



THE ARMY LAWYER

ARTICLES

Operational Contract Support Integration Cells: A Primer For Judge Advocates

Major Michael E. Gilbertson

Understanding Foreign Criminal Jurisdiction: A primer for Operational Law Advisors

Major Brett R. Swaim

TJAGLCS FEATURES

Lore of the Corps

Major General Walter A. Bethel: The First The Judge Advocate General in Army History

Mr. Frederic L. Borch III

BOOK REVIEWS

The Bravest Battle: The 28 Days of the Warsaw Ghetto Uprising

Reviewed by Andrew S. Bowne

The First Congress: How James Madison, George Washington and a Group of Extraordinary Men Invented the Government

Reviewed by Major Robert Gotheridge

Judge Advocate General's Corps Professional Bulletin 27-50-17-11

November 2017

Editor, Captain John Cody Barnes
Contributing Editor, Lieutenant Colonel Michael P. Harry and Major Jess B. Roberts
Legal Editor, Mr. Sean P. Lyons

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

The opinions expressed by the authors in the articles do not necessarily reflect the view of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps (JAGC), The Judge Advocate General's Legal Center and School, or any other governmental or non-governmental agency. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Editorial Board of *The Army Lawyer* includes the Chair, Administrative and Civil Law Department, and the Director, Professional Communications Program. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army.

Unless expressly noted in an article, all articles are works of the U.S. Government in which no copyright subsists. Where copyright is indicated in an article, all further rights are reserved to the article's author.

The Army Lawyer accepts articles that are useful and informative to Army lawyers. This includes any subset of Army lawyers, from new legal assistance attorneys to staff judge advocates and military judges. *The Army Lawyer* strives to cover topics that come up recurrently and are of interest to the Army JAGC. Prospective authors should search recent issues of *The Army Lawyer* to see if their topics have been covered recently.

Authors should revise their own writing before submitting it for publication, to ensure both accuracy and readability. The style guidance in paragraph 1-36 of Army Regulation 25-50, *Preparing and Managing Correspondence*, is extremely helpful. Good writing for *The Army Lawyer* is concise, organized, and right to the point. It favors short sentences over long and active voice over passive. The proper length of an article for *The Army Lawyer* is "long enough to get the information across to the reader, and not one page longer."

Other useful guidance may be found in Strunk and White, *The Elements of Style*, and the Texas Law Review, *Manual on Usage & Style*. Authors should follow *The Bluebook: A Uniform System of Citation* (20th ed. 2015) and the *Military Citation Guide* (TJAGLCS, 20th ed. 2015). No compensation can be paid for articles.

The Army Lawyer may make necessary revisions or deletions without prior permission of the author. An author is responsible for the accuracy of the author's work, including citations and footnotes.

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

Articles may be cited as: [author's name], [article title in italics], ARMY LAW., [date], at [first page of article], [pincite].

Lore of the Corps

Major General Walter A. Bethel: The First *The Judge Advocate General in Army History*
Mr. Frederic L. Borch III.....1

Articles

Operational Contract Support Integration Cells: A Primer for Judge Advocates
Major Michael E. Gilbertson.....4

Understanding Foreign Criminal Jurisdiction: A Primer for Operational Law Advisors
Major Brett R. Swaim26

TJAGLCS Features

Book Reviews

The Bravest Battle: The 28 Days of the Warsaw Ghetto Uprising
Reviewed by *Major Andrew S. Bowne*.....36

The First Congress: How James Madison, George Washington, and a Group of Extraordinary Men Invented the Government
Reviewed by *Major Robert Gotheridge*.....40

Lore of the Corps

Major General Walter A. Bethel:

The first *The Judge Advocate General in Army History*

By Fred L. Borch

Regimental Historian & Archivist



BG Walter Bethel February 1923

In January 1924, Major General Walter A. Bethel, who had been serving as *the Judge Advocate General (tJAG)* for less than a year, made history as the first *The Judge Advocate General (TJAG)*. While this *Lore of the Corps* article is about that unique—and lasting—change in the title of the senior ranking uniformed lawyer in the Army, it is also about the career of TJAG Bethel. He was the top lawyer in General John J. Pershing's

American Expeditionary Force (AEF) in World War I and, as this year (2017) is the 100th anniversary of America's entry into that armed conflict, it is only appropriate to make Bethel the subject of this short legal history vignette.

Born in Ohio in November 1866, Bethel was the oldest of four children (two boys and two girls). After graduating from high school, he worked as a public school teacher until he happened to read in a notice in the local newspaper that a competitive examination was about to be held to choose a candidate for an appointment to the U.S. Military Academy. Like many men of his era, Bethel wanted a college education but did not have the financial means to pursue it. Realizing that West Point would give him the education he desired, Bethel took the exam with about twenty other young men. He finished second in the final standing and was named the first alternate. When it was discovered that the man who had finished first in the exam was five days over the maximum age limit for admission to West Point, 19-year old Bethel was given the appointment instead.¹

He graduated four years later, ranked 14th in a class of 49, and was commissioned as second lieutenant of Artillery.²

¹ Obituary of Walter A. Bethel 1889, <https://externalapps.westpointaog.org/Memorials/Article/3295/> (hereinafter Obituary).

² Major General Thomas H. Green, *History of the Judge ADVOC. GEN.'S DEP'T, THE ARMY LAWYER*, June 1975, at 15.

While at West Point, Bethel got the nickname "Peribo." Peribo, which was the name of a dog in a story that Bethel's French class was reading. One day the instructor, calling upon Bethel to recite, said "Monsieur Peribo" instead of "Mr. Bethel" and after that Peribo was his nickname for the rest of his days in uniform—at least among his classmates.

Bethel served fourteen years as a line officer in various locations, but found time to study law in his off-duty hours. While at Fort McPherson, he entered Atlanta Law School, with the intent of joining the Judge Advocate General's Department (JAGD) after graduation. He was reassigned to Washington, D.C., before he could finish his law studies in Georgia but Bethel did manage to complete his degree in 1894 at Columbia (now George Washington) law school.³

From 1895 to 1900, Bethel—still an Artillery officer—served as an instructor of chemistry, history and law at West Point. He left his teaching position for a few months to serve briefly in Puerto Rico during the Spanish American War but then returned to New York. Bethel's follow-on assignment after West Point was at Vancouver Barracks, near Portland, Oregon. It was during this tour of duty that Bethel was finally able to join the JAGD. During this period, the entire Department consisted of one brigadier general, two colonels, three lieutenant colonels, six majors, and one acting judge advocate captain "for each geographic department or tactical division not provided with a judge advocate."⁴ Consequently, while Bethel certainly had been qualified to join the JAGD since 1894, competition was fierce for a place in such a small organization and it was not until July 15, 1903 that he obtained an appointment as a judge advocate major. After pinning the crossed-pen-and-sword insignia to his collar, MAJ Bethel served in a variety of locations, including another tour at West Point (where he was a Professor of Law from 1909 to 1914) and overseas in the Philippines and Puerto Rico.⁵

Bethel was a good athlete and, as a young officer began playing tennis. He was so good that, in 1903, he won

³ Obituary, *supra* note 1.

⁴ Green, *supra* note 2, at 92.

⁵ Obituary, *supra* note 1.

the Pacific Northwest Championships in both singles and doubles, and for a number of years was nationally ranked.⁶

In 1917, when General Pershing took command of the American Expeditionary Forces (A.E.F.), then Lieutenant Colonel Bethel joined his staff as the judge advocate for A.E.F. This job came with a temporary promotion to brigadier general and as a result Bethel wore one star on his collar from October 1917 until June 1920, when he reverted to his permanent rank of colonel.

Brigadier General Bethel served in France as the top lawyer in the A.E.F. until August 15, 1920. He took part in the Meuse-Argonne offensive and in the occupation of the St. Die Sector. For his service in France, Bethel was awarded the Distinguished Service Medal in 1919. His citation reads:

As judge advocate of the American Expeditionary Force, he organized this important department and administered its affairs with conspicuous efficiency from the date of the arrival in France of the first American combat troops. His marked legal ability and sound judgment were important factors in the splendid work of his department, and he at all times handled with success the various military and international problems that arose as a result of the operation of our armies.⁷

There is little doubt that Bethel's superb performance in the A.E.F. raised his stature in the Army and, when Major General Enoch Crowder retired as the Judge Advocate General (tJAG) in February 1923, after 46 years of active duty, COL Bethel succeeded him as the top lawyer in the Army.

For the next 22 months, until "a case of severe eye strain"⁸ required his early retirement for physical disability, Major General Bethel's tenure as tJAG was marked by two important historical events. The first involves his title as the Army's top uniformed attorney; the second involves the insignia worn by judge advocates.

Prior to Major General Bethel, the senior lawyer in the Army was known as "the Judge Advocate of the Army" or "the Judge Advocate General," depending on the wording of the congressional statute creating the position. In 1924, however, the War Department announced that the "heads or chiefs" of the Inspector General's Department, the Judge Advocate General's Department, the Quartermaster Department and the Medical Department would now have "The" in the title of their positions capitalized. As a result, the Inspector General became *The* Inspector General, the Judge Advocate General became *The* Judge Advocate General, the Quartermaster General became *The*

Quartermaster General and the Surgeon General became *The* Surgeon General.⁹ This change has remained the rule in the Army, which means that since Bethel's tenure, we refer to the senior uniformed lawyer as TJAG and not tJAG.

The second event of historical importance during Major General Bethel's tour of duty as TJAG was his attempt to change the branch insignia for Army lawyers. All judge advocates had worn the 'crossed-pen-and-sword, wreathed' insignia since 1890. Bethel, however, did not like this insignia. Apparently he did not think that it was "sufficiently symbolic" of a judge advocate's duties. Consequently, TJAG Bethel pushed for the adoption of a new design: "A balance upheld by a Roman sword and ribbon blindfold." The scales and sword hilt were to be gold in color; the blade and ribbon were to be silver colored.¹⁰

The proposed JAGD insignia was supposed to be effective in July 1924, but implementation was delayed. As a result, when Major General Bethel retired in November 1924, the new TJAG, Major General John A. Hull, asked members of the JAGD if they liked the proposed "balance-and-sword." When Hull learned that most did not, he obtained the Army's permission to rescind the unpopular insignia. The result was the retention of the 'crossed-pen-and-sword, wreathed' insignia still worn today by judge advocates, legal administrators and paralegals. Anticipating that the 'balance-and-sword,' would be adopted, however, some judge advocates purchased the new insignia.¹¹

A photograph of the obverse and reverse of this insignia—which is quite rare—is shown here.



After retiring, Walter Bethel was appointed to the American-Mexican Claims Commission. This organization had been created by treaty in the early 1920s to permit citizens of the United States to file claims for losses or injuries resulting from the "revolutionary disturbances" that had

⁶ *Id.*

⁷ War Department General Orders No. 12, (1919).

⁸ Obituary, *supra* note 1.

⁹ War Department, General Orders No. 2, (31 Jan. 1924).

¹⁰ Green, *supra* note 2, at 141-42.

¹¹ *Id.*

occurred in Mexico in the early 1900s. Bethel's chief duty was to represent various companies and individuals who were filing claims for money damages with the Commission. Bethel presented their claims to the Commission, and received compensation based on the successful adjudication and settlement of those claims. He worked with the American-Mexican Claims Commission for more than 20 years; Bethel finished his last case in 1947.¹²

Major General Walter A. Bethel died in Washington, D.C. in January 1954. He was 87 years old and was survived by his wife and three daughters; the oldest two girls were twins.¹³

¹² Obituary, *supra* note 1. For more on the Commission, see Reports of International Arbitral Awards, General Claims Commission, United Mexican States and United States of America, September 8, 1923,

http://legal.un.org/riaa/cases/vol_IV/7-320.pdf (accessed November 4, 2017).

¹³ Obituary, *supra* note 1.

Major Michael E. Gilbertson*

Well a lawyer says this and a lawyer says that and you have to go through this process and that process and you have to have oversight from this that and the other . . . You give me \$17 million on the credit card, I'll call Cabelas tonight, and I'll outfit every Soldier, Sailor, Airman, and Marine with a pistol and I'll get a discount on it for bulk buys.¹

I. Introduction

A brigade staff is working late to churn out an operations order for an upcoming exercise. They miss dinner, they are hungry, and they cannot leave the office, so they have the Assistant S-2 order pizzas for delivery. When he is asked what kind of pizza they want, the Assistant S-2 grows impatient with the incessant questions. He tells the salesman they have five separate orders and there is no time to discuss the details—it is too easy, they just want pizza.

An hour passes and a delivery person arrives with the first pizza. It is a large pizza with anchovies. Everyone on the staff hates anchovies. No one eats it. Subsequent orders arrive over the next few hours and the results are all the same; too big, too small, too cold, no toppings, the wrong kind of toppings, and each order is stacked with delivery charges and the expectation for a tip. The time to eat has passed and all the restaurants have closed for the evening. Everyone on the staff is still hungry and they do not have the time, the money, or the opportunity for another order.

Briefly put, the staff has failed to meet its mission objective — to procure an acceptable kind and amount of food for the team. Had it properly and timely defined the requirements and ensured proper coordination, it would have increased its chances for mission success.

Now substitute pizza for government contracts to procure mine resistant ambush protected vehicles,² interoperable command communication systems,³ or the U.S. Army's new service pistol.⁴ The significance and scale of the procurement, and the risk of unmet requirements becomes more apparent.

In recognizing this risk and in response to other concerns specifically identified with contingency defense contracting, Congress and senior U.S. defense officials decided that operational field commanders will incorporate the Operational Contract Support (OCS) process into joint military training, operations, and military education.⁵ For instance, Congress directed the Chairman of the Joint Chiefs of Staff (CJCS) to ensure commands address OCS

* Judge Advocate, United States Army. Currently assigned as the Group Judge Advocate, Asymmetric Warfare Group, Fort George G. Meade, Maryland. LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; M.S., 2010, National Defense Intelligence College, Washington, DC; J.D., 2004, Valparaiso University School of Law, Valparaiso, Indiana; B.A., 2001, The Citadel, Charleston, South Carolina. Previous assignments include Military Personnel Law Attorney, U.S. Army Training and Doctrine Command, Fort Eustis, Virginia, 2015-2016; Brigade Judge Advocate, 501st Military Intelligence Brigade, USAG-Yongsan, Korea, 2014-2015; Senior Trial Counsel, Eighth Army, USAG-Yongsan, Korea, 2013-2014; Trial Counsel, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2012-2013; Chief of Operational Law, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2011-2012; Claims Judge Advocate, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2010-2011; Administrative Law Attorney, National Guard Bureau, Washington, DC, 2009-2010; and Brigade S-2, 55th Sustainment Brigade, Joint Base Balad, Iraq, 2008. Member of the bars of the Supreme Court of the United States, Court of Appeals for the Armed Forces, the United States Court of Appeals for Veterans Claims, Army Court of Criminal Appeals, and the District of Columbia Court of Appeals. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ General Mark A. Milley, 39th *Chief of Staff of the Army*, quoted in Matthew Cox, Army Chief Wants Power to Select New Pistol, MILITARY.COM (Mar. 10, 2016), <http://www.military.com/daily-news/2016/03/10/army-chief-wants-power-to-select-new-pistol.html>.

² "I think what you have is a natural evolution of technology and very sharp people in business and industry looking at the problem and devising different ways to defeat the problem." (quoting General Peter Pace, 16th Chairman of the Joint Chiefs of Staff, on how the design, development, and deployment of the MRAP in Iraq was a success story of the military working with industry to define its requirements). Donna Miles, Gates

Hopes to Get Better Armored Vehicles to Troops Faster, U.S. ARMY (May 11, 2007), <https://www.army.mil/article/3079/>.

³ Memorandum from Sec'y of Def. to the Secretaries of the Military Dep'ts et. al., subject: Investigation Review-Secretary of Defense Guidance (28 Apr. 2016), <http://www.defense.gov/Portals/1/Documents/pubs/SD-ROE-Guidance-post-Kunduz.pdf> (directing the Combatant Commanders and Service Secretaries to "[i]dentify incompatible technological systems and generate solutions to enhance interoperability among operational forces." in response to U.S. airstrike against the Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 Oct. 2015).

⁴ "As [the] MHS [Modular Handgun System] moves forward into operational testing, the due diligence taken by all of the stakeholders will ensure a program that remains on-budget and on-schedule." (quoting Ms. Steffanie B. Easter, Principal Deputy Assistant Secretary of the Army (Acquisition, Logistics, and Technology). Matthew Cox, *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol*, MILITARY.COM (Jan. 19, 2017), <http://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html>.

⁵ For a complete discussion of these concerns see, e.g., COMM'N ON ARMY ACQUISITION & PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 1 and 21 (Oct. 31, 2007), http://www.acq.osd.mil/dpap/contingency/reports/docs/gansler_commission_report_final_report_20071031.pdf; Urgent Reform Required: Army Expeditionary Contracting, the Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations: Hearing Before the Subcomm. on Readiness and Mgmt. Support of the S. Comm. on Armed Servs. 110th Cong. 11-12 (2007); COMM'N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 1 (Aug. 31, 2011), <https://cybercemetery.unt.edu/archive/cwc/20110929213820/> http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf; and U.S. GOV'T ACCOUNTABILITY

requirements in military planning.⁶ Likewise, Congress directed the U.S. Department of Defense (DoD) to include OCS in its required training for all military personnel with contingency acquisition duties, including operational field commanders and their staff.⁷ It also required the inclusion of OCS in Joint Professional Military Education (JPME).⁸

Commanders are responsible for OCS.⁹ However, this command requirement flows down to the judge advocate to provide an OCS advisory role. Accordingly, judge advocates need to understand both the opportunities and challenges across the three OCS functions and the overarching role of the Operational Contract Support Integration Cells (OCSICs), to help their command meet its requirements through contracted support. Therefore, this paper will provide a background of OCS and OCSICs, identify the judge advocate's role in each step of the OCS process, and identify ways that the judge advocate can add additional value throughout the OCS process.¹⁰

II. Operational Contract Support

The DoD defines OCS as a process, an ability, a joint activity, and a force multiplier.¹¹ Primarily, OCS is a process “of planning for and obtaining supplies, services, and construction from commercial sources in support of joint

operations.”¹² As an ability, OCS “orchestrate[s] and synchronize[s] the provision of integrated contract support and management of contractor personnel providing support to the joint force within a designated operational area.”¹³ In addition, OCS is “a multi-faceted joint activity executed by the GCC [Geographic Combatant Commander] and subordinate JFCs [Joint Force Commanders] through boards, centers, and working groups [B2C2WGs], and associated lead service or joint theater support contracting-related activities.”¹⁴

Moreover, OCS is a “key force multiplier across the range of military operations, both foreign and domestic.”¹⁵ Taken together, these definitions can be summarized as OCS is the framework wherein an operational field commander and the staff plans for, acquires, and manages the procurement of supplies, services, and construction from commercial sources in support of military operations. Also, it is important to understand that OCS applies to all “organizational entities within the Department of Defense,”¹⁶ during all phases of military planning and operations.¹⁷ Moreover, its reach includes all DoD contingency operations,¹⁸ humanitarian

OFF., GAO-15-243, OPERATIONAL CONTRACT SUPPORT: ACTIONS NEEDED TO ENHANCE THE COLLECTION, INTEGRATION, AND SHARING OF LESSONS LEARNED 1 (2015).

⁶ 10 U.S.C.A. § 153 (West 2017), amended by National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 § 941, 125 Stat. 1298 (2011).

⁷ 10 U.S.C.A. § 2333(e) (West 2017), amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 849, 122 Stat. 3, 245-246 (2008). See also, Colonel Joshua Burris, Joint exercise implements OCS planning and readiness tenets, U.S. ARMY (Feb. 26, 2016), <https://www.army.mil/article/163075/>.

Recognizing the importance of OCS [Operational Contract Support], the DOD [Department of Defense] funds, and the Joint Staff Logistics sponsors, an annual OCS exercise -- Operational Contract Support Joint Exercise, or OCSJX. It implements the OCS planning and readiness tenets: contract support integration, contracting support and contractor management. OCSJX has evolved from U.S. Army Contracting Command's annual exercise, focused on preparing military contracting officers for deployment, into a joint, interagency and multinational exercise with non-acquisition and acquisition participants.

Id.

⁸ 10 U.S.C.A. § 2151(a)(6) (West 2017), amended by National Defense Authorization Act for Fiscal Year 2013 Pub. L. No. 112-239, § 845(c), 126 Stat. 1632, 1848 (2013).

⁹ See Joint Chiefs of Staff, Joint Pub. 4-10, Operational Contract Support I-4 (16 Jul. 2014) [hereinafter Joint Pub. 4-10].

¹⁰ The intent is that this primer will be applicable to judge advocates in the Geographic and Joint Commands rather than narrowly tailored to a particular military service. However, for a copy of the only Service

Component Command to issue Operational Contract Support (OCS) policy and procedures, see U.S. ARMY CENTRAL COMMAND, USARCENT 4-10: USARCENT COMMANDERS OPERATIONAL CONTRACT SUPPORT STANDARD OPERATING PROCEDURES (July 2016) [hereinafter ARCENT OCS SOP].

¹¹ A force multiplier is “[a] capability that, when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment.” DOD DICTIONARY OF MILITARY TERMS, http://www.dtic.mil/doctrine/dod_dictionary/, search for “force multiplier.”

¹² Joint Pub. 4-10, *supra* note 9, at I-2 (defining OCS). U.S. Dep’t of Army, Army Techniques Pub. 4-10, Multi-Service Tactics, Techniques, and Procedures for Operational Support 1-1 (18 Feb. 2016) [hereinafter ATP 4-10] (mirroring the definition of OCS as stated in Joint Pub. 4-10).

¹³ Operational Contract Support: Definitions, 32 C.F.R. § 158.3 (2016) (defining OCS). U.S. DEP’T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (OCS) Glossary (20 Dec. 2011) [hereinafter DoDI 3020.41] (mirroring the definition of OCS as stated in 32 C.F.R. § 158.3).

¹⁴ Joint Pub. 4-10, *supra* note 9, at I-2.

¹⁵ ATP 4-10, *supra* note 12, at 1-1. “Used properly, OCS provides a critical force multiplier, enabling commanders to deliver desired military and economic effects on a global scale without spending the time, money, and political capital to deploy additional soldiers and equipment.” Major General Edward F. Dorman and Lieutenant Colonel William C. Lantham, Jr., Operational Contract Support: The Missing Ingredient in the Army Operating Concept, MIL. L. REV. (Nov-Dec 2016), at 52, 55.

¹⁶ Operational Contract Support: Applicability, 32 C.F.R. § 158.2 (2016).

¹⁷ JOINT PUB. 4-10, *supra* note 9, at I-3.

¹⁸ See 10 U.S.C.A. § 101(a)(13) (West 2017) (defining the phrase “contingency operation”).

assistance,¹⁹ and other peace operations²⁰ generally outside the United States.²¹

Lastly, OCS is comprised of three intertwined functions: contract support integration, contracting support, and contractor management. Respectfully, these functions involve the planning, acquisition, and administration of contract support with the OCSIC as the hub for effective OCS coordination, execution, and assessment.

A. Contract Support Integration

The OCS-Contract Support Integration (OCS-CSI) function includes a planning and execution process.²² During the Contract Support Integration planning process, the J-4 (Logistics) staff at the GCC and JFC typically leads OCS working groups and ensures the OCS annex and OCS concerns are incorporated throughout operational and contingency plans.²³ However, all GCC and JFC primary and special staff members are responsible for addressing OCS issues related to their staff function into plans.²⁴ Consequently, the entire staff must incorporate OCS considerations into the base plan and its annexes during all phases of the operation.

The critical staff product initially produced and continually refined during this Contract Support Integration planning phase is the OCS annex – Annex – W, *Operational*

Contract Support – to the applicable base plan.²⁵ The current Annex W template includes five paragraphs and three appendices in which the GCC and subordinate JFC analyze, describe, and provide direction and guidance for meeting the command's commercially resourced needs.²⁶ In addition, the Annex W is used to synchronize the command's contracting efforts with other DoD and U.S. elements in the area of operations "to avoid undue competition for the same locally available supplies, equipment, and subcontractor employees."²⁷

During the Contract Support Integration execution process, the operational field command (requiring activity) is the lead effort for determining, prioritizing, and synchronizing its support requirements and the appropriate source of support, i.e. through organic support, multinational support, acquisition and cross-servicing agreement (ACSA) support, or contracted support.²⁸ If the requiring activity (RA) decides to meet its requirements through contracted support, it first prepares an acquisition-ready contract support requirements packet in accordance with the relevant Annex W and any applicable GCC policy.²⁹

The requiring activity will then submit its requirements packet through the relevant portal, such as the Combined Information Data Network Exchange (CIDNE) or the Contingency Acquisition Support Module (cASM) database,³⁰ to the Requirements Review Board (RRB) and the

¹⁹ See 10 U.S.C.A. § 401(e) (West 2017) (defining the phrase "humanitarian and civic assistance").

²⁰ See DoD DICTIONARY OF MILITARY TERMS, http://www.dtic.mil/doctrine/dod_dictionary/, search for "peace operations." (defining the phrase "peace operations"). Id.

²¹ Operational Contract Support: Applicability, 32 C.F.R. § 158.2 (2016). Moreover, the Secretary of Defense can direct, and a combatant commander can determine, that OCS otherwise applies to other military or contingency operations. The implication appears that OCS could also apply within the United States.

²² JOINT PUB. 4-10, *supra* note 9, at III-3.

²³ There is likely no doctrinal requirement for OCS to be a J-4 staff function. While OCS is usually placed under the G-4/J-4 staff section, some Joint Force Commands (JFCs) maintain the OCS Integration Cell (OCSIC) as a separate organization outside the G-4/J-4. Telephone Interview with Lieutenant Colonel Jose A. Cora, Branch Chief, Trial Team III, Contract and Fiscal Law Division, U.S. Army Legal Services Agency (Oct. 7, 2016) [hereinafter LTC Cora Interview].

²⁴ *Id.* Although not an exhaustive list, the J-1 (Personnel) staff will maintain contractor accountability and casualty reporting. The J-2 (Intelligence) staff will handle the vetting of contractors and define its intelligence contract support requirements. The J-3 (Operations) staff manages requirements validation and prioritization, and addresses issues relating to the use of private security contractors and arming contractors. The J-4 (Logistics) staff determines how to sustain and transport contractors and identify contract support logistics requirements. The J-4 (Engineer) staff determines land and facility allocation and usage for contractors. The J-5 (Planning) staff incorporates OCS in the planning and risk assessment process. The J-6 (Communications) staff identifies the contract support requirements for information technology and IT security. The J-8 (Resource Management) staff providing funding oversight and monitors "contract expenditures." The Surgeon's office will determine the medical

requirements needed to support the contractor force. The Provost Marshall's office investigates contractor criminal activity to include fraud and trafficking in persons. JOINT PUB. 4-10, *supra* note 9, at III-5, see also The Joint OCS Essentials for Commanders and Staff (JOECS) course, JOINT KNOWLEDGE ONLINE, <https://jkodirect.jten.mil/> (last visited Feb. 2, 2017).

²⁵ See *infra* Appendix A for a sample Annex W template.

²⁶ DEF. PROCUREMENT & ACQUISITION POLICY, *Annex W Template*, http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/AP_files/template/ANNEX_W_Template.docx.

²⁷ Otherwise, the command could inadvertently cause contract fratricide and drive "up the prices of local goods and services and could create shortages." DEF. PROCUREMENT & ACQUISITION POLICY, DEFENSE CONTINGENCY CONTRACTING HANDBOOK V5 94 (Jul. 2015), http://www.acq.osd.mil/dpap/ccap/cc/jcchb/DCCH_V.5_July2015.pdf [hereinafter DCC HANDBOOK].

²⁸ JOINT PUB. 4-10, *supra* note 9, at III-3. "Requirements determination is an operational command function, not a contracting activity function." *Id.* at I-4.

²⁹ JOINT PUB. 4-10, *supra* note 9, at F-5. Based on the estimated cost of the procurement, the command may have the delegated authority to approve the requirement; especially if the amount is under the micro-purchase or simplified acquisition threshold detailed in Part 13 of the Federal Acquisition Regulation (FAR) and Part 213 of the Defense FAR Supplement (DFAR).

³⁰ "The Contingency Acquisition Support Model (cASM) is a web-based tool used to plan, generate, staff for approval, and track acquisition-ready requirements packages. This tool enables users to get requirements on contract more efficiently. CASM's output produces a complete, approved, and electronically signed requirements package (RP)." DCC HANDBOOK

applicable validation authority for a requirements validation decision.³¹

“Requirements validation is the process to coordinate, review, prioritize, and approve contract support requests. Depending on the type and estimated cost of the requirement as well as local command policies, the contract support requirements package may be subject to numerous staff reviews.”³²

B. Contract Support

The OCS-Contract Support (OCS-CS) function includes the “execution of contracting authority and coordination of common contracting actions in support of combatant commander directed operations.”³³ Contract Support is largely managed by the professional contracting community staffed with U.S. government employees like warranted contracting officers (KOs).³⁴ During Contract Support, these contracting professionals plan and establish contracting support organizations, convert requirements into contract documents, develop contracts, award and administer contracts, and close out contracts.³⁵

Based on operational considerations, the GCC will choose one of the following three forms of contract support

supra note 27, at 62.

³¹ “Normally, only high-dollar and mission critical common support contract support requests will be required to be processed through the JRRB process.” JOINT PUB. 4-10, *supra note 9*, at F-4.

³² *Id.* at III-19.

³³ U.S. Dep’t of Army, Tech. Pub. 4-10.1, Logistics Civil Augmentation Program Support to Unified Land Operations (1 Aug. 2016) [hereinafter ATP 4-10.1].

³⁴ JOINT PUB. 4-10, *supra note 9*, at 1-6.

Contracting officer is the government official (military or civilian) with the legal authority to enter into, administer, and/or terminate contracts. Within all components, the contracting officer is appointed in writing through a warrant (Standard Form 1402). Only duly warranted contracting officers are authorized to obligate the USG, legally binding it to make payments against contracts.

Id.

³⁵ In support of joint operations, the GCC or JFC will create a group of Contingency Contract Administrators as required by the mission (e.g. including acquisition corps specialists like Administrative Contracting Officers and Quality Assurance Representatives along with service component provided Contracting Officer’s Representatives and technical inspectors). DEF. FED. ACQUISITION REG. SUPP. (DFARS) & PROC., GUIDANCE, & INFO. (PGI) 225.373, Contract Administration in Support of Contingency Operations, (Oct. 30, 2015) http://www.acq.osd.mil/dpap/dars/pgi/pgi_html/PGI225_3.htm#225.373.

³⁶ JOINT PUB. 4-10, *supra note 9*, at IV-1. “Additionally, theater support contracting organizational requirements may change as the operation progresses. In any case, the theater support contracting organization structure should be planned and specifically addressed in Annex W by phase of operation when possible.” *Id.*

organizations to provide in-theater contracting support services to award the contract: a Joint Theater Support Contracting Command (JTSCC), a Lead Service for Contracting (LSC), or a Lead Service for Contracting Coordination (LSCC).³⁶ The JTSCC is most applicable for large-scale, complex operations.³⁷ The LSC is more applicable for small-scale, longer-term service-centric operations.³⁸ The LSCC is more applicable for small-scale, short-term operations and security cooperation and deterrence activities.³⁹

Another important Contract Support organization is the Joint Contracting Support Board (JCSB).

The JCSB is the forum for theater support, Service CAP [Civil Augmentation Programs], and other designated in-theater external contracting organizations to share information, coordinate acquisition strategies, and to minimize chances of competition and redundancies between individual contracts and/or task orders and look for opportunities to optimize filling of like requirements through common contracts. It is in this process, the LSC’s/LSCC’s contracting activity or JTSCC develops a contracting COP [Common Operating Picture]⁴⁰ which is then in

³⁷ *Id.* at IV-3.

The JTSCC is a functionally focused JTF [joint task force] with C2 [command and control], normally tactical control, and contracting authority over contracting personnel assigned and/or organizations attached within a designated operational area, normally a JOA [joint operations area]. The JTSCC’s contracting authority is delegated by the [Senior Procurement Executive] SPE of the Service component designated by the GCC to form the nucleus to the JTSCC.

Id.

³⁸ “In this organizational construct, the designated Service component contracting activity is responsible to provide theater support contracting for specified common commodities and services for a particular geographical region, normally a JOA or major expeditionary base.” *Id.* at IV-3.

³⁹ JOINT PUB. 4-10, *supra note 9*, at IV-2.

