 and 65 percent are within the normal range; rates significantly above or below this warrant scrutiny. Similarly, offices with denial rates and reconsideration rates below eight percent are within the norm; rates significantly above this may indicate a problem.⁷⁴

Claims of wounded warriors must be handled with special care. Claims personnel are authorized to pay personnel claims of Soldiers evacuated from a combat theater when their personal effects are lost.⁷⁵ However, before making such payments, claims personnel should coordinate with the Joint Personal Effects Depot at Dover Air Force Base, Delaware. This organization is responsible for shipping personal effects of military personnel who are killed or wounded in a combat theater and may be able to locate missing property.⁷⁶ The USARCS can assist with this coordination.

⁷⁰ In February 2011, the USARCS has asked a number of claims offices to gather empirical data that will provide the basis for developing metrics to measure the new work being done as a result of the Full Replacement Value Program and Defense Personal Property Program.

⁷¹ Army claims offices are required to make appropriate deductions for depreciation of lost and destroyed personal property. See AR 27-20, *supra* note 2, para. 11-14d (discussing how to calculate depreciation).

⁷² 10 U.S.C. § 2470 (2006).

⁷³ Claims statistics are on file with U.S. Army Claims Service, 4411 Llewellyn Avenue, Fort Meade, Maryland 20755.

⁷⁴ These payment, denial, and reconsideration rate ranges are based on the above statistics and were developed by Henry Nolan, the Chief of the Personnel Claims and Recovery Branch, U.S. Army Claims Service, 4411 Llewellyn Avenue, Fort Meade, Maryland 20755.

⁷⁵ AR 27-20, *supra* note 2, para. 11-5e.

Staff judge advocates should ensure that tort claims are investigated promptly and settled fairly.⁷⁷ Tort claims are paid under a number of different statutory authorities.⁷⁸ Often such claims are payable under more than one statute; in these situations it is important for claims professionals to consider each claim under all appropriate statutes.⁷⁹

The Federal Tort Claims Act⁸⁰ permits payment of claims for death, injury, or property loss caused by negligent or wrongful acts of military personnel acting within the scope of employment.⁸¹ These claims must be evaluated based on the law of the place where the tort occurred,⁸² requiring claims professionals to become experts in local law.⁸³ The *Feres*⁸⁴ doctrine prohibits payment of claims for injuries or death of military personnel incurred incident to their service.⁸⁵ In recent years this doctrine has come under increasing attack, including legislative proposals to overturn its application to medical malpractice claims.⁸⁶ Other exclusions prohibit payment of claims based on exercise of a discretionary function,⁸⁷ claims arising from combat activities,⁸⁸ and claims arising in foreign countries.⁸⁹ Claims professionals must carefully investigate claims to determine if any of these exclusions apply. Lawsuits may be initiated if a claim is not settled within six months after it is filed.⁹⁰

⁷⁶ Brett Kangas, *Personal Effects Depot relocating from Aberdeen to Dover*, WWW.ARMY.MIL (28 June 2011), <http://www.army.mil/article/5548/personal-effects-depot-relocating-from-aberdeen-to-dover/?ref=news-arnews-title1>.

⁷⁷ Prompt investigation and fair settlement avoids unnecessary litigation. AR 27-20, *supra* note 2, para. 1-8.

⁷⁸ *Id.* para. 1-4a(1).

⁷⁹ *Id.* para. 2-15.

⁸⁰ 28 U.S.C. §§ 2671–2680 (2006).

⁸¹ AR 27-20, *supra* note 2, para. 4-2a.

⁸² 28 U.S.C. § 1346(b)(1) (2006); AR 27-20, *supra* note 2, para. 2-24a.

⁸³ AR 27-20, *supra* note 2, para. 1-12a(4) (requiring heads of claims processing offices to maintain publications on local law related to tort claims).

⁸⁴ *Feres v. United States*, 340 U.S. 135, 141–42 (1950).

⁸⁵ AR 27-20, *supra* note 2, para. 2-26a.

⁸⁶ Major Edward G. Bahdi, *A Look at the Feres Doctrine as It Applies to Medical Malpractice Lawsuits: Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline*, ARMY LAW., Nov. 2010, at 56, 61–62.

⁸⁷ AR 27-20, *supra* note 2, para. 2-28b.

⁸⁸ *Id.* para. 2-28j.

⁸⁹ *Id.* para. 2-28k.

⁹⁰ 28 U.S.C. § 2675 (2006); DA PAM. 27-162, *supra* note 2, para. 4-2b.

Therefore, claims professionals must conclude their investigations and settlement negotiations promptly.

The Military Claims Act⁹¹ permits payment of claims for death, injury, or property loss caused by negligent or wrongful acts of military personnel acting within the scope of employment or incident to “noncombat activities” of armed forces.⁹² Noncombat activities are authorized military activities, such as weapons firing and maneuvers, which have little parallel in civilian pursuits and historically have furnished a proper basis for paying claims.⁹³ An example of a noncombat activity is a range fire that leaves a federal installation, damaging nearby property.⁹⁴ Prohibitions on the payment of such claims include the *Feres* doctrine,⁹⁵ and the discretionary function,⁹⁶ and combat activity exclusions.⁹⁷ The Military Claims Act can be used to pay claims arising in foreign countries that are brought by U.S. persons.⁹⁸ Although the statute does not authorize lawsuits,⁹⁹ claims professionals must adjudicate these claims fairly.¹⁰⁰

The National Guard Claims Act¹⁰¹ permits payment of claims for death, injury, or property loss caused by negligent or wrongful acts of Army National Guard personnel acting within the scope of employment under Title 32 of the United States Code or caused by noncombat activities of the National Guard.¹⁰² Since 2001, the Army National Guard

⁹¹ 10 U.S.C. § 2733 (2006).

⁹² AR 27-20, *supra* note 2, para. 3-3a.

⁹³ *Id.* at 108 (glossary).

⁹⁴ Sean Murphy, *Wildfire Rages in SW Okla., Destroys 13 Homes*, DESERET NEWS, June 25, 2011, at 1, available at <http://www.deseretnews.com/article/700147008/Wildfire-rages-in-SW-Okla-destroys-13-homes.html>; Bryan Dean, *Army to Reimburse Medicine Park Wildfire Victims*, THE OKLAHOMAN, July 1, 2011, at 1, available at <http://newsok.com/army-to-reimburse-medicine-park-wildfire-victims/article/3581797>.

⁹⁵ AR 27-20, *supra* note 2, para. 2-26a.

