



# THE ARMY LAWYER

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## Lore of the Corps

### Tried by Military Commission and Hanged for Murder: *United States v. Franz Strasser*\*

Fred L. Borch  
Regimental Historian and Archivist

In mid-December 1945, a Signal Corps photographer stamped the following caption on the reverse of a photograph he had taken a few days earlier: “10 Dec 45, 3rd Army. Big Finale—The body of Former Nazi Official Franz Strasser, accused of killing two American Fliers forced down in Germany, swings and twitches at the end of the gallows rope.”<sup>1</sup> What follows is the story of forty-six-year-old Franz Strasser, whose misconduct in December 1944 resulted in his prosecution by a military commission, a conviction for murder, and death at the end of a rope.

On the afternoon of 9 December 1944, an American bomber made a forced landing near Zahdelesdorg, Czechoslovakia. The pilot, co-pilot, and three crew members voluntarily surrendered to the local authorities and “were loaded into a truck for the ostensible purpose of transporting them to Kaplitz,” Czechoslovakia.<sup>2</sup> Two automobiles accompanied the truck: one contained Nazi Party official Franz Strasser, the Kreisleiter of Kreis Kaplitz,<sup>3</sup> and the other car contained Captain Lindemeyer, the Kaplitz chief of police.

When the convoy got to the top of a hill on the road to Kaplitz, Strasser, who was in the lead vehicle, stopped his car. The truck containing the unarmed American fliers also stopped. Strasser then walked back to the truck and shot and killed one airman with his machine pistol. When the driver of the truck tried to protect a second American airman by

allowing him to take refuge in the truck cab, Strasser threatened to kill the driver if he continued to interfere.<sup>4</sup>

Strasser then shot this second American and, when the American was prostrate on the ground, “raked the airman from head to foot with his machine pistol.”<sup>5</sup> As for the other three airmen? They were shot and killed by Captain Lindemeyer.

On 24 August 1945, Franz Strasser was tried by a military commission sitting in Dachau, Germany.<sup>6</sup> He was charged as follows:

Charge I: Violation of the Laws and Usages of War.

Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully kill an American airman, whose name, rank and serial number are unknown, by shooting him with a machine pistol.

Charge II: Violation of the Laws and Usages of War.

Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully shoot an American airman, whose name, rank and serial number are unknown.<sup>7</sup>

At trial, Strasser pleaded not guilty. He did not deny that he had participated in the shooting of the five American

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\* The author thanks Lieutenant Colonel (LTC) Virginia Griffin Beakes, Judge Advocate, U.S. Army Reserve, for alerting him to the existence of the Strasser photographs, and Lieutenant General (Retired) Thomas N. Griffin, Jr., U.S. Army, for allowing him to borrow them for this article. General Griffin's father, then LTC Thomas N. Griffin, was the 3d Army Provost Marshal who supervised the execution of Franz Strasser.

<sup>1</sup> 3242 Signal Photo Co., Signal Corps photograph no. 00842-HQ-A9-10 Dec 45-3rd Army (Herod) (Regimental Historian's files, The Judge Advocate General's Legal Center and School).

<sup>2</sup> U.S. Forces European Theater, Deputy Theater Judge Advocate's Office, War Crimes Branch, Review and Recommendations, *United States v. Franz Strasser*, Case No. 8-27, at 2 (14 Oct. 1945), <http://www.jewishvirtuallibrary.org/jsource/Holocaust/dachautrial/fs17.pdf> (last visited Dec. 7, 2013) (follow Home; The Library; History; Modern Jewish History/World War II; Post-war/War Crimes; War Crimes Trials and Results/Dachau Trials; The Cases/U.S. POW Cases; Other Prisoner of War Cases/Case No. 8-5 (U.S. vs. Harra Kielsing) Tried 24 Oct. 47) (the document is mislabeled on the webpage).

<sup>3</sup> In Nazi Germany, a “Kreisleiter” was a “county leader” and was the highest Nazi Party official in a “kreis” or county municipal government. Today, Kreis Kaplitz is in the Czech Republic. In 1944, however, it was part of Germany, having been annexed as part of German-speaking Sudetenland in October 1938.

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<sup>4</sup> *Strasser*, Case No. 8-27, at 6.

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

<sup>6</sup> Headquarters, Third U.S. Army, Special Orders No. 229 (19 Aug. 1945). For more on war crimes trials at Dachau, see JOSHUA M. GREENE, JUSTICE AT DACHAU (2003). Strasser and Lindemeyer were apprehended and charged after the Army conducted an investigation into the deaths of the five airmen soon after 8 May 1945 (Victory in Europe (VE) Day). JACK R. MYERS, SHOT AT AND MISSED: RECOLLECTIONS OF A WORLD WAR II BOMBARDIER 298–99 (2004).

<sup>7</sup> *Strasser*, Case No. 8-27, at 1.

prisoners. Rather, Strasser admitted that he and Lindemeyer had killed the men, but insisted “that the shooting was justifiable because it was necessary to prevent the escape of the prisoners.”<sup>8</sup> According to Strasser, he had stopped his car at the top of the mountain to wait for the truck which, because of poor road conditions and the steepness of the incline, was having “difficulty in negotiating the hill.”<sup>9</sup> Then, after the truck had stopped, and the Americans attempted to escape, Strasser—and Lindemeyer—had shot them to prevent them from fleeing.