In this organizational option, the Services retain C2 and contracting authority over their deployed theater support contracting organizations, but a designated lead Service is responsible to coordinate common contracting actions through a JCSB [Joint Contracting Support Board] or JCSB-like process as directed in annex W. This organizational option is also applicable to operations where the bulk of the individual Service component units will be operating in distinctly different areas of the JOA, thus limiting potential competition for the same vendor base.

Id.

⁴⁰ Lieutenant Colonel Jose A. Cora, Operational Contract Support (OCS) Overview – CENTCOM AOR at slide 21 (17 Nov. 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter LTC Cora OCS

turn shared with the subordinate joint force command OCSIC.⁴¹

Coordination with the OCSIC and decisions at the Joint Contracting Support Board can lead to strategic sourcing decisions and economies of scale whereby the GCC can effectuate smarter buys for the commands at a cost-saving to the U.S. taxpayer.⁴² After the RRB validates a requirement, it may be “sent over the fence to contracting” so they can put the requirement on a contract, solicit bids, and evaluate and award the contract.⁴³ If, however, the “JCSB identifies a currently existing contract with capacity, it can direct the requirement to be purchased from that vehicle” rather than entering into a new contract.⁴⁴

There are primarily three types of available contract support within OCS: theater support contracts, systems support contracts, and external support contracts. Theater

Overview].

A contract COP is a single display source of existing contracts and contract-solution requirements in the generation, validation, and execution processes. There are two groups of information required to establish the COP: contracts that the unit currently has in place, and requirements that require a contract solution. Once established, there are two key components in maintaining the COP: [c]ontract and COR [m]onitoring and [m]anagement, and [a]pplying the current COP into the OCS [p]lanning [c]ycle.

Id.

⁴¹ JOINT PUB. 4-10, *supra* note 9, at IV-7.

⁴² See *infra* Section II.D. See also, the GEN. SERV. ADMIN., Federal Strategic Sourcing Initiative (FSSI), <https://strategicsourcing.gov/about-FSSI-0> (last visited Feb. 2, 2017).

[Strategic sourcing] and FSSI solutions provide easy access to common procurement vehicles that offer greater discounts as collective volume increases, business intelligence and best practice solutions. Additional benefits include: Meets OMB's [Office of Management and Budget] goal for cross-government participation; Assists with socioeconomic goals; Collect and analyze data; Identify trends; Re-engineer high cost business processes; Replicate cost-saving business processes; Share lessons learned and best practices; Realize cost efficiencies; Streamlines procurement process; and Drives additional discounts.

Id.

⁴³ LTC Cora Interview, *supra* note 23.

⁴⁴ LTC Cora Interview, *supra* note 23.

⁴⁵ JOINT PUB. 4-10, *supra* note 9, at I-7.

During contingency operations, these contracts are normally executed under expedited contracting authority and provide supplies, services, and minor construction from commercial sources generally within the operational area. Theater support contracts can range from small local contracts for a single unit or operational area-wide contracts in support of the entire force.

support contracts are awarded in the area of operations through deployed U.S. government contracting officers, and the requested support is commonly staffed by local national contractors.⁴⁵ Systems support contracts provide contractor logistics support, maintenance, and repair through deployed U.S. field service representatives.⁴⁶ External support contracts normally procure a mix of U.S. citizens, local national contractor employees, and third country national contractors to provide various logistical and service support functions.⁴⁷

Another major activity within the Contract Support function requires the contracting officer coordinating with the requiring activity in formulating theater business clearance (TBC) policies and procedures.⁴⁸ Moreover, they will determine which contractors qualify for Contractor Authorized to Accompany the Force (CAAF) status⁴⁹ and which, if any, will be designated as non-CAAF.⁵⁰ “CAAF

Id.

⁴⁶ “Systems support contracts are routinely put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control (C2) systems.” *Id.*

⁴⁷ “The most common and well-known external support contracts are the Services’ civil augmentation programs (CAPs), which include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force contract augmentation program (AFCAP), the Navy Global Contingency Construction Multiple Award Contract (GCCMAC), and Global Contingency Service Multiple Award Contract (GCSMAC).” *Id.*

⁴⁸ U.S. Central Command (CENTCOM) Contracting Command, Contracting Officers’ Guide for Theater Business Clearance – Kuwait 1 (15 Oct. 2011).

TBC is the process which provides Joint Force Commanders and the [] Contracting Commander visibility over all contracts and contractors performing work in their area of responsibility. It facilitates a common operating picture of contracted support in a Joint Operations Area, ensures that solicitations and contracts contain provisions to meet Commanders’ requirements, and assures that contractor personnel life support requirements are addressed and coordinated prior to arrival in theater.

Id. For an example of TBC requirements, see Memorandum from Dir., Def. Procurement & Acquisition Policy, subject: Theater Business Clearance Update for Afghanistan (21 Jan. 2015), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA007256-14-DPAP.pdf>.

⁴⁹ DFARS 252.225-7040 (Sep. 2016).

CAAF generally include all U.S. citizen and third-country national employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. Armed Forces and who routinely are collocated with the U.S. Armed Forces (especially in non-permissive environments). Personnel collocated with U.S. Armed Forces shall be afforded CAAF status through a letter of authorization. In some cases, Combatant Commander subordinate commanders may designate mission-essential host nation or local national contractor employees (e.g., interpreters) as CAAF.*Id.*

⁵⁰ DFARS 252.225-7040 (Sep. 2016).

status should be pre-determined and publicized as part of the solicitation in order to ensure accurate contract pricing.”⁵¹ Outside of the U.S. logistical and medical support implications for contractors affected by this designation, CAAF status also offers the contractor protections under international law.⁵²

C. Contract Management

The OCS-Contract Management (OCS-CM) function integrates contractor personnel and associated equipment into military operations. During Contract Management, the requiring activity prepares for contractor deployment, deploys and redeploys contractors, and manages and sustains contractors. Contractor personnel are largely managed through contracting authority and contractor company management personnel rather than military command authority.⁵³ However, the requiring activity also has

contractor management responsibilities to include personnel and equipment accountability.⁵⁴

Contract Management also requires the command to monitor and coordinate matters relating to government furnished property (GFP) and contractor acquired government owned (CAGO) property,⁵⁵ transportation and personal security,⁵⁶ and coordinating and synchronizing non-DoD contractor requirements.⁵⁷

Contractor personnel accountability in Contract Management is important. As the Secretary of Defense stated in his testimony before Congress in 2009, “I think that the use of contractors in many respects grew willy-nilly after 2003, and all of the sudden, we had a very large number of people and it became clear we had inadequate capacity to monitor them.”⁵⁸ Consequently, the DoD created the Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT-ES) to manage contractor personnel accountability and mandated its use by defense contractors.⁵⁹

Non-CAAF means personnel who are not designated as CAAF, such as local national (LN) employees and non-LN employees who are permanent residents in the operational area or third-country nationals not routinely residing with U.S. Armed Forces (and third-country national expatriates who are permanent residents in the operational area) who perform support functions away from the close proximity of, and do not reside with, U.S. Armed Forces. Government-furnished support to non-CAAF is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. Armed Forces.”

Id.

⁵¹ LTC Cora Interview, *supra* note 23.

⁵² U.S. Dep’t of Army, Reg. 715–9, Operational Contract Support Planning and Management (20 June 2011) [hereinafter AR 715-9].

Under applicable law, contractors may support military contingency operations in a noncombat role if they have been designated as CAAF by the force they accompany, and are provided with an appropriate identification card under the provisions of The Geneva Conventions of 1949, International Committee of the Red Cross, Convention (III) relative to the Treatment of Prisoners of War and DODD 4500.54E.

Id.

⁵³ JOINT PUB. 4-10, *supra* note 9, at V-2.

⁵⁴ USCENTCOM, STANDARD OPERATING PROCEDURES FOR OPERATIONAL CONTRACT SUPPORT INTEGRATION CELL (OCSIC) (SOP) 23 (1 June 2016) [hereinafter USCENTCOM, OCSIC SOP]. The OCS staff will facilitate OCS-CM oversight during unit Relief in Place (RIP) / Transfer of Authority (TOA) activities, convene OCS-CM working groups, advise the operational command on OCS-CM effectiveness and policies, and coordinate with contracting activities. Moreover, although not an exhaustive list, the J-1 (Personnel) staff will maintain contractor accountability reporting and morale and welfare activities. The J-2 (Intelligence) staff will conduct threat assessment and screening of contractors. The J-3 (Operations) staff will establish contractor predeployment training requirements, conduct force protection and security

base assessment, and establish the armed private security rules of use of force. The J-4 (Logistics) staff will facilitate the government furnished life support (GFLS) requirements. The J-5 (Plans) staff will continue to integrate OCS-CM into the overall planning effort. The Surgeon’s office will ensure medical support for contractors. The judge advocate’s role is discussed below. *Id.*

⁵⁵ JOINT PUB. 4-10, *supra* note 9, at V-24. *See also*, U.S. DEP’T OF DEF., INSTR. 4161.02, Accountability and Management of Government Contract Property (27 Apr. 2012) (establishing DoD policy for the accountability and management of government contract property in the custody of contractors).

⁵⁶ *Id.* at V-26.

⁵⁷ *Id.* at V-28. “For example, in Operation Iraqi Freedom, contractors in support of USG departments and agencies, IGOs, and NGOs could be found throughout the operational area to include significant use of contracted security forces.” *Id.*

⁵⁸ The Challenges Facing the Department of Defense: Hearing Before the Subcomm. on Armed Services, 111th Cong. 44 (2009) (statement of the Hon. Robert M. Gates, The Secretary of Defense).

⁵⁹ DFARS 252.225-7040(g) (Sep. 2016).

(1) The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system, to enter and maintain the data for all CAAF and, as designated by USD(AT&L) or the Combatant Commander, non-CAAF supporting U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause.

(2) The Contractor shall enter the required information about their contractor personnel prior to deployment and shall continue to use the SPOT web-based system at <https://spot.altess.army.mil/privacy.aspx> to maintain accurate, up-to-date information throughout the deployment for all Contractor personnel. Changes to status of individual Contractor personnel relating to their in-theater arrival date and their duty location, to include closing out the deployment with their proper status (e.g., mission complete, killed, wounded) shall be annotated within the SPOT database in accordance

SPOT-ES includes SPOT, the Joint Asset Movement Management System (JAMMS), and the Total Operational Picture Support System (TOPSS), “SPOT is web-based [and] shows the contracts and contractors, costs, the type of contractor (third-country national, local national, and U.S. citizen), kind of work they do, and availability of government-furnished services.”⁶⁰ “JAMMS captures movement and location information about operating forces, government, and contractors [by scanning personnel identity credentials, such as the Common Access Card (CAC), Defense Biometric Identification System (DBIDS) cards, and passports] through data collection points established in specified operational theaters [and uploads to SPOT daily].”⁶¹ TOPSS is the reporting and analysis component of SPOT-ES and provides tailorable graphs, reports, and analysis of the contractor footprint in an operational area for the OCSIC and commands.⁶²

D. OCS Integration Cell

The OCS Integration Cell (OCSIC) is a multi-disciplinary team whose primary purpose is to provide the full spectrum of effective and efficient planning, coordination, and integration of the three OCS functions across all joint,

with the timelines established in the SPOT business rules.

Id.

⁶⁰ OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is SPOT-ES?, http://www.acq.osd.mil/log/PS/.spot.html/SPOT-ES_Info_Sheet-final.pdf.

⁶¹ OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is JAMMS?, http://www.acq.osd.mil/log/PS/.spot.html/JAMMS_Info_Sheet-final.pdf.

⁶² OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is TOPSS?, http://www.acq.osd.mil/log/PS/.spot.html/TOPSS_Info_Sheet-final.pdf.

⁶³ “The OCSIC is the link between the command staff, requiring activities, finance, contracting, and in some instances, Host Nation Support to successfully meet the Commander’s intent for contracted support.” LTC Cora, OCS Overview, *supra* note 40, at slide 7. The OCSIC integrates, it does not lead, all OCS planning and management actions. The OCSIC should be made up of 5-10 personnel at the GCC, JFC, or component level with a mixture of specially trained personnel with operational-level logistics and contingency contracting experience. In practice, the OCSIC falls within the J-4 (Logistics) staff and include an O-6 Chief, an O-5 Deputy, and three O-4s with an Engineering Officer, a Logistical Officer, and a Contracting Officer (without a warrant so he will not be tasked outside of the OCSIC). *Id.* at 8.

⁶⁴ JOINT PUB. 4-10, *supra* note 9, at I-2, D-2.

⁶⁵ Total Force Policy, the QDR, and other Defense and Operational Planning: Why Does Planning for Contractors Continue to Lag?: Hearing Before the H. Comm. on Wartime Contracting, 111th Cong. 8 (2010), (statement of LTG Kathleen M. Gainey, Director of Logistics, Joint Chiefs of Staff) (stating “We will increase our focus on planning procedures that not only deliver supplies and services to the war fighters in a responsible and cost-effective manner, but leverage the economic benefit of DoD spending to achieve national strategic and counter-insurgency objectives.”). *Id.* at 10.

personal, and special staffs, service components, combat support agencies, and the designated lead theater support contracting activity in the operational area.⁶³ “[A]ll geographic CCMDs [Combatant Commands] and USSOCOM [U.S. Special Operations Command] have permanent OCSICs of various sizes and configurations . . . [s]ubordinate joint force command OCSICs fluctuate in size and skill sets based on the phase of the operation . . .”⁶⁴ According to the Director of Logistics for the Joint Chiefs of Staff, “this [embedding OCS planners into the Combatant Command staff] initiative has probably had the greatest impact on improving COCOMs’ ability to plan for OCS.”⁶⁵

The OCSIC is responsible for the requirements review board validation process but operates across all three OCS functions.⁶⁶ The most important benefit that the OCSIC brings to the GCC and JFC is that it assists the command staff in developing its requirements⁶⁷ during the Contract Support Integration function. It also identifies strategic sourcing opportunities for emerging requirements through their coordination with the JCSB during the Contract Support function,⁶⁸ with the ultimate goal of common-user logistics (CUL) for appropriate services and supplies.⁶⁹

⁶⁶ The OCSIC conducts the following common tasks across the three OCS functions: leading the OCS planning and integration effort across primary and special staffs; providing OCS-related advice to commander and staff; collecting, analyzing, and sharing analysis of OCS aspects of the operational environment information; establishing and maintaining the OCS common operating picture (COP); establishing and running OCS-related boards working groups; developing and maintaining OCS policy and other operational guidance documents, like theater business clearance implementing guidance (TBC); reviewing all orders, policies, etc., for OCS equities and impact, ensuring JFC-directed, OCS-related policies and guidance are properly executed; and tracking and working any major contract management issues. JOINT PUB. 4-10 *supra* note 9, Figure D-2, D-4 and LTC Cora, OCS Overview, *supra* note 40, at 11.

⁶⁷ The OCSIC helps the command and staff “identify and develop their operational requirements timely and accurately as part of the staff’s operational mission planning.” *Id.* at 9.

⁶⁸ The OCSIC helps the command and staff “identify common requirements that can be consolidated across the area of operations and then assigns a single service contracting activity to contract for those requirements;” decreasing lead-times for sourcing requirements, lessening administrative overhead support and costs, expedites requirements fulfillment, lowers costs through economies of scale, and eliminates contract duplication, i.e. “contracting fratricide.” *Id.*

⁶⁹ Joint Chiefs of Staff, Joint Pub. 4-0, Joint Logistics III-13 (16 Oct. 2013).

CCMD and subordinate logistic planners must keep in mind that while CUL [common-user logistics] support can be very efficient, it may not always be the most effective method of support. By its very nature, CUL support will normally take place outside routine support channels, which may lead to reduced responsiveness if not properly planned, coordinated, and executed. CCDRs, along with their subordinate commanders, must review, coordinate, and direct CUL requirements with DLA, functional CCDRs, and Service component commanders to provide an integrated joint logistic system from the strategic to

III. Role of the Judge Advocate within Operational Contract Support

Judge advocates are not permanently assigned to OCSICs.⁷⁰ Consequently, the requiring authority's servicing legal office is responsible for supporting OCSICs on a non-dedicated basis, like all other staff sections. If an OCSIC receives a dedicated legal advisor, however, that legal advisor will be under the technical oversight of the servicing legal office of the command where the OCSIC resides.⁷¹

There is limited published information specifically detailing how judge advocates support all three OCS functions.⁷² According to the current doctrine, that legal support includes:

“. . . review[ing] contract support requirements for legal sufficiency. These legal reviews encompass funding sources and constraints, contracting methods, and associated issues. They also include operational and jurisdictional issues concerning HN [host nation] agreements, security agreements, and other contractor personnel-related issues. Legal reviews should also address any statutory and regulatory issues as well as any other pertinent issues (e.g., appropriateness of armed PSC [private security contractor] support) that may not

tactical levels. All parties must ensure that the advantages and disadvantages of each CUL-related COA are properly considered; however, the GCC has overall responsibility for deciding the amount and type of CUL support for a particular joint operation.

Id.

⁷⁰ Lieutenant Colonel Jose A. Cora, Introduction to Operational Contract Support (OCS) and OCS Integration Cells (OCSICs), at 15 (28 Feb. 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter LTC Cora, OCSIC Introduction].

⁷¹ LTC Cora Interview, *supra* note 23.

⁷² See also Joint Chiefs Of Staff, Joint Pub. 1-04, Legal Support to Military Operations (2 Aug. 2016) [hereinafter Joint Pub. 1-04].

[The Joint Force Staff Judge Advocate will] ensure that all joint force commander plans and policies are in compliance with US law, international law, local law, status-of-forces agreements, and Department of Defense policy as they relate to the use of contracted, vice military, support. Specific concerns are legal status of US and third country national contractor personnel hired outside of the operational area; force protection / security measures; and, arming contractor personnel (includes arming for self-defense and for security support). See Department of Defense Instruction 3020.41.

Id. at I-14.

⁷³ JOINT PUB. 4-10, *supra* note 9, at III-19.

⁷⁴ For additional service specific OCS guidance see AR 715-9, *supra* note 52.; U.S. Dep't of Air Force, Instr. 64-102, Contracting: Operational

have a statutory or regulatory basis but do reflect appropriate judgment and analysis for the best decision.”⁷³

Given this doctrinal explanation, it would appear that requiring activity legal support to OCS begins and ends at requirements validation. However, the following roles of the judge advocate are inferred from the available joint and service doctrine and unpublished guidance.⁷⁴

A. Role of the Judge Advocate in Contract Support Integration

During the OCS-CSI planning process, the supporting judge advocate helps the staff and the OCSIC prepare Annex W, *Operational Contract Support*, and reviews the entire operations order to ensure it is consistent with applicable host nation, international, and U.S. law, regulation, and policy.⁷⁵ Additionally, the judge advocate helps the command evaluate the fiscal law implications to include those potentially unique to contingency operations. For example, one OCS legal practitioner⁷⁶ has considered whether the lead time exception to the bona fide needs (BFN) rule applies to services;⁷⁷ whether the Title 10 United States Code section 2410a severable services exception applies to ACSAs as it does to interagency support agreements;⁷⁸ and when a unit has a BFN when planning for future operations.⁷⁹

Contracting Program (9 Oct 2014).

⁷⁵ JOINT PUB. 1-04, *supra* note 72, at I-14. For more guidance on how the judge advocate generally supports the military planning process, see Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW, Sept. 2014, at 5.

⁷⁶ LTC Cora, OCSIC Introduction, *supra* note 70, at 15.

⁷⁷ U.S. Gov't Accountability Off., B-309530, National Labor Relations Board - Funding of Subscription Contracts 1 (2007).

The National Labor Relations Board (NLRB) did not violate the bona fide needs rule when, in September 2006, it obligated fiscal year (FY) 2006 funds for five Web site database subscription renewals that it needed to have in place on October 1, 2006, the first day of FY 2007. Even though delivery of the renewed subscriptions would occur entirely in FY 2007, to ensure continued receipt of the subscriptions, NLRB reasonably determined that the renewal orders needed to be placed in FY 2006, before the expiration of the existing subscriptions on September 30, 2006.

Id.

⁷⁸ U.S. GOV'T ACCOUNTABILITY OFF., B-323940, U.S. ARMY EUROPE - OBLIGATION OF FUNDS FOR AN INTERAGENCY AGREEMENT FOR SEVERABLE SERVICES 1 (2005) (finding agencies may rely on 10 U.S.C. § 2410a to enter into interagency agreements (ISA) because an ISA is akin to a contract, and the obligational consequences of an interagency agreement entered into under [an agency's] revolving fund authority are the same as if it were a contract.”) *Id.*

⁷⁹ U.S. GOV'T ACCOUNTABILITY OFF., B-324781, DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND - USE OF APPROPRIATED FUNDS FOR BOTTLED WATER 4 (2013) (finding an agency can use appropriated funds

During the Contract Support Integration execution process, the supporting judge advocate helps the requiring activity and OCSIC identify, develop, and articulate their contract requirements.⁸⁰ As part of this support, the judge advocate conducts a fiscal law review of all pertinent documents and ensures that any requested contract support does not constitute an inherently governmental function⁸¹ or a personal service contract.⁸²

In addition, the judge advocate receives the requirements packet from the OCSIC before the requirements review board through cASM, generates requests for information if needed, provides legal advice on issues such as arming contractors or private security contract support,⁸³ serves as a non-voting member on the requirements review board,⁸⁴ and actively engages and asks questions during the requirements review board on the validity of the requested requirement.⁸⁵ If the command has streamlined the RRB validation process, then the requirements should only require one legal review by the serving judge advocate at the level of the approval/validation authority.⁸⁶

B. Role of the Judge Advocate in Contract Support

As part of the Contract Support function, there is a judge advocate advising the operational command and the OCSIC

“to provide a work site that satisfies such basic fundamental needs as potable drinking water, clean air, and sufficient light” . . . “in response to legitimately anticipated dangers and exigencies.” *Id.*

⁸⁰ See USCENTCOM, OCSIC SOP, *supra* note 54, Appendix B and *infra* Appendix B for an example of a well-defined requirements template established by the USCENTCOM, OCSIC SOP. This template can serve as an example for other OCSICs to streamline the requirements development and validation process while addressing many of the fiscal law issues that judge advocates evaluate as part of the legal review process.

⁸¹ See FAR subpart 7.5, Inherently Governmental Functions, for a list of examples of functions considered to be inherently governmental functions. *See also* U.S. DEP’T OF DEF., INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX (12 Apr. 2010) [hereinafter DODI 1100.22] (establishing DoD policy for determining the appropriate mix of military, DoD civilian, and private sector support.).

⁸² “A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel . . . Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.” FAR 37.104(a), Personal services contract.

⁸³ *See* U.S. DEP’T OF DEF., INSTR. 3025.21, PRIVATE SECURITY CONTRACTORS (PSCs) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES (22 July 1999) (C1, 1 Aug. 2009) (establishing DoD policy for the selection, accountability, training, and arming private security contractors during contingency operations, humanitarian, or peace operations, or other military operations or exercises).

⁸⁴ USCENTCOM, OCSIC SOP, *supra* note 54, at 27.

⁸⁵ Be prepared to hear and appropriately and professionally respond to, “The Top 10 Responses to Legal Objections” from frustrated clients (that do not actually overcome legal objections):

and a contract attorney advising the contracting command and its contracting officers.⁸⁷ The judge advocate servicing the OCSIC advises on funding sources and restrictions, procurement fraud oversight, and acquisition and cross-servicing agreements.”⁸⁸ The contract attorney servicing the contracting officers advises on the interpretation of the Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) contract provisions,⁸⁹ battlefield acquisition, commercial activities, bid protests and contract dispute litigation, and provides opinions on the exercise of sound business practices on how to fulfill the RA’s requirement through one of the various procurement processes.⁹⁰

The judge advocate can also be helpful by advising the OCSIC and J-2 (Intelligence) staff on foreign vendor vetting. Foreign vendor vetting is the process of investigating proposed foreign vendors for their association with terrorist groups or other enemies of the United States, and against other requirements dictated by U.S. legal or policy requirements.⁹¹ As the former commander for the International Security Assistance Force (ISAF) articulated, the importance of vendor vetting cannot be understated:

If, however, we spend large quantities of international contracting funds quickly and with insufficient oversight, it is likely that some of

(1) We’ve always done it this way; (2) You don’t understand how important this is; (3) This is one of the boss’s priorities; (4) You didn’t have an issue with this last time; (5) Nobody else [no previous audits] had an issue with this; (6) It’s too (late/hard) to make any changes now; (7) I talked to (3rd party) and (he/she) agrees with me; (8) I (non-lawyer) disagree with your legal interpretation; (9) We have an approved exception (but it isn’t documented); and (10) What do I have to wordsmith to get this past you?

Courtesy of the U.S. Army TRADOC Off. of the Staff Judge Advocate.

⁸⁶ USCENTCOM, OCSIC SOP, *supra* note 54, at 13. *See also* COMBINED JOINT TASK FORCE-OPERATION INHERENT RESOLVE (CJTF-OIR) IRAQ TRAIN AND EQUIP FUND (ITEF) STANDARD OPERATING PROCEDURE (SOP) (20 June 2016) [hereinafter CJTF-OIR ITEF SOP] (identifying the role for the judge advocate as serving as a non-voting member of the ITEF requirements validation board and providing a legal review mostly limited to scribing the phrase: “No Legal Objection (NLO)” or “Legally Objectionable”). *Id.* at 10.

⁸⁷ LTC Cora, OCS Overview, *supra* note 40, at 14.

⁸⁸ JOINT PUB. 1-04, *supra* note 72, at 1-14.

⁸⁹ *Id.* at II-5.

⁹⁰ FAR 1.603-2, 15.303(b)(1) (2016).

⁹¹ “All partner forces, prior to receiving training or equipment, must be vetted to ensure the units have not committed gross violations of human rights (GVHR) IAW Department of Defense Leahy Law [10 U.S.C § 2249e] and meet additional vetting requirements mandated by section 1236 of the NDAA for FY15, as amended by section 1223 of the NDAA for FY16.” CJTF-OIR ITEF SOP, *supra* note 86, at 2.

those funds will unintentionally fuel corruption, finance insurgent organizations, strengthen criminal patronage networks, and undermine our efforts in Afghanistan.⁹²

This concern led to enactment of the statutory prohibition against contracting with individual groups “actively opposing United States or coalition forces involved in contingency operations.”⁹³ In addition to advising on the prohibition against contracting with the enemy, the judge advocate can be helpful by advising the staff on the prohibitions against contracting with individuals subject to financial sanctions⁹⁴ and individuals or entities subject to export control restrictions.⁹⁵

⁹² Memorandum from Commander, Int’l Sec. Assistance Force, subject: COMISAF’s Counterinsurgency (COIN) Contracting Guidance (8 Sept. 2010), available at <http://graphics8.nytimes.com/packages/pdf/PETRAEUSGUIDELINES.pdf>. In response to this concern, the ISAF commander established Task Force 2010 in August 2010 to “reduce corruption and neutralize criminal patronage networks” by analyzing the “risk of contracting funds going to hostile groups.” Moshe Schwartz & Joyprada Swain, Cong. Research Serv., R40764, Dep’t. of Def. Contractors in Afghanistan and Iraq: Background and Analysis, 12-13 (May 13, 2011), <http://fas.org/sgp/crs/natsec/R40764.pdf>.

⁹³ The National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 841-843, 128 Stat. 3450-3457 (2014).

⁹⁴ JOINT PUB. 4-10, *supra* note 9, at III-22.

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. OFAC maintains the Specially Designated Nationals (SDN) List and Blocked Persons List (BPL) which should be consulted prior to the execution of contract support in order to limit the risk of conducting business with individuals and entities subject to US Government sanctions . . . List checking alone is insufficient to meet the due diligence requirements due to the fact that OFAC traditionally only designates umbrella organizations.

Id. See also the SDN and BPL list, <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.

⁹⁵ JOINT PUB. 4-10, *supra* note 9, at III-22.

The Bureau of Industry and Security in the Department of Commerce issues specific guidance to mitigate the risk of conducting business with individuals and entities subject to export regulations. Specifically, the Bureau of Industry and Security recommends that in the event a company, entity, or person on one of the maintained lists (Denied Persons List, Entity List, Unverified List, and Consolidated Screening List) appears to match a potential party in an export transaction, additional due diligence is required before proceeding.

Id. See also the consolidated interagency, http://2016.export.gov/ecr/eg_main_023148.asp.

⁹⁶ AR 715-9, *supra* note 74, para. 4-2.b.

C. Role of the Judge Advocate in Contract Management

During the Contract Management process, the supporting judge advocate will advise the OCSIC and command on the implications of host nation laws,⁹⁶ the applicability of the Uniform Code of Military Justice⁹⁷ and the Military Extraterritorial Jurisdiction Act,⁹⁸ to contractors, and the commander’s adverse administrative authority over contractors.⁹⁹ Additionally, judge advocates can play a critical role in advising the staff on procurement fraud.¹⁰⁰ In addition, there is value with having the judge advocate assist the command Contracting Officer Representative (COR) with the administration and oversight of the contract on issues like unauthorized commitments, inspection and acceptance, and claims.¹⁰¹

Contractors authorized to accompany the force are subject to all host nation laws while deployed, unless otherwise excluded from host nation jurisdiction by the SOFAs or other security agreements. The host nation may retain jurisdiction for violation of their laws or relinquish jurisdiction to the United States. Commanders will notify the Department of State (through the designated ARFOR or Joint Forces Command point of contact) of any alleged CAAF-related host nation law violations or apprehensions by host nation authorities.

Id.

⁹⁷ “Contractors authorized to accompany the force are subject to Uniform Code of Military Justice jurisdiction when deployed to a contingency area outside the United States and territories. (See AR 27-10 for guidance on commander and supervisor responsibilities in addressing alleged misconduct of civilians accompanying the force.)” *Id.* para. 4-2.c.

⁹⁸ “All contractor personnel in support of an Army contract are subject to Federal criminal jurisdiction under 18 USC 3261 while deployed to a contingency area outside the United States and its territories.” *Id.* para. 4-d.

⁹⁹ AR 715-9, *supra* note 74, § 4-2.e.

Commanders may respond to incidents, investigate, restore safety and order, and apprehend and detain contractors for violations of the law. Area and base commanders may also restrict or revoke CAAF and non-CAAF access to Army facilities or installations for disciplinary infractions. All such actions will be immediately coordinated with the supporting Judge Advocate and the commander must inform the appropriate contracting authority of these access restrictions as soon as practical, preferably prior to taking such action.

Id.

¹⁰⁰ Procurement fraud schemes involve: product substitution, defective pricing, cost mischarging, price fixing, fabrication of records, bribes, gratuities, and kick-backs (common in deployed environments), and U.S. government employee collusion and fraud. ARCENT OCS SOP, *supra* note 10, at 21. For a list of DoD procurement fraud cases investigated and prosecuted by the U.S. government, see U.S. DEP’T OF JUSTICE, PROCUREMENT FRAUD, <https://www.justice.gov/criminal-fraud/procurement-fraud> (last visited Feb. 2, 2017).

¹⁰¹ Contracting Officer Representatives (COR), also referred to as a Contracting Officer’s Technical Representative (COTR) or Quality Assurance Representative (QAR), are authorized by Contracting Officers by a letter of appointment to perform specific technical or administrative

D. Role of the Judge Advocate Supporting the OCS Integration Cell

In addition to providing the OCSIC with the above legal advice and counsel, the judge advocate also advises the OCSIC by providing ethics advice on issues such as interacting with contractors¹⁰² and identifying and addressing financial conflicts of interest.¹⁰³ Moreover, the judge advocate can provide advice on staffing decisions for the OCSIC. For example, as mentioned above, the OCSIC's contracting officer should not have an active contracting warrant to ensure that the contracting officer is not tasked with contract support missions outside the OCSIC.¹⁰⁴ In addition, the GCC or JFC may consider contracting for OCSIC service support as long as the OCSIC Chief is staffed by a U.S. government employee.¹⁰⁵

One of the ongoing challenges in OCS is that the current validation process is notoriously onerous.¹⁰⁶ Consequently, OCSICs are spending their time and energy on the redundant validation process but are not properly "focusing on requirements development within the B2C2WGs or planning for strategic sourcing solutions."¹⁰⁷ Not only does this redundancy affect the OCSIC but it also has an impact on the amount of legal reviews the legal office produces for each procurement.¹⁰⁸ One possible solution is for the judge advocates among the subordinate commands and OCSICs to arrive at a consensus that the legal review of record comes from the servicing legal office for the final validation authority. Issues like this, though not legal, can benefit from proactive steps by judge advocates to ensure the effective and efficient functioning of the OCSIC.

IV. Conclusion

As discussed above, there is little published doctrine establishing how judge advocates specifically support their

functions relating to the contract. CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CONTRACT ATTORNEYS DESKBOOK 1-2 – 1-3, 3-7 – 3-14, 32A-24 – 32A-29 (2016).