⁹⁶ *Id.* para. 2-28b.

⁹⁷ *Id.* para. 2-28j.

⁹⁸ *Id.* para. 2-28k.

⁹⁹ 10 U.S.C. § 2735 (2006) (noting that claims settlements under the act are final and conclusive “notwithstanding any other provision of law”); DA PAM. 27-162, *supra* note 2, para. 3-1c (noting that the Act provides for an administrative appeal “[i]nstead of a judicial remedy”).

¹⁰⁰ See AR 27-20, *supra* note 2, para. 1-17a(3) (establishing Department of the Army policy that favors compromising claims to achieve fair and equitable results).

¹⁰¹ 32 U.S.C. § 715 (2006).

¹⁰² AR 27-20, *supra* note 2, para. 6-2c, d. Many of these claims are also covered by the Federal Tort Claims Act and are processed under that statute. *Id.* When National Guard Soldiers are performing full time active duty they are under federal command and control and the National Guard

has performed missions in Title 32 status that in the past would have been performed in State Active Duty status; these Soldiers are federal employees and are covered by federal claims statutes.¹⁰³ Claims arising from National Guard operations should be coordinated with the full-time National Guard judge advocate for the state involved.¹⁰⁴ Claims professionals must contact the USARCS before denying any National Guard claim based on a determination that the Soldiers causing the claim were not covered by federal claims statutes.¹⁰⁵

Staff judge advocates in Europe and Asia should be familiar with the International Agreements Claims Act.¹⁰⁶ This statute permits payment of claims under Status of Forces Agreements (SOFAs).¹⁰⁷ There are three types of claims under most SOFAs: intergovernmental claims, scope claims, and *ex-gratia* claims. Intergovernmental claims involve damage or loss to government property of the receiving state (the host country). Liability for such claims is generally waived, either in part or in full.¹⁰⁸ Scope claims involve injury to a third party, such as a local national, arising from acts of sending state forces acting in the scope of their duties.¹⁰⁹ *Ex-gratia* claims involve injury to third parties arising from acts of sending state forces who were not acting in the scope of their duties, such as vandalism or other off-duty misconduct.¹¹⁰ Most SOFAs include a provision requiring the sending state and the receiving state to share the costs of scope claims.¹¹¹ *Ex-gratia* claims, on the other hand, are paid solely by the sending state.¹¹² When American forces are stationed in a country that has not

Claims Act does not apply. *Id.* para. 6-2a(1). When National Guard Soldiers are performing full time National Guard duty or Inactive Duty Training they are under state command and control and the National Guard Claims Act does apply. *Id.* para. 6-2a(2).

¹⁰³ Walter E. Parker, IV, *New National Guard Missions and the Federal Tort Claims Act*, ARMY LAW., Jan. 2011, at 59.

¹⁰⁴ *Id.* at 60.

¹⁰⁵ *Id.* The USARCS is located at 4411 Llewellyn Avenue, Fort Meade, Maryland 20755; its current phone number is (301) 677-9388. Additional contact information is available at the U.S. Army Claims Service internet site, <https://www.jagcnet.army.mil/8525752700444FBA>.

¹⁰⁶ 10 U.S.C. §§ 2734a, 2734b (2006).

¹⁰⁷ AR 27-20, *supra* note 2, para. 7-1.

¹⁰⁸ *Id.* para. 7-4b(1).

¹⁰⁹ *Id.* para. 7-4b(2).

¹¹⁰ *Id.* para. 7-4b(3).

¹¹¹ See *id.* para. 7-5 (pointing out that the North Atlantic Treaty Organization, Partnership for Peace (PFP), Singapore, and Australian Status of Forces Agreements all contain such cost-sharing provisions).

¹¹² The United States pays these claims under the Foreign Claims Act. 10 U.S.C. § 2734 (2006). AR 27-20, *supra* note 2, para. 7-12b; DA PAM. 27-162, *supra* note 2, para. 7-2b(3).

entered into a SOFA, the Foreign Claims Act¹¹³ is used to pay claims.¹¹⁴

The Nonscope Claims Act¹¹⁵ authorizes payment for death, injury, or property loss caused by military personnel using government vehicles or property. The loss must not be cognizable under any other act and the maximum payment is \$1000.¹¹⁶ The Army Maritime Claims Settlement Act¹¹⁷ permits payment for damage caused by Army vessels as well as towage and salvage rendered to Army vessels and maritime damages caused by tortious conduct of military personnel.¹¹⁸

Each claims office is responsible for investigating tort claims within a specific geographic district.¹¹⁹ Staff judge advocates should ensure that their offices are properly staffed and funded to meet this mission.¹²⁰

Article 139 Claims

Staff judge advocates should ensure their claims offices properly process claims under Article 139 of the Uniform Code of Military Justice.¹²¹ This article permits claims to be filed directly against Soldiers who willfully damage or destroy or wrongfully take the property of others.¹²² Any individual or entity can be a proper claimant.¹²³ The claim is processed by the local military claims office but investigated by the offender's unit.¹²⁴ The offender's Special Court-Martial Convening Authority may approve assessments up to \$5000, the General Court-Martial Convening Authority may approve assessments up to \$10,000, and the USARCS can approve assessments above these amounts.¹²⁵ The claim is paid directly from the pay of the Soldier responsible for the loss or damage.¹²⁶

Staff judge advocates should ensure their personnel do not delay the processing of these claims pending the outcome of a criminal investigation or disciplinary action.¹²⁷ If a convening authority will be required to act on the offender's court-martial or other disciplinary action, the claim may be forwarded to a higher level.¹²⁸ Overseas, there is often overlap between the SOFA *ex-gratia* claims process and Article 139; such claims should be processed under Article 139 unless undue hardship will result to the claimant.¹²⁹

Affirmative Claims

Staff judge advocates should ensure their claims offices are aggressively pursuing affirmative claims on behalf of the Army. Several statutes permit the Army to recover from those responsible for damaging federal property or injuring military personnel.¹³⁰ This is truly a "good news" story for SJAs, since these funds can often be returned to the local installation.¹³¹

Army claims offices can recover for the cost of medical care provided to military personnel who suffer injuries under circumstances where someone else is legally responsible.¹³² The Army can recover under the Federal Medical Care Recovery Act¹³³ when its personnel are injured in circumstances creating tort liability to a third person.¹³⁴ It can also recover under 10 U.S.C. § 1095¹³⁵ from health benefits insurers and automobile liability insurance companies.¹³⁶ Claims professionals must review records provided by Military Treatment Facilities and local military police reports to determine when to assert an affirmative claim.¹³⁷ If the injured party is represented by an attorney, military claims professionals can enter into an agreement

¹¹³ 10 U.S.C. § 2734 (2006).