Captain Lindemeyer, who had committed suicide prior to the trial, was not in court to give evidence on this point. The whereabouts of the two other participants in the war crime, who had been in the automobile with Strasser on the day in question, were unknown. Consequently, there was no testimony from them to either prove or disprove Strasser’s defense.<sup>10</sup>

But the driver of the truck, a man named Pusch, did testify at Strasser’s trial and, unfortunately for Strasser, his testimony was devastating. Pusch testified that Strasser had “signaled to him to stop the truck” at the summit of the hill.<sup>11</sup> He also testified that the airmen were unarmed and that they had not attempted to escape. While Pusch did testify that “some shots were fired before Strasser arrived at the truck,”<sup>12</sup> Pusch insisted that Strasser had shot one airman dead and then threatened Pusch with death if he interfered with the execution of the second American flier. After the shootings, Strasser and Lindemeyer discussed their handiwork, with Strasser claiming “credit” for two of the murders; Lindemeyer took credit for killing three of the airmen.<sup>13</sup>

Additional evidence presented by the government supported the theory that Strasser and Lindemeyer had “a previously conceived plan” to kill the American fliers, no doubt in revenge for the suffering inflicted upon the Third Reich by the Allied bombing of Germany. This made sense, as Strasser was a Kreisleiter and Lindemeyer a police official. In mid-1943, the Nazis began insisting that “all bombardment of the civil population was to be regarded as terrorism” and, on 10 August 1943, Heinrich Himmler, the head of the Gestapo, instructed both the Secret Service and police officers that it was “not the task of the police to interfere in clashes between Germans and the English and

American terror fliers who have baled [sic] out.”<sup>14</sup> When other Nazi Party officials similarly announced that the police were not to protect Allied airmen “against the fury of the people,” the result was that “many were lynched by the populace or shot by the police” during 1944 and 1945.<sup>15</sup> With this as background, it seems that the war crimes committed by Strasser and Lindemeyer were very much a reflection of official Nazi policy.

At the end of the one-day trial, having considered the evidence before them, the members of the military commission found Franz Strasser guilty as charged and sentenced him “to be hanged by the neck until dead.”<sup>16</sup> On 14 October 1945, Judge Advocate Major (MAJ) Ford R. Sargent<sup>17</sup> conducted a legal review of the Strasser case for the Commanding General, U.S. Forces, European Theater, who now had to take final action in the proceedings.

Sargent wrote that “the essential facts [in the case] were established by the direct testimony of eyewitnesses.”<sup>18</sup> He also concluded that there were “no irregularities in the proceedings or trial which prejudiced any substantial rights of the accused.”<sup>19</sup> As MAJ Sargent put it, the accused “was given a fair trial, consistent with Anglo-Saxon conceptions, and there is no doubt whatsoever as to his guilt.”<sup>20</sup> Since Sargent was willing to state that the evidence went far beyond the reasonable doubt standard applicable to war crimes trials,<sup>21</sup> it is worth quoting his comments about the appropriateness of the death sentence for Strasser:

The offense in this case was particularly heinous because it involved the cold-blooded murder of absolutely defenseless prisoners of war. No mercy whatsoever was exhibited by the accused. The offense

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> Perhaps by Lindeman or one of the men accompanying him, although this is unclear from the record.

<sup>13</sup> *Strasser*, Case No. 8-27, at 6.

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<sup>14</sup> EDWARD F. L. RUSSELL (LORD RUSSELL OF LIVERPOOL), *SCOURGE OF THE SWASTIKA* 39 (2002).

<sup>15</sup> *Id.* at 40.

<sup>16</sup> *Strasser*, Case No. 8-27, at 1.

<sup>17</sup> A native of Saginaw, Michigan, Ford R. Sargent entered The Judge Advocate General’s Department after graduating from the 11th Officer Course held at The Judge Advocate General’s School, Ann Arbor, Michigan. *THE JUDGE ADVOCATE GENERAL’S SCHOOL, STUDENT AND FACULTY DIRECTORY* 42 (1946).

<sup>18</sup> *Strasser*, Case No. 8-27, at 8.

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

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

<sup>21</sup> While the official legal view of the Judge Advocate General’s Department was that “the rule in American municipal criminal law as to reasonable doubt and presumption of innocence was not applicable as such to war crimes trials, in the absence of a suitable prescribed standard, the rule requiring that an accused be presumed innocent until proven guilty and that proof of guilt be established beyond a reasonable doubt was adhered to in war crimes trials” in the European Theater (emphasis added). *REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES, EUROPEAN COMMAND, JUNE 1944 TO JULY 1948*, at 67 (1948).

closely approximated common law murder. Murder is the unlawful killing of a human being with malice aforethought. The usual penalty among civilized peoples for murder is life imprisonment or death. There are no extenuating circumstances in the instant case to warrant changing the penalty of death imposed by the Commission. The evidence is overwhelming that the offenses were committed by STRASSER in accordance with a preconceived plan to murder five American airmen. The sentence of the Commission and the action of the Reviewing Authority thereon are just, and commensurate with the nature of the offense committed by the accused.<sup>22</sup>

Three days later, on 17 October 1945, Colonel Claude B. Mickelwait, the Deputy Theater Judge Advocate, concurred with MAJ Sargent's review and recommended that the sentence be confirmed. General Dwight D. Eisenhower, Commanding General, U.S. Forces, European Theater, accepted the recommendation of his senior military lawyer, and ordered the sentence be carried out.<sup>23</sup>



At the time his case was heard by a military commission, Strasser was married and had three children. He testified that his fourth child was "expected in September" and presumably this baby had been born at the time forty-six-year-old Strasser climbed the gallows steps at the Landsberg Punishment Prison on 10 December 1945.



<sup>22</sup> *Strasser*, Case No. 8-27, at 8.

<sup>23</sup> *Id.* Claude B. Mickelwait had a lengthy and distinguished career as an Army lawyer. Born in Iowa in July 1894, he later moved to Twin Falls, Idaho and graduated from the University of Idaho in 1916. He entered the Army as a first lieutenant in 1917 and served in a variety of infantry assignments until obtaining a law degree in 1935 from the University of California School of Jurisprudence and transferring to The Judge Advocate General's Department.

With the invasion of North Africa in 1942, Mickelwait was stationed in Casablanca as Judge Advocate, Atlantic Base Section. He subsequently served as Judge Advocate, Fifth Army, in both North Africa and Italy. In March 1944, Colonel (COL) Mickelwait became Acting Theater Judge Advocate of the North African Theater of Operations. Two months later, he was the Judge Advocate of First Army Group in England and, in July 1944, deployed to France as the Judge Advocate of the 12th U.S. Army Group.

In August 1945, COL Mickelwait was appointed Deputy Theater Judge Advocate of the U.S. Forces in the European Theater and in May 1946, he assumed duties as Theater Judge Advocate of those forces. Colonel Mickelwait returned to the United States when he was promoted to brigadier general in April 1947. He was promoted to major general and appointed as The Assistant Judge Advocate General in May 1954. Major General Mickelwait retired from active duty in 1956. *General Promotions—Army JAG, JUDGE ADVOCATE J.*, June 1954, at 4–5.