¹⁰² See *infra* Appendix C, Top 10 Rules for Engaging with Government Contractors.

¹⁰³ See, e.g., U.S. Dep't of Def. Standards of Conduct Office, Determining Which Positions Should File a Confidential Financial Disclosure Report: A Worksheet, http://www.dod.mil/dodgc/defense_ethics/resource_library/oge450_filing_determination_worksheet.pdf.

¹⁰⁴ "Also of importance, contracting officers with duty in the OCSIC will not have active contracting warrants. These contracting officers will serve as staff officers focusing on contracting support-related matters, and are not awarding or administering contracts." JOINT PUB. 4-10, *supra* note 9, Appendix D-2.

¹⁰⁵ "If contractor augmentation [to the OCSIC] is contemplated, ensure the contract support requirements package clearly states the need for non-disclosure and non-competition agreements as part of the terms and conditions of the contract. In no case should the OCSIC chief position itself be occupied by a non-government employee." JOINT PUB. 4-10, *supra* note

command and its OCSIC throughout the OCS process. This may lead some to depict the role of the judge advocate as either serving as a *No Legal Objection* rubber stamp or a *Legally Objectionable* brick wall in OCS. However, in between these two extremes, the judge advocate has a meaningful role.

Using the frame of reference and compilation of resources provided by this paper, judge advocates add additional value throughout the OCS process. For example, judge advocates can ensure that requiring activities have well-defined requirements, serve as a business counselor to the command, can help identify and report procurement fraud. Moreover, they can advocate that economies of scale are considered through strategic resourcing. In doing so, judge advocates assist their command in meeting its operational requirements while ensuring that the U.S. military is a good steward of U.S. taxpayer money. While helping facilitate timely acquisitions of necessary goods and services.

9, Appendix D-2. See also DODI 1100.22, *supra* note 81.

¹⁰⁶ Dorman, *supra* note 15, at 57.

[C]ommanders should not blindly accept lengthy and bureaucratic staffing procedures that interfere with effective decisions regarding OCS. Parallel planning, running estimates, staff assistance visits, and web-based information sharing will improve knowledge management across the force while enabling subordinate commanders to acquire the necessary decisions, funding, and contract support to accomplish their missions.

Id.

¹⁰⁷ LTC Cora, OCS Overview, *supra* note 40, at 10.

¹⁰⁸ "... Although legal reviews have a valuable part of the requirements validation process, they may be a time intensive staff product. A high volume of legal review requests may slow down a command seeking to forward requirements to the higher approval authority as expeditiously as possible." CJTF-OIR, ADMIN. / CONTRACT & FISCAL LAW, AFTER ACTION REPORT (2016) (unpublished document) (on file with author).

ANNEX W – Operational Contract Support

HEADQUARTERS, XX COMMAND

ADDRESS

XX XXX 20XX

ANNEX W TO XX COMMAND OPLAN/OPORD XXXX-XX

OPERATIONAL CONTRACT SUPPORT

(U) References: List all applicable references essential to this annex. *[List all key OCS related regulations, policies, instructions, messages to include higher level Annex Ws when applicable. JFC specific OCS references can be found via the Defense Procurement and Acquisition Policy Area of Responsibility portal available via the following link http://www.acq.osd.mil/dpap/pacc/cc/areas_of_responsibility.html. Service components should include applicable Service and/or command specific references.]*

1. (U) Situation:

a. (U) Enemy. Provide threat level assessment as it relates to OCS. Also, see Annex B (Intelligence). *[This section should include a short assessment of the estimated impact of the potential threats to utilizing contract support in the operation to include such information as threats from the use of local national employees to provide on-base services, threats that would require armed security to protect contracted services, etc.]*

b. (U) Friendly. List major contract support related commands and agencies involved in this operation, but not under the C2 this command; include their key OCS related tasks. *[Include organizations such as USTRANSCOM, DLA, DCMA, DCAA and other governmental agencies impacting or influencing OCS actions such as American Embassies and USAID operating in the projected operational area. Include basic information on the OCS related authorities, capabilities of each organization]*

c. (U) Commercial Business Environment. Provide a brief description of the general business environment and estimated impact on the ability to utilize commercial support in the designated operational area. *[Based on a coordinated GCC, Service component, construction agent and CSA OCS preparation of the operational environment efforts, this paragraph should include information on such things as existing DOD contracts, estimated local and in-transit commercial capabilities, local electronic banking capabilities, etc.]*

d. (U) Assumptions. State valid and necessary assumptions. *[Briefly describe key OCS related planning assumptions based on threat assessment, commercial business environment, host nation/international and multinational considerations and any established OCS related facts.]*

e. (U) Limiting Factors. State all key limited factors to include specific constraints and restraints. *[Based on threat assessment, commercial business environment research and any established OCS related facts and assumptions, list specific OCS related limiting factors such as status of forces agreements (SOFAs) restrictions (e.g. a SOFA that limits the number of US or third country national contractors allowed in country), general business environment (e.g. lack of established electronic banking systems), etc.]*

2. (U) Mission. See base plan.

3. (U) Execution

a. (U) Concept of Contract Support Operations. Provide a broad concept of OCS integration and oversight for this operation. *[This sub-paragraph includes a general overview of how contracting supports the operation and articulates the commander's priorities, intent and specific OCS command guidance by phase of operation (e.g. ensure maximum use of local national commercial sources and employees in phase IV) by type of contract support or other logical manner. This section should also address the overall contract support arrangements (e.g., support to own Services, lead Service or Joint Theater Support Contracting Command (JTSCC), contract support related restrictions (by phase, location, function, guidance on use of/transition from Service CAP support, etc. Include description how OCS achieves or helps to achieve desired operational effects.]*

(1) (U) Guidance on Utilization of Types of Contracted Support.

(a) (U) Systems Support Contracts. Provide any specific guidance on use of system support contracts in this operation. *[This sub-paragraph(s) addresses any command guidance/restrictions on the use of Service weapon systems support contracts. Use caution in placing any restrictions on the use of system support contracts since most of these contract are critically important in maintaining weapon and support system readiness.]*

(b) (U) External Support Contracts. Provide any specific guidance on use of external support contracts in this operation. *[This sub-paragraph addresses general guidance on the use of major external support contracts (e.g. DLA, USTRANSCOM, etc.) and Service Civil Augmentation Programs (e.g. Army Logistics Civil Augmentation Program; Air Force Capabilities Program [AFCAP]; and Navy's Global Contingency Construction Contract [GCCC] and Global Contingency Services Contract [GCSC]). This section will also include commander's guidance on the transition of Civil Augmentation Program support to theater support contracting by phase of operation where appropriate. The GCC and/or sub-JFC Annex W may refer to the appropriate Service component Annex Ws for a more detailed description of planned Civil Augmentation Program support (e.g., Army Annex W may have LOGCAP plan).]*

(c) (U) Theater Support Contracts. Provide any specific guidance on use of theater support contracts in this operation. *[This sub-paragraph addresses the concept of theater support contracting in the joint operational area by phase of the operation. The GCC and/or sub-JFC Annex W should refer to related sections of the Annex W to include theater support contracting command tasks and Appendix 1 Operational Contract Support Capabilities.]*

(2) (U) Contingency Contracting Administrative Services (CCAS). State how CCAS will be performed. *(Provides direction on CCAS at the GCC level. Normal options include Services providing their own CCAS capability or CCAS being provided by DCMA per theater business clearance guidance. If CCAS is going to be performed by DCMA, this paragraph should refer to tasks to subordinate units and other related guidance (i.e. theater business clearance rules).*

(b). (U) Tasks To Major Subordinate Units. List major OCS related tasks for each Service component, JTSCC (if formed), Joint Contingency Acquisition Office (JCASO) mobile support team (MST)(if deployed) and CSAs to include identification of the lead OCS manager/integrator staff or unit and participation in boards, bureaus, centers, cells (B2C2W) working groups. *[This sub-paragraph should include OCS related guidance to major subordinate commands, JTSCC (if formed) and CSAs not contained in other sections of the Annex W. The GCC plan should include the requirement for Service components and CSAs to follow GCC OCS related guidance as found in the DPAP AOR portal (web linked in reference section above) and other OCS guidance (e.g. theater business clearance rules) as applicable. Service components and CSAs will be required to conduct OCS planning in support of the GCC and may be required to submit draft CSIPs to include appropriate Tabs and Appendices. The GCC level plan must include OCS integration responsibilities such as BC2W responsibilities not already captured in GCC standard procedures and/or policies as well as lead OCS advisory responsibilities. Service component and CSA plans should reflect similar OCS integration and advisory responsibilities applicable to their subordinate organizations. Finally, instructions to the lead Service responsible for theater support contracting (if appointed) or JTSCC (if formed) must include direction to publish mission specific theater acquisition instruction (e.g. standard clauses, contract negotiation policy, pricing procedures, etc.) and responsibility to coordinate theater business clearance guidance with OSD (if and when published).*

(c). (U) Initial Guidance by Support Function. Identify major support function planned for commercial support sourcing. *[This sub-paragraph along with the Annex W Tab A, Summary of Contractor Support Estimate, outlines anticipated commercial support sourcing by joint capability area and/or commodity. The information in the GCC and/or sub-JFC Annex W should be linked to the appropriate Service component or CSA plan as well as to Tab A to Appendix 3 Summary of Contractor Support Estimate which will contain more detailed planning guidance. Specific guidance found in each section below is based on GCC directed lead Service directives/CSA responsibilities, JFC ANNEX W Concept of the Operations guidance, applicable functional supportability analysis data, commercial business environment analysis factors, risk assessment analysis and other operational factors. Each individual section below should contain Service component command guidance on suitability for*

contracted support to include specific restrictions and contract venue guidance (e.g. external support vice theater support contract type decision) by location and phase of operations as applicable and as directed by the GCC. The requiring activities (e.g., the Service components) will be responsible to develop contract statement of requirements (CSOR) that includes a description, location, timing, and estimated amount) for the designated supply or service. The CSOR template and instructions can be found at TAB C to APPENDIX F to ENCLOSURE F. The outline below provides specific guidance on the types of services that should be addressed in this paragraph.

1. Non-Logistic Support

- (a) Interpreters/Linguists
- (b) Intel
- (c) Communications
- (d) Security
- (e) Other

2. Logistics

- (a) Commodities
 - (1) Bottled Water
 - (2) Class I
 - (3) Class II
 - (4) Class III (B/P)
 - (5) Class IV
 - (6) Class VIII
 - (7) Class IX
- (b) Base Life Support (non-facility related)
 - (1) Tactical Water Purification
 - (2) Dining Facility (DFAC) Support
 - (3) Class I, II, III(P), IX Supply Support Services
 - (4) Morale, Welfare and Recreation
- (c) Common Equipment Maintenance
- (d) Construction/General Engineering/Facility Maintenance Support
- (e) Distribution/Transportation
- (f) Health Readiness
- (g) Materiel Disposition Services
- (h) Other.

d. (U) Coordinating Instructions. Provide any mission specific board, bureau, center, cell, working group guidance or other coordinating instructions or reports as necessary.

4. (U) Administration and Logistics

a. (U) Funding/Fund Disbursement. Address OCS related funding and fund disbursement arrangements. Also, see Base Plan, Annex E Personnel, Appendix 3 Finance and Disbursing. *[This sub-paragraph should specify who will provide/perform financial management responsibilities (including resource management, comptroller) along with information on who will provide funding for administrative support and operations. Designate who and how deploying funds certification and funds disbursement capabilities will support deploying contracting capabilities.]*

b. (U) Contract/Fiscal Law Support. Specify who is responsible for providing contract law support to facilitate OCS. Also, see Base Plan, Annex E Personnel, Appendix 4 Legal. *[This sub-paragraph should describe specific contract and fiscal law support arrangements.]*

5. (U) Command, Control, and Contracting Authority

a. (U) Command and Control. Address the OCS C2 organizational construct. *[The GCC level plan or order must designate specific OCS C2 relationships and how they fit into the overall JFC C2 arrangements. The GCC level plan must specifically address any lead Service or JTSCC C2 relationships over attached subordinate contracting organizations and if planned, how the OCS C2 organizational construct may change or evolve.]*

b. (U) Contracting Authority. Address theater support head of contracting activity (HCA) authority to include linkages to in-theater contracting organization(s) and, if applicable, theater business clearance authorities. *[This information should be addressed in the GCC level plan and be coordinated closely with the Service components and when necessary, DPAP. If determined necessary, coordinate with DPAP to initiate executive agent authority directives.]*

Annex W Appendixes and Associated Tabs:

Appendix 1 Operational Contract Support Capabilities Summary. Identifies key contracting, separate CCAS organization (if applicable) and contract integration organizations by phase and location. *[This appendix should capture the deployment sequence and primary location of key OCS related elements include such organizations. For example, GCC and/or sub-JFC Annex W should capture organizations such as the JCASO-MST, Army Contracting Support Brigades, USAF contingency Contracting unit HQs, etc. Service component Annex Ws should provide additional detail such as location and support relationships of contingency contracting teams, LOGCAP support officers, etc.]*

Appendix 2 Contractor Management Plan (CMP). Identifies theater specific contractor management requirements to include key staff and subordinate command responsibilities. *[The CMP should cover contractors authorized to Accompany the Force (CAAF) related deployment preparation, in-theater management (to include legal jurisdiction and discipline matters) and government furnished support coordination and support requirements. The CMP also must address certain contractor management requirements for non-CAAF contracted employees who have an area of performance on a US military facility or within the vicinity of US forces. It also can be used (when applicable) to address unique contractor management aspects of both CAAF and non-CAAF private security personnel. This CMP planning information must be closely coordinated with the applicable primary and special staff members. More details can be found in TAB H to APPENDIX F to ENCLOSURE F.]*

Appendix 3 Summary of Contractor Support Estimate. Identifies the estimated contracted support requirements by function, location, phase of operation and includes estimated contractors accompanying the force footprint. *[This tab provides data base like presentation of major contracted function guidance found in paragraph 3 c. This information is depicted by JCA, phase of the operation, and location to include estimated CAAF footprint information. The CAAF personnel numbers estimates will be determined using historical data and/or the Contractor Estimate Tool. In the future, these estimates will be tied to standard and non-standard contracted unit type code information.]*

John A. Doe
General (or Admiral), U.S. xxxxx
Commander
OFFICIAL////////

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
PART 1 – BASIC INFORMATION ABOUT THE REQUIREMENT		
2. REQUIRING ACTIVITY OR UNIT:		3. NAME OF REQUIREMENT:
4. BOTTOM LINE UP FRONT (BRIEF DESCRIPTION OF REQUIREMENT AND UNIT OPERATIONAL NEED):		
5. IS THIS A NEW UNIT REQUIREMENT OR IS THIS REQUIREMENT CURRENTLY BEING PERFORMED? <input type="checkbox"/> NEW <input type="checkbox"/> CURRENTLY BEING PERFORMED		6. IF SUPPLY/EQUIPMENT PURCHASE, WHAT IS THE REQUESTED DELIVERY DATE? <input type="checkbox"/> N/A <input type="checkbox"/> DELIVERY DATE: _____
7. FOR CONSTRUCTION; OR FOR SUSTAINMENT, REPAIR AND MAINTENANCE (SRM) OF A FACILITY, WHAT IS THE REQUESTED GROUND-BREAKING START DATE AND DELIVERY DATE? <input type="checkbox"/> N/A <input type="checkbox"/> REQUESTED GROUND-BREAKING DATE: _____ <input type="checkbox"/> REQUESTED COMPLETION DATE: _____		8. FOR SERVICES, WHAT IS THE REQUESTED PERIOD OF PERFORMANCE (POP)? <input type="checkbox"/> N/A <input type="checkbox"/> START DATE: _____ <input type="checkbox"/> END DATE: _____
9. IDENTIFY THE REQUESTED DELIVERY LOCATION(S):		
PART 2 – ROUGH ORDER OF MAGNITUDE (ROM) COST ESTIMATE		
10. SUPPLY, COMMODITY AND EQUIPMENT COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____		11. SERVICES COSTS (INCLUDE EQUIP. MAINT.): <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____
12. FACILITY CONSTRUCTION, ADDITIONS, AND IMPROVEMENTS; OR REPAIR AND MAINT. COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____		13. SHIPPING COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____
14. RELOCATABLE BUILDING (RLB) COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> RLB COST: _____		15. INSTALLATION AND PREPARATION COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> INSTALLATION COSTS: _____ <input type="checkbox"/> SITE PREPARATION COSTS: _____
16. WARRANTY AND/OR LICENSING COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> LICENSING COSTS: _____ <input type="checkbox"/> WARRANTY COSTS: _____		17. TOTAL ROM ESTIMATED COST: TOTAL COST: _____
PART 3 – WHO IS THIS REQUIREMENT FOR?		
18. IDENTIFY THE SINGLE <i>PRIMARY</i> END USER OR RECEIVER OF THIS REQUIREMENT: <input type="checkbox"/> DOD SERVICE-MEMBERS AND GOV'T CIVILIANS <input type="checkbox"/> NON-DOD USG AGENCY <input type="checkbox"/> DOD CONTRACTOR <input type="checkbox"/> FOREIGN MIL FORCES <input type="checkbox"/> FOREIGN GOV'T <input type="checkbox"/> FOREIGN CIVILIANS/POP <input type="checkbox"/> OTHER		19. IDENTIFY ANY/ALL <i>SECONDARY</i> END USER OR RECEIVER OF THIS REQUIREMENT: <input type="checkbox"/> N/A <input type="checkbox"/> DOD SERVICE-MEMBERS AND GOV'T CIVILIANS <input type="checkbox"/> NON-DOD USG AGENCY <input type="checkbox"/> DOD CONTRACTOR <input type="checkbox"/> FOREIGN MIL FORCES <input type="checkbox"/> FOREIGN GOV'T <input type="checkbox"/> FOREIGN CIVILIANS/POP <input type="checkbox"/> OTHER
20. IF YOU IDENTIFIED REQUIREMENT USERS OR RECEIVERS <i>OTHER THAN THE PRIMARY</i> USER, ESTIMATE THE PERCENTAGE OF USE BY THE PRIMARY USER AND EACH SECONDARY USER (TOTAL 100%): <input type="checkbox"/> N/A		
PART 4 – WHAT IS YOUR REQUIREMENT?		
21. HOW WOULD YOU BEST DESCRIBE YOUR <i>PRIMARY</i> REQUIREMENT? <input type="checkbox"/> SERVICES <input type="checkbox"/> SUPPLIES, COMMODITIES, OR EQUIPMENT <input type="checkbox"/> FACILITY CONSTRUCTION, IMPROVE, OR ADDITIONS <input type="checkbox"/> FACILITY SUSTAIN, REPAIR OR MAINTENANCE (SRM) <input type="checkbox"/> RELOCATABLE BUILDINGS (RLBs)		22. IDENTIFY ANY/ALL <i>SECONDARY</i> OR ADDITIONAL NEEDS WITH THIS REQUIREMENT: <input type="checkbox"/> N/A <input type="checkbox"/> SERVICES <input type="checkbox"/> SUPPLIES, COMMODITIES, OR EQUIPMENT <input type="checkbox"/> FACILITY CONSTRUCTION, IMPROVE, OR ADDITIONS <input type="checkbox"/> FACILITY SUSTAIN, REPAIR OR MAINTENANCE (SRM) <input type="checkbox"/> RELOCATABLE BUILDINGS (RLBs)

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
PART 4 – WHAT IS YOUR REQUIREMENT? (CONT.)		
23. IF YOU IDENTIFIED SECONDARY OR ADDITIONAL REQUIREMENTS OTHER THAN THE PRIMARY REQUIREMENT, DESCRIBE AND ESTIMATE THE PERCENTAGE OF COST OF EACH TYPE OF REQUIREMENT (TOTAL 100%): <input type="checkbox"/> N/A		
PART 4A – SUPPLY, COMMODITY AND EQUIPMENT PURCHASES (INCLUDE IT EQUIPMENT)		
24. IS ANY OF YOUR REQUIREMENT FOR SUPPLIES, COMMODITIES AND/OR EQUIPMENT? <input type="checkbox"/> YES (FILL OUT PART 4A) <input type="checkbox"/> NO (SKIP TO PART 4B)	25. HOW LONG ARE THESE SUPPLIES, COMMODITIES AND EQUIPMENT INTENDED/DESIGNED TO LAST? <input type="checkbox"/> ONE (1) YEAR OR LESS <input type="checkbox"/> MORE THAN ONE (1) YEAR	
26. HOW ARE THESE SUPPLIES OR EQUIPMENT DESIGNED AND INTENDED TO BE USED? <input type="checkbox"/> INDIVIDUAL USE (E.G., PAPER, REPAIR PART, ETC.) <input type="checkbox"/> USED/INSTALLED TOGETHER (E.G., IT SYSTEM)	27. DO THESE SUPPLIES REQUIRE SERVICES SUCH AS INSTALLATION, SHIPPING OR MAINTAIN COSTS? <input type="checkbox"/> N/A <input type="checkbox"/> YES; INSTALLATION COSTS: _____ <input type="checkbox"/> YES; SHIPPING COSTS: _____ <input type="checkbox"/> YES; MAINTENANCE COSTS: _____	
PART 4B – SERVICES (INCLUDING SERVICES INCIDENT TO EQUIPMENT PURCHASES)		
28. IS ANY OF YOUR REQUIREMENT FOR SERVICES? <input type="checkbox"/> YES (FILL OUT PART 4B) <input type="checkbox"/> NO (SKIP TO PART 4C)	29. ARE THESE SERVICES RECURRING IN NATURE OR DO THEY BUILD TO A SINGLE END PRODUCT/RESULT? <input type="checkbox"/> RECURRING (E.G., FACILITY CLEANING) <input type="checkbox"/> END RESULT (E.G., STUDY; REGULATION RE-WRITE)	
30. DOES THE SERVICE REQUIRE THE DOD PURCHASE OR LEASE OF SUPPLIES OR EQUIPMENT? <input type="checkbox"/> N/A <input type="checkbox"/> YES; PURCHASE COST IS: _____ <input type="checkbox"/> YES; LEASE COST IS: _____	31. DOES THE SERVICE REQUIRE THE PURCHASE OF LICENSES? HOW MANY; LICENSE DURATION? <input type="checkbox"/> N/A <input type="checkbox"/> YES; _____ LICENSES (<=1 YEAR), COST: _____ <input type="checkbox"/> YES; _____ LICENSES (>1 YEAR), COST: _____	
PART 4C – FACILITY CONSTRUCTION; OR SUSTAIN, REPAIR AND MAINTENANCE (SRM)		
32. IS ANY OF YOUR REQUIREMENT FOR NEW FACILITY CONSTRUCTION, ADDITIONS, OR IMPROVEMENTS; OR FOR SUSTAINMENT, REPAIR OR MAINTENANCE (SRM)? <input type="checkbox"/> YES (FILL OUT PART 4C) <input type="checkbox"/> NO (SKIP TO PART 4D)	33. REQUESTED GROUND-BREAKING (FOR NEW FACILITIES) OR REQUESTED START DATE (FOR SRM): DATE: _____ 34. IDENTIFY PROJECT LOCATION(S) BELOW:	
35. WHAT TYPE OF PROJECT(S) DO YOU REQUIRE? <input type="checkbox"/> NEW FACILITY CONSTRUCTION <input type="checkbox"/> ADDITION OR IMPROVE EXISTING FACILITY <input type="checkbox"/> SUSTAIN, REPAIR, MAINT. OF EXISTING FACILITY <input type="checkbox"/> LEASE OF FACILITIES <input type="checkbox"/> LAND PURCHASE/LEASE <input type="checkbox"/> OTHER-	36. ESTIMATED COST FOR BLOCK 35 PROJECT TYPES: <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> DESCRIBE OTHER: _____ OTHER COST: _____ TOTAL COST: _____	
37. IF THIS IS NEW CONSTRUCTION(S), DO YOU HAVE A LAND USE AGREEMENT (LUA) OR OPERATIONAL CONTROL MEMO FOR THE LOCATION(S)? <input type="checkbox"/> N/A <input type="checkbox"/> YES – INCLUDED IN THIS JUSTIFICATION PACKET <input type="checkbox"/> NO – THE PROJECT IS ON A PERMANENT U.S. BASE <input type="checkbox"/> NO – NEED ASSISTANCE WITH THOSE DOCUMENTS	38. IF THIS IS NEW CONSTRUCTION, IDENTIFY THE ELECTRICAL SOURCING (E.G., LOCAL POWER GRID, GENERATORS, ETC.) AND OTHER UTILITIES: <input type="checkbox"/> N/A	
39. WILL THIS FACILITY BE "COMPLETE AND USEABLE" BY YOUR UNIT UPON COMPLETION OF THE PROJECT? <input type="checkbox"/> YES <input type="checkbox"/> NO (EXPLAIN WHY NOT IN BLOCK 41)	40. ARE THERE ANY OTHER CONSTRUCTION PROJECTS CURRENTLY ONGOING OR PLANNED THAT ARE RELATED TO THIS PROJECT? <input type="checkbox"/> YES (DESCRIBE THE OTHER PROJECTS IN BLOCK 41) <input type="checkbox"/> NO	

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM	1. VALIDATION AUTHORITY CONTROL #:
PART 4C – FACILITY CONSTRUCTION; OR SUSTAIN, REPAIR AND MAINTENANCE (CONT.)	
41. IF "NO" ON BLOCK 39, EXPLAIN WHY THIS FACILITY WILL NOT BE "COMPLETE AND USEABLE" UPON COMPLETION; IF "YES" ON BLOCK 40 IDENTIFY AND DESCRIBE ANY OTHER CONSTRUCTION PROJECTS CURRENTLY ONGOING OR PLANNED THAT ARE RELATED TO THIS PROJECT: <input type="checkbox"/> N/A	
42. IF THIS CONSTRUCTION PROJECT IS NOT APPROVED, WILL IT NEGATIVELY AFFECT THE "LIFE, HEALTH, AND SAFETY" OF YOUR UNIT PERSONNEL? IF SO PLEASE EXPLAIN BELOW, IN DETAIL: <input type="checkbox"/> N/A	
PART 4D – RELOCATABLE BUILDINGS (RLBs)	
43. DOES YOUR REQUIREMENT INCLUDE PURCHASE OR INSTALLATION OF RELOCATABLE BUILDINGS (RLBs)? <input type="checkbox"/> YES (FILL OUT PART 4D) <input type="checkbox"/> NO (SKIP TO PART 5)	44. ARE THESE RLBs BEING USED FOR, OR IN CONJUNCTION WITH, A CONSTRUCTION PROJECT? <input type="checkbox"/> YES (FILL OUT PART 4C IN ADDITION TO PART 4D) <input type="checkbox"/> NO
45. PLEASE IDENTIFY AND ESTIMATE ALL OF THE RLB COSTS THAT WILL BE REQUIRED FOR THIS RLB PROJECT:	
<input type="checkbox"/> ACTUAL RLBs	<input type="checkbox"/> COST: _____
<input type="checkbox"/> RLB SHIPPING	<input type="checkbox"/> COST: _____
<input type="checkbox"/> FOUNDATION	<input type="checkbox"/> COST: _____
<input type="checkbox"/> ASSEMBLY/DISASSEMBLY	<input type="checkbox"/> COST: _____
<input type="checkbox"/> POST-ASSEMBLY WORK LIKE UTILITY/DRY WALL OR FIRE-SUPPRESSION INSTALLATION	<input type="checkbox"/> COST: _____
<input type="checkbox"/> OTHER-DESCRIBE: _____	<input type="checkbox"/> COST: _____
TOTAL RLB PROJECT COST: _____	
PART 5 – OPERATIONAL NEED JUSTIFICATION	
46. PROVIDE A COMPLETE JUSTIFICATION FOR WHY YOUR UNIT NEEDS THIS REQUIREMENT, AND HOW THE REQUIREMENT WILL SATISFY THE NEED:	
47. EXPLAIN THE OPERATIONAL IMPACT TO YOUR UNIT IF THIS REQUIREMENT IS NOT APPROVED:	

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
48. ADDITIONAL INFORMATION REQUIRED BY THE VALIDATION AUTHORITY:		
PART 6 – SIGNATURES		
49. NAME/TITLE OF RA/UNIT PREPARER:		50. DATE:
51. SIGNATURE OF PREPARER:		
52. NAME/TITLE OF RA/UNIT APPROVER:		53. DATE:
54. SIGNATURE OF RA/UNIT APPROVER:		
GENERAL INSTRUCTIONS		
Follow these guidelines and guidance listed in the MAAWS-A to complete this form.		
<p>Block 1: To be assigned by JRRB Staff Blocks 2-3: Self explanatory Block 4: Be as concise yet descriptive as possible to provide a short summary of the requirement Blocks 5-9: Self explanatory Blocks 10-15: An exact cost is not required as that is determined during the contracting process. However, the Rough Order of Magnitude should be as close as possible to allow for efficient validation and processing. Block 16: If the warranty/license covers multiple years, check to see if the warranty cost is severable and can be paid in one year blocks. Block 17: The total sum of the costs in blocks 10-16. Blocks 18-19: If "Other," please use the space in block 55 to explain your answer, preceded by the continued block number. (i.e. 18:) Block 20: Self explanatory Blocks 21-22: Force Protection items, like T-walls and HESCO barriers, may be considered supplies IAW MAAWS-A, para. 3.69. For RLBs, consider the 20% rule (aka 80/20 Analysis) when indicating the type of project. For more information on the 20% rule, see MAAWS-A, para. 4.36 and http://portal.usfora.oneteam.centcom.smil.mil/sites/JENIG/PJMP/Shared%20Documents/Forms/AllItems.aspx. Blocks 23-25: Self explanatory Block 26: If you are unsure, the space in block 55 to explain your answer, preceded by the continued block number. (i.e. 26:) Block 27-30: Self explanatory Block 31: If the license covers multiple years, check to see if the license cost is severable and can be paid in one year increments. Blocks 32-34: Self explanatory Blocks 35-36: Divide the total Rough Order of Magnitude between each type of project on the lines in block 36 directly in line with the project type from block 35. If "Other," please use the space in block 55 to explain your answer, preceded by the block number (i.e. 18:) Blocks 37-40: Self explanatory Block 41: "Related projects" include repair, maintenance, and construction on the same utility system, infrastructure, or building. Block 42: A true Life, Health, or Safety issue is likely to cause immediate injury, death or catastrophic equipment failure if not mitigated. Lack of time remaining to complete the approval process is generally NOT a Life, Health, or Safety threat. Blocks 43-44: Self explanatory Block 45: A detailed breakdown of RLB expenses is required to complete the 20% rule (aka 80/20) analysis. For more details see MAAWS-A, para. 4.36 and http://portal.usfora.oneteam.centcom.smil.mil/sites/JENIG/PJMP/Shared%20Documents/Forms/AllItems.aspx. Block 46: This section is very important. A detailed description of the need for the requirement and how the current plan will meet the need can expedite the approval process. If you do not have enough space, please use the space in block 55 to continue your answer, preceded by the continued block number. (i.e. 46:) Block 47: Be specific regarding mission impact. If you do not have enough space, please use the space in block 55 to continue your answer, preceded by the continued block number. (i.e. 47:) Block 48: Use this space as required for any additional information requested by the Validation Authority. Blocks 49-54: Self explanatory Blocks 55-56: Use this space as required for any additional information that does not fit within Blocks 2-48.</p>		

Courtesy of the U.S. Army TRADOC Office of the Staff Judge Advocate

Rule 1

Recognize that Contractors Are Competitors - Maintain a Level Playing Field. Be sensitive to whether a meeting, action, or release of information would give a competitive advantage to a contractor. All similarly situated contractors should receive equal treatment. Because of the significant demands on their schedules, Senior Army Leaders may restrict contact with contractors—generally deferring such meetings to their action officers and/or program managers.

Rule 2

Decline to Meet with Contractors Regarding Ongoing Competitions. Decline meetings with competing contractors once a solicitation has been released; instead, refer contractors to the designated contracting officer. Avoid discussing or responding to questions on matters that are being litigated. When in doubt, contact your judge advocate.

Rule 3

Avoid Preferential Treatment or the Appearance of Endorsement. Do not give preferential treatment to any private party. Again, if you elect to meet with one contractor, you should be available to meet with other similarly situated contractors. Also, do not provide VIP visitor treatment to contractor representatives, to include those who may be retired DoD personnel - e.g., no Government vehicle rides from the airport, no all-day escort, no officially-hosted free dining.

Rule 4

Avoid Private Discussions with Contractors. You should avoid private meetings or discussions with contractors regarding its business and relationship with the Army. Make it your practice to have a staff member attend sessions with contractors.