¹¹⁴ AR 27-20, *supra* note 2, para. 2-15d(1).

¹¹⁵ 10 U.S.C. § 2737 (2006).

¹¹⁶ AR 27-20, *supra* note 2, para. 5-2a.

¹¹⁷ 10 U.S.C. §§ 4801–4804, 4806 (2006).

¹¹⁸ AR 27-20, *supra* note 2, para. 8-3.

¹¹⁹ *Id.* para. 2-1d.

¹²⁰ *Id.* para. 1-11a(8).

¹²¹ 10 U.S.C. § 939 (2006).

¹²² AR 27-20, *supra* note 2, para. 9-2.

¹²³ *Id.* para. 9-3a.

¹²⁴ *Id.* para. 9-8.

¹²⁵ *Id.* para. 9-7.

¹²⁶ *Id.* para. 9-8i.

¹²⁷ *Id.* para. 9-4; DA PAM. 27-162, *supra* note 2, para. 9-4a.

¹²⁸ DA PAM. 27-162, *supra* note 2, para. 9-7.

¹²⁹ AR 27-20, *supra* note 2, para. 9-5e (providing that claims cognizable under more than one statute may be processed under Article 139); *see also* DA PAM. 27-162, *supra* note 2, para. 9-8e (providing that, in the event of undue delay in processing an Article 139 claim, the Personnel Claims Act may be used to compensate the claimant, who must return any overpayment to the government if the Article 139 claim succeeds).

¹³⁰ AR 27-20, *supra* note 2, paras. 14-1, 14-2.

¹³¹ *Id.* para. 14-14a(2), a(3), a(5), b, c(1).

¹³² *Id.* para. 14-2b.

¹³³ 42 U.S.C. §§ 2651–2653 (2006).

¹³⁴ DA PAM. 27-162, *supra* note 2, para. 14-1b(1).

¹³⁵ 10 U.S.C. § 1095 (2006).

¹³⁶ DA PAM. 27-162, *supra* note 2, para. 14-1c(1).

¹³⁷ AR 27-20, *supra* note 2, para. 14-6b.

with the attorney to pursue the government claim.¹³⁸ Claims professionals must notify all injured parties (or their attorneys), tortfeasors, and insurers of the government claim.¹³⁹ Funds recovered for treatment at military Medical Treatment Facilities can be deposited into the account supporting the facility.¹⁴⁰

Claims for lost military pay are authorized by Federal Medical Care Recovery Act.¹⁴¹ The statute permits recovery for basic, special, and incentive pays for periods when a Soldier is unable to perform duty because of hospitalization or convalescent leave related to an injury.¹⁴² Collections are deposited into the account supporting the Soldier's unit.¹⁴³

Claims for damage to government property are authorized by the Federal Claims Collection Act.¹⁴⁴ Recoveries are generally deposited to the General Treasury pursuant to the Miscellaneous Receipts Act. However, recoveries for damage to military family housing are deposited to the local installation's housing operations and maintenance account.¹⁴⁵ Recoveries for damage to real property are deposited into an escrow account on behalf of the installation, but currently may not be withdrawn or used.¹⁴⁶ Legislation to fix this problem has been proposed.

The statute of limitations to assert an affirmative claim is three years for claims founded upon tort¹⁴⁷ and six years for claims founded upon contract.¹⁴⁸ The statute of limitations is not tolled by the assertion of a claim; claims professionals must contact the U.S. Army Litigation

Division and the local U.S. Attorney's Office well before the limitations period expires.¹⁴⁹ Staff judge advocates should ensure that their office has a suspense system to determine when claims are about to expire.

Military claims offices may compromise or waive affirmative claims asserted for \$50,000 or less based on the inability of a tortfeasor or insurer to pay, the government's inability to prove its case, a determination that collection costs would exceed the amount compromised, or because available funds are insufficient to satisfy all claims.¹⁵⁰ The Army Claims Service has delegated higher affirmative claims settlement authority to a few of the best Army field claims offices. This "blue chip" authority provides these offices with authority to waive or compromise affirmative claims up to \$100,000.¹⁵¹

When the Army successfully asserts medical care affirmative claims on behalf of TRICARE, the recovered funds are deposited to TRICARE's account.¹⁵² In early 2009, the Army entered into an agreement with TRICARE to return a portion of these funds to the Army.¹⁵³ TRICARE now reimburses Army Medical Treatment Centers for costs invested in the Medical Affirmative Claims program in proportion to TRICARE's share of recoveries.¹⁵⁴ In order to take advantage of this agreement, SJAs should ensure that their offices have entered into agreements with their local Medical Treatment Facilities.¹⁵⁵

¹³⁸ See DA PAM. 27-162, *supra* note 2, para. 14-10a. *But see* Captain David P. Lewen, Jr., *A Question of Priority: Issues Impacting Priority of Payment Under the Federal Medical Care Recovery Act*, ARMY LAW., Mar. 2007, at 20 (urging affirmative claims judge advocates to pursue recovery without obtaining a representation agreement with the injured party's attorney).

¹³⁹ AR 27-20, *supra* note 2, para. 14-9a.

¹⁴⁰ *Id.* para. 14-14c(1).

¹⁴¹ 42 U.S.C. §§ 2651–2653 (2006).

¹⁴² AR 27-20, *supra* note 2, para. 14-9b(3); DA PAM. 27-162, *supra* note 2, para. 14-9b(3)(c) (discussing how to calculate lost pay).

¹⁴³ AR 27-20, *supra* note 2, para. 14-14b.

¹⁴⁴ 31 U.S.C. § 3711 (2006).

¹⁴⁵ 10 U.S.C. § 2775(d) (2006); AR 27-20, *supra* note 2, para. 14-14a(5).

¹⁴⁶ 10 U.S.C. § 2782 (2006) (providing that funds are credited to accounts "available for the repair or replacement of the real property," and may be used "for the same purposes and under the same circumstances as other funds in the account" as "provided in advance of appropriation Acts"); AR 27-20, *supra* note 2, para. 14-14a(2) (stating that the escrow account is used to "temporarily hold deposits" and "roll over" deposits to avoid their reversion to the General Treasury, but not authorizing any use of these funds).