As photographs taken by a Signal Corps photographer show, Strasser received last rites from a Catholic priest just minutes before he was hanged, but whether or not this soothed his conscience will be forever unknown.<sup>24</sup>

*More historical information can be found at*  
The Judge Advocate General's Corps  
Regimental History Website  
*Dedicated to the brave men and women who have served our*  
*Corps with honor, dedication, and distinction.*  
<https://www.jagcnet.army.mil/History>

<sup>24</sup> Short video clips about the military tribunal of Strasser are available at [http://www.t3licensing.com/license/clip/49312041\\_033.do](http://www.t3licensing.com/license/clip/49312041_033.do) and [http://www.ushmm.org/online/film/display/detail.php?file\\_num=2062](http://www.ushmm.org/online/film/display/detail.php?file_num=2062).

# Bridging the Funding Gap: The Implementation of Fiscal Law and Policy to a Lapse in Appropriations

Captain Matthew A. Freeman\*

## I. Introduction

On 30 September 2013, the clock struck midnight with no appropriations or continuing resolutions to fund government operations, resulting in the first lapse in appropriations since 1996.<sup>1</sup> Without appropriations, the Department of Defense (DoD) and the U.S. Army had no alternative but to execute a partial shutdown of the majority of its day-to-day operations. The government shutdown began the morning of 1 October with the furlough of government civilian employees, who encompass a large portion of the Army's workforce. Over the next four hours, employees subject to furlough<sup>2</sup> set their e-mail out-of-office messages and handed off work to co-workers designated as "excepted employees."<sup>3</sup> Commanders and supervisors made decisions about how to apply the Headquarters, Department of the Army (HQDA) planning guidance for a variety of different operations. Army personnel traveling for official duties were subject to a recall to their stations of origin, depending on the purpose of the travel. Courts-martial proceeded cautiously, with judges and lawyers unsure if the trials would continue. Every potential expenditure of government funds was subject to review.

During a lapse in appropriations, also known as a funding gap,<sup>4</sup> unprecedented restraints on funding affected Army operations and generated a plethora of legal issues for all areas of practice within offices of the staff judge advocate (OSJAs). The staff judge advocate, for example, addressed the furloughs of his civilian support staff. The chief of justice addressed funding for courts-martial witnesses and the potential impact of the funding gap on the judge's docket. Many judge advocates (JAs) advised their respective commanders on what activities and expenditures were legally permissible during a funding gap. The OSJA administrative staff grappled with travel issues and attendant temporary duty (TDY) costs, the purchase of office supplies, and the use of government credit cards. In sum, the October 2013 funding lapse directly affected the planning and orderly shutdown of all OSJA areas of law.

Parts II and III of this article provide the current legal and policy framework for government expenditures and activities during a funding gap. Part IV of this article discusses the application of this framework to U.S. Army operations during the Fiscal Year (FY) 2014 funding gap that occurred from 1–16 October 2013. To assist practitioners with the planning and preparation for future funding gaps, Part V recommends strategies to mitigate their impact.

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<sup>1</sup> JESSICA TOLLESTRUP, CONG. RESEARCH SERV., RS20348, FEDERAL FUNDING GAPS: A BRIEF OVERVIEW 1 (2013), available at <http://www.fas.org/sgp/crs/misc/RS20348.pdf>.

<sup>2</sup> Employees subject to furlough are those funded through annual appropriations but not designated as "excepted." These employees are barred from working during a shutdown, except to perform minimal activities as necessary to execute an orderly suspension of agency operations related to non-excepted activities. See *infra* note 3.

<sup>3</sup> During a funding gap, personnel and related activities that are determined to be necessary for the "the safety of human life or the protection of property," or fall under other allowable exceptions to the Antideficiency Act, are referred to as "excepted." TOLLESTRUP, *supra* note 1, note 5. Some authorities also provide for a third category of employees and activities that are also exempt from a funding gap. U.S. OFFICE OF PERS. MGMT., GUIDANCE FOR SHUTDOWN FURLOUGHS 1 (Oct. 11, 2013), available at <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>. This category includes employees paid with other than annual appropriations that did not lapse. For purposes of this article, this exempt category will be included as part of the excepted activity and personnel category.

## II. The Legal Framework of Funding Gaps

A funding gap occurs during the interval between the expiration of an appropriation and the enactment of a new one.<sup>5</sup> During this lapse in appropriations,<sup>6</sup> a group of statutes, collectively known as the Antideficiency Act<sup>7</sup> (ADA), prohibits the government from obligating funds in the absence of appropriations.<sup>8</sup> Exceptions to this law, including activities involving the safety of human life or the

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<sup>4</sup> CLINTON BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 2 n.5 (2013), available at <http://www.fas.org/sgp/crs/misc/RL34680.pdf>.

<sup>5</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-382SP, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-146 (3d ed. 2006) [hereinafter GAO REDBOOK II].

<sup>6</sup> Major Janet C. Eberle, Instant Replay: Proposing an Automatic Continuing Resolution (Mar. 15, 2013) (unpublished research paper, The Judge Advocate General's Legal Center and School) (on file with The Judge Advocate General's Legal Center and School) (discussing the historical background of the Antideficiency Act and U.S. Government's budgeting process, which is useful for understanding a lapse in appropriations).

<sup>7</sup> 31 U.S.C. §§ 1341–1342, 1511–1519 (2013).

<sup>8</sup> TOLLESTRUP, *supra* note 1, at 1.

protection of property,<sup>9</sup> allow certain government “excepted activities” to continue, while requiring all other “non-excepted activities” to shut-down in an orderly manner.<sup>10</sup> Section A discusses the legal framework<sup>11</sup> for determining the difference between excepted activities and non-excepted activities during a funding gap. While the government may obligate funds for excepted activities (i.e., enter into a legal obligation to pay),<sup>12</sup> those funds cannot be disbursed during the funding gap (i.e., paid).<sup>13</sup> Section B discusses the difference between such obligations and disbursements. Finally, legislation enacted during a funding gap may partially appropriate funds for certain activities; with the proper appropriation of funds, these activities continue as normal. Section C discusses the effects of additional legislation on government activities during a funding gap.