Rule 5

Should You Meet with a Contractor. Set an Agenda. After agreeing to meet with a contractor, have the contractor identify the topic(s) for discussion and whether there are any current contracts, competitions, or active proposals that it has pending with the Army. You may want to have the contracting officer's representative (COR) attend if a particular contract action is involved.

Rule 6

Primary Purpose of a Meeting is to Receive. While it is alright to ask informational and clarifying questions during a meeting, avoid asking contractors to send follow-up information. The meeting should not be the basis for further action, and should not unintentionally solicit formal proposals. Leverage your staff or designated program manager for any follow-up. Use public forums such as Industry Days to "push" information out to contractors on Army needs and requirements. If you are uncertain, contact your judge advocate.

Rule 7

Keep "Inside Information" Inside. Do not release "Inside Information" that is not otherwise available to the public (or relevant community of DoD contractors). Inside Information includes:

- Selective release of advance procurement information, Army requirements, or premature release of contract award decisions;
- Acquisition information, to include: unopened bids, ranking of bids, proposed costs, the Army's estimate of costs, source selection plans, proprietary information (e.g., labor rates), reports by source selection boards, and information marked as source selection sensitive;
- Information not available to the public under the Freedom of Information Act; and,
- Information protected under the Privacy Act, trade secrets, and classified material.

Rule 8

Gifts Limits. Small gifts are occasionally offered in meetings with contractors. Food and refreshments that are not a meal (e.g., coffee and doughnuts) may be accepted. Anything more should be avoided and/or declined. That said, ethics rules allow acceptance of nominal presentation items or items worth less than \$20 (but not more than \$50 in total from any one source in a year). Consult your JAG when something other than a nominal gift is offered.

Rule 9

Restricted Contacts with Former DoD Officials & Retired Military Officers.

- The One-Year "Cooling Off" Restriction. Former senior DoD civilian employees and retired General Officers are prohibited from attempting to influence official actions in their former department or agency for one year after their departure. (18 USC § 207).
- For two years after leaving Government service, former Government officials may not represent someone else to the Government regarding "particular matters" (e.g., contract actions) that were pending under their responsibility during their last year of Government service. (18 USC § 207).
- Former officers and employees are forever prohibited from representing someone in a particular matter that involved non-Federal parties, in which they were personally and substantially involved while working for the Government. (18 USC § 207).
- Federal officials who had authority to award contracts, make payments, set overhead rates, and settle claims of more than \$10 million are prohibited for a period of one year after the official action from working for the contractor who received the payment. (41 USC § 2104).

Rule 10

Letters, Star Notes, Awards. DoD officials are prohibited from using their official position, title, or authority to endorse any person, product, service, or enterprise. This includes the use of official stationery and Star Notes. (Personal letters of recommendation are an exception and should be coordinated with your JAG.) It is DOD policy not to recognize contractors with honorary awards unless the contribution is unrelated and completely outside any contractual relationship with DoD and the recognition is clearly in the public interest - a very high standard.

If conduct by contractor personnel is deemed to meet the DOD standard, then recognition is limited to a letter or an informal certificate of appreciation signed at the lowest organizational level. Recognition of contractors must be coordinated with the cognizant contracting officer. Prior coordination is required because the contracting officer may be taking action related to contractor performance.

Obtain legal counsel regarding the propriety of any recognition action involving a contractor.

- "Commander's coins" purchased with appropriated funds may not be presented to contractors.
- Before providing a contractor employee a personal letter of recommendation, contact your judge advocate for fact-specific advice.
- DoD Components must not permit any person, organization, or company having a commercial or profit-making relationship with DoD to participate in DoD award programs and must not create awards or awards programs to recognize such persons, organizations, or companies. (See DoDI 1400.25 - V451.)

END NOTE

Communication between the Government and industry must be fair, even, and transparent. The above guidance offers an overview for properly engaging contractors. Do not hesitate to request the assistance of your servicing legal advisor.

Understanding Foreign Criminal Jurisdiction: A Primer For Operational Law Advisors

MAJOR BRETT R. SWAIM*

A tragedy is when one of your beloved young sailors or Marines, who will literally die to carry out your orders, does something, and now you have to court [-] martial him. That is the last thing you ever want to do, because you failed to talk your people through it, to [illustrate for] them what it's going to be like.¹

I. Introduction

A Philippine transgender prostitute was found dead in a Marine's hotel room near Subic Bay on 12 October 2014.² Hours prior, the Marine and his unit completed a successful bilateral training exercise between U.S. and Philippine forces.³ Unfortunately for Private First Class (PFC) Joseph Pemberton, his final night of liberty is one he will never forget. This tragic event also illustrates that U.S. service members abroad may find themselves subject to an investigation and prosecution by a foreign nation. Commanders operating in foreign countries need to understand the landscape of criminal jurisdiction over their personnel before an international incident occurs. As service members deploy to more permissive environments⁴, judge advocates need a game plan to properly advise commanders on the legal protections, or lack thereof, provided to their forces under international law.

A fair amount of scholarly writing already exists regarding the history of foreign criminal jurisdiction⁵ dating back to the 1950's when the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA) entered into force. Despite all of these writings, no stand-alone text exists that provides a roadmap for the operational law practitioner to determine criminal jurisdiction from one country to another. This primer is intended to fill that gap by establishing a framework for judge advocates to answer

questions surrounding foreign criminal jurisdiction matters related to military members deploying to specific countries. In order to answer these questions, this primer starts by addressing who is responsible for the force. Part two explains how to identify and locate the relevant international agreements addressing foreign criminal jurisdiction. Part three then unpacks the terms of these agreements and addresses concerns with deploying forces where no protections exist. Part four briefly addresses the jurisdiction of the International Criminal Court (ICC) and considerations when conducting multinational operations.

II. Responsibility over the Force

The starting point in determining the level of protections Department of Defense (DoD) personnel are afforded when operating abroad is often times the most overlooked; who owns the force? As a general rule, military forces deployed are the responsibility of the geographic combatant command to which they are assigned.⁶ An exception to this rule exists when military personnel deploy to a foreign country in direct support and control of the U.S. Ambassador.⁷

* Judge Advocate, United States Marine Corps. Presently assigned as Deputy Staff Judge Advocate, Marine Corps Forces, Europe and Africa, Stuttgart, Germany. LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D., 2005, Ohio Northern University Pettit College of Law; B.S., 2000, St. Cloud State University, St. Cloud, Minnesota. Previous assignments include Staff Judge Advocate, Marine Corps Air Station Beaufort, South Carolina, 2014-2016; Operational Law Advisor/Instructor, Marine Corps Security Cooperation Group, Marine Corps Forces Command, Fort Story, Virginia, 2011-2014; Resident Student, Expeditionary Warfare School, Marine Corps University, 2010-2011; Legal Assistance Officer, Marine Corps Base Camp Lejeune, North Carolina, 2009-2010; Trial Counsel, Legal Services Support Section, 2d Marine Logistics Group, Camp Lejeune, North Carolina, 2009-2010; Battalion Judge Advocate, 1st Battalion, 9th Marines, Ramadi, Iraq, 2008; and Deputy Staff Judge Advocate, II Marine Expeditionary Force, Camp Lejeune, North Carolina, 2007-2008. Member of the bar of Minnesota. This paper was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ General James Mattis, U.S. Marine Corps, Retired, William C. Stunt Ethics Lecture sponsored by The Center for the Study of Professional Military Ethics at the United States Naval Academy: Ethical Challenges in contemporary conflict: The Afghanistan and Iraq Cases (Nov. 8, 2004) (on file with author).

² Ira Pedrasa, *Del Rosario: PH won't concede jurisdiction over Pemberton*, ABS-CBN NEWS (Oct. 22, 2014, 8:33 PM), <http://news.abs-cbn.com/nation/10/22/14/del-rosario-ph-wont-concede-jurisdiction-over-pemberton>.

³ *Id.*

⁴ Permissive environment is defined as an operating environment "in which host nation (HN) military and law enforcement agencies have control, the intent, and the capability to assist operations that a unit intends to conduct. In this situation, entry operations during deployment are unopposed and the host country is supporting the deployment." JOINT CHIEFS OF STAFF, JOINT PUB. 3-35, DEPLOYMENT AND REDEPLOYMENT OPERATIONS I-1 (31 Jan. 2013) [hereinafter JOINT PUB. 3-35].

⁵ For a brief history of foreign criminal jurisdiction, see, Joop Voetelink, *Status of Forces and Criminal Jurisdiction*, 60(2) NETH. INT'L L.R. 231-50 (2013); Daniel L. Pagano, *Criminal Jurisdiction of United States Forces in Europe*, 4 PACE Y.B. INT'L L. 189 (1992).

⁶ 10 U.S.C. § 164 (2008); see also JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (25 Mar. 2013) [hereinafter JOINT PUB. 1].

⁷ U.S. DEP'T OF STATE, FOREIGN AFFAIRS HANDBOOK 2 FAH-2 H-100 (Sept. 22, 2010), <https://fam.state.gov/FAM/02FAH02/02FAH020110.html> [hereinafter FOREIGN AFFAIRS HANDBOOK].

A. Combatant Command (COCOM) Authority

Military forces deploy under the authority of the geographic combatant command as the default rule⁸ through the Global Force Management Process.⁹ A traditional analysis to determine status of forces protections is required for such deployments, which will be explained in greater detail in Part III. Legal advisors should also note that if adequate protections for military personnel from foreign criminal jurisdiction are not in place, forces may not deploy without a legal review and specific approval from the geographic combatant commander.¹⁰ Status protection waivers¹¹ are required when forces deploy with less protection than what is provided under Article 37 of the Vienna Convention on Diplomatic Relations; commonly referred to as “administrative and technical” status (A&T status).¹² Administrative and technical status provides protection against foreign criminal jurisdiction for acts arising out of both official and unofficial acts, and civil protection for acts arising out of official acts only.¹³ As the number of troops and missions conducted in permissive environments increase, greater emphasis needs to be placed on making sure commanders understand the extent to which foreign criminal jurisdiction applies so they can properly manage and mitigate risk.

B. Chief of Mission (COM) Authority

The primary exception to the rule over responsibility for military forces in foreign countries occurs when military personnel are assigned to duties under the cognizance of the U.S. ambassador and embassy.¹⁴ A U.S. ambassador’s authority, referred to as “chief of mission,” flows directly

from the president.¹⁵ Examples of DoD service members who fall under COM authority overseas include defense attachés, Marine security guard personnel, and others specifically assigned by the president to fulfill security assistance functions under the Foreign Assistance Act of 1961.¹⁶ For this reason, it is possible to have different protections for each group of military members in the same country.

When forces deploy in support of security assistance missions,¹⁷ the legal advisor must determine whether the force falls under COCOM or COM authority. As a starting point, review the partial list of security assistance missions listed in the *State Department’s Foreign Affairs Manual Handbook* that fall under COM Authority.¹⁸ “Because only those personnel who have been accredited to the Embassy (or consulate) have these Convention-based immunities,” the legal advisor must verify and confirm the actual status of deploying personnel with either the respective service component command,¹⁹ or the military group assigned to the embassy.²⁰ The lack of a uniform naming convention for the military groups from country to country can also add another layer of confusion to the analysis.²¹

As an example, the northwest African nation of Morocco is the situs of an annual bilateral training exercise known as African Lion.²² The exercise features over 1,000 U.S. forces from U.S. Africa Command, Moroccan forces, as well as military personnel from a number of additional countries.²³ American service members working in the Office of Security Cooperation for the U.S. Embassy enjoy full protection against criminal liability of host nation law because they fall under the COM authority and have A&T status protections.²⁴ However, the thousand-plus U.S. personnel supporting the African Lion exercise in Morocco each year have no

⁸ 10 U.S.C. § 164; *see also* JOINT PUB. 1, *supra* note 6.

⁹ The Global Force Management Process controls the assignment, apportionment, and allocation of forces in support of combatant command requests for forces. JOINT PUB. 3-35, *supra* note 4, at I-1.

¹⁰ INT’L SEC. ADVISORY BD., U.S. DEP’T OF STATE, REPORT ON STATUS OF FORCES AGREEMENTS, 33 (JAN. 16, 2015) [hereinafter SOFA REPORT].

¹¹ U.S. AFR. COMMAND, INSTR. 5800.08A, LEGAL AFFAIRS STATUS OF FORCES POLICIES AND INFORMATION § 4.b. (11 May 2015) [hereinafter AFRICOM INSTR. 5800.08A].

¹² Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention]. The United States signed the Vienna Convention on Diplomatic Relations on June 29, 1961, and ratified it on November 13, 1972. *Id.*

¹³ *Id.*

¹⁴ FOREIGN AFFAIRS HANDBOOK, *supra* note 7, at H-100.

¹⁵ 22 U.S.C. § 3927 (2015).

¹⁶ Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151–2443 (2015); FOREIGN AFFAIRS HANDBOOK, *supra* note 7, at H-116.4; *see also* SOFA REPORT, *supra* note 10, at 12 n.6.

¹⁷ Security Assistance (SA) “is a group of programs, authorized under Title 22 authorities, by which the United States provides defense articles, military education and training, and other defense-related services by grant, loan, credit, cash sales, or lease, in furtherance of national policies and objectives.

All SA programs are subject to the continuous supervision and general direction of the Secretary of State to best serve U.S. foreign policy interests; however, programs are variously administered by [Department of Defense] DoD or Department of State (DoS). Those SA programs that are administered by DoD are a subset of [security cooperation] SC.” DEFENSE SECURITY COOPERATION AGENCY, SECURITY ASSISTANCE MANAGEMENT MANUAL C.1.2.2. (Jan. 26, 2016) <http://www.samm.dsca.mil/chapter/chapter-1>.

¹⁸ FOREIGN AFFAIRS HANDBOOK, *supra* note 7, at H-116.4.

¹⁹ JOINT PUB. 1, *supra* note 6, at IV-15.

²⁰ SOFA REPORT, *supra* note 10, at 12 n.6.

²¹ R. MATTHEW C. WEED & NINA M. SERAFINO, CONG. RESEARCH SERV., R43422, U.S. DIPLOMATIC MISSIONS: BACKGROUND AND ISSUES ON CHIEF OF MISSION (COM) AUTHORITY 8 n.34 (2014). Some of the names used for office of security cooperation (OSC) include: the office of military cooperation (OMC), military assistance advisory group (MAAG), military group (MILGP), and office of defense cooperation (ODC). *Id.*

²² *Exercises: African Lion*, U.S. AFR. COMMAND, <http://www.africom.mil/what-we-do/exercises/african-lion> (last visited Nov. 21, 2016).

²³ *Id.*

²⁴ FOREIGN AFFAIRS HANDBOOK, *supra* note 7, at H-116.4. Specifically identifies the Office of Defense Cooperation in Morocco as a Security Assistance Organization under the authority of the chief of mission. *Id.*

protection against foreign criminal jurisdiction as they fall under COCOM authority, and no agreements exist addressing criminal jurisdiction.²⁵ Despite DoD policy to seek maximum protections for service members from facing foreign criminal jurisdiction abroad,²⁶ the United States still lacks such agreements with a number of countries. After determining who has responsibility for the deployed forces, the legal advisor needs to identify, locate, and interpret all agreements that address protections for U.S. forces operating under COCOM authority.

III. Does an Agreement Exist?

Most U.S. military forces deploying overseas will operate under COCOM authority, thus triggering the need to determine what agreement, if any, exists between the United States and the host nation. While the naming convention of the document can vary from one country to another,²⁷ the first hurdle to overcome is simply finding the document itself.

A. NATO and Partnership for Peace Agreements

Instability in Europe following World War II, combined with fears of Communist expansion by the Soviet Union, led to the establishment of NATO in 1949.²⁸ Established through treaty²⁹ as “both a political entity and a military entity[.]”³⁰ the organization established a standard NATO SOFA to govern the multitude of matters that arise when foreign troops spend considerable time training and operating within the borders of other NATO countries.³¹ The NATO alliance currently includes 28 nations, to include a majority of Europe.³² When U.S. forces operate within the boundaries of

a NATO ally, the NATO SOFA determines jurisdiction over all criminal offenses.

In 1994, NATO created the Partnership for Peace (PfP) program as a way “to enable participants to develop an individual relationship with NATO, choosing their own priorities for cooperation, and the level and pace of progress.”³³ Twenty-two countries currently belong to the PfP Program and have signed on to the corresponding SOFA. The PfP SOFA is not a stand-alone agreement, rather, it invites PfP member countries to enjoy the benefits of the NATO SOFA when operating or training in furtherance of NATO efforts.³⁴ Between NATO and PfP partners, the United States effectively maintains one standard SOFA for nearly all of Europe.³⁵ Unfortunately, determining whether agreements exist with other nations beyond the borders of Europe presents an entirely different challenge.

B. Non-NATO Bilateral Agreements

Outside of Europe, agreements take on different forms by different names with different protections. Despite the DoD’s best efforts to minimize exposure to foreign criminal jurisdiction overseas, not every country is willing to provide this same level of protection. While the agreements vary in content and format, the approach to locating and verifying them remains the same across the geographic combatant commands.

1. Service-Level International Agreement Databases

Each military service maintains an international agreement database on the Non-classified Internet Protocol Router (NIPR) Network.³⁶ The international agreements are

²⁵ USAFRICOM Message, 151135Z Jul 2015, CDR USAFRICOM J3, subject: (U/FOUO) USAFRICOM STATUS PROTECTION WAIVER (SPW) SUBMISSION REQUIREMENTS FOR TRAVEL TO AFRICOM AREA OF RESPONSIBILITY (on file with author); *African Lion 2016 Exercise Plan*, para. 1.h.(3) (26 Feb. 2016), U.S. AFRICA COMMAND (on file with author); ELECTRONIC FOREIGN CLEARANCE GUIDE, <https://www.fcg.pentagon.mil/docs/MO.cfm> (last visited Mar. 14, 2017); See also, U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2016, (2016), <http://www.state.gov/documents/organization/267489.pdf> [hereinafter TREATIES IN FORCE].

²⁶ U.S. DEP’T OF DEF., DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION § 3 (21 Nov. 2003) [hereinafter DoDD 5525.1].

²⁷ Status of forces agreements may come in the form of an executive agreement, memorandum of understanding or memorandum of agreement, an exchange of diplomatic notes (dip notes), or a visiting forces agreement to name a few. See also Lieutenant Colonel Ryan B. Dowdy et al., *A Primer on Key International Law Issues for the Regionally Aligned Legal Advisor*, ARMY LAW., Nov. 2015, at 30, 32, 34.

²⁸ *A short history of NATO*, NORTH ATLANTIC TREATY ORG., <http://www.nato.int/history/nato-history.html> (last visited Nov. 22, 2016).

²⁹ North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

³⁰ Colonel Brian H. Brady, *The North Atlantic Treaty Organization Legal Advisor: A Primer*, ARMY LAW., Oct. 2013, at 5.

³¹ Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

³² *NATO Member Countries*, NORTH ATLANTIC TREATY ORG., http://www.nato.int/cps/en/natohq/nato_countries.htm (last visited Nov. 22, 2016).

³³ *Partnership for Peace Programme*, NORTH ATLANTIC TREATY ORG., http://www.nato.int/cps/en/natolive/topics_50349.htm (last visited Nov. 23, 2016).

³⁴ Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, June 19, 1995, T.I.A.S. 12666, 1996 WL 1359216 [hereinafter PfP SOFA].

³⁵ R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 21–22 (2012). (These tables list agreements that supplement or add to the terms of the NATO SOFA with NATO and PfP countries. So while one SOFA applies broadly, the terms may be implemented differently depending on other bilateral agreements.) *Id.*

³⁶ *JAO Resources – SOFA’s*, JUDGE ADVOCATE DIVISION, HEADQUARTERS MARINE CORPS, <https://ehqmc.usmc.mil/org/sja/JAO/JAO%20Resources/Forms/AllItems.aspx?RootFolder=%2FForg%2Fsja%2FJAO%2FJAO%20Resources%2FInternational%20Agreements%20and%20SOFAs%2FSOFA%27s> (last visited February 3, 2017); *International Agreements*, CODE 10, JUDGE ADVOCATE GENERAL’S CORPS, U.S. NAVY, <https://www.nko.navy>

organized alphabetically by country for quick reference. These sites are typically the quickest way to identify whether an agreement exists, while also obtaining a copy of the document. Unfortunately, none of the service databases represent a complete collection of all known agreements. Similar searchable databases also exist on the Secured Internet Protocol Router (SIPR) Network, which includes classified and sensitive agreements. While these databases are a good starting point, additional steps are necessary to verify that the agreement is still valid, and whether any other agreements may impact the analysis.³⁷

2. State Department's Treaties in Force and other International Agreements

The next step in the process is to review the State Department's Treaties in Force to identify any other potential agreements that can impact the analysis.³⁸ The Treaties in Force is organized alphabetically by country name, then sub-categorized into subject matters for the various agreements.³⁹ When researching a particular country, turn to that country's section in the text and review all of the documents listed under the Defense sub-heading. Unfortunately, a uniform naming convention was not applied to the agreements, which may require additional time to sift through the various defense-related bilateral agreements.⁴⁰ In the event that a document identified in the Treaties in Force is not available through one of the service-level international agreement databases, the agreement might be available through the State Department's searchable database online for Texts of International Agreements to which the United States is a Party (TIAS).⁴¹ Unfortunately, the TIAS is not a complete document repository. If the service-level databases, and the TIAS, do not contain the agreement, reach out to the Staff Judge Advocate office at the regional service component command, or the geographic combatant command for additional support and guidance.

.mil/group/ international-and-operational-law-code-10/international-agreements (last visited November 23, 2016); *International & Operational Law Library*, JAGCNET, U.S. ARMY, <https://www.jagcnet2.army.mil/Sites/io.nsf/homeLibrary.xsp> (last visited November 23, 2016); *HQ USAF/JAO – Operations & International Law Directorate*, FLITE: LEGAL RESEARCH FOR THE DEPARTMENT OF DEFENSE, U.S. AIR FORCE, <https://kmjas.jag.af.mil/moodle/course/view.php?id=38> (last visited February 3, 2017).

³⁷ Center for Law & Military Operations, *CLAMO Guide: Researching International Agreements*, JAGCNET, <https://www.jagcnet2.army.mil/Sites%5C%5Cio.nsf/0/5DEEF4417A5C8EE185257DA50056C5F4/%24File/CLAMO%20Information%20Paper-Researching%20International%20Agreements.docx> (last visited Feb. 2, 2017).

³⁸ See TREATIES IN FORCE, *supra* note 25.

³⁹ *Id.*

⁴⁰ According to the 2016 Treaties in Force, the following agreements explain criminal jurisdiction between the United States and the countries below. In Jordan it is named the "Agreement regarding the status of United

3. Verify through Service Component or Combatant Command SJA

Even if the existence and name of all agreements have been identified, consultation with the Staff Judge Advocate (SJA) Office for the regional service component command or the geographic combatant command may be necessary to obtain a copy of the agreement. It is also critical to consult with one of these offices to verify the reliability and interpretation of the international agreement in place, whether any other agreements augment or supersede the agreement, and whether there are any concerns with the host nation over interpretation. Some of these concerns may require the need for secured communications to adequately discuss such agreements, as well as the interpretation by the host nation, and implementation.

IV. Understanding Foreign Criminal Jurisdiction

Foreign criminal jurisdiction, in the context of military forces deployed to another country, is the convergence or clash of two separate and sovereign legal systems. This clash pits the fundamental concept of exclusive jurisdiction held by a national sovereign over offenses occurring within its territory against that of U.S. military law—the Uniform Code of Military Justice (UCMJ). The former is a fundamental and well-established principle in international law,⁴² while the latter is a sometimes extraterritorial legal system intended to apply to a broad class of personnel⁴³ "in all places."⁴⁴ Because the NATO SOFA impacts criminal jurisdiction with the single largest number of U.S. allies, it will be discussed first.⁴⁵ Next, this paper will discuss non-NATO jurisdictional agreements, and provide a brief discussion of situations in which no agreement exists. This section will conclude with a brief overview of the protections that can be expected when a receiving state exercises jurisdiction over a U.S. service member.

States military personnel and civilian employees of the Department of Defense who may be in Jordan temporarily in connection with their official duties." *Id.* at 237. In Liberia it is the "Agreement regarding the status of United States personnel who may be temporarily present in Liberia." *Id.* at 261. In the Republic of Georgia it is simply referred to as the "Agreement on defense cooperation, with annex." *Id.* at 155. A variety of names, some easier to identify than others, each contain the relevant status of forces language for the respective country. *Id.*

⁴¹ *Texts of Int'l Agreements to Which the U.S. is a Party*, DEP'T OF ST., <http://www.state.gov/s/l/treaty/tias/index.htm> (last visited February 3, 2017).

⁴² *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812); see also Ernest V. Harris, *The Judicial Dilemma O'Callahan v. Parker Presents to SOFA's*, 3 Ga. J. Int'l & Comp. L. 164, 169 n.41 (1973).

⁴³ UCMJ art. 2 (2016).

⁴⁴ *Id.* at art. 5.

⁴⁵ MASON, *supra* note 5, at 2.

A. Foreign Criminal Jurisdiction under the NATO SOFA

The NATO SOFA governs criminal jurisdiction of U.S. military personnel in 49 different countries.⁴⁶ As such, it is the single biggest international agreement impacting criminal jurisdiction of U.S. forces abroad. Article VII of the NATO SOFA establishes a framework in which some offenses become the sole exclusive jurisdiction of either the sending or receiving state, while also creating a loose framework for resolving matters subject to concurrent jurisdiction.

1. Exclusive Jurisdiction under the NATO SOFA

The NATO SOFA recognizes the exclusive jurisdiction of the sending state with respect to “offenses, including offenses relating to its security, punishable by the law of the sending state, but not by the law of the receiving state.”⁴⁷ It defines a security offense as including “treason against the State; sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.”⁴⁸ For example, a U.S. service member suspected of selling U.S. military secrets while in a NATO country can only be prosecuted according to U.S. law under the terms of the SOFA. The trigger for exclusive jurisdiction, however, is not subject matter, but whether the other state has a law prohibiting the offense. The expansive nature of the UCMJ effectively limits the offenses to which another country may claim exclusive jurisdiction over U.S. military personnel abroad. Because of the UCMJ’s jurisdictional impact on the NATO SOFA, many more offenses fall into the category of concurrent jurisdiction.

2. Concurrent Jurisdiction under the NATO SOFA

While the NATO SOFA limits exclusive jurisdiction for both sending and receiving states, a majority of criminal offenses fall within the broad reaches of concurrent jurisdiction.⁴⁹ In so doing, “the drafters of the agreement adopted an almost revolutionary approach to criminal jurisdiction over visiting forces by balancing the interest of

both sending and host states.”⁵⁰ This balance is achieved through a straightforward and flexible concurrent jurisdictional arrangement focused into two categories: where the gravamen of the offense is against a party also from the sending state, and where the offense was committed while acting in an official duty status. Paragraph 3 of Article VII establishes the priorities assigned in assessing primary jurisdiction in such situations.⁵¹

First, primary jurisdiction is placed with the sending state over a member of its force for “offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent.”⁵² When cases arise with victims belonging to both the sending and receiving state, the most common resolution is for the state with primary jurisdiction over the most serious offense to take jurisdiction over the entirety of the offenses.⁵³ However, the NATO SOFA is silent on such matters, which are often resolved through negotiations between both states.

The second class of cases in which the sending state has primary jurisdiction include “offenses arising out of any act or omission in the performance of official duty.”⁵⁴ The NATO SOFA does not define official duty, nor provide any guidance as to how such a determination is made. While this has been an area of contention over the years since the NATO SOFA entered into force,⁵⁵ the NATO SOFA Supplementary Agreement, originally between Germany and the United States, addressed this issue.⁵⁶ It closed the gap by placing responsibility with the sending state to determine “whether an offence has arisen out of any act or omission done in the performance of official duty[.]”⁵⁷ Receiving state authorities are bound to this determination. However, the agreement does allow for a judicial review by a court of the receiving state in “exceptional cases.”⁵⁸ Fourteen NATO allies have signed onto the Supplemental Agreement, so its applicability is limited.⁵⁹ Judge advocates must also realize that in

⁴⁶ *Id.*

⁴⁷ NATO SOFA, *supra* note 31, Article VII, § (2)(b).

⁴⁸ *Id.* at Article VII, § (2)(c).

⁴⁹ Major Stephen J. Lepper, USAF, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. Rev. 169, 173 (1994). Stephen Lepper retired from the U.S. Air Force on April 1, 2014 at the rank of Major General after serving as the Deputy Judge Advocate General of the U.S. Air Force. *Major General Stephen J. Lepper U.S. Air Force Biography*, U.S. AIR FORCE, <http://www.af.mil/AboutUs/Biographies/Display/tabid/225/Article/107970/major-general-steven-j-lepper.aspx>. (last visited Feb. 3, 2017).

⁵⁰ Voetelink, *supra* note 5, at 236.

⁵¹ NATO SOFA, *supra* note 31, Article VII, § 3.

⁵² *Id.* at Article VII, § 3(a)(i).

⁵³ JOSEPH SNEE AND KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION 56-57 (1957).

⁵⁴ NATO SOFA, *supra* note 31, Article VII, § 3(a)(ii).

⁵⁵ Will H. Carroll, *Official Duty Cases Under Status of Forces Agreements: Modest Guidelines Toward a Definition*, 12 A.F. L. REV. 284 (1970).

⁵⁶ Supplementary agreement to the NATO Status of Forces Agreement with respect to forces stationed in the Federal Republic of Germany Article 18, Aug. 3, 1959, 14 U.S.T. 531, 1963 WL 65037.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Center for Law & Military Operations, *CLAMO SOFA Quick Reference Matrix*, JAGCNET, <https://www.jagcnet2.army.mil/Sites%5C%5Cio.nsf/0/180E3D12CBC4D94D852579C9004C9468/%24File/SOFA%20Quick%20Reference%20Guide.pdf> (last visited Feb. 2, 2017).

practice, official duty does not necessarily mean the same thing as “in the line of duty.”⁶⁰

Despite the two bases for primary jurisdiction under the concurrent model in the NATO SOFA, the agreement provides even greater flexibility through the waiver exception. “This paragraph allows either state to waive its primary jurisdiction if it considers the other state’s prosecution motives to be more important.”⁶¹ The most common application of waivers for U.S. forces occurs when minor offenses occur off-base and little to no harm or damage is suffered by members of the receiving state. Rather than adjudicate the minor offense (such as driving under the influence of alcohol where no injuries or damages occurred), the receiving state may waive their primary jurisdiction and allow for adjudication by the sending state.⁶²

In total, the criminal exclusive and concurrent jurisdictional arrangement in the NATO SOFA has proved effective since its inception in 1951. The success stems from the fact that the SOFA does not exclusively reserve all jurisdiction in favor of one party, and because of its malleable framework allowing for adjustments to be made on a case-by-case basis. The NATO SOFA is unique to the discussion because the United States shares the same agreement with 49 other countries. As the next section will discuss, this leaves relations with nearly 150 other nations up to individual bilateral agreements that vary widely in format, name, and substance.

B. Non-NATO Jurisdictional Agreements

The United States has the most robust network of bilateral agreements with other countries to resolve jurisdictional questions.⁶³ Many such agreements exist in various forms and are referred to generically here as bilateral agreements. The terms that resolve criminal jurisdiction can be found in traditional SOFA’s, mini-SOFA’s, or an assortment of other documents ranging from an exchange of diplomatic notes to defense cooperation agreements.⁶⁴

⁶⁰ See also SNEE AND PYE, *supra* note 53, at 46-54, for a detailed explanation of how various countries interpret the meaning of official duty under a wide range of SOFA’s.

⁶¹ Lepper, *supra* note 49, at 176.

⁶² Email from Ms. Georgia Harville-Hummel, Chief of International Law, Stuttgart Law Center, to author (Mar. 14, 2013, 11:40 AM) (on file with author).

⁶³ MASON, *supra* note 35 at 1.

⁶⁴ Lieutenant Colonel Arthur C. Bredemeyer, *International Agreements: A Primer for the Deploying Judge Advocate*, 42 A.F. L. Rev. 101, 105-107 (1997); see also Colonel Richard J. Erickson, (USAF, Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. Rev. 137, 141 (1994).