¹⁴⁷ 28 U.S.C. § 2415(b) (2006); AR 27-20, *supra* note 2, para. 14-5b(1).

¹⁴⁸ 28 U.S.C. § 2415(a) (2006); AR 27-20, *supra* note 2, para. 14-5b(2).

¹⁴⁹ AR 27-20, *supra* note 2, para. 14-11 (describing situations in which litigation is "particularly appropriate" and recommending that litigation commence at least six months before the expiration of the limitations period).

¹⁵⁰ *Id.* paras. 14-12a, d (providing authority for compromise and a nonexhaustive list of acceptable reasons for compromise).

¹⁵¹ Thomas Kennedy, *Blue Chip Selections (2011–2012)*, Affirmative Claims Discussion Board, JAGCNET (26 May 2011), <https://www/jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=ACDAFFB464AC8A3F852578680073E440&Count=30&ExpandSection=1>.

¹⁵² AR 27-20, *supra* note 2, para. 14-14c(2).

¹⁵³ Memorandum of Agreement (MOA) Between TRICARE Management Activity (TMA), and Army Medical Command (MEDCOM) and U.S. Army Office of the Judge Advocate General (OTJAG), subject: TMA Reimbursement to Army for Support of Medical Affirmative Claims (MAC) Program, signed 12 Dec 2008 (Robert D. Seaman, TMA General Counsel), 23 Dec. 2008 (Allen Middleton, TMA Health Budgets and Financial Policy), 14 Jan. 2009 (Lieutenant General Eric B. Schoemaker, MEDCOM), and 31 Dec 2008 (Lieutenant General Scott C. Black, Office of the Judge Advocate General).

¹⁵⁴ Thomas Kennedy, *TRICARE AGREEMENT Reimbursement Process*, Affirmative Claims Discussion Board, JAGCNET (Dec. 6, 2011), <https://www.jagcnet2.army.mil/JAGCNETPortals/Intranet/Discussion%20Boards/claimsdb.nsf/WebBoardSubNotApp?OpenView&RestrictToCategory=24CF617FACD035D0852577F10082A51E&Count=30&ExpandSection=1> (citing unpublished Memorandum of Agreement Between TMA, MEDCOM, and U.S. Army OTJAG).

¹⁵⁵ See Kennedy, *supra* note 154.

Deployment Claims

Staff judge advocates should ensure that their offices are prepared to pay claims during a deployment. Commanders have long recognized claims operations as a combat multiplier.¹⁵⁶ Deployed claims professionals often perform their duties at great personal risk. In Vietnam the only citation for heroism by a judge advocate was earned by Lieutenant Colonel Zane Finkelstein while paying claims.¹⁵⁷ In May 2007, Army Corporal Coty Phelps was tragically killed by a roadside explosive device while participating in a claims mission in Iraq.¹⁵⁸ Despite these risks, commanders continue to conduct claims operations in combat zones because of their importance to mission success.

The Army has single-service claims responsibility for many countries where Americans have recently deployed, including Iraq and Afghanistan.¹⁵⁹ This means that Army claims professionals are responsible for settling claims in these countries regardless of whether they arose from Army, Air Force, Navy or Marine operation.

Since the United States does not have a SOFA in Iraq or Afghanistan,¹⁶⁰ the Foreign Claims Act¹⁶¹ is the primary means of paying claims in these countries.¹⁶² This statute permits payment for death, injury, or property loss caused by negligent or wrongful acts of military personnel or incident

¹⁵⁶ See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 299 (2011) (noting that claims serve "[t]o ensure friendly relations with the local population and maintain the morale of our own troops").

¹⁵⁷ Fred L. Borch III, *For Heroism in Combat While Paying Claims: The Story of the Only Army Lawyer to be Decorated for Gallantry in Vietnam*, ARMY LAW., Sept. 2010, at 2.

¹⁵⁸ Major Richard DiMeglio, *In Memoriam: Corporal Coty James Phelps*, ARMY LAW., Apr. 2008, at 1, 3.

¹⁵⁹ U.S. DEP'T OF DEF., INSTR. 5515.08, ASSIGNMENT OF CLAIMS RESPONSIBILITY enclosure 2 (11 Nov. 2006). The Army has single-service claims responsibility for Afghanistan, Albania, Austria, Belarus, Belgium, Bulgaria, the Czech Republic, El Salvador, Eritrea, Estonia, Ethiopia, Germany, Grenada, Honduras, Hungary, Iran, Iraq, Kenya, Korea, Kuwait, Latvia, Lithuania, the Marshall Islands, Moldova, the Netherlands, Poland, Romania, Seychelles, Slovakia, Slovenia, Somalia, Sudan, Switzerland, Ukraine, Yemen, as well as claims in Central Command area of responsibility not specifically assigned to the Air Force or Navy. The Air Force has single-service claims responsibility for Australia, Azores, Canada, Cyprus, Denmark, Egypt, France, India, Japan, Jordan, Luxembourg, Morocco, Nepal, Norway, Oman, Pakistan, Qatar, Saudi Arabia, Tunisia, Turkey, the United Kingdom, and claims generated by Special Operations Command in countries not specifically assigned to the Army or Navy. The Navy has single-service claims responsibility for Bahrain, Djibouti, Greece, Guantanamo, Iceland, Israel, Italy, Portugal, Spain, and the United Arab Emirates. *Id.*

¹⁶⁰ Commander Trevor A. Rush, *Don't Call It a SOFA! An Overview of the U.S.—Iraq Security Agreement*, ARMY LAW., May 2009, at 34.

¹⁶¹ 10 U.S.C. § 2734 (2006).

¹⁶² AR 27-20, *supra* note 2, para. 2-15d(1).

to the noncombat operations of the armed forces.¹⁶³ Payable claims include loss or damage caused by traffic accidents,¹⁶⁴ appropriation of property,¹⁶⁵ and temporary trespass on land.¹⁶⁶ The statute permits payment of claims even if the military personnel who caused the injury or loss were not acting in the scope of their duties.¹⁶⁷ The Foreign Claims Act does not permit payment of claims which arise from combat activities,¹⁶⁸ are not in the best interests of the United States,¹⁶⁹ or are for the rental of real estate.¹⁷⁰ Claims must be evaluated using the law of the foreign country where the act occurred,¹⁷¹ so claims professionals must become experts in foreign law. Although the statute does not authorize lawsuits,¹⁷² claims professionals must adjudicate these claims fairly.¹⁷³

The Foreign Claims Act relies on Foreign Claims Commissions, one- or three-person groups that investigate and settle claims.¹⁷⁴ One-member Foreign Claims Commissions have the authority to pay up to \$15,000;¹⁷⁵ three-member Foreign Claims Commissions may pay up to \$50,000.¹⁷⁶ All members of such commissions must be U.S.