#### A. The Law of Funding Gaps: Excepted Versus Non-Excepted Activities

An analysis of the legal framework for U.S. government operations during a lapse in appropriations begins with the Appropriations Clause of the U.S. Constitution, which states, “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . .”<sup>14</sup> This “power of the purse”<sup>15</sup> is further protected by Congress through the ADA, which generally prohibits government agencies from obligating funds in advance of appropriations, as described in 31 U.S.C §§ 1341, 1342, and 1517.<sup>16</sup> These statutes create difficult legal problems<sup>17</sup> concerning what a

government agency is permitted or required to do during a funding gap.<sup>18</sup> To address these issues, the U.S. Attorney General, and later the Assistant U.S. Attorney General, articulated their interpretation of the law applicable to government operations during a lapse in appropriations in three important memoranda. These legal interpretations from 1980, 1981, and 1995, respectively, form the basis of the legal framework on government operations during a lapse in appropriations. This legal framework distinguished between excepted activities (where the obligation of funds does not violate the ADA) and non-excepted activities (where the government must cease operations because obligations would violate the ADA), and is still applicable today.

In 1980, U.S. Attorney General Benjamin R. Civiletti wrote the first of two legal opinions, known as the Civiletti opinions, for the President of the United States on the application of the ADA to government activities during a funding gap.<sup>19</sup> This opinion articulated the general rule in applying the ADA when he stated, “[O]n a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law.”<sup>20</sup> The second Civiletti opinion discussed the exceptions to this general rule, which permitted certain government activities to continue after a lapse in appropriations.<sup>21</sup> These exceptions include activities authorized by law or other constitutional authorities.<sup>22</sup> The two Civiletti opinions provide the basic legal framework for determining the permissibility of specific government operations during a funding gap.

In anticipation of a potential funding gap in 1995, Alice Rivlin, the director of the Office of Management and Budget (OMB), requested advice from the Attorney General on government operations during a lapse in appropriations. In response, Assistant Attorney General Dellinger wrote a memorandum (referred to as the Dellinger Memo)<sup>23</sup>

<sup>9</sup> 31 U.S.C. § 1342.

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

<sup>11</sup> Three Department of Justice (DoJ) memoranda form the basic legal framework for funding gaps that is still applicable today. *See infra* notes 19, 21, 23.

<sup>12</sup> Obligation: Amount representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. U.S. DEP’T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION glossary, at 13 (Dec. 2008) [hereinafter DOD FMR].

<sup>13</sup> Disbursements: Amounts paid by federal agencies, by cash or cash equivalent, during the fiscal year to liquidate government obligations. *Id.* glossary, at 21.

<sup>14</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>15</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-261SP, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1-3 (3d. ed. 2004) [hereinafter GAO REDBOOK I].

<sup>16</sup> *Id.* at 6-36 to -37.

<sup>17</sup> Violations of 31 U.S.C. §§ 1341(a), 1342, and 1517(a) of the Antideficiency Act (ADA) are subject to both penal and administrative sanctions. Even though the DoJ may take actions to enforce the criminal provisions of the ADA, violations are typically handled administratively. Whether violations occur during or outside of a funding gap, it appears that the DoJ has never prosecuted an officer or employee for a violation of the ADA. In addition to these sanctions, violations of the ADA must be signed by the agency head and reported to the President and Congress through the Office of Management and Budget (OMB). The report includes all relevant

facts and a summary of the action taken to correct the error, including any disciplinary measures. GAO REDBOOK II, *supra* note 5, at 6-144.

<sup>18</sup> *Id.* at 6-147.

<sup>19</sup> The President, 43 U.S. Op. Att’y. Gen. 224 (1980) [hereinafter Civiletti I].

<sup>20</sup> *Id.* at 229.

<sup>21</sup> The President, 43 U.S. Op. Att’y. Gen. 293 (1981) [hereinafter Civiletti II].

<sup>22</sup> *Id.* at 300.

<sup>23</sup> Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, Dep’t of Justice, for the Director Office of Management and Budget, subject: Government Operations in the Event of a Lapse in Appropriations (Aug. 16, 1995) [hereinafter Dellinger Memo], available at <https://www.jagcnet.army.mil/DocLibs/TJAGLCSDocLib.nsf/topicThread.xsp?action=openDocument&documentId=D545FC5B411C379785257B24006D1F31> (providing Memorandum Opinion for the Dir., Office of Mgmt. & Budget, in CONTRACT AND FISCAL LAW DEP’T, THE JUDGE ADVOCATE

reviewing the limits of permissible activities during a lapse in appropriations and also addressing the legislative change to the ADA after the Civiletti opinions. The amendment to the ADA in 1990 added the following language to the statute: “The term emergencies involving the safety of human life or the protection of property does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.”<sup>24</sup> Mr. Dellinger determined that the change to the language of the ADA was intended to limit the coverage of the emergency exception.<sup>25</sup> In addition, the Dellinger Memo reiterated the major exceptions to the ADA that were later detailed in the Civiletti opinions.<sup>26</sup> These five exceptions to the ADA during a lapse in appropriations outline the boundaries of excepted activities that may continue during a funding gap, as described below:

1. Government activities funded with multi-year and indefinite appropriations, may continue. These activities continue because there is no lapse in the relevant appropriation.<sup>27</sup> For example, activities which use previous-year research, development, test and evaluation (RDT&E) funds may continue, as the two-year RDT&E appropriation would not lapse during a funding gap on the second year of the appropriation.