⁶⁵ “The standard SOFA will usually try to address the following areas: (1) respect for law and sovereignty, (2) entry and departure procedures, (3) wearing of the uniform, (4) the carrying of arms, (5) driving licenses and registration, (6) criminal jurisdiction, (7) civil jurisdiction, (8) arrest and service of process, (9) claims, (10) duties, taxes, and other charges, (11)

Traditional SOFA’s cover a broad range of issues that typically follow when large numbers of U.S. military personnel maintain a long-term presence within the receiving state.⁶⁵ The mini-SOFA is smaller in scale and scope and is primarily used for smaller sized military units that deploy to a receiving state for a specified period of time.⁶⁶ The final category serves as a catch-all assortment of different bilateral agreements that address criminal jurisdiction to some degree. Despite the structural differences in these documents, one thing remains fairly consistent: the protections afforded rise to the level of A&T status, which will be further developed below.⁶⁷

1. Defense Department Policy

Although bilateral agreements addressing jurisdiction can vary in substance and format, the overarching policy of the DoD serves as the stabilizing force that attempts to keep the meaning from one country to another uniform. “It is the policy of the United States that U.S. Defense personnel should not be sent to foreign countries unless sufficient status safeguards are assured.”⁶⁸ In other words, the policy of the DoD is to maximize the jurisdiction of the United States over her personnel abroad through bilateral agreements and diplomatic means when necessary.⁶⁹

2. Administrative and Technical Status

In negotiating agreements designed to address criminal jurisdiction, the United States seeks A&T status for U.S. service members abroad as a matter of policy, when the United States cannot secure comprehensive exclusive criminal jurisdiction.⁷⁰ While A&T status shields personnel from foreign criminal jurisdiction, this status does not provide total immunity.⁷¹ Article 37 of the Vienna Convention on Diplomatic Relations extends immunity from criminal prosecution to members of the Embassy designated with A&T status, but this protection does not carry over to civil and

importation, use and exemption of personal property, (12) personal tax exemption, (13) morale, welfare, and recreation activities, (14) health care, (15) postal services, (16) use of transportation, (17) use of currency and banking facilities, (18) contractor employees, (19) local procurement, (20) utilization of local labor, (21) customs, (22) governing agreement, and (23) duration and termination.” Bredemeyer, *supra* note 64, at 106.

⁶⁶ *Id.* at 107.

⁶⁷ Vienna Convention, *supra* note 12.

⁶⁸ SOFA REPORT, *supra* note 10, at 1.

⁶⁹ DODD 5525.1, *supra* note 26; SEC’Y OF THE NAVY INST. 5820.4G, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION, 1-2, § 1-7a (14 Jan. 1990); and SOFA REPORT, *supra* note 10, at 5.

⁷⁰ SOFA REPORT, *supra* note 10, at 5.

⁷¹ OFFICE OF FOREIGN MISSIONS, DEP’T OF ST., DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES, 8 (Jun. 2015); SOFA REPORT, *supra* note 10, at 12 n.6.

administrative jurisdiction for “acts performed outside the course of their duties.”⁷²

The State Department is ultimately responsible for negotiating international agreements with foreign states, yet shares responsibility for implementation with the DoD.⁷³ Because of this sometimes awkward arrangement, State developed a “Global SOFA Template,” or GST, to streamline the interagency process and achieve greater worldwide uniformity.⁷⁴ The proposed language in the GST states: “As a result of these discussions, the Embassy proposes that United States personnel be accorded the privileges, exemptions, and immunities equivalent to those accorded to the administrative and technical staff of a diplomatic mission under the Vienna Convention on Diplomatic Relations of April 18, 1961[.]”⁷⁵ The GST also goes one step further to cement the U.S. position of maintaining criminal jurisdiction over military personnel. “The Government of [name of country] recognizes the particular importance of disciplinary control by United States Armed Forces authorities over United States personnel and, therefore, authorizes the Government of the United States to exercise criminal jurisdiction over United States personnel while in [name of country].”⁷⁶ This reservation of exclusive criminal jurisdiction in favor of the United States has not been well received. One such example occurred in 2011 as the United States attempted to negotiate an agreement with Iraq which would protect U.S. military personnel from Iraqi criminal jurisdiction.⁷⁷ The breakdown in negotiations prompted President Obama to unexpectedly order a complete troop withdrawal by the end of 2011.⁷⁸

C. In the Absence of an Agreement – Waivers

The general rule states that U.S. personnel do not enter a foreign country without having an agreement in place with adequate protections from host nation criminal jurisdiction. This rule can be waived in exceptional circumstances by the geographic combatant commander.⁷⁹ Waiver exceptions typically require a lengthy processing timeline, and extensive prior coordination with the SJA Office for the COCOM.

⁷² Vienna Convention, *supra* note 12; *see also* SOFA REPORT, *supra* note 10, at 12 n.6.

⁷³ SOFA REPORT, *supra* note 10, at 1.

⁷⁴ *Id.* at 3.

⁷⁵ *Id.* at A-1.

⁷⁶ *Id.*

⁷⁷ Mark Landler, *Despite Difficult Talks, U.S. and Iraq Had Expected Some American Troops to Stay*, N.Y. TIMES (Oct. 22, 2011), <http://www.nytimes.com/2011/10/22/world/middleeast/usa-and-iraq-had-not-expected-troops-would-have-to-leave.html>.

D. Receiving State Prosecution Protections

Despite the United States’ best efforts to maintain exclusive criminal jurisdiction over personnel abroad, situations occur in which military members find themselves facing criminal prosecution in a foreign country. In these cases, DoD regulations specify in very certain terms what protections must be afforded to the service member, bearing in mind that the court need not be identical to a U.S. court to be considered a fair and impartial hearing.⁸⁰ First, a trial observer is appointed by the military command to provide oversight to the court proceedings and prepare a detailed report for the command.⁸¹ Second, counsel fees are provided so that the accused may hire a local attorney to present a defense at trial.⁸² Third, military personnel confined in a foreign jurisdiction are protected from any type of discharge until completion of the sentence and returned to the United States.⁸³ Finally, and perhaps most significantly, enclosure (2) to DoD Directive 5525.1 itemizes the Constitutional protections that must be afforded to the accused even in a foreign jurisdiction. The list includes:

1. Criminal statute alleged to be violated must set forth specific and definite standards of guilt.
2. Accused shall not be prosecuted under an ex post facto law.
3. Accused shall not be punished by bills of attainder.
4. Accused must be informed of the nature and cause of the accusation and have a reasonable time to prepare a defense.
5. Accused is entitled to have the assistance of defense counsel.
6. Accused is entitled to be present at the trial.
7. Accused is entitled to be confronted with hostile witnesses.
8. Accused is entitled to have compulsory process for obtaining favorable witnesses.

⁷⁸ *Id.*

⁷⁹ *See also* AFRICOM INSTR. 5800.08A, *supra* note 11. Such waiver requests must provide detailed information to the combatant commander for decision. Some considerations include: number of participants, expected duration, risk assessment, and whether any other alternatives exist. *Id.*

⁸⁰ DODD 5525.1, *supra* note 26.

⁸¹ *Id.* at 4.

⁸² *Id.* at 6.

⁸³ *Id.* at 9.

9. Use of evidence against the accused obtained through unreasonable search or seizure or other illegal means is prohibited.

10. Burden of proof is on the government in all criminal trials.

11. Accused is entitled to be tried by an impartial court.

12. Accused may not be compelled to be a witness against him or herself; and shall be protected from the use of a confession obtained by torture, threats, violence, or the exertion of any improper influence.

13. Accused shall not be subjected to cruel and unusual punishment.

14. Accused is entitled to be tried without unreasonable (prejudicial) delay.

15. Accused is entitled to a competent interpreter when the accused does not understand the language in which the trial is conducted and does not have counsel proficient in the language both of the court and of the accused.

16. Accused is entitled to a public trial.

17. Accused may not be subjected to consecutive trials for the same offense that are so vexatious as to indicate fundamental unfairness.⁸⁴

V. Additional Considerations

Once the operational law advisor has worked through whether an agreement exists and determined the scope of criminal jurisdiction (and whether a waiver must be requested), there are a few additional corollary matters to consider. First, whether service members are traveling to a country that has ratified the Rome Statute and joined the International Criminal Court (ICC), and second, whether the mission entails partnering with additional foreign militaries

⁸⁴ *Id.* at enclosure (2).

⁸⁵ Erik Rosenfeld, *Application of U.S. Status of Forces Agreements to Article 98 of the Rome Statute*, 2 Wash. U. Global Stud. L. Rev. 273, 273-274 (2003).

⁸⁶ Rome Statute of the International Criminal Court Article 5, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. This article specifically includes (1) the crime of genocide, (2) crimes against humanity, (3) war crimes, and (4) the crime of aggression. *Id.*

⁸⁷ Rosenfeld, *supra* note 85, at 274.

⁸⁸ Luke A. McLaurin, *Can the President “Unsign” a Treaty? A Constitutional Inquiry*, 84 Wash. Univ. L. Rev. 1941, 1941 (2002).

⁸⁹ *Id.*

that may not have the same jurisdictional arrangements as the United States with the receiving state.

A. International Criminal Court

The ICC is the natural progression for an international criminal tribunal “created out of the legacy of Nuremberg, Tokyo, and the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.”⁸⁵ Unlike these prior tribunals, the ICC is a permanent court designed to exercise jurisdiction over “the most serious crimes of concern to the international community.”⁸⁶ Despite significant participation throughout the drafting of the Rome Statute, the United States ultimately voted against the final version after failing to convince a majority of the members to include a provision protecting U.S. service members from the court’s jurisdiction.⁸⁷ President Bill Clinton signed the Rome Statute as one of his final acts prior to leaving office.⁸⁸ However, he cautioned his successor against seeking ratification until the jurisdictional issues over U.S. service members were resolved.⁸⁹ President George W. Bush took a different approach and formally notified the United Nations that the United States no longer intended to join the ICC.⁹⁰

1. Potential Jurisdiction over U.S. Personnel

The international community officially recognizes the U.S. position that it is not bound by the Rome Statute and the ICC. However, questions remain about whether the ICC may ever establish jurisdiction over a U.S. service member for actions abroad.⁹¹ As a starting point, one must understand that the ICC exists as a court of last resort.⁹² “Although the term ‘complementarity’ is never used in the Statute, the Preamble, Article 1, and Article 17 establish that the ICC shall exercise its jurisdiction in cases where national legal systems are non-existent, refuse to prosecute, or are unable to prosecute suspects.”⁹³ Under the Rome Statute, it is possible for the ICC to claim jurisdiction over U.S. personnel for acts committed within the territory of a state party to the ICC, or when a case is referred to the ICC Prosecutor under Chapter VII of the United Nations Charter by the Security Council.⁹⁴ Both of these scenarios are extremely narrow and unlikely to

⁹⁰ Letter from John Bolton, Under Sec’y of State for Arms Control and Int’l Security, to United Nations Sec’y General Kofi Annan, (May 6, 2002) <https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm>.

⁹¹ See ICC Comment on Jurisdiction, at 3, <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/comment/>. The comment includes a discussion about the differing views on jurisdiction. Germany pushed for universal jurisdiction on one end of the spectrum, while the U.S. argued for state consent as a requirement in all cases. *Id.*

⁹² *About the ICC*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/about> (last visited Jan. 20, 2017).

⁹³ Rosenfeld, *supra* note 85, at 278.

⁹⁴ Rome Statute, *supra* note 86, at Article 12-13.

result in a prosecution of U.S. personnel. In order for territorial jurisdiction to attach to a service member, Article 12 requires that the non-state party (the United States) accept the jurisdiction of the court.⁹⁵ Under the second scenario, the Security Council must vote to refer a case to the ICC. As a permanent member, the United States has the ability to block any action relying upon its veto authority. Despite these safeguards, the Bush administration took additional steps to protect service members abroad by entering into supplemental “non-surrender” agreements.

2. Article 98 Agreements

Shortly after withdrawing from the ICC, the Bush administration prioritized entering into bilateral “non-surrender” agreements with as many countries as possible to extinguish any possibility of ICC jurisdiction over U.S. personnel.⁹⁶ As of May 2005, the United States had signed 100 bilateral non-surrender agreements with foreign governments, according to a State Department press release.⁹⁷ These agreements have come to be known as “Article 98 Agreements,” named after the article of the Rome Statute that was relied upon to enter into them.⁹⁸ In 2002, the American Service members’ Protection Act (ASPA), was signed into law, which effectively cut off foreign military funding to countries that were unwilling to enter into these bilateral agreements.⁹⁹ The restrictions of ASPA impacted the COCOM authority to deploy troops to some countries, until they were removed by the National Defense Authorization Act of 2008.¹⁰⁰

While questions remain over whether the ICC may ever assert jurisdiction over U.S. service members, it remains an area of concern that legal advisors must anticipate and address during the planning phase of any operation.¹⁰¹

⁹⁵ *Id.*

⁹⁶ David Scheffer, *Article 98(2) of the Rome Statute: America’s Original Intent*, 3 J. of Int’l Crim. Justice 333, 344 (2005).

⁹⁷ Press Statement from Richard Boucher, Spokesman, Dep’t of State, (May 3, 2005) <https://2001-2009.state.gov/r/pa/prs/ps/2005/45573.htm>.

⁹⁸ CLARE M. RIBANDO, CONG. RESEARCH SERV., RL33337, ARTICLE 98 AGREEMENTS AND SANCTIONS ON U.S. FOREIGN AID TO LATIN AMERICA 2 (2006). Article 98(2) states, in part, that “[t]he Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements[.]” Rome Statute, *supra* note 86, at Article 98(2).

⁹⁹ THE AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, U.S. CHRONOLOGY WITH THE ICC, 2 (Mar. 4, 2011) [hereinafter AMICC Chronology].

¹⁰⁰ National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1212, 122 Stat. 371 (2008); *THE AMICC CHRONOLOGY*, *supra* note 99, at 7.

¹⁰¹ The Prosecutor for the ICC is currently in the Preliminary Examination phase investigating allegations of war crimes for detainee abuse by U.S. military and Central Intelligence Agency (CIA) personnel in Afghanistan.

B. Multinational Operations

One final consideration regarding foreign criminal jurisdiction is to understand that friendly military forces from different countries may not receive the same status protections as U.S. personnel. Imagine a situation in which U.S. military personnel stationed in a NATO country invite members from another non-NATO foreign military to participate in a joint training exercise. During the exercise a member of the non-NATO military force is arrested by the host nation law enforcement for theft. Assuming a separate agreement does not exist between the host nation (NATO country) and the non-NATO country, host nation authorities have no agreement by which to pass jurisdiction back to the non-NATO country.¹⁰² The amount of time and coordination required to deal with such a small infraction can have an adverse impact on the unit’s ability to train. Now try to imagine how difficult this scenario becomes when the offense is a significant crime of violence or destruction that sparks international interest. No magical or perfect agreement exists to remedy these types of jurisdictional issues. However, if working with military personnel from a PFP state, keep in mind that they are entitled to the same protections as contained in the standard NATO SOFA.¹⁰³ If the other foreign military has no agreement in place with the receiving state, raise the issue as early as possible in order to seek some type of resolution before the exercise.

VI. Conclusion

This brings the discussion back to where it started: the fate of PFC Pemberton in the Philippines. He was a Marine assigned to a unit conducting a bilateral exercise for a short duration, which placed him under the control and responsibility of the combatant commander. Second, a bilateral agreement exists between the United States and the Philippines, commonly referred to as a visiting forces

ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2016, Nov. 14, 2016, 47. During this initial phase, the prosecutor will take a closer look at jurisdictional issues before seeking authorization to move forward with a formal investigation and making any charging decisions. *An ICC Preliminary Examination – How Does it Work?*, JUSTICE HUB, <https://justicehub.org/article/icc-preliminary-examination-how-does-it-work>, last visited on Jan. 20, 2017. It is doubtful that the ICC can establish jurisdiction in this instance over U.S. personnel, since the Article 98 Agreement with Afghanistan entered into force on August 23, 2003. Agreement regarding the surrender of persons to the International Criminal Court, Afg.–U.S., Sept. 20, 2002, T.I.A.S. 03-823.

¹⁰² A similar situation occurred in 2014 when a Georgian soldier was arrested by German authorities for theft during a joint training exercise in Hohenfels, Germany. The German District Attorney maintained that it was impossible to drop or waive the charges because no SOFA or other jurisdictional agreement existed between Germany and the Republic of Georgia. After establishing that Georgia was a Partnership for Peace member, and that the terms of NATO SOFA should apply, the District Attorney agreed to waive jurisdiction and the Georgian soldier was sent home to face disciplinary action. REPORT OF INVESTIGATION, MARINE CORPS SECURITY COOPERATION GROUP (4 Feb. 2014) (on file with author).

¹⁰³ PFP Sofa, *supra* 34.

agreement (VFA).¹⁰⁴ The criminal jurisdiction provisions mirror that of the NATO SOFA.¹⁰⁵ Under concurrent jurisdiction, the Philippines had the primary right to exercise jurisdiction because the offense was committed against a Philippine national and because Pemberton was not acting in performance of his official duties at the time.¹⁰⁶ While the Philippine government could have waived jurisdiction under the VFA, they chose not to in this case;¹⁰⁷ although they did re-negotiate the place of detention.¹⁰⁸

Fourteen months later, Pemberton was convicted of homicide (a lesser included offense of murder) by a Philippine court and sentenced to spend 6 to 12 years in prison.¹⁰⁹ A trial observer provided daily oversight of the proceedings to safeguard the rights of the accused, as articulated in DoD Directive 5525.1.¹¹⁰ Throughout his incarceration, Pemberton will remain an active duty Marine in order to assure his safe return to the United States and discharge from the Marine Corps upon completion of his sentence.¹¹¹ The official policy of the United States may be to maximize criminal jurisdiction over U.S. personnel abroad,¹¹² but service members will continue to find themselves operating in places where U.S. jurisdiction is not absolute, nearly non-existent, or highly doubtful. Commanders deploying abroad would do well to add this nugget of wisdom, and the cautionary tale of PFC Pemberton, to their next liberty safety brief.

¹⁰⁴ AC Nicolls, *Court affirms Pemberton's conviction but reduces sentence to up to 10 years*, CNN PHILIPPINES (Apr. 4, 2016, 2:41 PM), <http://cnnphilippines.com/news/2016/04/03/joseph-scott-pemberton-jennifer-laude-olongapo-regional-trial-court-decision-downgraded.html>.

¹⁰⁵ J.W. Egan, *The Future of Criminal Jurisdiction over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 Emory Int'l L. Rev. 291, 325 (2006).

¹⁰⁶ Agreement Between the Government of the United States of America and the Government of the Republic of the Philippines Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.–U.S., Oct. 9, 1998, T.I.A.S. 12931, Article V.

¹⁰⁷ Ira Pedrasa, *Del Rosario: PH won't concede jurisdiction over Pemberton*, ABS-CBN NEWS (Oct. 22, 2014, 8:33 PM), <http://news.abs-cbn.com/nation/10/22/14/del-rosario-ph-wont-concede-jurisdiction-over-pemberton>.

¹⁰⁸ Jamie Laude, *Jail being built for Pemberton at Camp Aguinaldo?* The Philippine Star (Dec. 3, 2015, 12:00 AM), <http://www.philstar.com/headlines/2015/12/03/1528406/jail-being-built-pemberton-camp-aguinaldo>.

¹⁰⁹ Floyd Whaley, *U.S. Marine Guilty in Killing of Transgender Woman in Philippines*, N.Y. TIMES (Dec. 1, 2015), https://www.nytimes.com/2015/12/02/world/asia/us-marine-joseph-pemberton-guilty-in-killing-of-transgender-woman-in-philippines.html?_r=0.

¹¹⁰ Email from Captain Barret C. Diefenderfer, Judge Advocate Division, U.S. Marine Corps, to author (Nov. 2, 2016, 4:56 PM) (on file with author).

¹¹¹ *Personnel Locator*, MARINE ONLINE, <https://mol.tfs.usmc.mil/mol/locator/displayDetail.do?index=11> (last visited Jan. 20, 2017) (showing Joseph Pemberton listed as a Lance Corporal still on active duty). *Id.*

¹¹² DODD 5525.1, *supra* note 26.

The Bravest Battle:

The 28 Days of the Warsaw Ghetto Uprising¹

REVIEWED BY MAJOR ANDREW S. BOWNE*

We will declare war on Germany—the most hopeless declaration of war that has ever been made.²

I. Introduction

In 1940, the Germans forced almost a half-million Jews of Warsaw, Poland, roughly a third of city's population, into a tightly guarded ghetto, enclosed by a brick wall, ten feet high and eleven miles long.³ The ghetto was overcrowded and there was little food or medical care.⁴ Despite 50,000 Jews dying of starvation and disease every year in the ghetto, the Germans grew impatient with the rate of demise.⁵ By April 1943, the Nazis determined to finally rid Warsaw of the last surviving Jews, and began its final *Aktion*, a military offensive to kill or deport the Jews to concentration camps.⁶ On April 19, 1943, the Germans marched into the ghetto, expecting to defeat the Jews within three days.⁷ However, they were met with the fierce resistance of Jewish fighters, led by 24 year old Mordecai Anielewicz.⁸

The Bravest Battle: The 28 Days of the Warsaw Ghetto Uprising, written by Dan Kurzman,⁹ provides a nearly omniscient account of each day of this incredible and unrepresented fight. Kurzman, complying first-hand accounts through exhaustive interviews of “approximately five hundred people, including most of the surviving fighters, more than one hundred civilians who lived through the uprising, and scores of Germans and Poles who were involved,”¹⁰ transports the reader to the thick of the battle, in often suffocating detail. From a military history perspective, the account of the battle is contradictory; the Jews fought harder and caused more damage, real and symbolic, to the Germans than anyone thought possible. Yet the planning and coordination of the fighters, universally glorified by Kurzman, leaves the reader agonizingly frustrated. The

successes realized, while remarkable, could have been so much more had politics, pride and prejudice not interfered. Additionally, the tactics employed by both sides force the reader to wrestle with making complex moral judgments throughout the book. From a literary prospective, the narrative, while harrowing, is stunted by the painstaking and cumbersome detail Kurzman employs. Nonetheless, this relatively unknown and truly extraordinary story itself is what ultimately redeems *The Bravest Battle*.

II. Background: A Fight to the Death

The Bravest Battle opens patiently, sparing few details recounting the living conditions in the ghetto before the battle and introduces the reader to the heroes and villains. Daily life in the ghetto, as Kurzman describes, rivals that of Dante's *Inferno*.

[S]keletal figures with yellow swollen faces sat propped against the walls of building, their puffy slitlike eyes vacant, their gnarled hands reaching out to indifferent pedestrians for bread. Others, already dead, lay covered with old newspapers along the curbs, awaiting the gravediggers who would haul them off in handcarts to mass graves. Children crawled on all fours, resembling monkeys. They snatched packages of food from people When one “snatcher” . . . dropped a jar of soup, he lapped up the contents, mud and all, hardly aware that the screaming owner was

* Judge Advocate, U.S. Air Force. Presently assigned as Associate Professor, Contract & Fiscal Law Department, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. LL.M. in Military Law with Contract and Fiscal Law Specialty, 2017, The Judge Advocate General's School; J.D., 2009, George Washington University, Washington, D.C.; B.A., 2004, Pepperdine University, Malibu, California. Previous assignments include 48th Fighter Wing, Royal Air Force Lakenheath, United Kingdom, 2013-2016; 319th Air Base Wing, Grand Forks Air Force Base, North Dakota, 2010-2013; Rule of Law Field Force--Afghanistan/North Atlantic Treaty Organization Rule of Law Field Support Mission, Helmand, Afghanistan, 2012-2013. Member of the bar of California.

¹ DAN KURZMAN, *THE BRAVEST BATTLE: THE 28 DAYS OF THE WARSAW GHETTO UPRISING* (Da Capo Press 1993) (1976).

² *Id.* at 52. Quote by Leon Feiner, a Zionist leader in Warsaw, Apr. 18, 1943. *Id.* at 50.

³ *Id.* at 22-23.

⁴ *Id.* at 23. The ghetto averaged thirteen persons living in one room. *Id.*

⁵ *Id.*

⁶ *See id.* at 29-31. Heinrich Himmler ordered the final “transfer,” the Nazi euphemism for removing Jews from the ghetto to an extermination camp, of the remaining Jews in Warsaw in early 1943. Andrzej Wirth, *Introduction to THE STROOP REPORT*, at III, IV (Sybil Milton, trans., 1979).

⁷ KURZMAN, *supra* note 1, at 94-95.

⁸ *Id.* at 29. Anielewicz was the commander in chief of the Jewish Fighting Organization (*Zydowska Organizacja Bojowa*, or ZOB), a group of Zionists with ties to Communism. *Id.* at 29, 53.

⁹ Kurzman (born 1922; died 2010) was an American journalist and the author of 17 books, mostly on modern military history, and won multiple literary awards. *Dan Kurzman*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dan_Kurzman (last visited Sep. 12, 2016). Kurzman was a foreign correspondent with the *Washington Post*, winning the Newspaper Guild's Front Page Award for a series of articles he wrote for the *Washington Post* from Cuba. DAN KURZMAN, *THE RACE FOR ROME* 487 (1975).

¹⁰ KURZMAN, *supra* note 1, at 19.

kicking him in the head. One woman even cannibalized her dead baby.¹¹

Mordechai Anielewicz, facing unconquerable forces in the German army, knew the Jewish resistance in the Warsaw ghetto was doomed,¹² however, “if they had to die, it was best to fall proudly in battle.”¹³ Anielewicz was a natural leader, beloved by his supporters for his discipline, strength, calm in battle, and vision.¹⁴ His goal was not to win, “but to refine the quality of man.”¹⁵

Anielewicz would lead the Jews into “a fight to the death to purify man’s spirit.”¹⁶ His opponent, Major General Jürgen Stroop,¹⁷ would “kill to purify man’s blood.”¹⁸ The strategy of each leader was inextricably linked to their mission. Anielewicz, believing his “fifteen hundred largely untrained Jewish fighters” were doomed in advance when the Germans would have “a hundred times their firepower,”¹⁹ calculated his advantage was the will to fight to the death, as “surrender was equivalent to death.”²⁰ Accordingly, he negated to plan for the possibility of success beyond the first day. He failed to align his forces with the Polish partisans,²¹ prepare bunkers or tunnels to provide opportunity to retreat,²² and miscalculated the tactics employed by the Germans, believing the fight would be with bullets, not fire or toxic gas.²³

Stroop, believing his Germans the superior race to the “subhumans,”²⁴ was unprepared for the strength of the resistance. The minor victories of the Jewish fighters: the hoisting of the Zionist and Polish flags on the first day of the battle;²⁵ the German soldiers retreating from the onslaught of Molotov cocktails;²⁶ Germans suffering the double indignity

of being killed by a Jewish woman,²⁷ became a key theme of *The Bravest Battle*. The notion of outmanned, out-armed Jews demonstrating strength against the Germans was so contradictory to the Nazi ideal, Anielewicz’s goal was realized on Day 1 of the battle.²⁸

The German reaction was two-fold: rationalize the losses to the Jews by labelling the fighters as “bandits” and “terrorists,”²⁹ and return to the ghetto to complete the mission with more ruthless force. The characterization of the Jewish fighters as “terrorists,” is a thought-provoking one in the modern military context. Indeed, many similarities can be drawn in a tactical and even strategic sense between the fighters and modern terrorists or insurgents. Faced with an indomitable force, terrorists employ tactics like Anielewicz to force the hand of the stronger force. Passages of *The Bravest Battle* could have easily described the close quarter combat of Fallujah. Only here, the protagonists are the “terrorists,” so the fighters are forgiven for reveling at the sight of Germans suffering or for shooting at Germans attempting to approach wearing white “truce” rosettes on their uniforms and holding their rifles above their head.³⁰ Strategically, the goal was, generally speaking, similar: the mission was not to win, but to demonstrate the pride and bravery of the smaller force and reveal the weakness of the larger opposition.

III. Redemption and Revenge

Whether it was intended by Kurzman is unclear, but *The Bravest Battle* requires the reader to question the morality of killing for the sake of revenge, particularly when the atrocities

¹¹ See *id.* at 23. The psychological and emotion torment of ghetto life was unimaginable. Some Jews hoped they would be spared by cooperating with the Germans and acted as policemen, sometimes turning over their own parents to the Gestapo to meet their quota. *Id.* at 67. Others worked for the German war industry, prompting one Warsaw Jew to write, “[a] nation that hates the Germans with all its soul can ransom itself from death only at the price of its contribution to the enemy’s victory, a victory which means its complete extermination in Europe and perhaps in the whole world.” *Id.* at 78.

¹² *Id.* at 93.

¹³ *Id.* at 38.

¹⁴ See *id.* at 31-37.

¹⁵ *Id.* at 44.

¹⁶ *Id.*

¹⁷ *Id.* at 39. Stroop was commander of the *Schutzstaffel*, or SS, in Warsaw. *Id.*

¹⁸ *Id.* at 44.

¹⁹ *Id.* at 31. The Jewish fighters were equipped with only a few rifles, several thousand grenades and Molotov cocktails, and limited space to maneuver. *Id.*

²⁰ *Id.*

²¹ Along with Anielewicz’s ZOB fighters, Polish partisans supporting the Polish Home Army, and the Jewish Military Organization (*Zydowski Związek Wojskowy*, or ZZW) were also fighting the Germans in Warsaw.

Id. at 61. The ZZW had developed ties to the Poles, who supplied and supported them, but the Polish government, due to anti-Semitism, anti-Communism, apathy, or genuine logistical infeasibility, would not support the ZOB. See *id.* at 86-90. On the eve of battle, Anielewicz was set to meet with the leader of the ZZW to complete plans for uniting the two fighting groups; however, the Germans barred the doors of the building the meeting was set to take place, forcing the two groups to fight uncoordinated and isolated battles. *Id.* at 92-93.

²² See *id.* at 130. Anielewicz, despite his strong leadership, was not as gifted in military planning. The lack of supplies and inability to escape the ghetto led to his, and most of his fighters’, demise at the end of the battle. See *id.* at 306.

²³ *Id.* at 129, 304.

²⁴ *Id.* at 108.

²⁵ *Id.* at 110.

²⁶ *Id.* at 97.

²⁷ *Id.* at 99.

²⁸ Stroop struggled to reconcile the success of the Jewish fighters with the Nazi theory of Aryan racial superiority. *Id.* at 131.

²⁹ *Id.* at 115.

³⁰ *Id.* at 99, 136. Whether the fighters were insurgents or terrorists is debatable. The goal of an insurgency is to gain political power; killing as many enemies as possible, is the goal of terrorists, not insurgents.

committed by the Nazis demanded such a response. More difficult questions arise when confronted with situations of suicide,³¹ assisted suicide,³² infanticide,³³ or even pacifism.³⁴ Kurzman succeeds in convincing the reader that, in the context of genocide and unfathomable human suffering and indignity, preconceived notions of morality are quaint.

Stroop was ultimately successful, though his forces suffered many losses³⁵ and humiliation at the hands of the Jews.³⁶ The historical significance of the act of defiance was not lost on Kurzman. He argues “the Warsaw Ghetto uprising, more than any other event, symbolically ended two thousand years of Jewish submission to discrimination, oppression, and finally, genocide.”³⁷ Kurzman peppers the narrative with grand metaphors, foreshadowing the next ordeal the Jewish people would face.³⁸ He claims the uprising “signaled the beginning of an iron militancy rooted in the will to survive, a militancy that was to be given form and direction by the creation of the state of Israel.”³⁹

However, despite Kurzman’s assertions of the lasting impact of the battle, it is unclear how the fight had any tangible impact on the fate of the Jews, whether immediate or eventual. Poland never came to the aid of the Jews in Warsaw.⁴⁰ Moreover, while Jews mounted armed resistance in other ghettos in Poland, Kurzman concludes Anielewicz “kindled a spreading and unquenchable flame of resistance,”⁴¹ without providing evidence to support his link. Rather, the facts he provides in the Epilogue show the uprising in Warsaw was isolated, with most of the surviving fighters killed shortly after the end of the uprising.⁴² While the heroics and defiance exhibited in the uprising could have inspired others to take up arms, the incident remained unknown or discounted by much of the world outside the

largely unsympathetic Warsaw.⁴³ Moreover, as impressive of a feat the uprising was, it is disheartening, and perhaps naïve, to conflate revenge and humanity, as both Anielewicz and Kurzman do. Anielewicz stated “Jewish self-defense” was the realization of his life’s dream.⁴⁴ However, throughout the uprising, Anielewicz emphasized the mission is “to spill as much German blood as possible.”⁴⁵ Despite Kurzman’s insistence that Anielewicz was an inspirational leader, he died with most of his fighters conflicted between committing suicide or being killed or captured by the Germans,⁴⁶ illustrating the fighters had not fully embraced Anielewicz’s vision or assertion that revenge, in and of itself, equaled honor.