¹⁶³ *Id.* para. 10-3a.

¹⁶⁴ See DA PAM. 27-162, *supra* note 2, para. 10-4b (explaining that if a U.S. Soldier causes a vehicle collision, resulting damage to a third party would be payable).

¹⁶⁵ *Id.* para. 10-3c (noting that cognizable claims include those resulting from wrongful acts of U.S. Soldiers and civilian employees).

¹⁶⁶ See Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 22, 35.

¹⁶⁷ AR 27-20, *supra* note 2, para. 10-3a. However, claims involving tortious conduct of a local national employee who was not acting in the scope of employment may not be paid. *Id.*

¹⁶⁸ *Id.* para. 10-4k, 2-28j; DA PAM. 27-162, *supra* note 2, para. 10-3b.

¹⁶⁹ AR 27-20, *supra* note 2, para. 10-4h.

¹⁷⁰ *Id.* para. 10-4b (claims "purely contractual in nature" may not be paid). *But see* Ford, *supra* note 166 (claims for temporary trespass on land may be paid).

¹⁷¹ AR 27-20, *supra* note 2, para. 10-5. In particular, the amount paid may not exceed the amount that would be paid under the host country's law (even if that amount is zero).

¹⁷² 10 U.S.C. § 2734 (2006).

¹⁷³ AR 27-20, *supra* note 2, para. 1-17a(3) (DA Policy "seeks to compromise claims in a manner that represents a fair and equitable result to both the claimant and the United States.").

¹⁷⁴ *Id.* paras. 10-6e, f; 10-7a.

¹⁷⁵ *Id.* para. 10-9c. This authority is extended only to one-member Foreign Claims Commissions that are judge advocates; a non-attorney one-member Foreign Claims Commission (FCC) may pay up to \$5,000. *Id.* para. 10-8.

¹⁷⁶ *Id.* para. 10-9d(2)(a). At least two members of such a commission must be judge advocates. *Id.* para. 10-8.

citizens.¹⁷⁷ The Commander of the USARCS appoints Foreign Claims Commissions in Iraq and Afghanistan.¹⁷⁸ Prior to deployments, SJAs should coordinate with the USARCS to ensure that Foreign Claims Commissions are properly trained.¹⁷⁹ Once deployed, SJAs should request appointments of such commissions by contacting the USARCS.¹⁸⁰ Foreign Claims Commissions need not be composed solely of Army personnel; Navy, Marine, and Air Force personnel may be appointed as well.¹⁸¹

Staff judge advocates should also be aware of means of compensating local nationals outside the claims system. Solatia payments may be made to victims of U.S. military activities to express sympathy when local customs permit for such payments. Such payments come from Operations and Maintenance funds, not claims funds. Solatia is used extensively in Japan and Korea.¹⁸² The Commander's Emergency Response Program (CERP) may also be used to provide funds to victims of U.S. military activities.¹⁸³ This program has been used extensively in Iraq and Afghanistan.¹⁸⁴

Claims by detainees must be handled with special care. Because of the sensitivity of these claims, SJAs should notify the USARCS of all claims involving alleged abuse or maltreatment of detainees.¹⁸⁵ Claims of persons who were detained in Iraq must be acted on by the Secretary of the Army.¹⁸⁶

Disaster Claims

Staff judge advocates should ensure their claims offices are prepared to respond to disasters.¹⁸⁷ Military claims offices must prepare for two types of disasters: those caused by the military, such as range fires, and those caused by natural or other forces, such as hurricanes, that cause property damage on a military installation compensable under the Personnel Claims Act.¹⁸⁸

Damages from disasters caused by the military may be payable under the Federal Tort Claims Act,¹⁸⁹ the Military Claims Act,¹⁹⁰ the National Guard Claims Act,¹⁹¹ or the Foreign Claims Act.¹⁹² The military claims office with geographic responsibility for the disaster is responsible for the resulting claims.¹⁹³ This office should immediately notify the USARCS,¹⁹⁴ which may deploy a team and set up a special claims processing office.¹⁹⁵ Staff judge advocates should obtain assistance from local authorities to establish the special claims office and publicize its location.¹⁹⁶ If claimants are in immediate need of funds as a result of the disaster, emergency partial payments may be authorized.¹⁹⁷ In these cases, SJAs should coordinate with their local finance offices to obtain cash for immediate payment.

Natural and other disasters that are not caused by the military require a different approach. Under the Personnel Claims Act,¹⁹⁸ Soldiers and Army civilian employees can be paid for losses incident to service that result from fire, flood, hurricane, or other unusual occurrence.¹⁹⁹ In the United

States, these payments are generally limited to damage that occurs on the installation.²⁰⁰ Overseas, Soldiers and

¹⁷⁷ *Id.* para. 10-8.

¹⁷⁸ *Id.* para. 10-6b; DA PAM. 27-162, *supra* note 2, para. 10-6a(2) (discussing need of the staff judge advocate to coordinate with USARCS for appointment of FCC).

¹⁷⁹ AR 27-20, *supra* note 2, para. 1-11a(14).

¹⁸⁰ DA PAM. 27-162, *supra* note 2, para. 10-6a(2).

¹⁸¹ AR 27-20, *supra* note 2, para. 10-8 (requiring approval of commander, USARCS, for any such appointment).

¹⁸² *Id.* para. 10-11.

¹⁸³ Captain Karin Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW., Feb. 2004, at 39, 41.

¹⁸⁴ Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commanders Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1.

¹⁸⁵ AR 27-20, *supra* note 2, para. 2-1c (requiring notification to commander, USARCS, of "all major incidents involving serious injury or death . . .").

¹⁸⁶ Memorandum from Sec'y of Defense, to Sec'y of the Army, subject: Processing of Claims by Iraqi Detainees Based on Allegations of Personal Injury/Abuse and Mistreatment (15 Sept. 2004), available at USARCS website, <https://www.jagcnet.army.mil/8525752700444FBA/0/0B4B0B6A8992AE268525782C0043D019?opendocument&noly=1>.

¹⁸⁷ AR 27-20, *supra* note 2, para. 1-21; DA PAM. 27-162, *supra* note 2, para. 1-21 (discussing disaster claims planning in general).