2. If Congress provides an express authority for agencies to enter into contracts or borrow funds, the ADA does not bar the activities because they are authorized by law.<sup>28</sup> For example, the Feed and Forage Act<sup>29</sup> authorizes the DoD to contract for necessary clothing, subsistence, forage, supplies, etc., without an appropriation.<sup>30</sup>

3. The second Civiletti opinion concluded that the ADA allows a limited number of government functions funded with lapsed appropriations to continue because they support other excepted activities. For example, the distribution of social security payments, which operate under indefinite appropriations, implies the check writing and distributing activities required to disburse the funds. The Dellinger Memo refers to this category of excepted activities as, “[n]ecessary implications: authority to obligate that is necessarily implied by statute.”<sup>31</sup> Another important example under the necessary implications group is activities necessary to bring about an orderly termination of functions that may not continue during a lapse in appropriations.<sup>32</sup>

4. Obligations that are necessary for the execution of the President’s constitutional duties and powers are excepted activities.<sup>33</sup> For example, the ADA does not prohibit the President from exercising his authority under the U.S. Constitution<sup>34</sup> to grant reprieves and pardons for offenses against the United States.<sup>35</sup>

5. Personal or voluntary services for “emergencies involving the safety of human life or the protection of property”<sup>36</sup> are excepted activities.<sup>37</sup> This emergency exception probably includes the exception for “national security,”<sup>38</sup> and encompasses the majority of DoD operations during a funding gap.

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GEN.’S LEGAL CTR. & SCH., 2013 CONTRACT AND FISCAL LAW DESKBOOK ch. 9, app. B, at 9-22 to 9-31 (2013)).

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> *Id.* at 3–4.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 4.

<sup>29</sup> 41 U.S.C. § 11 (2013) (sometimes also referred to as the Feed and Forage Act). The text of the Feed and Forage Act requires the Secretary of Defense to immediately advise Congress of the exercise of this authority. As an example of the use of this authority unrelated to funding gaps, on 21 September 2001, Secretary of Defense Donald H. Rumsfeld invoked fiscal provisions available under this act. *News Release: Department of Defense Invokes Feed and Forage Act*, U.S. DEP’T OF DEF. (Sept. 21, 2001), <http://www.defense.gov/releases/release.aspx?releaseid=3054>. During the funding gap from 1–16 October 2013, however, the Secretary of Defense did not exercise this authority, and some speculate that the authority of DoD to continue national security-related activities appears to be broader than the authority provided by the Feed and Forage Act. AMY BELASCO & PAT TOWELL, CONG. RESEARCH SERV., R41745, GOVERNMENT SHUTDOWN: OPERATIONS OF THE DEPARTMENT OF DEFENSE DURING A LAPSE IN APPROPRIATIONS 3 (2013), available at <http://www.fas.org/sgp/crs/natsec/R41745.pdf>. This may explain why the Feed and Forage Act has never been invoked by the DoD during a funding gap.

<sup>30</sup> Dellinger Memo, *supra* note 23, at 4.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>35</sup> Civiletti II, *supra* note 21, at 299.

<sup>36</sup> 31 U.S.C. § 1342 (2013).

<sup>37</sup> Dellinger Memo, *supra* note 23, at 4.

<sup>38</sup> In November, 1981, then OMB Director, Mr. Richard Darman issued guidance that first described the exception for “national security.” Memorandum from David A. Stockman, Dir., Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Agency Operations in the Absence of Appropriations (Nov. 17, 1981) (retyped (without change by Office of Personnel Management (OPM))), available at [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-4.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf). Although the Civiletti Opinions and the Dellinger Memo do not specifically address the exception for national security, it is likely that the national security activity exception is rooted in the ADA’s emergency exception. Since the emergency exception includes the safety of human life and the protection of property, it logically overlaps with some of the national security interests of the United States. Moreover, the DoD has generally not cited any authority beyond the emergency exception. Some analysts, however, believe the national security exception is independent of the emergency exception to the ADA. BELASCO & TOWELL, *supra* note 29, at 18. The distinction between the emergency exception and the DoD authority to continue operations for national security, if any exists, remains unclear.

## B. Obligation Versus Disbursement

Although the exceptions to the ADA allow the government to obligate funds for certain excepted activities, these activities do not continue normally, as the ADA prohibits the disbursement of funds during a lapse in appropriations.<sup>39</sup> If the expenditure, however, supports a non-excepted activity, the government may not obligate nor disburse funds during a lapse in appropriations, without violating the ADA.<sup>40</sup>

An obligation is any act that legally binds the government to make payment. Obligations can occur when placing an order, awarding a contract, receiving services, or similar transactions that bind the government to a legal liability for payment in the future.<sup>41</sup> The disbursement takes place when the government actually makes a payment.<sup>42</sup> Obligation and disbursement can take place in succession or at the same time.<sup>43</sup> For example, assume a contracting officer (KO) awards a contract for cleaning services on 15 August, which requires the daily cleaning of a building, and makes the first payment for these services on 1 September. The obligation took place on 15 August: at this point, the government was legally required to make payments in the future. The disbursement occurred on 1 September, when the government made a payment against the obligation.

During a funding gap, obligations for non-excepted activities and disbursements for both excepted and non-excepted activities are legally objectionable. Therefore, legal practitioners should pay close attention to any type of potential disbursement and obligations for non-excepted activities during a funding gap. When fiscal law questions arise during the funding gap, examine the point of obligation (usually contract award or point of sale for government purchase cards) and the point of disbursement (usually the payment to liquidate the obligation at a specified interval) to ensure that government employees do not disburse any payments.

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<sup>39</sup> BELASCO & TOWELL, *supra* note 29, at 11.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> See DOD FMR, *supra* note 12.

<sup>42</sup> *Id.*

<sup>43</sup> For example, field ordering officers (FOOs) typically purchase items with cash, whereas obligation and disbursement occur at the same time. MONEY AS A WEAPONS SYSTEM—AFGHANISTAN 179 (19 Oct. 2013). Field ordering officers provide their commands with the ability to quickly make local purchases for mission-essential requirements to support contingency operations. Although contingency operations are excepted, the Army is not allowed to disburse funds during a funding gap. As such, even though they support excepted activities, FOO operations using lapsed Operation and Maintenance (O&M) funds are effectively shut down during a funding gap because the payment is a disbursement.