IV. Kurzman’s Problem

Kurzman notes his problem in writing this book was bringing the facts together, “while keeping the details from submerging the central importance of the story—the ways people in desperate conditions acted individually and in concert to express their common humanity and their personal and communal dignity.”⁴⁷ Kurzman’s fear that the details would overwhelm the theme of the book was well-founded. *The Bravest Battle* is a challenging read. Kurzman’s admirable attempt to piece together a cohesive account of the uprising through hundreds of interviews of the actors leaves the overall narrative stuttering. It is often difficult to keep track of the dozens of characters, many with Polish, German, or Yiddish names, who weave in and out of the storyline. Kurzman, a journalist, is at his best as an objective reporter of the events; in sections, he succeeds at transporting the reader to the ghetto, such is the vividness of detail, particularly in the height of battle on Day 1.⁴⁸ However, long sections of the book are overburdened by the minutia as well as clumsy and

³¹ *Id.* at 305.

³² *Id.* at 306.

³³ To avoid giving away the position of fighters to the Germans, crying babies were killed. *Id.* at 164, 232.

³⁴ Marek Edelman, one of Anielewicz’s lieutenants, presents both views of the debate: while most believed the resistance was inextricably linked with honor, Edelman felt “[r]esistance in hopeless circumstances offered little more to him than the fleeting satisfaction of revenge, which he felt had no real honor.” *Id.* at 140.

³⁵ Stroop carefully covered up or downplayed his losses in his daily reports to Headquarters. *Id.* at 154.

³⁶ Stroop struggled to comprehend how it was possible that the “subhumans” were able to match his own men in skill, tenacity, and fanatical dedication. *Id.* at 271.

³⁷ *Id.* at 17.

³⁸ Kurzman writes that Israel Kanal was the first Jew to shoot an enemy in the Warsaw Ghetto, a significant moment in Jewish history: “Israel had fired the symbolic shot that was to signal the beginning of the Jews’ campaign to fight their torturers and slayers, a shot that would still be echoing more than thirty years later in the Middle East.” *Id.* at 69-70.

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 339. While some Poles emphasized with the Jews and even wanted to fight with them, the largely anti-Semitic Poles avoided interfering with the German’s plan to eradicate the Jews, stating that “the Jews’ struggle has nothing to do with Poland.” *Id.* at 286.

⁴¹ *Id.* at 337.

⁴² *See id.* at 339.

⁴³ *Id.* at 194-195. Kurzman argues that the Poles largely thought of the Jews as a separate people, despite their long history in Poland. *Id.* at 22. Exacerbating the general dislike for the Polish Jews, was the perception that the Jews were Communists, and therefore dangerous allies to the hated Russians. *See id.* at 194, 224. The Nazis did their part to perpetuate the notion that the Jewish fighters were actually Moscow-directed Communists. *Id.* at 280.

⁴⁴ *Id.* at 184.

⁴⁵ *Id.* at 305. Anielewicz was convinced that there was no possibility of surviving the uprising and believed the aim of the fighters, even late into the battle, should not be to survive, but “to live as long as possible in order to exact every last pound of Nazi flesh.” *Id.* at 259.

⁴⁶ *Id.* at 305-06.

⁴⁷ *Id.* at 20. Even here, Kurzman equates killing Germans to an expression of “common humanity” and “dignity.” *Id.*

⁴⁸ *See id.* at 94-133 (recounting the first day of the battle).

superficial explanations of the political and social divides that had as much of an impact on the outcome of the uprising and the future of Jewish Poles as the fighting itself.⁴⁹ As one review explains, “[t]he book focuses so closely on the day-to-day, bunker-by-bunker sequence of the four-week uprising . . . that the shape of events remains rather elusive.”⁵⁰

Kurzman acknowledges the ghetto conditions and struggle to survive forced some of the inhabitants into beasts, with the “greediest and most cowardly” juxtaposing the “bravest and most altruistic”⁵¹ Jews and Poles, but his treatment of the fighters is generous. While Kurzman goes to great lengths to emphasize his source material is first-hand accounts of the survivors, and all “quotations and descriptions, as well as thoughts” are attributed and provided in the Notes at the end of the book,⁵² he largely discounts the effect of the three decades between the uprising and his interviews, as well as the significant problem that many of the main actors were killed during the uprising. Moreover, while Kurzman derides Stroop for downplaying his losses in his reports to his superiors,⁵³ he appears less critical of the rather unbelievable accounts he obtained from some of the Jews and Poles. One of Kurzman’s principle sources in *The Bravest Battle*, Henryk Iwanski, a Polish officer, has been accused of being a revisionist who likely fabricated much of the story he gave Kurzman, glorifying and expanding the role he actually played in the battle.⁵⁴

V. Conclusion

Though deeply flawed, *The Bravest Battle* remains a fascinating, mostly true, account of the Warsaw Ghetto uprising that manages to overcome its weaknesses simply by telling the story. That it took over thirty years for a book to provide the Jewish counterpoint to *The Stroop Report* of the uprising,⁵⁵ shows how easily this story could have been lost in time. The legacy of the uprising, though likely not as concrete as Kurzman posits, is that of a courageous stand in the face of annihilation, if not leading to the creation of Israel, at least symbolic of its struggle. Anielewicz and his fighters refused to give up hope that their sacrifice would someday allow others to live as human beings. It is a story unlike any other and, while challenging in narrative and content, is ultimately a fascinating and thought-provoking account of a key moment in one of history’s darkest times.

⁴⁹ *The Bravest Battle: The 28 Days of the Warsaw Ghetto Uprising*, KIRKUS REVIEWS, <https://www.kirkusreviews.com/book-reviews/dan-kurzman-4/the-bravest-battle-the-28-days-of-the-warsaw-gh/>.

⁵⁰ *Id.*

⁵¹ KURZMAN, *supra* note 1, at 18.

⁵² *Id.* at 19.

⁵³ *Id.* at 154.

⁵⁴ See Dariusz Libionka & Laurence Weinbaum, *A Legendary Commander: Polish President Lech Kaczynski seeks the creation of a monument to*

commemorate Zydowski Zwiasek Wojskowy (ZZW), the Jewish Fighting Union, the Revisionist militia that fought in the Warsaw Ghetto uprising, HAARETZ, Jun. 22, 2007, <http://www.haaretz.com/israel-news/a-legendary-commander-1.223769>.

⁵⁵ Numerous searches of books on this topic revealed that no other published account of the uprising dates before 1975. *The War Against the Jews* by Lucy Dawidowicz and *Uprising in the Warsaw Ghetto* by Ber Mark were both published in 1975, while *The Bravest Battle* was published a year later. *Id.* In comparison, *The Stroop Report* was published in 1960. Wirth, *supra* note 7, at I.

Major Michael E. Gilbertson*

Well a lawyer says this and a lawyer says that and you have to go through this process and that process and you have to have oversight from this that and the other . . . You give me \$17 million on the credit card, I'll call Cabelas tonight, and I'll outfit every Soldier, Sailor, Airman, and Marine with a pistol and I'll get a discount on it for bulk buys.¹

I. Introduction

A brigade staff is working late to churn out an operations order for an upcoming exercise. They miss dinner, they are hungry, and they cannot leave the office, so they have the Assistant S-2 order pizzas for delivery. When he is asked what kind of pizza they want, the Assistant S-2 grows impatient with the incessant questions. He tells the salesman they have five separate orders and there is no time to discuss the details—it is too easy, they just want pizza.

An hour passes and a delivery person arrives with the first pizza. It is a large pizza with anchovies. Everyone on the staff hates anchovies. No one eats it. Subsequent orders arrive over the next few hours and the results are all the same; too big, too small, too cold, no toppings, the wrong kind of toppings, and each order is stacked with delivery charges and the expectation for a tip. The time to eat has passed and all the restaurants have closed for the evening. Everyone on the staff is still hungry and they do not have the time, the money, or the opportunity for another order.

Briefly put, the staff has failed to meet its mission objective — to procure an acceptable kind and amount of food for the team. Had it properly and timely defined the requirements and ensured proper coordination, it would have increased its chances for mission success.

Now substitute pizza for government contracts to procure mine resistant ambush protected vehicles,² interoperable command communication systems,³ or the U.S. Army's new service pistol.⁴ The significance and scale of the procurement, and the risk of unmet requirements becomes more apparent.

In recognizing this risk and in response to other concerns specifically identified with contingency defense contracting, Congress and senior U.S. defense officials decided that operational field commanders will incorporate the Operational Contract Support (OCS) process into joint military training, operations, and military education.⁵ For instance, Congress directed the Chairman of the Joint Chiefs of Staff (CJCS) to ensure commands address OCS

* Judge Advocate, United States Army. Currently assigned as the Group Judge Advocate, Asymmetric Warfare Group, Fort George G. Meade, Maryland. LL.M., 2017, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; M.S., 2010, National Defense Intelligence College, Washington, DC; J.D., 2004, Valparaiso University School of Law, Valparaiso, Indiana; B.A., 2001, The Citadel, Charleston, South Carolina. Previous assignments include Military Personnel Law Attorney, U.S. Army Training and Doctrine Command, Fort Eustis, Virginia, 2015-2016; Brigade Judge Advocate, 501st Military Intelligence Brigade, USAG-Yongsan, Korea, 2014-2015; Senior Trial Counsel, Eighth Army, USAG-Yongsan, Korea, 2013-2014; Trial Counsel, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2012-2013; Chief of Operational Law, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2011-2012; Claims Judge Advocate, 21st Theater Sustainment Command, Kaiserslautern, Germany, 2010-2011; Administrative Law Attorney, National Guard Bureau, Washington, DC, 2009-2010; and Brigade S-2, 55th Sustainment Brigade, Joint Base Balad, Iraq, 2008. Member of the bars of the Supreme Court of the United States, Court of Appeals for the Armed Forces, the United States Court of Appeals for Veterans Claims, Army Court of Criminal Appeals, and the District of Columbia Court of Appeals. This article was submitted in partial completion of the Master of Laws requirements of the 65th Judge Advocate Officer Graduate Course.

¹ General Mark A. Milley, 39th *Chief of Staff of the Army*, quoted in Matthew Cox, Army Chief Wants Power to Select New Pistol, MILITARY.COM (Mar. 10, 2016), <http://www.military.com/daily-news/2016/03/10/army-chief-wants-power-to-select-new-pistol.html>.

² "I think what you have is a natural evolution of technology and very sharp people in business and industry looking at the problem and devising different ways to defeat the problem." (quoting General Peter Pace, 16th Chairman of the Joint Chiefs of Staff, on how the design, development, and deployment of the MRAP in Iraq was a success story of the military working with industry to define its requirements). Donna Miles, Gates

Hopes to Get Better Armored Vehicles to Troops Faster, U.S. ARMY (May 11, 2007), <https://www.army.mil/article/3079/>.

³ Memorandum from Sec'y of Def. to the Secretaries of the Military Dep'ts et. al., subject: Investigation Review-Secretary of Defense Guidance (28 Apr. 2016), <http://www.defense.gov/Portals/1/Documents/pubs/SD-ROE-Guidance-post-Kunduz.pdf> (directing the Combatant Commanders and Service Secretaries to "[i]dentify incompatible technological systems and generate solutions to enhance interoperability among operational forces." in response to U.S. airstrike against the Doctors without Borders Trauma Center in Kunduz, Afghanistan on 3 Oct. 2015).

⁴ "As [the] MHS [Modular Handgun System] moves forward into operational testing, the due diligence taken by all of the stakeholders will ensure a program that remains on-budget and on-schedule." (quoting Ms. Steffanie B. Easter, Principal Deputy Assistant Secretary of the Army (Acquisition, Logistics, and Technology). Matthew Cox, *Army Picks Sig Sauer's P320 Handgun to Replace M9 Service Pistol*, MILITARY.COM (Jan. 19, 2017), <http://www.military.com/daily-news/2017/01/19/army-picks-sig-sauer-replace-m9-service-pistol.html>.

⁵ For a complete discussion of these concerns see, e.g., COMM'N ON ARMY ACQUISITION & PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 1 and 21 (Oct. 31, 2007), http://www.acq.osd.mil/dpap/contingency/reports/docs/gansler_commission_report_final_report_20071031.pdf; Urgent Reform Required: Army Expeditionary Contracting, the Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations: Hearing Before the Subcomm. on Readiness and Mgmt. Support of the S. Comm. on Armed Servs. 110th Cong. 11-12 (2007); COMM'N ON WARTIME CONTRACTING IN IRAQ & AFGHANISTAN, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 1 (Aug. 31, 2011), <https://cybercemetery.unt.edu/archive/cwc/20110929213820/> http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf; and U.S. GOV'T ACCOUNTABILITY

requirements in military planning.⁶ Likewise, Congress directed the U.S. Department of Defense (DoD) to include OCS in its required training for all military personnel with contingency acquisition duties, including operational field commanders and their staff.⁷ It also required the inclusion of OCS in Joint Professional Military Education (JPME).⁸

Commanders are responsible for OCS.⁹ However, this command requirement flows down to the judge advocate to provide an OCS advisory role. Accordingly, judge advocates need to understand both the opportunities and challenges across the three OCS functions and the overarching role of the Operational Contract Support Integration Cells (OCSICs), to help their command meet its requirements through contracted support. Therefore, this paper will provide a background of OCS and OCSICs, identify the judge advocate's role in each step of the OCS process, and identify ways that the judge advocate can add additional value throughout the OCS process.¹⁰

II. Operational Contract Support

The DoD defines OCS as a process, an ability, a joint activity, and a force multiplier.¹¹ Primarily, OCS is a process “of planning for and obtaining supplies, services, and construction from commercial sources in support of joint

operations.”¹² As an ability, OCS “orchestrate[s] and synchronize[s] the provision of integrated contract support and management of contractor personnel providing support to the joint force within a designated operational area.”¹³ In addition, OCS is “a multi-faceted joint activity executed by the GCC [Geographic Combatant Commander] and subordinate JFCs [Joint Force Commanders] through boards, centers, and working groups [B2C2WGs], and associated lead service or joint theater support contracting-related activities.”¹⁴

Moreover, OCS is a “key force multiplier across the range of military operations, both foreign and domestic.”¹⁵ Taken together, these definitions can be summarized as OCS is the framework wherein an operational field commander and the staff plans for, acquires, and manages the procurement of supplies, services, and construction from commercial sources in support of military operations. Also, it is important to understand that OCS applies to all “organizational entities within the Department of Defense,”¹⁶ during all phases of military planning and operations.¹⁷ Moreover, its reach includes all DoD contingency operations,¹⁸ humanitarian

OFF., GAO-15-243, OPERATIONAL CONTRACT SUPPORT: ACTIONS NEEDED TO ENHANCE THE COLLECTION, INTEGRATION, AND SHARING OF LESSONS LEARNED 1 (2015).

⁶ 10 U.S.C.A. § 153 (West 2017), amended by National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 § 941, 125 Stat. 1298 (2011).

⁷ 10 U.S.C.A. § 2333(e) (West 2017), amended by National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 849, 122 Stat. 3, 245-246 (2008). See also, Colonel Joshua Burris, Joint exercise implements OCS planning and readiness tenets, U.S. ARMY (Feb. 26, 2016), <https://www.army.mil/article/163075/>.

Recognizing the importance of OCS [Operational Contract Support], the DOD [Department of Defense] funds, and the Joint Staff Logistics sponsors, an annual OCS exercise -- Operational Contract Support Joint Exercise, or OCSJX. It implements the OCS planning and readiness tenets: contract support integration, contracting support and contractor management. OCSJX has evolved from U.S. Army Contracting Command's annual exercise, focused on preparing military contracting officers for deployment, into a joint, interagency and multinational exercise with non-acquisition and acquisition participants.

Id.

⁸ 10 U.S.C.A. § 2151(a)(6) (West 2017), amended by National Defense Authorization Act for Fiscal Year 2013 Pub. L. No. 112-239, § 845(c), 126 Stat. 1632, 1848 (2013).

⁹ See Joint Chiefs of Staff, Joint Pub. 4-10, Operational Contract Support I-4 (16 Jul. 2014) [hereinafter Joint Pub. 4-10].

¹⁰ The intent is that this primer will be applicable to judge advocates in the Geographic and Joint Commands rather than narrowly tailored to a particular military service. However, for a copy of the only Service

Component Command to issue Operational Contract Support (OCS) policy and procedures, see U.S. ARMY CENTRAL COMMAND, USARCENT 4-10: USARCENT COMMANDERS OPERATIONAL CONTRACT SUPPORT STANDARD OPERATING PROCEDURES (July 2016) [hereinafter ARCENT OCS SOP].

¹¹ A force multiplier is “[a] capability that, when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment.” DOD DICTIONARY OF MILITARY TERMS, http://www.dtic.mil/doctrine/dod_dictionary/, search for “force multiplier.”

¹² Joint Pub. 4-10, *supra* note 9, at I-2 (defining OCS). U.S. Dep’t of Army, Army Techniques Pub. 4-10, Multi-Service Tactics, Techniques, and Procedures for Operational Support 1-1 (18 Feb. 2016) [hereinafter ATP 4-10] (mirroring the definition of OCS as stated in Joint Pub. 4-10).

¹³ Operational Contract Support: Definitions, 32 C.F.R. § 158.3 (2016) (defining OCS). U.S. DEP’T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (OCS) Glossary (20 Dec. 2011) [hereinafter DoDI 3020.41] (mirroring the definition of OCS as stated in 32 C.F.R. § 158.3).

¹⁴ Joint Pub. 4-10, *supra* note 9, at I-2.

¹⁵ ATP 4-10, *supra* note 12, at 1-1. “Used properly, OCS provides a critical force multiplier, enabling commanders to deliver desired military and economic effects on a global scale without spending the time, money, and political capital to deploy additional soldiers and equipment.” Major General Edward F. Dorman and Lieutenant Colonel William C. Lantham, Jr., Operational Contract Support: The Missing Ingredient in the Army Operating Concept, MIL. L. REV. (Nov-Dec 2016), at 52, 55.

¹⁶ Operational Contract Support: Applicability, 32 C.F.R. § 158.2 (2016).

¹⁷ JOINT PUB. 4-10, *supra* note 9, at I-3.

¹⁸ See 10 U.S.C.A. § 101(a)(13) (West 2017) (defining the phrase “contingency operation”).

assistance,¹⁹ and other peace operations²⁰ generally outside the United States.²¹

Lastly, OCS is comprised of three intertwined functions: contract support integration, contracting support, and contractor management. Respectfully, these functions involve the planning, acquisition, and administration of contract support with the OCSIC as the hub for effective OCS coordination, execution, and assessment.

A. Contract Support Integration

The OCS-Contract Support Integration (OCS-CSI) function includes a planning and execution process.²² During the Contract Support Integration planning process, the J-4 (Logistics) staff at the GCC and JFC typically leads OCS working groups and ensures the OCS annex and OCS concerns are incorporated throughout operational and contingency plans.²³ However, all GCC and JFC primary and special staff members are responsible for addressing OCS issues related to their staff function into plans.²⁴ Consequently, the entire staff must incorporate OCS considerations into the base plan and its annexes during all phases of the operation.

The critical staff product initially produced and continually refined during this Contract Support Integration planning phase is the OCS annex – Annex – W, *Operational*

Contract Support – to the applicable base plan.²⁵ The current Annex W template includes five paragraphs and three appendices in which the GCC and subordinate JFC analyze, describe, and provide direction and guidance for meeting the command's commercially resourced needs.²⁶ In addition, the Annex W is used to synchronize the command's contracting efforts with other DoD and U.S. elements in the area of operations "to avoid undue competition for the same locally available supplies, equipment, and subcontractor employees."²⁷

During the Contract Support Integration execution process, the operational field command (requiring activity) is the lead effort for determining, prioritizing, and synchronizing its support requirements and the appropriate source of support, i.e. through organic support, multinational support, acquisition and cross-servicing agreement (ACSA) support, or contracted support.²⁸ If the requiring activity (RA) decides to meet its requirements through contracted support, it first prepares an acquisition-ready contract support requirements packet in accordance with the relevant Annex W and any applicable GCC policy.²⁹

The requiring activity will then submit its requirements packet through the relevant portal, such as the Combined Information Data Network Exchange (CIDNE) or the Contingency Acquisition Support Module (cASM) database,³⁰ to the Requirements Review Board (RRB) and the

¹⁹ See 10 U.S.C.A. § 401(e) (West 2017) (defining the phrase "humanitarian and civic assistance").

²⁰ See DoD DICTIONARY OF MILITARY TERMS, http://www.dtic.mil/doctrine/dod_dictionary/, search for "peace operations." (defining the phrase "peace operations"). Id.

²¹ Operational Contract Support: Applicability, 32 C.F.R. § 158.2 (2016). Moreover, the Secretary of Defense can direct, and a combatant commander can determine, that OCS otherwise applies to other military or contingency operations. The implication appears that OCS could also apply within the United States.

²² JOINT PUB. 4-10, *supra* note 9, at III-3.

²³ There is likely no doctrinal requirement for OCS to be a J-4 staff function. While OCS is usually placed under the G-4/J-4 staff section, some Joint Force Commands (JFCs) maintain the OCS Integration Cell (OCSIC) as a separate organization outside the G-4/J-4. Telephone Interview with Lieutenant Colonel Jose A. Cora, Branch Chief, Trial Team III, Contract and Fiscal Law Division, U.S. Army Legal Services Agency (Oct. 7, 2016) [hereinafter LTC Cora Interview].

²⁴ *Id.* Although not an exhaustive list, the J-1 (Personnel) staff will maintain contractor accountability and casualty reporting. The J-2 (Intelligence) staff will handle the vetting of contractors and define its intelligence contract support requirements. The J-3 (Operations) staff manages requirements validation and prioritization, and addresses issues relating to the use of private security contractors and arming contractors. The J-4 (Logistics) staff determines how to sustain and transport contractors and identify contract support logistics requirements. The J-4 (Engineer) staff determines land and facility allocation and usage for contractors. The J-5 (Planning) staff incorporates OCS in the planning and risk assessment process. The J-6 (Communications) staff identifies the contract support requirements for information technology and IT security. The J-8 (Resource Management) staff providing funding oversight and monitors "contract expenditures." The Surgeon's office will determine the medical

requirements needed to support the contractor force. The Provost Marshall's office investigates contractor criminal activity to include fraud and trafficking in persons. JOINT PUB. 4-10, *supra* note 9, at III-5, see also The Joint OCS Essentials for Commanders and Staff (JOECS) course, JOINT KNOWLEDGE ONLINE, <https://jkodirect.jten.mil/> (last visited Feb. 2, 2017).

²⁵ See *infra* Appendix A for a sample Annex W template.

²⁶ DEF. PROCUREMENT & ACQUISITION POLICY, *Annex W Template*, http://www.acq.osd.mil/dpap/ccap/cc/jcchb/Files/Topical/AP_files/template/ANNEX_W_Template.docx.

²⁷ Otherwise, the command could inadvertently cause contract fratricide and drive "up the prices of local goods and services and could create shortages." DEF. PROCUREMENT & ACQUISITION POLICY, DEFENSE CONTINGENCY CONTRACTING HANDBOOK V5 94 (Jul. 2015), http://www.acq.osd.mil/dpap/ccap/cc/jcchb/DCCH_V.5_July2015.pdf [hereinafter DCC HANDBOOK].

²⁸ JOINT PUB. 4-10, *supra* note 9, at III-3. "Requirements determination is an operational command function, not a contracting activity function." *Id.* at I-4.

²⁹ JOINT PUB. 4-10, *supra* note 9, at F-5. Based on the estimated cost of the procurement, the command may have the delegated authority to approve the requirement; especially if the amount is under the micro-purchase or simplified acquisition threshold detailed in Part 13 of the Federal Acquisition Regulation (FAR) and Part 213 of the Defense FAR Supplement (DFAR).

³⁰ "The Contingency Acquisition Support Model (cASM) is a web-based tool used to plan, generate, staff for approval, and track acquisition-ready requirements packages. This tool enables users to get requirements on contract more efficiently. CASM's output produces a complete, approved, and electronically signed requirements package (RP)." DCC HANDBOOK

applicable validation authority for a requirements validation decision.³¹

“Requirements validation is the process to coordinate, review, prioritize, and approve contract support requests. Depending on the type and estimated cost of the requirement as well as local command policies, the contract support requirements package may be subject to numerous staff reviews.”³²

B. Contract Support

The OCS-Contract Support (OCS-CS) function includes the “execution of contracting authority and coordination of common contracting actions in support of combatant commander directed operations.”³³ Contract Support is largely managed by the professional contracting community staffed with U.S. government employees like warranted contracting officers (KOs).³⁴ During Contract Support, these contracting professionals plan and establish contracting support organizations, convert requirements into contract documents, develop contracts, award and administer contracts, and close out contracts.³⁵

Based on operational considerations, the GCC will choose one of the following three forms of contract support

supra note 27, at 62.

³¹ “Normally, only high-dollar and mission critical common support contract support requests will be required to be processed through the JRRB process.” JOINT PUB. 4-10, *supra note 9*, at F-4.

³² *Id.* at III-19.

³³ U.S. Dep’t of Army, Tech. Pub. 4-10.1, Logistics Civil Augmentation Program Support to Unified Land Operations (1 Aug. 2016) [hereinafter ATP 4-10.1].

³⁴ JOINT PUB. 4-10, *supra note 9*, at 1-6.

Contracting officer is the government official (military or civilian) with the legal authority to enter into, administer, and/or terminate contracts. Within all components, the contracting officer is appointed in writing through a warrant (Standard Form 1402). Only duly warranted contracting officers are authorized to obligate the USG, legally binding it to make payments against contracts.

Id.

³⁵ In support of joint operations, the GCC or JFC will create a group of Contingency Contract Administrators as required by the mission (e.g. including acquisition corps specialists like Administrative Contracting Officers and Quality Assurance Representatives along with service component provided Contracting Officer’s Representatives and technical inspectors). DEF. FED. ACQUISITION REG. SUPP. (DFARS) & PROC., GUIDANCE, & INFO. (PGI) 225.373, Contract Administration in Support of Contingency Operations, (Oct. 30, 2015) http://www.acq.osd.mil/dpap/dars/pgi/pgi_html/PGI225_3.htm#225.373.

³⁶ JOINT PUB. 4-10, *supra note 9*, at IV-1. “Additionally, theater support contracting organizational requirements may change as the operation progresses. In any case, the theater support contracting organization structure should be planned and specifically addressed in Annex W by phase of operation when possible.” *Id.*

organizations to provide in-theater contracting support services to award the contract: a Joint Theater Support Contracting Command (JTSCC), a Lead Service for Contracting (LSC), or a Lead Service for Contracting Coordination (LSCC).³⁶ The JTSCC is most applicable for large-scale, complex operations.³⁷ The LSC is more applicable for small-scale, longer-term service-centric operations.³⁸ The LSCC is more applicable for small-scale, short-term operations and security cooperation and deterrence activities.³⁹

Another important Contract Support organization is the Joint Contracting Support Board (JCSB).

The JCSB is the forum for theater support, Service CAP [Civil Augmentation Programs], and other designated in-theater external contracting organizations to share information, coordinate acquisition strategies, and to minimize chances of competition and redundancies between individual contracts and/or task orders and look for opportunities to optimize filling of like requirements through common contracts. It is in this process, the LSC’s/LSCC’s contracting activity or JTSCC develops a contracting COP [Common Operating Picture]⁴⁰ which is then in

³⁷ *Id.* at IV-3.

The JTSCC is a functionally focused JTF [joint task force] with C2 [command and control], normally tactical control, and contracting authority over contracting personnel assigned and/or organizations attached within a designated operational area, normally a JOA [joint operations area]. The JTSCC’s contracting authority is delegated by the [Senior Procurement Executive] SPE of the Service component designated by the GCC to form the nucleus to the JTSCC.

Id.

³⁸ “In this organizational construct, the designated Service component contracting activity is responsible to provide theater support contracting for specified common commodities and services for a particular geographical region, normally a JOA or major expeditionary base.” *Id.* at IV-3.

³⁹ JOINT PUB. 4-10, *supra note 9*, at IV-2.

In this organizational option, the Services retain C2 and contracting authority over their deployed theater support contracting organizations, but a designated lead Service is responsible to coordinate common contracting actions through a JCSB [Joint Contracting Support Board] or JCSB-like process as directed in annex W. This organizational option is also applicable to operations where the bulk of the individual Service component units will be operating in distinctly different areas of the JOA, thus limiting potential competition for the same vendor base.

Id.

⁴⁰ Lieutenant Colonel Jose A. Cora, Operational Contract Support (OCS) Overview – CENTCOM AOR at slide 21 (17 Nov. 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter LTC Cora OCS

turn shared with the subordinate joint force command OCSIC.⁴¹

Coordination with the OCSIC and decisions at the Joint Contracting Support Board can lead to strategic sourcing decisions and economies of scale whereby the GCC can effectuate smarter buys for the commands at a cost-saving to the U.S. taxpayer.⁴² After the RRB validates a requirement, it may be “sent over the fence to contracting” so they can put the requirement on a contract, solicit bids, and evaluate and award the contract.⁴³ If, however, the “JCSB identifies a currently existing contract with capacity, it can direct the requirement to be purchased from that vehicle” rather than entering into a new contract.⁴⁴

There are primarily three types of available contract support within OCS: theater support contracts, systems support contracts, and external support contracts. Theater

Overview].

A contract COP is a single display source of existing contracts and contract-solution requirements in the generation, validation, and execution processes. There are two groups of information required to establish the COP: contracts that the unit currently has in place, and requirements that require a contract solution. Once established, there are two key components in maintaining the COP: [c]ontract and COR [m]onitoring and [m]anagement, and [a]pplying the current COP into the OCS [p]lanning [c]ycle.

Id.

⁴¹ JOINT PUB. 4-10, *supra* note 9, at IV-7.

⁴² See *infra* Section II.D. See also, the GEN. SERV. ADMIN., Federal Strategic Sourcing Initiative (FSSI), <https://strategicsourcing.gov/about-FSSI-0> (last visited Feb. 2, 2017).

[Strategic sourcing] and FSSI solutions provide easy access to common procurement vehicles that offer greater discounts as collective volume increases, business intelligence and best practice solutions. Additional benefits include: Meets OMB's [Office of Management and Budget] goal for cross-government participation; Assists with socioeconomic goals; Collect and analyze data; Identify trends; Re-engineer high cost business processes; Replicate cost-saving business processes; Share lessons learned and best practices; Realize cost efficiencies; Streamlines procurement process; and Drives additional discounts.

Id.

⁴³ LTC Cora Interview, *supra* note 23.

⁴⁴ LTC Cora Interview, *supra* note 23.

⁴⁵ JOINT PUB. 4-10, *supra* note 9, at I-7.

During contingency operations, these contracts are normally executed under expedited contracting authority and provide supplies, services, and minor construction from commercial sources generally within the operational area. Theater support contracts can range from small local contracts for a single unit or operational area-wide contracts in support of the entire force.

support contracts are awarded in the area of operations through deployed U.S. government contracting officers, and the requested support is commonly staffed by local national contractors.⁴⁵ Systems support contracts provide contractor logistics support, maintenance, and repair through deployed U.S. field service representatives.⁴⁶ External support contracts normally procure a mix of U.S. citizens, local national contractor employees, and third country national contractors to provide various logistical and service support functions.⁴⁷

Another major activity within the Contract Support function requires the contracting officer coordinating with the requiring activity in formulating theater business clearance (TBC) policies and procedures.⁴⁸ Moreover, they will determine which contractors qualify for Contractor Authorized to Accompany the Force (CAAF) status⁴⁹ and which, if any, will be designated as non-CAAF.⁵⁰ “CAAF

Id.

⁴⁶ “Systems support contracts are routinely put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control (C2) systems.” *Id.*

⁴⁷ “The most common and well-known external support contracts are the Services’ civil augmentation programs (CAPs), which include the Army Logistics Civil Augmentation Program (LOGCAP), the Air Force contract augmentation program (AFCAP), the Navy Global Contingency Construction Multiple Award Contract (GCCMAC), and Global Contingency Service Multiple Award Contract (GCSMAC).” *Id.*

⁴⁸ U.S. Central Command (CENTCOM) Contracting Command, Contracting Officers’ Guide for Theater Business Clearance – Kuwait 1 (15 Oct. 2011).

TBC is the process which provides Joint Force Commanders and the [] Contracting Commander visibility over all contracts and contractors performing work in their area of responsibility. It facilitates a common operating picture of contracted support in a Joint Operations Area, ensures that solicitations and contracts contain provisions to meet Commanders’ requirements, and assures that contractor personnel life support requirements are addressed and coordinated prior to arrival in theater.

Id. For an example of TBC requirements, see Memorandum from Dir., Def. Procurement & Acquisition Policy, subject: Theater Business Clearance Update for Afghanistan (21 Jan. 2015), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA007256-14-DPAP.pdf>.