¹⁸⁸ 31 U.S.C. § 3721 (2006); AR 27-20, *supra* note 2, para. 11-5c.

¹⁸⁹ 28 U.S.C. §§ 2671–2680 (2006).

¹⁹⁰ 10 U.S.C. § 2733 (2006).

¹⁹¹ *Id.* § 715.

¹⁹² *Id.* § 2731.

¹⁹³ DA PAM. 27-162, *supra* note 2, para. 1-21b.

¹⁹⁴ *Id.* para. 1-21d(1).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* para. 1-21d(2).

¹⁹⁷ 10 U.S.C. § 2736 (2006); AR 27-20, *supra* note 2, paras. 2-49d, 11-18.

¹⁹⁸ 31 U.S.C. § 3721 (2006).

¹⁹⁹ AR 27-20, *supra* note 2, para. 11-5c; DA PAM. 27-162, *supra* note 2, para. 11-5c.

²⁰⁰ For example, in the United States damages occurring at quarters are only compensable if the quarters were provided in kind by the government. AR

civilian employees can be paid for damage at authorized quarters off the installation.²⁰¹ Claims professionals can make emergency partial payments under the Personnel Claims Act of up to \$5000.²⁰²

In 2011, the USARCS initiated a new procedure for adjudicating claims involving catastrophic losses.²⁰³ The Catastrophic Loss Accelerated Settlement Procedure (CLASP) can be authorized by the commander of the USARCS as an exception to policy.²⁰⁴ At the claimant's option, this procedure may be used to obtain settlement without the need for a complete itemized list of all property.²⁰⁵

Conclusion

Good claims office management is critical to the success of SJAs. All SJAs should require their claims offices to apply for The Judge Advocate General's Award for Excellence in Claims. Staff judge advocates should keep track of new developments in transportation, which may impact claims office manning, and new developments in tort claims and affirmative claims law. They should also ensure that their personnel are adequately prepared for deployment claims and disaster claims operations.

27-20, *supra* note 2, para. 11-5d(1); DA PAM. 27-162, *supra* note 2, para. 11-5d(1).

²⁰¹ AR 27-20, *supra* note 2, para. 11-5d(2); DA PAM. 27-162, *supra* note 2, para. 11-5d(2).

²⁰² AR 27-20, *supra* note 2, para. 11-18; DA PAM. 27-162, *supra* note 2, para. 11-18.

²⁰³ Colonel R. Peter Masterton, *Personal Claims Note: New Personnel Claims Procedure for Catastrophic Losses*, ARMY LAW., Jan. 2011, at 1.

²⁰⁴ AR 27-20, *supra* note 2, para. 1-17e (giving the Commander, USARCS, broad authority to deviate from the specific requirements of AR 27-20 "in the best interests of the government," except in matters governed by statute, executive order, or other controlling law).

²⁰⁵ Masterton, *supra* note 203, at 1.

CLE News

1. Resident Course Quotas

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

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

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

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

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATRRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATRRS Quota Manager or Training Coordinator for an update or correction.

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

2. TJAGLCS CLE Course Schedule (June 2011–September 2012) (<http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
GENERAL		
5-27-C20	186th JAOBC/BOLC III (Ph 2)	4 Nov 11 – 1 Feb 12
5-27-C20	187th JAOBC/BOLC III (Ph 2)	17 Feb – 2 May 12
5-27-C20	188th JAOBC/BOLC III (Ph 2)	20 Jul – 3 Oct 12
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
	61st Judge Advocate Officer Graduate Course	13 Aug – 23 May 13
5F-F1	220th Senior Officer Legal Orientation Course	23 – 27 Jan 12
5F-F1	221st Senior Officer Legal Orientation Course	19 – 23 Mar 12
5F-F1	222th Senior Officer Legal Orientation Course	11 – 15 Jun 12
5F-F1	223d Senior Officer Legal Orientation Course	27 – 31 Aug 12
5F-F3	18th RC General Officer Legal Orientation Course	30 May – 1 Jun 12
5F-F5	2012 Congressional Staff Legal Orientation (COLO)	23 – 24Feb 12
5F-F52	42d Staff Judge Advocate Course	4 – 8 Jun 12

5F-F52-S	15th SJA Team Leadership Course	4 – 6 Jun 12
5F-F55	2012 JAOAC	9 – 20 Jan 12
5F-F70	43d Methods of Instruction	5 – 6 Jul 12

NCO ACADEMY COURSES		
512-27D30	2d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	3d Advanced Leaders Course (Ph 2)	9 Jan – 14 Feb 12
512-27D30	4th Advanced Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D30	5th Advanced Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D30	6th Advanced Leaders Course (Ph 2)	9 Jul – 14 Aug 12
512-27D40	2d Senior Leaders Course (Ph 2)	12 Mar – 17 Apr 12
512-27D40	3d Senior Leaders Course (Ph 2)	7 May – 12 Jun 12
512-27D40	4th Senior Leaders Course (Ph 2)	9 Jul – 14 Aug 12

WARRANT OFFICER COURSES		
7A-270A0	19th JA Warrant Officer Basic Course	20 May – 15 Jun 12
7A-270A1	23d Legal Administrator Course	11 – 15 Jun 12
7A-270A2	13th JA Warrant Officer Advanced Course	26 Mar – 20 Apr 12

ENLISTED COURSES		
512-27D/20/30	23d Law for Paralegal NCO Course	19 – 23 Mar 12
512-27D/DCSP	21st Senior Paralegal Course	18 – 22 Jun 12
512-27D-BCT	BCT NCOIC Course	7 – 11 May 12
512-27DC5	37th Court Reporter Course	6 Feb – 23 Mar 12
512-27DC5	38th Court Reporter Course	30 Apr – 15 Jun 12
512-27DC5	39th Court Reporter Course	6 Aug – 21 Sep 12
512-27DC6	12th Senior Court Reporter Course	9 – 13 Jul 12
512-27DC7	16th Redictation Course	9 – 13 Jan 12
	17th Redictation Course	9 – 13 Apr 12

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	65th Law of Federal Employment Course	20 – 24 Aug 12
5F-F24	36th Administrative Law for Military Installations & Operations	13 – 17 Feb 12
5F-F24E	2012 USAREUR Administrative Law CLE	10 – 14 Sep 12
5F-F28	2011 Income Tax Law Course	5 – 9 Dec 11

5F-F28H	2012 Hawaii Income Tax CLE Course	19 – 13 Jan 12
5F-F28P	2012 PACOM Income Tax CLE Course	2 – 6 Jan 12
5F-F202	10th Ethics Counselors Course	9 – 13 Apr 12