## C. The Effect of Other Legislation During the October 2013 Funding Gap: POMA and HFFSA

A funding gap begins when the government fails to enact legislation appropriating funds, and ends when the government enacts legislation to appropriate funds. If the government, however, enacts legislation that either partially appropriates funds or otherwise authorizes government activities during the funding gap, the legal analysis for operations during the funding gap may change significantly. As discussed above, the ADA prohibits the obligation of funds in advance of an appropriation.<sup>44</sup> By enacting legislation that appropriates funds for certain activities during a funding gap, however, these activities are legally permissible regardless of whether or not they support an excepted activity. As such, obligations and disbursements for these activities may continue normally during the funding gap. During the FY14 funding gap, two statutes partially appropriated funds during the funding gap: the Honoring the Families of Fallen Soldiers Act (HFFSA)<sup>45</sup> and the Pay Our Military Act (POMA).<sup>46</sup> While the DoD implemented HFFSA with relative ease, POMA required a more in depth analysis.

The POMA appropriated funds for the pay and allowances of military, civilian, and contractor personnel continuing to work during the FY14 funding gap.<sup>47</sup> Prior to POMA funds being obligated, however, the statute required the Secretary of Defense (SECDEF) to determine which DoD civilians and contractor personnel provided “support to members of the Armed Forces” before recalling those employees to work and to receive pay.<sup>48</sup> The SECDEF implemented this POMA authority via policy memorandum on 5 October 2013.<sup>49</sup> Under this “POMA recall,” however, the SECDEF only recalled DoD civilian employees whose responsibilities included either providing support to servicemembers or their families, or sustaining capabilities

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<sup>44</sup> See discussion *infra* Part II.

<sup>45</sup> Department of Defense Survivor Benefits Continuing Appropriations Resolution, 2014, Pub. L. No. 113-44, 127 Stat. 555 (2013), available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ44/pdf/PLAW-113publ44.pdf>.

This legislation was passed after the DoD determined that POMA did not appropriate funds for these survivor benefits, and families of fallen Soldiers were not receiving benefit payments.

<sup>46</sup> Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013) [hereinafter POMA], available at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ39/pdf/PLAW-113publ39.pdf>. This legislation appropriated funds for pay and allowances for DoD military, civilian, and contractor personnel. In addition, this act required the Secretary of Defense to recall employees who would normally be subject to a furlough as non-excepted employees. *Id.*

<sup>47</sup> *Id.* § 2(a).

<sup>48</sup> *Id.* § 2(a)(2) and 2(a)(3).

<sup>49</sup> Memorandum from Chuck Hagel, Sec’y of Def., for Deputy Sec’y of Def. et al., subject: Guidance for Implementation of Pay Our Military Act (Oct. 5, 2013) [hereinafter Hagel Memo], available at <http://www.defense.gov/pubs/POMA-implementation-guidance.pdf>.

and Force Readiness.<sup>50</sup> This policy memorandum also provided examples of employees included in these two categories, as well as employees who were to remain furloughed.<sup>51</sup> Moreover, since servicemembers were already excepted from furlough, POMA authorized DoD to disburse their pay and allowances as well. The SECDEF, however, did not certify any contractor employees for recall under POMA.<sup>52</sup> Under the authority of this statute, which by its language is only applicable to the FY14 funding gap,<sup>53</sup> the SECDEF recalled the majority of DoD civilian employees back to work.<sup>54</sup>

### III. The Policy Framework

The Civiletti Opinions and the Dellinger Memo provide the executive branch's interpretation of the ADA with respect to funding gaps. In conjunction with these Department of Justice (DoJ) memoranda, OMB provides overarching policy guidance on funding gaps for the rest of the executive branch. To understand the policy framework and how it applies to the Army, the legal advisor's analysis should start with the aforementioned OMB policy, as implemented by DoD policy, and further refined by the Army policy guidance issued by HQDA. An analysis of

policies issued during the October 2014 funding gap, described below, is particularly useful to understand the likely implementing policies for future potential funding gaps.

On 17 September 2013, the OMB issued a policy memorandum that cited previous question and answer documentation from the OMB and the Office of Personnel Management (OPM), conveyed the basic legal framework from the Civiletti opinions and the Dellinger Memo, and required agencies to update their plans for a funding gap.<sup>55</sup> On 25 September 2013, the Deputy SECDEF issued a memorandum<sup>56</sup> stating all military personnel would continue in a normal duty status, regardless of whether or not they are supporting excepted activities;<sup>57</sup> delegating the responsibility for determining excepted activities to the appropriate Secretaries and Heads of DoD Components; and attaching a memorandum containing a list of excepted activities.<sup>58</sup> The HQDA issued Planning Order (PLANORD) 226-13, which provided detailed guidance on issues for both military and civilian personnel.<sup>59</sup> HQDA also issued two Fragmentary Orders (FRAGOs) to this PLANORD prior to the lapse in appropriations, which provided additional guidance on personnel, TDY, and logistics.<sup>60</sup> The U.S. Army Reserve Command (USARC) issued Operation Order (OPORD) 13-165 and a FRAGO, providing similar guidance.<sup>61</sup> In sum,

<sup>50</sup> *Id.* at 2.

<sup>51</sup> Some examples of support for servicemembers included health care, family support activities, repair and maintenance of weapons systems, training, supply chain management, human resource activities, installation support, commissary, payroll, and legal advice. Some examples of activities that contribute to capabilities and force readiness are acquisition program oversight and management, intelligence functions, information technology functions, and the necessary support of the aforementioned functions. Examples of activities that did not fall under POMA included certain legislative affairs, auditor and related functions, and civil works functions of the Department of the Army. *Id.*

<sup>52</sup> The DoD did not recall any contract employees under POMA because implementation for contractor employees presented additional challenges, as the government does not pay contractor employee salaries directly. The government has privity of contract with the contractor, and not its contractor employees. Instead, the contractor (company) invoices the government in accordance with the terms of the contract, which includes costs for various contract expenses that may be unrelated to employee pay and allowances (e.g., materials, profit, administrative overhead, and other direct and indirect costs incurred by the contractor during contract performance). As such, paying only the salaries for contractor employees through POMA would have been challenging to implement. BELASCO & TOWELL, *supra* note 29, at 3. It is likely, however, that if the FY14 Funding Gap had continued for longer than two weeks, the SECDEF would have implemented POMA for contractor employee pay and salaries in conjunction with a new contract clause that would have directed contractors to submit invoices with the contractor employee salary and expense costs identified separately from other contract direct and indirect costs.