⁴⁹ DFARS 252.225-7040 (Sep. 2016).

CAAF generally include all U.S. citizen and third-country national employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. Armed Forces and who routinely are collocated with the U.S. Armed Forces (especially in non-permissive environments). Personnel collocated with U.S. Armed Forces shall be afforded CAAF status through a letter of authorization. In some cases, Combatant Commander subordinate commanders may designate mission-essential host nation or local national contractor employees (e.g., interpreters) as CAAF.*Id.*

⁵⁰ DFARS 252.225-7040 (Sep. 2016).

status should be pre-determined and publicized as part of the solicitation in order to ensure accurate contract pricing.”⁵¹ Outside of the U.S. logistical and medical support implications for contractors affected by this designation, CAAF status also offers the contractor protections under international law.⁵²

C. Contract Management

The OCS-Contract Management (OCS-CM) function integrates contractor personnel and associated equipment into military operations. During Contract Management, the requiring activity prepares for contractor deployment, deploys and redeploys contractors, and manages and sustains contractors. Contractor personnel are largely managed through contracting authority and contractor company management personnel rather than military command authority.⁵³ However, the requiring activity also has

contractor management responsibilities to include personnel and equipment accountability.⁵⁴

Contract Management also requires the command to monitor and coordinate matters relating to government furnished property (GFP) and contractor acquired government owned (CAGO) property,⁵⁵ transportation and personal security,⁵⁶ and coordinating and synchronizing non-DoD contractor requirements.⁵⁷

Contractor personnel accountability in Contract Management is important. As the Secretary of Defense stated in his testimony before Congress in 2009, “I think that the use of contractors in many respects grew willy-nilly after 2003, and all of the sudden, we had a very large number of people and it became clear we had inadequate capacity to monitor them.”⁵⁸ Consequently, the DoD created the Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT-ES) to manage contractor personnel accountability and mandated its use by defense contractors.⁵⁹

Non-CAAF means personnel who are not designated as CAAF, such as local national (LN) employees and non-LN employees who are permanent residents in the operational area or third-country nationals not routinely residing with U.S. Armed Forces (and third-country national expatriates who are permanent residents in the operational area) who perform support functions away from the close proximity of, and do not reside with, U.S. Armed Forces. Government-furnished support to non-CAAF is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. Armed Forces.”

Id.

⁵¹ LTC Cora Interview, *supra* note 23.

⁵² U.S. Dep’t of Army, Reg. 715–9, Operational Contract Support Planning and Management (20 June 2011) [hereinafter AR 715-9].

Under applicable law, contractors may support military contingency operations in a noncombat role if they have been designated as CAAF by the force they accompany, and are provided with an appropriate identification card under the provisions of The Geneva Conventions of 1949, International Committee of the Red Cross, Convention (III) relative to the Treatment of Prisoners of War and DODD 4500.54E.

Id.

⁵³ JOINT PUB. 4-10, *supra* note 9, at V-2.

⁵⁴ USCENTCOM, STANDARD OPERATING PROCEDURES FOR OPERATIONAL CONTRACT SUPPORT INTEGRATION CELL (OCSIC) (SOP) 23 (1 June 2016) [hereinafter USCENTCOM, OCSIC SOP]. The OCS staff will facilitate OCS-CM oversight during unit Relief in Place (RIP) / Transfer of Authority (TOA) activities, convene OCS-CM working groups, advise the operational command on OCS-CM effectiveness and policies, and coordinate with contracting activities. Moreover, although not an exhaustive list, the J-1 (Personnel) staff will maintain contractor accountability reporting and morale and welfare activities. The J-2 (Intelligence) staff will conduct threat assessment and screening of contractors. The J-3 (Operations) staff will establish contractor predeployment training requirements, conduct force protection and security

base assessment, and establish the armed private security rules of use of force. The J-4 (Logistics) staff will facilitate the government furnished life support (GFLS) requirements. The J-5 (Plans) staff will continue to integrate OCS-CM into the overall planning effort. The Surgeon’s office will ensure medical support for contractors. The judge advocate’s role is discussed below. *Id.*

⁵⁵ JOINT PUB. 4-10, *supra* note 9, at V-24. *See also*, U.S. DEP’T OF DEF., INSTR. 4161.02, Accountability and Management of Government Contract Property (27 Apr. 2012) (establishing DoD policy for the accountability and management of government contract property in the custody of contractors).

⁵⁶ *Id.* at V-26.

⁵⁷ *Id.* at V-28. “For example, in Operation Iraqi Freedom, contractors in support of USG departments and agencies, IGOs, and NGOs could be found throughout the operational area to include significant use of contracted security forces.” *Id.*

⁵⁸ The Challenges Facing the Department of Defense: Hearing Before the Subcomm. on Armed Services, 111th Cong. 44 (2009) (statement of the Hon. Robert M. Gates, The Secretary of Defense).

⁵⁹ DFARS 252.225-7040(g) (Sep. 2016).

(1) The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system, to enter and maintain the data for all CAAF and, as designated by USD(AT&L) or the Combatant Commander, non-CAAF supporting U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause.

(2) The Contractor shall enter the required information about their contractor personnel prior to deployment and shall continue to use the SPOT web-based system at <https://spot.altess.army.mil/privacy.aspx> to maintain accurate, up-to-date information throughout the deployment for all Contractor personnel. Changes to status of individual Contractor personnel relating to their in-theater arrival date and their duty location, to include closing out the deployment with their proper status (e.g., mission complete, killed, wounded) shall be annotated within the SPOT database in accordance

SPOT-ES includes SPOT, the Joint Asset Movement Management System (JAMMS), and the Total Operational Picture Support System (TOPSS), “SPOT is web-based [and] shows the contracts and contractors, costs, the type of contractor (third-country national, local national, and U.S. citizen), kind of work they do, and availability of government-furnished services.”⁶⁰ “JAMMS captures movement and location information about operating forces, government, and contractors [by scanning personnel identity credentials, such as the Common Access Card (CAC), Defense Biometric Identification System (DBIDS) cards, and passports] through data collection points established in specified operational theaters [and uploads to SPOT daily].”⁶¹ TOPSS is the reporting and analysis component of SPOT-ES and provides tailorable graphs, reports, and analysis of the contractor footprint in an operational area for the OCSIC and commands.⁶²

D. OCS Integration Cell

The OCS Integration Cell (OCSIC) is a multi-disciplinary team whose primary purpose is to provide the full spectrum of effective and efficient planning, coordination, and integration of the three OCS functions across all joint,

with the timelines established in the SPOT business rules.

Id.

⁶⁰ OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is SPOT-ES?, http://www.acq.osd.mil/log/PS/.spot.html/SPOT-ES_Info_Sheet-final.pdf.

⁶¹ OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is JAMMS?, http://www.acq.osd.mil/log/PS/.spot.html/JAMMS_Info_Sheet-final.pdf.

⁶² OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, What is TOPSS?, http://www.acq.osd.mil/log/PS/.spot.html/TOPSS_Info_Sheet-final.pdf.

⁶³ “The OCSIC is the link between the command staff, requiring activities, finance, contracting, and in some instances, Host Nation Support to successfully meet the Commander’s intent for contracted support.” LTC Cora, OCS Overview, *supra* note 40, at slide 7. The OCSIC integrates, it does not lead, all OCS planning and management actions. The OCSIC should be made up of 5-10 personnel at the GCC, JFC, or component level with a mixture of specially trained personnel with operational-level logistics and contingency contracting experience. In practice, the OCSIC falls within the J-4 (Logistics) staff and include an O-6 Chief, an O-5 Deputy, and three O-4s with an Engineering Officer, a Logistical Officer, and a Contracting Officer (without a warrant so he will not be tasked outside of the OCSIC). *Id.* at 8.

⁶⁴ JOINT PUB. 4-10, *supra* note 9, at I-2, D-2.

⁶⁵ Total Force Policy, the QDR, and other Defense and Operational Planning: Why Does Planning for Contractors Continue to Lag?: Hearing Before the H. Comm. on Wartime Contracting, 111th Cong. 8 (2010), (statement of LTG Kathleen M. Gainey, Director of Logistics, Joint Chiefs of Staff) (stating “We will increase our focus on planning procedures that not only deliver supplies and services to the war fighters in a responsible and cost-effective manner, but leverage the economic benefit of DoD spending to achieve national strategic and counter-insurgency objectives.”). *Id.* at 10.

personal, and special staffs, service components, combat support agencies, and the designated lead theater support contracting activity in the operational area.⁶³ “[A]ll geographic CCMDs [Combatant Commands] and USSOCOM [U.S. Special Operations Command] have permanent OCSICs of various sizes and configurations . . . [s]ubordinate joint force command OCSICs fluctuate in size and skill sets based on the phase of the operation . . .”⁶⁴ According to the Director of Logistics for the Joint Chiefs of Staff, “this [embedding OCS planners into the Combatant Command staff] initiative has probably had the greatest impact on improving COCOMs’ ability to plan for OCS.”⁶⁵

The OCSIC is responsible for the requirements review board validation process but operates across all three OCS functions.⁶⁶ The most important benefit that the OCSIC brings to the GCC and JFC is that it assists the command staff in developing its requirements⁶⁷ during the Contract Support Integration function. It also identifies strategic sourcing opportunities for emerging requirements through their coordination with the JCSB during the Contract Support function,⁶⁸ with the ultimate goal of common-user logistics (CUL) for appropriate services and supplies.⁶⁹

⁶⁶ The OCSIC conducts the following common tasks across the three OCS functions: leading the OCS planning and integration effort across primary and special staffs; providing OCS-related advice to commander and staff; collecting, analyzing, and sharing analysis of OCS aspects of the operational environment information; establishing and maintaining the OCS common operating picture (COP); establishing and running OCS-related boards working groups; developing and maintaining OCS policy and other operational guidance documents, like theater business clearance implementing guidance (TBC); reviewing all orders, policies, etc., for OCS equities and impact, ensuring JFC-directed, OCS-related policies and guidance are properly executed; and tracking and working any major contract management issues. JOINT PUB. 4-10 *supra* note 9, Figure D-2, D-4 and LTC Cora, OCS Overview, *supra* note 40, at 11.

⁶⁷ The OCSIC helps the command and staff “identify and develop their operational requirements timely and accurately as part of the staff’s operational mission planning.” *Id.* at 9.

⁶⁸ The OCSIC helps the command and staff “identify common requirements that can be consolidated across the area of operations and then assigns a single service contracting activity to contract for those requirements;” decreasing lead-times for sourcing requirements, lessening administrative overhead support and costs, expedites requirements fulfillment, lowers costs through economies of scale, and eliminates contract duplication, i.e. “contracting fratricide.” *Id.*

⁶⁹ Joint Chiefs of Staff, Joint Pub. 4-0, Joint Logistics III-13 (16 Oct. 2013).

CCMD and subordinate logistic planners must keep in mind that while CUL [common-user logistics] support can be very efficient, it may not always be the most effective method of support. By its very nature, CUL support will normally take place outside routine support channels, which may lead to reduced responsiveness if not properly planned, coordinated, and executed. CCDRs, along with their subordinate commanders, must review, coordinate, and direct CUL requirements with DLA, functional CCDRs, and Service component commanders to provide an integrated joint logistic system from the strategic to

III. Role of the Judge Advocate within Operational Contract Support

Judge advocates are not permanently assigned to OCSICs.⁷⁰ Consequently, the requiring authority's servicing legal office is responsible for supporting OCSICs on a non-dedicated basis, like all other staff sections. If an OCSIC receives a dedicated legal advisor, however, that legal advisor will be under the technical oversight of the servicing legal office of the command where the OCSIC resides.⁷¹

There is limited published information specifically detailing how judge advocates support all three OCS functions.⁷² According to the current doctrine, that legal support includes:

“. . . review[ing] contract support requirements for legal sufficiency. These legal reviews encompass funding sources and constraints, contracting methods, and associated issues. They also include operational and jurisdictional issues concerning HN [host nation] agreements, security agreements, and other contractor personnel-related issues. Legal reviews should also address any statutory and regulatory issues as well as any other pertinent issues (e.g., appropriateness of armed PSC [private security contractor] support) that may not

tactical levels. All parties must ensure that the advantages and disadvantages of each CUL-related COA are properly considered; however, the GCC has overall responsibility for deciding the amount and type of CUL support for a particular joint operation.

Id.

⁷⁰ Lieutenant Colonel Jose A. Cora, Introduction to Operational Contract Support (OCS) and OCS Integration Cells (OCSICs), at 15 (28 Feb. 2016) (unpublished PowerPoint presentation) (on file with author) [hereinafter LTC Cora, OCSIC Introduction].

⁷¹ LTC Cora Interview, *supra* note 23.

⁷² See also Joint Chiefs Of Staff, Joint Pub. 1-04, Legal Support to Military Operations (2 Aug. 2016) [hereinafter Joint Pub. 1-04].

[The Joint Force Staff Judge Advocate will] ensure that all joint force commander plans and policies are in compliance with US law, international law, local law, status-of-forces agreements, and Department of Defense policy as they relate to the use of contracted, vice military, support. Specific concerns are legal status of US and third country national contractor personnel hired outside of the operational area; force protection / security measures; and, arming contractor personnel (includes arming for self-defense and for security support). See Department of Defense Instruction 3020.41.

Id. at I-14.

⁷³ JOINT PUB. 4-10, *supra* note 9, at III-19.

⁷⁴ For additional service specific OCS guidance see AR 715-9, *supra* note 52.; U.S. Dep't of Air Force, Instr. 64-102, Contracting: Operational

have a statutory or regulatory basis but do reflect appropriate judgment and analysis for the best decision.”⁷³

Given this doctrinal explanation, it would appear that requiring activity legal support to OCS begins and ends at requirements validation. However, the following roles of the judge advocate are inferred from the available joint and service doctrine and unpublished guidance.⁷⁴

A. Role of the Judge Advocate in Contract Support Integration

During the OCS-CSI planning process, the supporting judge advocate helps the staff and the OCSIC prepare Annex W, *Operational Contract Support*, and reviews the entire operations order to ensure it is consistent with applicable host nation, international, and U.S. law, regulation, and policy.⁷⁵ Additionally, the judge advocate helps the command evaluate the fiscal law implications to include those potentially unique to contingency operations. For example, one OCS legal practitioner⁷⁶ has considered whether the lead time exception to the bona fide needs (BFN) rule applies to services;⁷⁷ whether the Title 10 United States Code section 2410a severable services exception applies to ACSAs as it does to interagency support agreements;⁷⁸ and when a unit has a BFN when planning for future operations.⁷⁹

Contracting Program (9 Oct 2014).

⁷⁵ JOINT PUB. 1-04, *supra* note 72, at I-14. For more guidance on how the judge advocate generally supports the military planning process, see Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW, Sept. 2014, at 5.

⁷⁶ LTC Cora, OCSIC Introduction, *supra* note 70, at 15.

⁷⁷ U.S. Gov't Accountability Off., B-309530, National Labor Relations Board - Funding of Subscription Contracts 1 (2007).

The National Labor Relations Board (NLRB) did not violate the bona fide needs rule when, in September 2006, it obligated fiscal year (FY) 2006 funds for five Web site database subscription renewals that it needed to have in place on October 1, 2006, the first day of FY 2007. Even though delivery of the renewed subscriptions would occur entirely in FY 2007, to ensure continued receipt of the subscriptions, NLRB reasonably determined that the renewal orders needed to be placed in FY 2006, before the expiration of the existing subscriptions on September 30, 2006.

Id.

⁷⁸ U.S. GOV'T ACCOUNTABILITY OFF., B-323940, U.S. ARMY EUROPE - OBLIGATION OF FUNDS FOR AN INTERAGENCY AGREEMENT FOR SEVERABLE SERVICES 1 (2005) (finding agencies may rely on 10 U.S.C. § 2410a to enter into interagency agreements (ISA) because an ISA is akin to a contract, and the obligational consequences of an interagency agreement entered into under [an agency's] revolving fund authority are the same as if it were a contract.”) *Id.*

⁷⁹ U.S. GOV'T ACCOUNTABILITY OFF., B-324781, DEPARTMENT OF THE ARMY, ABERDEEN PROVING GROUND - USE OF APPROPRIATED FUNDS FOR BOTTLED WATER 4 (2013) (finding an agency can use appropriated funds

During the Contract Support Integration execution process, the supporting judge advocate helps the requiring activity and OCSIC identify, develop, and articulate their contract requirements.⁸⁰ As part of this support, the judge advocate conducts a fiscal law review of all pertinent documents and ensures that any requested contract support does not constitute an inherently governmental function⁸¹ or a personal service contract.⁸²

In addition, the judge advocate receives the requirements packet from the OCSIC before the requirements review board through cASM, generates requests for information if needed, provides legal advice on issues such as arming contractors or private security contract support,⁸³ serves as a non-voting member on the requirements review board,⁸⁴ and actively engages and asks questions during the requirements review board on the validity of the requested requirement.⁸⁵ If the command has streamlined the RRB validation process, then the requirements should only require one legal review by the serving judge advocate at the level of the approval/validation authority.⁸⁶

B. Role of the Judge Advocate in Contract Support

As part of the Contract Support function, there is a judge advocate advising the operational command and the OCSIC

“to provide a work site that satisfies such basic fundamental needs as potable drinking water, clean air, and sufficient light” . . . “in response to legitimately anticipated dangers and exigencies.” *Id.*

⁸⁰ See USCENTCOM, OCSIC SOP, *supra* note 54, Appendix B and *infra* Appendix B for an example of a well-defined requirements template established by the USCENTCOM, OCSIC SOP. This template can serve as an example for other OCSICs to streamline the requirements development and validation process while addressing many of the fiscal law issues that judge advocates evaluate as part of the legal review process.

⁸¹ See FAR subpart 7.5, Inherently Governmental Functions, for a list of examples of functions considered to be inherently governmental functions. See also U.S. DEP’T OF DEF., INSTR. 1100.22, POLICY AND PROCEDURES FOR DETERMINING WORKFORCE MIX (12 Apr. 2010) [hereinafter DODI 1100.22] (establishing DoD policy for determining the appropriate mix of military, DoD civilian, and private sector support.).

⁸² “A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel . . . Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.” FAR 37.104(a), Personal services contract.

⁸³ See U.S. DEP’T OF DEF., INSTR. 3025.21, PRIVATE SECURITY CONTRACTORS (PSCs) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES (22 July 1999) (C1, 1 Aug. 2009) (establishing DoD policy for the selection, accountability, training, and arming private security contractors during contingency operations, humanitarian, or peace operations, or other military operations or exercises).

⁸⁴ USCENTCOM, OCSIC SOP, *supra* note 54, at 27.

⁸⁵ Be prepared to hear and appropriately and professionally respond to, “The Top 10 Responses to Legal Objections” from frustrated clients (that do not actually overcome legal objections):

and a contract attorney advising the contracting command and its contracting officers.⁸⁷ The judge advocate servicing the OCSIC advises on funding sources and restrictions, procurement fraud oversight, and acquisition and cross-servicing agreements.”⁸⁸ The contract attorney servicing the contracting officers advises on the interpretation of the Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) contract provisions,⁸⁹ battlefield acquisition, commercial activities, bid protests and contract dispute litigation, and provides opinions on the exercise of sound business practices on how to fulfill the RA’s requirement through one of the various procurement processes.⁹⁰

The judge advocate can also be helpful by advising the OCSIC and J-2 (Intelligence) staff on foreign vendor vetting. Foreign vendor vetting is the process of investigating proposed foreign vendors for their association with terrorist groups or other enemies of the United States, and against other requirements dictated by U.S. legal or policy requirements.⁹¹ As the former commander for the International Security Assistance Force (ISAF) articulated, the importance of vendor vetting cannot be understated:

If, however, we spend large quantities of international contracting funds quickly and with insufficient oversight, it is likely that some of

(1) We’ve always done it this way; (2) You don’t understand how important this is; (3) This is one of the boss’s priorities; (4) You didn’t have an issue with this last time; (5) Nobody else [no previous audits] had an issue with this; (6) It’s too (late/hard) to make any changes now; (7) I talked to (3rd party) and (he/she) agrees with me; (8) I (non-lawyer) disagree with your legal interpretation; (9) We have an approved exception (but it isn’t documented); and (10) What do I have to wordsmith to get this past you?

Courtesy of the U.S. Army TRADOC Off. of the Staff Judge Advocate.

⁸⁶ USCENTCOM, OCSIC SOP, *supra* note 54, at 13. See also COMBINED JOINT TASK FORCE-OPERATION INHERENT RESOLVE (CJTF-OIR) IRAQ TRAIN AND EQUIP FUND (ITEF) STANDARD OPERATING PROCEDURE (SOP) (20 June 2016) [hereinafter CJTF-OIR ITEF SOP] (identifying the role for the judge advocate as serving as a non-voting member of the ITEF requirements validation board and providing a legal review mostly limited to scribing the phrase: “No Legal Objection (NLO)” or “Legally Objectionable”). *Id.* at 10.

⁸⁷ LTC Cora, OCS Overview, *supra* note 40, at 14.

⁸⁸ JOINT PUB. 1-04, *supra* note 72, at 1-14.

⁸⁹ *Id.* at II-5.

⁹⁰ FAR 1.603-2, 15.303(b)(1) (2016).

⁹¹ “All partner forces, prior to receiving training or equipment, must be vetted to ensure the units have not committed gross violations of human rights (GVHR) IAW Department of Defense Leahy Law [10 U.S.C § 2249e] and meet additional vetting requirements mandated by section 1236 of the NDAA for FY15, as amended by section 1223 of the NDAA for FY16.” CJTF-OIR ITEF SOP, *supra* note 86, at 2.

those funds will unintentionally fuel corruption, finance insurgent organizations, strengthen criminal patronage networks, and undermine our efforts in Afghanistan.⁹²

This concern led to enactment of the statutory prohibition against contracting with individual groups “actively opposing United States or coalition forces involved in contingency operations.”⁹³ In addition to advising on the prohibition against contracting with the enemy, the judge advocate can be helpful by advising the staff on the prohibitions against contracting with individuals subject to financial sanctions⁹⁴ and individuals or entities subject to export control restrictions.⁹⁵

⁹² Memorandum from Commander, Int’l Sec. Assistance Force, subject: COMISAF’s Counterinsurgency (COIN) Contracting Guidance (8 Sept. 2010), available at <http://graphics8.nytimes.com/packages/pdf/PETRAEUSGUIDELINES.pdf>. In response to this concern, the ISAF commander established Task Force 2010 in August 2010 to “reduce corruption and neutralize criminal patronage networks” by analyzing the “risk of contracting funds going to hostile groups.” Moshe Schwartz & Joyprada Swain, Cong. Research Serv., R40764, Dep’t. of Def. Contractors in Afghanistan and Iraq: Background and Analysis, 12-13 (May 13, 2011), <http://fas.org/sgp/crs/natsec/R40764.pdf>.

⁹³ The National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 841-843, 128 Stat. 3450-3457 (2014).

⁹⁴ JOINT PUB. 4-10, *supra* note 9, at III-22.

The Office of Foreign Assets Control (OFAC) of the US Department of the Treasury acts under Presidential national emergency powers, as well as authority granted by specific legislation, to impose controls on transactions and freeze assets under US jurisdiction. OFAC maintains the Specially Designated Nationals (SDN) List and Blocked Persons List (BPL) which should be consulted prior to the execution of contract support in order to limit the risk of conducting business with individuals and entities subject to US Government sanctions . . . List checking alone is insufficient to meet the due diligence requirements due to the fact that OFAC traditionally only designates umbrella organizations.

Id. See also the SDN and BPL list, <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>.

⁹⁵ JOINT PUB. 4-10, *supra* note 9, at III-22.

The Bureau of Industry and Security in the Department of Commerce issues specific guidance to mitigate the risk of conducting business with individuals and entities subject to export regulations. Specifically, the Bureau of Industry and Security recommends that in the event a company, entity, or person on one of the maintained lists (Denied Persons List, Entity List, Unverified List, and Consolidated Screening List) appears to match a potential party in an export transaction, additional due diligence is required before proceeding.

Id. See also the consolidated interagency, http://2016.export.gov/ecr/eg_main_023148.asp.

⁹⁶ AR 715-9, *supra* note 74, para. 4-2.b.

C. Role of the Judge Advocate in Contract Management

During the Contract Management process, the supporting judge advocate will advise the OCSIC and command on the implications of host nation laws,⁹⁶ the applicability of the Uniform Code of Military Justice⁹⁷ and the Military Extraterritorial Jurisdiction Act,⁹⁸ to contractors, and the commander’s adverse administrative authority over contractors.⁹⁹ Additionally, judge advocates can play a critical role in advising the staff on procurement fraud.¹⁰⁰ In addition, there is value with having the judge advocate assist the command Contracting Officer Representative (COR) with the administration and oversight of the contract on issues like unauthorized commitments, inspection and acceptance, and claims.¹⁰¹

Contractors authorized to accompany the force are subject to all host nation laws while deployed, unless otherwise excluded from host nation jurisdiction by the SOFAs or other security agreements. The host nation may retain jurisdiction for violation of their laws or relinquish jurisdiction to the United States. Commanders will notify the Department of State (through the designated ARFOR or Joint Forces Command point of contact) of any alleged CAAF-related host nation law violations or apprehensions by host nation authorities.

Id.

⁹⁷ “Contractors authorized to accompany the force are subject to Uniform Code of Military Justice jurisdiction when deployed to a contingency area outside the United States and territories. (See AR 27-10 for guidance on commander and supervisor responsibilities in addressing alleged misconduct of civilians accompanying the force.)” *Id.* para. 4-2.c.

⁹⁸ “All contractor personnel in support of an Army contract are subject to Federal criminal jurisdiction under 18 USC 3261 while deployed to a contingency area outside the United States and its territories.” *Id.* para. 4-d.

⁹⁹ AR 715-9, *supra* note 74, § 4-2.e.

Commanders may respond to incidents, investigate, restore safety and order, and apprehend and detain contractors for violations of the law. Area and base commanders may also restrict or revoke CAAF and non-CAAF access to Army facilities or installations for disciplinary infractions. All such actions will be immediately coordinated with the supporting Judge Advocate and the commander must inform the appropriate contracting authority of these access restrictions as soon as practical, preferably prior to taking such action.

Id.

¹⁰⁰ Procurement fraud schemes involve: product substitution, defective pricing, cost mischarging, price fixing, fabrication of records, bribes, gratuities, and kick-backs (common in deployed environments), and U.S. government employee collusion and fraud. ARCENT OCS SOP, *supra* note 10, at 21. For a list of DoD procurement fraud cases investigated and prosecuted by the U.S. government, see U.S. DEP’T OF JUSTICE, PROCUREMENT FRAUD, <https://www.justice.gov/criminal-fraud/procurement-fraud> (last visited Feb. 2, 2017).

¹⁰¹ Contracting Officer Representatives (COR), also referred to as a Contracting Officer’s Technical Representative (COTR) or Quality Assurance Representative (QAR), are authorized by Contracting Officers by a letter of appointment to perform specific technical or administrative

D. Role of the Judge Advocate Supporting the OCS Integration Cell

In addition to providing the OCSIC with the above legal advice and counsel, the judge advocate also advises the OCSIC by providing ethics advice on issues such as interacting with contractors¹⁰² and identifying and addressing financial conflicts of interest.¹⁰³ Moreover, the judge advocate can provide advice on staffing decisions for the OCSIC. For example, as mentioned above, the OCSIC's contracting officer should not have an active contracting warrant to ensure that the contracting officer is not tasked with contract support missions outside the OCSIC.¹⁰⁴ In addition, the GCC or JFC may consider contracting for OCSIC service support as long as the OCSIC Chief is staffed by a U.S. government employee.¹⁰⁵

One of the ongoing challenges in OCS is that the current validation process is notoriously onerous.¹⁰⁶ Consequently, OCSICs are spending their time and energy on the redundant validation process but are not properly "focusing on requirements development within the B2C2WGs or planning for strategic sourcing solutions."¹⁰⁷ Not only does this redundancy affect the OCSIC but it also has an impact on the amount of legal reviews the legal office produces for each procurement.¹⁰⁸ One possible solution is for the judge advocates among the subordinate commands and OCSICs to arrive at a consensus that the legal review of record comes from the servicing legal office for the final validation authority. Issues like this, though not legal, can benefit from proactive steps by judge advocates to ensure the effective and efficient functioning of the OCSIC.

IV. Conclusion

As discussed above, there is little published doctrine establishing how judge advocates specifically support their

functions relating to the contract. CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CONTRACT ATTORNEYS DESKBOOK 1-2 – 1-3, 3-7 – 3-14, 32A-24 – 32A-29 (2016).

¹⁰² See *infra* Appendix C, Top 10 Rules for Engaging with Government Contractors.

¹⁰³ See, e.g., U.S. Dep't of Def. Standards of Conduct Office, Determining Which Positions Should File a Confidential Financial Disclosure Report: A Worksheet, http://www.dod.mil/dodgc/defense_ethics/resource_library/oge450_filing_determination_worksheet.pdf.

¹⁰⁴ "Also of importance, contracting officers with duty in the OCSIC will not have active contracting warrants. These contracting officers will serve as staff officers focusing on contracting support-related matters, and are not awarding or administering contracts." JOINT PUB. 4-10, *supra* note 9, Appendix D-2.

¹⁰⁵ "If contractor augmentation [to the OCSIC] is contemplated, ensure the contract support requirements package clearly states the need for non-disclosure and non-competition agreements as part of the terms and conditions of the contract. In no case should the OCSIC chief position itself be occupied by a non-government employee." JOINT PUB. 4-10, *supra* note

command and its OCSIC throughout the OCS process. This may lead some to depict the role of the judge advocate as either serving as a *No Legal Objection* rubber stamp or a *Legally Objectionable* brick wall in OCS. However, in between these two extremes, the judge advocate has a meaningful role.

Using the frame of reference and compilation of resources provided by this paper, judge advocates add additional value throughout the OCS process. For example, judge advocates can ensure that requiring activities have well-defined requirements, serve as a business counselor to the command, can help identify and report procurement fraud. Moreover, they can advocate that economies of scale are considered through strategic resourcing. In doing so, judge advocates assist their command in meeting its operational requirements while ensuring that the U.S. military is a good steward of U.S. taxpayer money. While helping facilitate timely acquisitions of necessary goods and services.

9, Appendix D-2. See also DODI 1100.22, *supra* note 81.

¹⁰⁶ Dorman, *supra* note 15, at 57.

[C]ommanders should not blindly accept lengthy and bureaucratic staffing procedures that interfere with effective decisions regarding OCS. Parallel planning, running estimates, staff assistance visits, and web-based information sharing will improve knowledge management across the force while enabling subordinate commanders to acquire the necessary decisions, funding, and contract support to accomplish their missions.

Id.

¹⁰⁷ LTC Cora, OCS Overview, *supra* note 40, at 10.

¹⁰⁸ "... Although legal reviews have a valuable part of the requirements validation process, they may be a time intensive staff product. A high volume of legal review requests may slow down a command seeking to forward requirements to the higher approval authority as expeditiously as possible." CJTF-OIR, ADMIN. / CONTRACT & FISCAL LAW, AFTER ACTION REPORT (2016) (unpublished document) (on file with author).

ANNEX W – Operational Contract Support

HEADQUARTERS, XX COMMAND

ADDRESS

XX XXX 20XX

ANNEX W TO XX COMMAND OPLAN/OPORD XXXX-XX

OPERATIONAL CONTRACT SUPPORT

(U) References: List all applicable references essential to this annex. *[List all key OCS related regulations, policies, instructions, messages to include higher level Annex Ws when applicable. JFC specific OCS references can be found via the Defense Procurement and Acquisition Policy Area of Responsibility portal available via the following link http://www.acq.osd.mil/dpap/pacc/cc/areas_of_responsibility.html. Service components should include applicable Service and/or command specific references.]*

1. (U) Situation:

a. (U) Enemy. Provide threat level assessment as it relates to OCS. Also, see Annex B (Intelligence). *[This section should include a short assessment of the estimated impact of the potential threats to utilizing contract support in the operation to include such information as threats from the use of local national employees to provide on-base services, threats that would require armed security to protect contracted services, etc.]*

b. (U) Friendly. List major contract support related commands and agencies involved in this operation, but not under the C2 this command; include their key OCS related tasks. *[Include organizations such as USTRANSCOM, DLA, DCMA, DCAA and other governmental agencies impacting or influencing OCS actions such as American Embassies and USAID operating in the projected operational area. Include basic information on the OCS related authorities, capabilities of each organization]*

c. (U) Commercial Business Environment. Provide a brief description of the general business environment and estimated impact on the ability to utilize commercial support in the designated operational area. *[Based on a coordinated GCC, Service component, construction agent and CSA OCS preparation of the operational environment efforts, this paragraph should include information on such things as existing DOD contracts, estimated local and in-transit commercial capabilities, local electronic banking capabilities, etc.]*

d. (U) Assumptions. State valid and necessary assumptions. *[Briefly describe key OCS related planning assumptions based on threat assessment, commercial business environment, host nation/international and multinational considerations and any established OCS related facts.]*

e. (U) Limiting Factors. State all key limited factors to include specific constraints and restraints. *[Based on threat assessment, commercial business environment research and any established OCS related facts and assumptions, list specific OCS related limiting factors such as status of forces agreements (SOFAs) restrictions (e.g. a SOFA that limits the number of US or third country national contractors allowed in country), general business environment (e.g. lack of established electronic banking systems), etc.]*

2. (U) Mission. See base plan.