CONTRACT AND FISCAL LAW

5F-F10	165th Contract Attorneys Course	16 – 27 Jul 12
5F-F12	83d Fiscal Law Course	12 – 16 Mar 12
5F-F14	30th Comptrollers Accreditation Fiscal Law Course	5 – 9 Mar 12
5F-F101	12th Procurement Fraud Course	15 – 17 Aug 12

CRIMINAL LAW

5F-F31	18th Military Justice Managers Course	20 – 24 Aug 12
5F-F33	55th Military Judge Course	16 Apr – 5 May 12
5F-F34	40th Criminal Law Advocacy Course	30 Jan – 3 Feb 12
5F-F34	41st Criminal Law Advocacy Course	6 – 10 Feb 12
5F-F34	42d Criminal Law Advocacy Course	10 – 14 Sep 12
5F-F34	43d Criminal Law Advocacy Course	17 – 21 Sep 12
5F-F35E	2012 USAREUR Criminal Law Advocacy Course	9 – 12 Jan 12

INTERNATIONAL AND OPERATIONAL LAW

5F-F40	2012 Brigade Judge Advocate Symposium	7 – 11 May 12
5F-F41	8th Intelligence Law Course	13 – 17 Aug 12
5F-F47	57th Operational Law of War Course	27 Feb – 9 Mar 12
5F-F47	58th Operational Law of War Course	30 Jul – 10 Aug 12
5F-F47E	2012 USAREUR Operational Law CLE	17 – 21 Sep 12
5F-F48	5th Rule of Law Course	9 – 13 Jul 12

3. Naval Justice School and FY 2011–2012 Course Schedule

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

Naval Justice School Newport, RI		
CDP	Course Title	Dates
0257	Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	11 Oct – 16 Dec 11 23 Jan – 30 Mar 12 30 Jul 12 – 5 Oct 12
900B	Reserve Legal Assistance (010) Reserve Legal Assistance (020)	18 – 22 Jun 12 24 – 28 Sep
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	23 Apr – 4 May 12 (Norfolk) 9 – 20 Jul 12 (San Diego)
786R	Advanced SJA/Ethics (010)	23 – 27 Jul 12
850V	Law of Military Operations (010)	4 – 15 Jun 12
NA	Litigating Complex Cases (010)	4 – 8 Jun 12
961J	Defending Sexual Assault Cases (010)	13 – 17 Aug 12
525N	Prosecuting Sexual Assault Cases (01)	13 – 17 Aug 12
4048	Legal Assistance Course (010)	2 – 6 Apr 12
03TP	Basic Trial Advocacy (010) Basic Trial Advocacy (020)	7 – 11 May 12 17 – 21 Sep 12
NA	Intermediate Trial Advocacy (010)	6 – 10 Feb 12
748A	Law of Naval Operations (010) Law of Naval Operations (020)	12 – 16 Mar 12 (San Diego) 17 – 21 Sep (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	23 Jul – 3 Aug 12
0258 (Newport)	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	6 – 10 Feb 12 12 – 16 Mar 12 7 – 11 May 12 28 May – 1 Jun 12 13 – 17 Aug 12 24 – 28 Sep 12
2622 (Fleet)	Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060)	17 – 19 Jan 12 (Pensacola) 27 Feb – 1 Mar 12 (Pensacola) 9 – 12 Apr 12 (Pensacola) 21 – 24 May 12 (Pensacola)

	Senior Officer (070) Senior Officer (080) Senior Officer (090) Senior Officer (100) Senior Officer (110)	9 – 12 Jul 12 (Pensacola) 30 Jul – 2 Aug 12 (Pensacola) 30 Jul – 2 Aug 12 (Camp Lejeune) 6 – 10 Aug 12 (Quantico) 10 – 13 Sep 12 (Pensacola)
7878	Legal Assistance Paralegal Course (010)	2 – 6 Apr 12
03RF	Legalman Accession Course (030)	11 Jun – 24 Aug 12
07HN	Legalman Paralegal Core (030) Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	31 Aug – 20 Dec 11 25 Jan – 16 May 12 22 May – 6 Aug 12 31 Aug – 20 Dec 12
932V	Coast Guard Legal Technician Course (010)	6 – 17 Aug 12
846L	Senior Legalman Leadership Course (010)	23 – 27 Jul 12
08XO	Paralegal Ethics Course (020) Paralegal Ethics Course (030)	5 – 9 Mar 12 11 – 15 Jun 12
08LM	Reserve Legalman Phases Combined (010)	TBD
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	28 Nov – 9 Dec 11 9 – 20 Apr 12 23 Jul – 3 Aug 12
627S	Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100)	15 – 17 Feb 12 (Norfolk) 28 Feb – 1 Mar 12 (San Diego) 27 – 29 Mar 12 (San Diego) 30 May – 1 Jun 12 (Norfolk) 30 May – 1 Jun 12 (San Diego) 17 – 19 Sep 12 (Pendleton) 19 – 21 Sep 12 (Norfolk)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020)	10 – 12 Jan 12 26 – 28 Jun 12
	Legal Specialist Course (010) Legal Specialist Course (020) Legal Specialist Course (030)	3 Oct – 16 Dec 11 25 Jan – 5 Apr 12 3 May – 20 Jul 12
NA	Legal Service Court Reporter (010) Legal Service Court Reporter (020)	9 Jan – 6 Apr 12 10 Jul – 5 Oct 12
NA	Information Operations Law Training (010)	19 – 23 Mar 12 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	19 – 23 Mar 12
NA	TC/DC Orientation (010) TC/DC Orientation (020)	30 Apr – 4 May 12 10 – 14 Sep 12

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	28 Nov – 16 Dec 11 23 Jan – 10 Feb 12 27 Feb – 16 Mar 12 2 – 20 Apr 12 7 – 25 May 12 11 – 29 Jun 12 9 – 27 Jul 12 12 – 31 Aug 12
0379	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 15 Dec 11 30 Jan – 10 Feb 12 5 – 16 Mar 12 9 – 20 Apr 12 14 – 25 May 12 16 – 27 Jul 12 20 – 31 Aug 12
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050)	26 Mar – 30 Mar 12 4 – 8 Jun 12 10 – 14 Sep 12