<sup>53</sup> POMA, *supra* note 46, § 3 ("Appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation (including a continuing appropriation) for any purpose for which amounts are made available in section 2; (2) the enactment into law of the applicable regular or continuing appropriations resolution or other Act without any appropriation for such purpose; or (3) January 1, 2015.").

<sup>54</sup> BELASCO & TOWELL, *supra* note 29, at 13.

<sup>55</sup> Memorandum from Sylvia M. Burwell, Dir., Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Planning for Agency Operations During a Potential Lapse in Appropriations (Sept. 17, 2013) [hereinafter Burwell Memo], available at [http://www.whitehouse.gov/omb/memoranda\\_2013](http://www.whitehouse.gov/omb/memoranda_2013).

<sup>56</sup> Memorandum from Ashton B. Carter, Deputy Sec'y of Def., for Sec'y's of the Military Departments et al., subject: Guidance for Continuation of Operations in the Absence of Available Appropriations (Sept. 25, 2013) [hereinafter Carter Memo], available at [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf).

<sup>57</sup> Prior to POMA, government personnel who were excepted from shutdown (including all military) would have reported to work during the funding gap without pay, since the government could not disburse funds absent appropriating legislation. *Id.*

<sup>58</sup> Carter Memo, *supra* note 56, attachment, available at [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf).

<sup>59</sup> HEADQUARTERS, U.S. DEP'T OF ARMY, PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (26 Sept. 2013) [hereinafter HQDA PLANORD], available at <https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/PLANORD.aspx?PageView=Shared>.

<sup>60</sup> HEADQUARTERS, U.S. DEP'T OF ARMY, FRAGMENTARY ORDER 1, TO PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (27 Sept. 2013) [hereinafter FRAGO 1 TO PLANORD]; HEADQUARTERS, U.S. DEP'T OF ARMY, FRAGMENTARY ORDER 2, TO PLANORD 226-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (29 Sept. 2013) [hereinafter FRAGO 2 TO PLANORD].

<sup>61</sup> U.S. ARMY RESERVE COMMAND, OPORD 13-165, CONTINGENCY PLAN GUIDANCE OF ESSENTIAL OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS OR CONTINUING RESOLUTION EFFECTIVE 01 OCTOBER 2013 (26 Sept. 2013).

the policy guidance that was issued in anticipation of the FY14 funding gap verified the applicability of the previous legal framework, provided general guidance on excepted activities, and articulated how commanders were to execute an orderly shutdown of operations on 1 October 2013.

Just before the funding gap began, the OMB issued a memorandum to begin the government's orderly shutdown.<sup>62</sup> The DoD also issued policy guidance through various offices during the funding gap.<sup>63</sup> On 1 October 2013, HQDA released policy guidance in the form of Executive Order (EXORD) 228-13.<sup>64</sup> During the first week of the funding gap, HQDA released FRAGOs to this EXORD almost daily. The eight FRAGOs<sup>65</sup> and numerous appendices issued during the funding gap implemented DoD guidance by detailing a list of excepted activities and approval requirements for certain expenditures.<sup>66</sup> The policy guidance released by these executive agencies proved critical during the funding gap.

#### IV. Application of Law and Policy to the FY14 Funding Gap

This Part analyzes the application of the law and policy to specific U.S. Army activities that took place during the

October 2013 funding gap. Practitioners should use this discussion as a framework to help determine excepted activities during a future lapse in appropriations. In making such a determination, the DoD warned, “[G]uidance should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and with assurance that the lives and property of our nation’s citizens will be protected.”<sup>67</sup> The DoD policy also provided flexibility: “The guidance does not identify every excepted activity, but rather provides an overarching direction and general principles for making these determinations.”<sup>68</sup> After these determinations are made in accordance with policy guidance, commanders can obligate funds in support of excepted activities during a lapse in appropriations.

##### A. Military Operations and Activities

During the FY14 funding gap, most military operations continued in order to provide national security under the emergency exception to the ADA.<sup>69</sup> The Army provided a list of approximately 100 specific, named operations and exercises (for example, Operation Enduring Freedom (OEF)), organized by combatant command, which were activities excepted for national security.<sup>70</sup> In addition to these specific operations, the DoD policy also designated direct support of these operations as excepted activities, such as the administrative, logistical, medical, and any other support required for the excepted military operations.<sup>71</sup> The policy also designated recruiting, military entrance processing (MEPS), and basic training activities for entry into the Armed Forces during contingency operations as excepted.<sup>72</sup> Funding gap operations during FY14 included a broad range of excepted activities for national security in the context of war. The list of excepted activities may not contain as many activities during peace time. The DoD also authorized the typical activities that fall under the emergency exception, including fire protection, law enforcement, security, explosive ordinance disposal, air traffic control, emergency services, etc.<sup>73</sup> Some other atypical examples under the emergency exception included

<sup>62</sup> Memorandum from Sylvia M. Burwell, Dir., Exec. Office of the President, Office of Mgmt. and Budget, for Heads of Executive Departments and Agencies, subject: Update on Status of Operations (Sept. 30, 2013), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-24.pdf>.

<sup>63</sup> The DoD may release policy guidance through a number of different offices, including but not limited to the SECDEF, the Deputy SECDEF, Under Secretaries of Defense, etc. Therefore, practitioners should pay attention to the different sources of policy guidance that may affect their operations. For example, Deputy SECDEF appointed the Under SECDEF (USD) Comptroller as the lead on funding gap operations. Carter Memo, *supra* note 56, at 2. In addition, the USD for Acquisition, Technology, and Logistics (AT&L) released contracting guidance on 9 October 2013, with clauses for contracts in support of excepted activities executed in advance of FY14 appropriations. Memorandum from Richard Ginman, Dir., Def. Procurement and Acquisition Pol’y, for Commander, United States Special Operations Command (Attn: Acquisition Executive), et al., subject: Class Deviation-Contract Obligations in Advance of Fiscal Year 2014 Funding (Oct. 9, 2013) [hereinafter Ginman Memo], available at [http://www.acq.osd.mil/dpap/policy/policyvault/USA005738-13-DPAP.pdf](http://http://www.acq.osd.mil/dpap/policy/policyvault/USA005738-13-DPAP.pdf).