3. (U) Execution

a. (U) Concept of Contract Support Operations. Provide a broad concept of OCS integration and oversight for this operation. *[This sub-paragraph includes a general overview of how contracting supports the operation and articulates the commander's priorities, intent and specific OCS command guidance by phase of operation (e.g. ensure maximum use of local national commercial sources and employees in phase IV) by type of contract support or other logical manner. This section should also address the overall contract support arrangements (e.g., support to own Services, lead Service or Joint Theater Support Contracting Command (JTSCC), contract support related restrictions (by phase, location, function, guidance on use of/transition from Service CAP support, etc. Include description how OCS achieves or helps to achieve desired operational effects.]*

(1) (U) Guidance on Utilization of Types of Contracted Support.

(a) (U) Systems Support Contracts. Provide any specific guidance on use of system support contracts in this operation. *[This sub-paragraph(s) addresses any command guidance/restrictions on the use of Service weapon systems support contracts. Use caution in placing any restrictions on the use of system support contracts since most of these contract are critically important in maintaining weapon and support system readiness.]*

(b) (U) External Support Contracts. Provide any specific guidance on use of external support contracts in this operation. *[This sub-paragraph addresses general guidance on the use of major external support contracts (e.g. DLA, USTRANSCOM, etc.) and Service Civil Augmentation Programs (e.g. Army Logistics Civil Augmentation Program; Air Force Capabilities Program [AFCAP]; and Navy's Global Contingency Construction Contract [GCCC] and Global Contingency Services Contract [GCSC]). This section will also include commander's guidance on the transition of Civil Augmentation Program support to theater support contracting by phase of operation where appropriate. The GCC and/or sub-JFC Annex W may refer to the appropriate Service component Annex Ws for a more detailed description of planned Civil Augmentation Program support (e.g., Army Annex W may have LOGCAP plan).]*

(c) (U) Theater Support Contracts. Provide any specific guidance on use of theater support contracts in this operation. *[This sub-paragraph addresses the concept of theater support contracting in the joint operational area by phase of the operation. The GCC and/or sub-JFC Annex W should refer to related sections of the Annex W to include theater support contracting command tasks and Appendix 1 Operational Contract Support Capabilities.]*

(2) (U) Contingency Contracting Administrative Services (CCAS). State how CCAS will be performed. *(Provides direction on CCAS at the GCC level. Normal options include Services providing their own CCAS capability or CCAS being provided by DCMA per theater business clearance guidance. If CCAS is going to be performed by DCMA, this paragraph should refer to tasks to subordinate units and other related guidance (i.e. theater business clearance rules).*

(b). (U) Tasks To Major Subordinate Units. List major OCS related tasks for each Service component, JTSCC (if formed), Joint Contingency Acquisition Office (JCASO) mobile support team (MST)(if deployed) and CSAs to include identification of the lead OCS manager/integrator staff or unit and participation in boards, bureaus, centers, cells (B2C2W) working groups. *[This sub-paragraph should include OCS related guidance to major subordinate commands, JTSCC (if formed) and CSAs not contained in other sections of the Annex W. The GCC plan should include the requirement for Service components and CSAs to follow GCC OCS related guidance as found in the DPAP AOR portal (web linked in reference section above) and other OCS guidance (e.g. theater business clearance rules) as applicable. Service components and CSAs will be required to conduct OCS planning in support of the GCC and may be required to submit draft CSIPs to include appropriate Tabs and Appendices. The GCC level plan must include OCS integration responsibilities such as BC2W responsibilities not already captured in GCC standard procedures and/or policies as well as lead OCS advisory responsibilities. Service component and CSA plans should reflect similar OCS integration and advisory responsibilities applicable to their subordinate organizations. Finally, instructions to the lead Service responsible for theater support contracting (if appointed) or JTSCC (if formed) must include direction to publish mission specific theater acquisition instruction (e.g. standard clauses, contract negotiation policy, pricing procedures, etc.) and responsibility to coordinate theater business clearance guidance with OSD (if and when published).*

(c). (U) Initial Guidance by Support Function. Identify major support function planned for commercial support sourcing. *[This sub-paragraph along with the Annex W Tab A, Summary of Contractor Support Estimate, outlines anticipated commercial support sourcing by joint capability area and/or commodity. The information in the GCC and/or sub-JFC Annex W should be linked to the appropriate Service component or CSA plan as well as to Tab A to Appendix 3 Summary of Contractor Support Estimate which will contain more detailed planning guidance. Specific guidance found in each section below is based on GCC directed lead Service directives/CSA responsibilities, JFC ANNEX W Concept of the Operations guidance, applicable functional supportability analysis data, commercial business environment analysis factors, risk assessment analysis and other operational factors. Each individual section below should contain Service component command guidance on suitability for*

contracted support to include specific restrictions and contract venue guidance (e.g. external support vice theater support contract type decision) by location and phase of operations as applicable and as directed by the GCC. The requiring activities (e.g., the Service components) will be responsible to develop contract statement of requirements (CSOR) that includes a description, location, timing, and estimated amount) for the designated supply or service. The CSOR template and instructions can be found at TAB C to APPENDIX F to ENCLOSURE F. The outline below provides specific guidance on the types of services that should be addressed in this paragraph.

1. Non-Logistic Support

- (a) Interpreters/Linguists
- (b) Intel
- (c) Communications
- (d) Security
- (e) Other

2. Logistics

- (a) Commodities
 - (1) Bottled Water
 - (2) Class I
 - (3) Class II
 - (4) Class III (B/P)
 - (5) Class IV
 - (6) Class VIII
 - (7) Class IX
- (b) Base Life Support (non-facility related)
 - (1) Tactical Water Purification
 - (2) Dining Facility (DFAC) Support
 - (3) Class I, II, III(P), IX Supply Support Services
 - (4) Morale, Welfare and Recreation
- (c) Common Equipment Maintenance
- (d) Construction/General Engineering/Facility Maintenance Support
- (e) Distribution/Transportation
- (f) Health Readiness
- (g) Materiel Disposition Services
- (h) Other.

d. (U) Coordinating Instructions. Provide any mission specific board, bureau, center, cell, working group guidance or other coordinating instructions or reports as necessary.

4. (U) Administration and Logistics

a. (U) Funding/Fund Disbursement. Address OCS related funding and fund disbursement arrangements. Also, see Base Plan, Annex E Personnel, Appendix 3 Finance and Disbursing. *[This sub-paragraph should specify who will provide/perform financial management responsibilities (including resource management, comptroller) along with information on who will provide funding for administrative support and operations. Designate who and how deploying funds certification and funds disbursement capabilities will support deploying contracting capabilities.]*

b. (U) Contract/Fiscal Law Support. Specify who is responsible for providing contract law support to facilitate OCS. Also, see Base Plan, Annex E Personnel, Appendix 4 Legal. *[This sub-paragraph should describe specific contract and fiscal law support arrangements.]*

5. (U) Command, Control, and Contracting Authority

a. (U) Command and Control. Address the OCS C2 organizational construct. *[The GCC level plan or order must designate specific OCS C2 relationships and how they fit into the overall JFC C2 arrangements. The GCC level plan must specifically address any lead Service or JTSCC C2 relationships over attached subordinate contracting organizations and if planned, how the OCS C2 organizational construct may change or evolve.]*

b. (U) Contracting Authority. Address theater support head of contracting activity (HCA) authority to include linkages to in-theater contracting organization(s) and, if applicable, theater business clearance authorities. *[This information should be addressed in the GCC level plan and be coordinated closely with the Service components and when necessary, DPAP. If determined necessary, coordinate with DPAP to initiate executive agent authority directives.]*

Annex W Appendixes and Associated Tabs:

Appendix 1 Operational Contract Support Capabilities Summary. Identifies key contracting, separate CCAS organization (if applicable) and contract integration organizations by phase and location. *[This appendix should capture the deployment sequence and primary location of key OCS related elements include such organizations. For example, GCC and/or sub-JFC Annex W should capture organizations such as the JCASO-MST, Army Contracting Support Brigades, USAF contingency Contracting unit HQs, etc. Service component Annex Ws should provide additional detail such as location and support relationships of contingency contracting teams, LOGCAP support officers, etc.]*

Appendix 2 Contractor Management Plan (CMP). Identifies theater specific contractor management requirements to include key staff and subordinate command responsibilities. *[The CMP should cover contractors authorized to Accompany the Force (CAAF) related deployment preparation, in-theater management (to include legal jurisdiction and discipline matters) and government furnished support coordination and support requirements. The CMP also must address certain contractor management requirements for non-CAAF contracted employees who have an area of performance on a US military facility or within the vicinity of US forces. It also can be used (when applicable) to address unique contractor management aspects of both CAAF and non-CAAF private security personnel. This CMP planning information must be closely coordinated with the applicable primary and special staff members. More details can be found in TAB H to APPENDIX F to ENCLOSURE F.]*

Appendix 3 Summary of Contractor Support Estimate. Identifies the estimated contracted support requirements by function, location, phase of operation and includes estimated contractors accompanying the force footprint. *[This tab provides data base like presentation of major contracted function guidance found in paragraph 3 c. This information is depicted by JCA, phase of the operation, and location to include estimated CAAF footprint information. The CAAF personnel numbers estimates will be determined using historical data and/or the Contractor Estimate Tool. In the future, these estimates will be tied to standard and non-standard contracted unit type code information.]*

John A. Doe
General (or Admiral), U.S. xxxxx
Commander
OFFICIAL////////

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
PART 1 – BASIC INFORMATION ABOUT THE REQUIREMENT		
2. REQUIRING ACTIVITY OR UNIT:		3. NAME OF REQUIREMENT:
4. BOTTOM LINE UP FRONT (BRIEF DESCRIPTION OF REQUIREMENT AND UNIT OPERATIONAL NEED):		
5. IS THIS A NEW UNIT REQUIREMENT OR IS THIS REQUIREMENT CURRENTLY BEING PERFORMED? <input type="checkbox"/> NEW <input type="checkbox"/> CURRENTLY BEING PERFORMED		6. IF SUPPLY/EQUIPMENT PURCHASE, WHAT IS THE REQUESTED DELIVERY DATE? <input type="checkbox"/> N/A <input type="checkbox"/> DELIVERY DATE: _____
7. FOR CONSTRUCTION; OR FOR SUSTAINMENT, REPAIR AND MAINTENANCE (SRM) OF A FACILITY, WHAT IS THE REQUESTED GROUND-BREAKING START DATE AND DELIVERY DATE? <input type="checkbox"/> N/A <input type="checkbox"/> REQUESTED GROUND-BREAKING DATE: _____ <input type="checkbox"/> REQUESTED COMPLETION DATE: _____		8. FOR SERVICES, WHAT IS THE REQUESTED PERIOD OF PERFORMANCE (POP)? <input type="checkbox"/> N/A <input type="checkbox"/> START DATE: _____ <input type="checkbox"/> END DATE: _____
9. IDENTIFY THE REQUESTED DELIVERY LOCATION(S):		
PART 2 – ROUGH ORDER OF MAGNITUDE (ROM) COST ESTIMATE		
10. SUPPLY, COMMODITY AND EQUIPMENT COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____		11. SERVICES COSTS (INCLUDE EQUIP. MAINT.): <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____
12. FACILITY CONSTRUCTION, ADDITIONS, AND IMPROVEMENTS; OR REPAIR AND MAINT. COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____		13. SHIPPING COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> COSTS: _____
14. RELOCATABLE BUILDING (RLB) COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> RLB COST: _____		15. INSTALLATION AND PREPARATION COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> INSTALLATION COSTS: _____ <input type="checkbox"/> SITE PREPARATION COSTS: _____
16. WARRANTY AND/OR LICENSING COSTS: <input type="checkbox"/> N/A <input type="checkbox"/> LICENSING COSTS: _____ <input type="checkbox"/> WARRANTY COSTS: _____		17. TOTAL ROM ESTIMATED COST: TOTAL COST: _____
PART 3 – WHO IS THIS REQUIREMENT FOR?		
18. IDENTIFY THE SINGLE <i>PRIMARY</i> END USER OR RECEIVER OF THIS REQUIREMENT: <input type="checkbox"/> DOD SERVICE-MEMBERS AND GOV'T CIVILIANS <input type="checkbox"/> NON-DOD USG AGENCY <input type="checkbox"/> DOD CONTRACTOR <input type="checkbox"/> FOREIGN MIL FORCES <input type="checkbox"/> FOREIGN GOV'T <input type="checkbox"/> FOREIGN CIVILIANS/POP <input type="checkbox"/> OTHER		19. IDENTIFY ANY/ALL <i>SECONDARY</i> END USER OR RECEIVER OF THIS REQUIREMENT: <input type="checkbox"/> N/A <input type="checkbox"/> DOD SERVICE-MEMBERS AND GOV'T CIVILIANS <input type="checkbox"/> NON-DOD USG AGENCY <input type="checkbox"/> DOD CONTRACTOR <input type="checkbox"/> FOREIGN MIL FORCES <input type="checkbox"/> FOREIGN GOV'T <input type="checkbox"/> FOREIGN CIVILIANS/POP <input type="checkbox"/> OTHER
20. IF YOU IDENTIFIED REQUIREMENT USERS OR RECEIVERS <i>OTHER THAN THE PRIMARY</i> USER, ESTIMATE THE PERCENTAGE OF USE BY THE PRIMARY USER AND EACH SECONDARY USER (TOTAL 100%): <input type="checkbox"/> N/A		
PART 4 – WHAT IS YOUR REQUIREMENT?		
21. HOW WOULD YOU BEST DESCRIBE YOUR <i>PRIMARY</i> REQUIREMENT? <input type="checkbox"/> SERVICES <input type="checkbox"/> SUPPLIES, COMMODITIES, OR EQUIPMENT <input type="checkbox"/> FACILITY CONSTRUCTION, IMPROVE, OR ADDITIONS <input type="checkbox"/> FACILITY SUSTAIN, REPAIR OR MAINTENANCE (SRM) <input type="checkbox"/> RELOCATABLE BUILDINGS (RLBs)		22. IDENTIFY ANY/ALL <i>SECONDARY</i> OR ADDITIONAL NEEDS WITH THIS REQUIREMENT: <input type="checkbox"/> N/A <input type="checkbox"/> SERVICES <input type="checkbox"/> SUPPLIES, COMMODITIES, OR EQUIPMENT <input type="checkbox"/> FACILITY CONSTRUCTION, IMPROVE, OR ADDITIONS <input type="checkbox"/> FACILITY SUSTAIN, REPAIR OR MAINTENANCE (SRM) <input type="checkbox"/> RELOCATABLE BUILDINGS (RLBs)

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
PART 4 – WHAT IS YOUR REQUIREMENT? (CONT.)		
23. IF YOU IDENTIFIED SECONDARY OR ADDITIONAL REQUIREMENTS OTHER THAN THE PRIMARY REQUIREMENT, DESCRIBE AND ESTIMATE THE PERCENTAGE OF COST OF EACH TYPE OF REQUIREMENT (TOTAL 100%): <input type="checkbox"/> N/A		
PART 4A – SUPPLY, COMMODITY AND EQUIPMENT PURCHASES (INCLUDE IT EQUIPMENT)		
24. IS ANY OF YOUR REQUIREMENT FOR SUPPLIES, COMMODITIES AND/OR EQUIPMENT? <input type="checkbox"/> YES (FILL OUT PART 4A) <input type="checkbox"/> NO (SKIP TO PART 4B)	25. HOW LONG ARE THESE SUPPLIES, COMMODITIES AND EQUIPMENT INTENDED/DESIGNED TO LAST? <input type="checkbox"/> ONE (1) YEAR OR LESS <input type="checkbox"/> MORE THAN ONE (1) YEAR	
26. HOW ARE THESE SUPPLIES OR EQUIPMENT DESIGNED AND INTENDED TO BE USED? <input type="checkbox"/> INDIVIDUAL USE (E.G., PAPER, REPAIR PART, ETC.) <input type="checkbox"/> USED/INSTALLED TOGETHER (E.G., IT SYSTEM)	27. DO THESE SUPPLIES REQUIRE SERVICES SUCH AS INSTALLATION, SHIPPING OR MAINTAIN COSTS? <input type="checkbox"/> N/A <input type="checkbox"/> YES; INSTALLATION COSTS: _____ <input type="checkbox"/> YES; SHIPPING COSTS: _____ <input type="checkbox"/> YES; MAINTENANCE COSTS: _____	
PART 4B – SERVICES (INCLUDING SERVICES INCIDENT TO EQUIPMENT PURCHASES)		
28. IS ANY OF YOUR REQUIREMENT FOR SERVICES? <input type="checkbox"/> YES (FILL OUT PART 4B) <input type="checkbox"/> NO (SKIP TO PART 4C)	29. ARE THESE SERVICES RECURRING IN NATURE OR DO THEY BUILD TO A SINGLE END PRODUCT/RESULT? <input type="checkbox"/> RECURRING (E.G., FACILITY CLEANING) <input type="checkbox"/> END RESULT (E.G., STUDY; REGULATION RE-WRITE)	
30. DOES THE SERVICE REQUIRE THE DOD PURCHASE OR LEASE OF SUPPLIES OR EQUIPMENT? <input type="checkbox"/> N/A <input type="checkbox"/> YES; PURCHASE COST IS: _____ <input type="checkbox"/> YES; LEASE COST IS: _____	31. DOES THE SERVICE REQUIRE THE PURCHASE OF LICENSES? HOW MANY; LICENSE DURATION? <input type="checkbox"/> N/A <input type="checkbox"/> YES; _____ LICENSES (<=1 YEAR), COST: _____ <input type="checkbox"/> YES; _____ LICENSES (>1 YEAR), COST: _____	
PART 4C – FACILITY CONSTRUCTION; OR SUSTAIN, REPAIR AND MAINTENANCE (SRM)		
32. IS ANY OF YOUR REQUIREMENT FOR NEW FACILITY CONSTRUCTION, ADDITIONS, OR IMPROVEMENTS; OR FOR SUSTAINMENT, REPAIR OR MAINTENANCE (SRM)? <input type="checkbox"/> YES (FILL OUT PART 4C) <input type="checkbox"/> NO (SKIP TO PART 4D)	33. REQUESTED GROUND-BREAKING (FOR NEW FACILITIES) OR REQUESTED START DATE (FOR SRM): DATE: _____ 34. IDENTIFY PROJECT LOCATION(S) BELOW:	
35. WHAT TYPE OF PROJECT(S) DO YOU REQUIRE? <input type="checkbox"/> NEW FACILITY CONSTRUCTION <input type="checkbox"/> ADDITION OR IMPROVE EXISTING FACILITY <input type="checkbox"/> SUSTAIN, REPAIR, MAINT. OF EXISTING FACILITY <input type="checkbox"/> LEASE OF FACILITIES <input type="checkbox"/> LAND PURCHASE/LEASE <input type="checkbox"/> OTHER-	36. ESTIMATED COST FOR BLOCK 35 PROJECT TYPES: <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> COST: _____ <input type="checkbox"/> DESCRIBE OTHER: _____ OTHER COST: _____ TOTAL COST: _____	
37. IF THIS IS NEW CONSTRUCTION(S), DO YOU HAVE A LAND USE AGREEMENT (LUA) OR OPERATIONAL CONTROL MEMO FOR THE LOCATION(S)? <input type="checkbox"/> N/A <input type="checkbox"/> YES – INCLUDED IN THIS JUSTIFICATION PACKET <input type="checkbox"/> NO – THE PROJECT IS ON A PERMANENT U.S. BASE <input type="checkbox"/> NO – NEED ASSISTANCE WITH THOSE DOCUMENTS	38. IF THIS IS NEW CONSTRUCTION, IDENTIFY THE ELECTRICAL SOURCING (E.G., LOCAL POWER GRID, GENERATORS, ETC.) AND OTHER UTILITIES: <input type="checkbox"/> N/A	
39. WILL THIS FACILITY BE "COMPLETE AND USEABLE" BY YOUR UNIT UPON COMPLETION OF THE PROJECT? <input type="checkbox"/> YES <input type="checkbox"/> NO (EXPLAIN WHY NOT IN BLOCK 41)	40. ARE THERE ANY OTHER CONSTRUCTION PROJECTS CURRENTLY ONGOING OR PLANNED THAT ARE RELATED TO THIS PROJECT? <input type="checkbox"/> YES (DESCRIBE THE OTHER PROJECTS IN BLOCK 41) <input type="checkbox"/> NO	

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM	1. VALIDATION AUTHORITY CONTROL #:
PART 4C – FACILITY CONSTRUCTION; OR SUSTAIN, REPAIR AND MAINTENANCE (CONT.)	
41. IF "NO" ON BLOCK 39, EXPLAIN WHY THIS FACILITY WILL NOT BE "COMPLETE AND USEABLE" UPON COMPLETION; IF "YES" ON BLOCK 40 IDENTIFY AND DESCRIBE ANY OTHER CONSTRUCTION PROJECTS CURRENTLY ONGOING OR PLANNED THAT ARE RELATED TO THIS PROJECT: <input type="checkbox"/> N/A	
42. IF THIS CONSTRUCTION PROJECT IS NOT APPROVED, WILL IT NEGATIVELY AFFECT THE "LIFE, HEALTH, AND SAFETY" OF YOUR UNIT PERSONNEL? IF SO PLEASE EXPLAIN BELOW, IN DETAIL: <input type="checkbox"/> N/A	
PART 4D – RELOCATABLE BUILDINGS (RLBs)	
43. DOES YOUR REQUIREMENT INCLUDE PURCHASE OR INSTALLATION OF RELOCATABLE BUILDINGS (RLBs)? <input type="checkbox"/> YES (FILL OUT PART 4D) <input type="checkbox"/> NO (SKIP TO PART 5)	44. ARE THESE RLBs BEING USED FOR, OR IN CONJUNCTION WITH, A CONSTRUCTION PROJECT? <input type="checkbox"/> YES (FILL OUT PART 4C IN ADDITION TO PART 4D) <input type="checkbox"/> NO
45. PLEASE IDENTIFY AND ESTIMATE ALL OF THE RLB COSTS THAT WILL BE REQUIRED FOR THIS RLB PROJECT:	
<input type="checkbox"/> ACTUAL RLBs	<input type="checkbox"/> COST: _____
<input type="checkbox"/> RLB SHIPPING	<input type="checkbox"/> COST: _____
<input type="checkbox"/> FOUNDATION	<input type="checkbox"/> COST: _____
<input type="checkbox"/> ASSEMBLY/DISASSEMBLY	<input type="checkbox"/> COST: _____
<input type="checkbox"/> POST-ASSEMBLY WORK LIKE UTILITY/DRY WALL OR FIRE-SUPPRESSION INSTALLATION	<input type="checkbox"/> COST: _____
<input type="checkbox"/> OTHER-DESCRIBE: _____	<input type="checkbox"/> COST: _____
TOTAL RLB PROJECT COST: _____	
PART 5 – OPERATIONAL NEED JUSTIFICATION	
46. PROVIDE A COMPLETE JUSTIFICATION FOR WHY YOUR UNIT NEEDS THIS REQUIREMENT, AND HOW THE REQUIREMENT WILL SATISFY THE NEED:	
47. EXPLAIN THE OPERATIONAL IMPACT TO YOUR UNIT IF THIS REQUIREMENT IS NOT APPROVED:	

CENTRAL COMMAND LETTER OF JUSTIFICATION (LOJ) FORM		1. VALIDATION AUTHORITY CONTROL #:
48. ADDITIONAL INFORMATION REQUIRED BY THE VALIDATION AUTHORITY:		
PART 6 – SIGNATURES		
49. NAME/TITLE OF RA/UNIT PREPARER:		50. DATE:
51. SIGNATURE OF PREPARER:		
52. NAME/TITLE OF RA/UNIT APPROVER:		53. DATE:
54. SIGNATURE OF RA/UNIT APPROVER:		
GENERAL INSTRUCTIONS		
Follow these guidelines and guidance listed in the MAAWS-A to complete this form.		
<p>Block 1: To be assigned by JRRB Staff Blocks 2-3: Self explanatory Block 4: Be as concise yet descriptive as possible to provide a short summary of the requirement Blocks 5-9: Self explanatory Blocks 10-15: An exact cost is not required as that is determined during the contracting process. However, the Rough Order of Magnitude should be as close as possible to allow for efficient validation and processing. Block 16: If the warranty/license covers multiple years, check to see if the warranty cost is severable and can be paid in one year blocks. Block 17: The total sum of the costs in blocks 10-16. Blocks 18-19: If "Other," please use the space in block 55 to explain your answer, preceded by the continued block number. (i.e. 18:) Block 20: Self explanatory Blocks 21-22: Force Protection items, like T-walls and HESCO barriers, may be considered supplies IAW MAAWS-A, para. 3.69. For RLBs, consider the 20% rule (aka 80/20 Analysis) when indicating the type of project. For more information on the 20% rule, see MAAWS-A, para. 4.36 and http://portal.usfora.oneteam.centcom.smil.mil/sites/JENIG/PJMP/Shared%20Documents/Forms/AllItems.aspx. Blocks 23-25: Self explanatory Block 26: If you are unsure, the space in block 55 to explain your answer, preceded by the continued block number. (i.e. 26:) Block 27-30: Self explanatory Block 31: If the license covers multiple years, check to see if the license cost is severable and can be paid in one year increments. Blocks 32-34: Self explanatory Blocks 35-36: Divide the total Rough Order of Magnitude between each type of project on the lines in block 36 directly in line with the project type from block 35. If "Other," please use the space in block 55 to explain your answer, preceded by the block number (i.e. 18:) Blocks 37-40: Self explanatory Block 41: "Related projects" include repair, maintenance, and construction on the same utility system, infrastructure, or building. Block 42: A true Life, Health, or Safety issue is likely to cause immediate injury, death or catastrophic equipment failure if not mitigated. Lack of time remaining to complete the approval process is generally NOT a Life, Health, or Safety threat. Blocks 43-44: Self explanatory Block 45: A detailed breakdown of RLB expenses is required to complete the 20% rule (aka 80/20) analysis. For more details see MAAWS-A, para. 4.36 and http://portal.usfora.oneteam.centcom.smil.mil/sites/JENIG/PJMP/Shared%20Documents/Forms/AllItems.aspx. Block 46: This section is very important. A detailed description of the need for the requirement and how the current plan will meet the need can expedite the approval process. If you do not have enough space, please use the space in block 55 to continue your answer, preceded by the continued block number. (i.e. 46:) Block 47: Be specific regarding mission impact. If you do not have enough space, please use the space in block 55 to continue your answer, preceded by the continued block number. (i.e. 47:) Block 48: Use this space as required for any additional information requested by the Validation Authority. Blocks 49-54: Self explanatory Blocks 55-56: Use this space as required for any additional information that does not fit within Blocks 2-48.</p>		

Courtesy of the U.S. Army TRADOC Office of the Staff Judge Advocate

Rule 1

Recognize that Contractors Are Competitors - Maintain a Level Playing Field. Be sensitive to whether a meeting, action, or release of information would give a competitive advantage to a contractor. All similarly situated contractors should receive equal treatment. Because of the significant demands on their schedules, Senior Army Leaders may restrict contact with contractors—generally deferring such meetings to their action officers and/or program managers.

Rule 2

Decline to Meet with Contractors Regarding Ongoing Competitions. Decline meetings with competing contractors once a solicitation has been released; instead, refer contractors to the designated contracting officer. Avoid discussing or responding to questions on matters that are being litigated. When in doubt, contact your judge advocate.

Rule 3

Avoid Preferential Treatment or the Appearance of Endorsement. Do not give preferential treatment to any private party. Again, if you elect to meet with one contractor, you should be available to meet with other similarly situated contractors. Also, do not provide VIP visitor treatment to contractor representatives, to include those who may be retired DoD personnel - e.g., no Government vehicle rides from the airport, no all-day escort, no officially-hosted free dining.

Rule 4

Avoid Private Discussions with Contractors. You should avoid private meetings or discussions with contractors regarding its business and relationship with the Army. Make it your practice to have a staff member attend sessions with contractors.

Rule 5

Should You Meet with a Contractor. Set an Agenda. After agreeing to meet with a contractor, have the contractor identify the topic(s) for discussion and whether there are any current contracts, competitions, or active proposals that it has pending with the Army. You may want to have the contracting officer's representative (COR) attend if a particular contract action is involved.

Rule 6

Primary Purpose of a Meeting is to Receive. While it is alright to ask informational and clarifying questions during a meeting, avoid asking contractors to send follow-up information. The meeting should not be the basis for further action, and should not unintentionally solicit formal proposals. Leverage your staff or designated program manager for any follow-up. Use public forums such as Industry Days to "push" information out to contractors on Army needs and requirements. If you are uncertain, contact your judge advocate.

Rule 7

Keep "Inside Information" Inside. Do not release "Inside Information" that is not otherwise available to the public (or relevant community of DoD contractors). Inside Information includes:

- Selective release of advance procurement information, Army requirements, or premature release of contract award decisions;
- Acquisition information, to include: unopened bids, ranking of bids, proposed costs, the Army's estimate of costs, source selection plans, proprietary information (e.g., labor rates), reports by source selection boards, and information marked as source selection sensitive;
- Information not available to the public under the Freedom of Information Act; and,
- Information protected under the Privacy Act, trade secrets, and classified material.

Rule 8

Gifts Limits. Small gifts are occasionally offered in meetings with contractors. Food and refreshments that are not a meal (e.g., coffee and doughnuts) may be accepted. Anything more should be avoided and/or declined. That said, ethics rules allow acceptance of nominal presentation items or items worth less than \$20 (but not more than \$50 in total from any one source in a year). Consult your JAG when something other than a nominal gift is offered.

Rule 9

Restricted Contacts with Former DoD Officials & Retired Military Officers.

- The One-Year "Cooling Off" Restriction. Former senior DoD civilian employees and retired General Officers are prohibited from attempting to influence official actions in their former department or agency for one year after their departure. (18 USC § 207).
- For two years after leaving Government service, former Government officials may not represent someone else to the Government regarding "particular matters" (e.g., contract actions) that were pending under their responsibility during their last year of Government service. (18 USC § 207).
- Former officers and employees are forever prohibited from representing someone in a particular matter that involved non-Federal parties, in which they were personally and substantially involved while working for the Government. (18 USC § 207).
- Federal officials who had authority to award contracts, make payments, set overhead rates, and settle claims of more than \$10 million are prohibited for a period of one year after the official action from working for the contractor who received the payment. (41 USC § 2104).

Rule 10

Letters, Star Notes, Awards. DoD officials are prohibited from using their official position, title, or authority to endorse any person, product, service, or enterprise. This includes the use of official stationery and Star Notes. (Personal letters of recommendation are an exception and should be coordinated with your JAG.) It is DOD policy not to recognize contractors with honorary awards unless the contribution is unrelated and completely outside any contractual relationship with DoD and the recognition is clearly in the public interest - a very high standard.

If conduct by contractor personnel is deemed to meet the DOD standard, then recognition is limited to a letter or an informal certificate of appreciation signed at the lowest organizational level. Recognition of contractors must be coordinated with the cognizant contracting officer. Prior coordination is required because the contracting officer may be taking action related to contractor performance.

Obtain legal counsel regarding the propriety of any recognition action involving a contractor.

- "Commander's coins" purchased with appropriated funds may not be presented to contractors.
- Before providing a contractor employee a personal letter of recommendation, contact your judge advocate for fact-specific advice.
- DoD Components must not permit any person, organization, or company having a commercial or profit-making relationship with DoD to participate in DoD award programs and must not create awards or awards programs to recognize such persons, organizations, or companies. (See DoDI 1400.25 - V451.)

END NOTE

Communication between the Government and industry must be fair, even, and transparent. The above guidance offers an overview for properly engaging contractors. Do not hesitate to request the assistance of your servicing legal advisor.

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781