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	28 Nov – 16 Dec 11 30 Jan – 17 Feb 12 5 – 23 Mar 12 7 – 25 May 12 11 – 29 Jun 12 23 Jul – 10 Aug 12 20 Aug – 7 Sep 12
947J	Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	5 – 15 Dec 11 9 Jan – 20 Jan 12 5 – 16 Feb 12 26 Mar – 6 Apr 12 14 – 25 May 12 18 – 29 Jun 12 27 Aug – 7 Sep 12
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060)	9 – 13 Jan 12 (San Diego) 2 – 6 Apr 12 (San Diego) 30 Apr – 4 May 12 (San Diego) 4 – 8 Jun 12 (San Diego) 17 – 21 Sep (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2012 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	Dates
Judge Advocate Staff Officer Course, Class 12-A	11 Oct – 15 Dec 2011
Deployed Fiscal Law & Contingency Contracting Course, Class 12-A	5 – 9 Dec 2011
Pacific Trial Advocacy Course, Class 12-A (Off-Site, Japan)	12 – 16 Dec 2011
Trial & Defense Advocacy Course, Class 12-A	9 – 21 Jan 2012
Gateway, Class 12-A	9 – 20 Jan 2012
Paralegal Apprentice Course, Class 11-02	10 Jan – 2 Mar 2012
Homeland Defense/Homeland Security Course, Class 12-A	23 – 27 Jan 2012
CONUS Trial Advocacy Course, Class 12-A (Off-Site)	30 Jan – 3 Feb 2012
Legal & Administrative Investigations Course, Class 12-A	6 – 10 Feb 2012
European Trial Advocacy Course, Class 12-A (Off-Site, Kapaun AS, Germany)	13 – 17 Feb 2012
Judge Advocate Staff Officer Course, Class 12-B	13 Feb – 13 Apr 2012
Paralegal Craftsman Course, Class 12-02	13 Feb – 29 Mar 2012
Paralegal Apprentice Course, Class 12-03	5 Mar – 24 Apr 2012
Environmental Law Update Course-DL, Class 12-A	27 – 29 Mar 2012
Defense Orientation Course, Class 12-B	2 – 6 Apr 2012
Advanced Labor & Employment Law Course, Class 12-A (Off-Site DC location)	11 – 13 Apr 2012
Air Force Reserve and Air National Guard Annual Survey of the Law, Class 12-A (Off-Site Atlanta, GA)	13 – 14 Apr 2012
Military Justice Administration Course, Class 12-A	16 – 20 Apr 2012
Paralegal Craftsman Course, Class 12-03	16 Apr – 1 Jun 2012
Will Preparation Paralegal Course, Class 12-A	23 – 25 Apr 2012
Paralegal Apprentice Course, Class 12-04	30 Apr – 20 Jun 2012
Cyber Law Course, Class 12-A	24 – 26 Apr 2012
Negotiation and Appropriate Dispute Resolution Course, Class 12-A	30 Apr – 4 May 2012

Advanced Trial Advocacy Course, Class 12-A	7 – 11 May 2012
Operations Law Course, Class 12-A	14 – 25 May 2012
CONUS Trial Advocacy Course, Class 12-B (Off-Site)	14 – 18 May 2012
CONUS Trial Advocacy Course, Class 12-C (Off-Site)	21 – 25 May 2012
Reserve Forces Paralegal Course, Class 12-A	4 – 8 Jun 2012
Staff Judge Advocate Course, Class 12-A	11 – 22 Jun 2012
Law Office Management Course, Class 12-A	11 – 22 Jun 2012
Paralegal Apprentice Course, Class 12-05	25 Jun – 15 Aug 2012
Will Preparation Paralegal Course, Class 12-B	25 – 27 Jun 2012
Judge Advocate Staff Officer Course, Class 12-C	9 Jul – 7 Sep 2012
Paralegal Craftsman Course, Class 12-04	9 Jul – 22 Aug 2012
Environmental Law Course, Class 12-A	20 – 24 Aug 2012
Trial & Defense Advocacy Course, Class 12-B	10 – 21 Sep 2012
Accident Investigation Course, Class 12-A	11 – 14 Sep 2012

5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225
- ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(850) 561-5600

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University Law School
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

MC Law: Mississippi College School of Law
151 East Griffith Street
Jackson, MS 39201
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center
1620 Pendleton Street
Columbia, SC 29201
(803) 705-5000

NDAA: National District Attorneys Association
44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
(703) 549-9222

NDAED: National District Attorneys Education Division
1600 Hampton Street
Columbia, SC 29208
(803) 705-5095

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 (in MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

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

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAIBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAIBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at <https://jag.learn.army.mil>.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. Training Year (TY) 2012 RC On-Site Legal Training Conferences

Date	Region, LSO & Focus	Location	Supported Units	POCs
27 – 29 Jan	Heartland Region 2d LSO Focus: International Law, Legal Administrators	New Orleans, LA	1st LSO 128th LSO 214th LSO	CPT Louis Russo louis.p.russo@us.army.mil (504) 784-7144
24 – 26 Feb	Southeast Region 213th LSO Focus: Trial Advocacy and Military Justice	Atlanta, GA	12th LSO 16th LSO 174th LSO	CPT Brian Pearce brian.pearce@usdoj.gov (404) 735-0388
18 – 20 May	Midwest Region 9th LSO Focus: Expeditionary Contracting & Fiscal Law	Cincinnati, OH	8th LSO 91st LSO	CPT Steven Goodin steven.goodin@us.army.mil (513) 673-4277
15 – 17 Jun	Western Region 78th LSO Focus: Rule of Law	Los Angeles, CA	6th LSO 75th LSO 87th LSO 117th LSO	CPT Charles Taylor charles.j.taylor@us.army.mil (213) 247-2829
20 – 22 Jul	Mid-Atlantic Region 139th LSO Focus: Rule of Law	Nashville, TN	134th LSO 151st LSO 10th LSO	CPT James Brooks james.t.brooks@us.army.mil (615) 231-4226
17 – 19 Aug	Northeast Region 153d LSO Focus: Client Services	Philadelphia, PA (Tentative)	3d LSO 4th LSO 7th LSO	MAJ Jack F. Barrett john.f.barrett@us.army.mil (215) 665-3391

2. Brigade Judge Advocate Mission Primer (BJAMP)

Dates: 12 – 15 Dec 11; 12 – 15 Mar 12; 4 – 7 Jun 12

Location: Pentagon

ATTRS No.: NA

POC: PDP@conus.army.mil

Telephone: (571) 256-2913/2914/2915/2923

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

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

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

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business

only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

5. The Army Law Library Service

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

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

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