<sup>64</sup> HEADQUARTERS, U.S. DEP’T OF ARMY, EXORD 228-13, CONTINUATION OF OPERATIONS IN THE ABSENCE OF AVAILABLE APPROPRIATIONS (1 Oct. 2013) [hereinafter HQDA EXORD], available at <https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/EXORD228.aspx>.

<sup>65</sup> HEADQUARTERS, U.S. DEP’T OF ARMY, FRAGMENTARY ORDERS 1–8, TO EXORD 228-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (2–14 Oct. 2013) [hereinafter FRAGOS 1–8 TO EXORD].

<sup>66</sup> The HQDA guidance provided a detailed analysis on the resolution of specific funding gap issues and is very useful for practitioners. For a good summation of the Fiscal Law Policy, please see HQDA EXORD Annex T, available at [https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC\\_Document\\_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf](https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf).

<sup>67</sup> Carter Memo, *supra* note 56, at 2.

<sup>68</sup> *Id.*

<sup>69</sup> See discussion *supra* note 38 (discussing the distinction between the emergency exception and the exception for national security).

<sup>70</sup> HEADQUARTERS, U.S. DEP’T OF ARMY, ANNEX A3 TO FRAGMENTARY ORDERS 1, TO EXORD 228-13, CONTINUATION OF OPERATIONS IN THE POTENTIAL ABSENCE OF AVAILABLE APPROPRIATIONS (2–14 Oct. 2013) [hereinafter ANNEX A3 TO EXORD], available at [https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC\\_Document\\_Library/Annex%20A3\\_228-13\\_FRAGO\\_1%20Activities%20Necessary%20for%20Nat%20Sec.doc](https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/Annex%20A3_228-13_FRAGO_1%20Activities%20Necessary%20for%20Nat%20Sec.doc).

<sup>71</sup> Carter Memo, *supra* note 56, attachment, at 7.

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

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

utilities and food services for military personnel, trash removal, and substance abuse counseling.<sup>74</sup> For the most part, contingency operations, such as OEF, were excepted activities and mostly unaffected by the funding gap.<sup>75</sup>

## B. Personnel

In preparation for the funding gap, the OMB required agency leaders to review which employees provided necessary support to excepted activities.<sup>76</sup> Shortly thereafter, the DoD released guidance stating that all military personnel and all civilian personnel supporting excepted activities would continue in a normal duty status without pay.<sup>77</sup> Next, HQDA delegated the authority to determine which employees continued in a normal duty status to commanders and supervisors,<sup>78</sup> and provided guidance on how to implement the potential furlough of non-excepted employees.<sup>79</sup> Commanders and supervisors executed this plan on 1 October 2013 by determining which employees supported the excepted activities and were thereby exempt from furlough.

The POMA also provided SECDEF<sup>80</sup> with an appropriation to fund the pay and allowances of the DoD workforce, including military members and government civilian and contractor employees, who “support the members of the Armed Forces.”<sup>81</sup> The SECDEF implemented this POMA authority on 5 October 2013 and eliminated furloughs for DoD civilian employees whose responsibilities contributed to the morale, well-being, capabilities, and readiness of servicemembers.<sup>82</sup> HQDA implemented this guidance and provided detailed instructions on how to implement the SECDEF’s policy.<sup>83</sup> On 7 October 2013, most DoD civilian employees returned to work.<sup>84</sup> The SECDEF, however, did not implement

POMA with respect to the pay and allowances of contractor employees because paying only the salaries for contractor employees through POMA would have been difficult.<sup>85</sup> The implementing guidance also stated, “The Act provides appropriations for personnel; it does not provide appropriations for equipment, supplies, material, and all the other things that the Department needs to keep operating efficiently.”<sup>86</sup> While an argument could be made that some of these other expenses are necessarily implied for the employees to return to work, the policy made it clear that this appropriation only provided payments for pay and allowances.<sup>87</sup>

## C. Courts-Martial

The only authority that directly stated that any and all criminal litigation is an excepted activity emanated from DoJ. The guidance stated, “The law enforcement capacity of the U.S. Government should not be impaired or perceived to be impaired. To do so could constitute an imminent threat to the safety of human life and the protection of property.”<sup>88</sup> Relying on the emergency exception to the ADA, the policy further stated, “Criminal litigation will continue without interruption as an activity essential to the safety of human life and the protection of property.”<sup>89</sup> This DoJ policy guidance in particular helped practitioners conclude that all courts-martial were excepted activities during the FY14 funding gap. If this policy persists during future funding gaps, then it is likely that courts-martial will remain excepted activities.<sup>90</sup>

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

<sup>75</sup> See discussion *supra* note 43 (discussing the impact of the funding gap on field ordering officer operations).

<sup>76</sup> Burwell Memo, *supra* note 55.

<sup>77</sup> Carter Memo, *supra* note 56.

<sup>78</sup> The executive branch issued this preliminary guidance on 25 September 2013, before POMA was enacted. In the absence of additional legislation similar to POMA during a funding gap, all personnel remain in a non-pay status, regardless of their duties. See *supra* note 57 and accompanying text. This legislation, however, appropriated funds during the funding gap. POMA, *supra* note 46. Therefore, all excepted employees received pay in accordance with this appropriation.

<sup>79</sup> HQDA PLANORD, *supra* note 59.

<sup>80</sup> See discussion *infra* Part II.C.

<sup>81</sup> POMA, *supra* note 46.

<sup>82</sup> Hagel Memo, *supra* note 49, at 2. For examples of these types of employees, see *supra* note 51.

<sup>83</sup> FRAGO 5 AND 6 TO EXORD, *supra* note 65.

<sup>84</sup> *Id.* FRAGO 6 TO EXORD.

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<sup>85</sup> See discussion *supra* note 52 (discussing the difficulty of applying POMA to salaries for contractors).

<sup>86</sup> Hagel Memo, *supra* note 49, at 2.

<sup>87</sup> Under the necessary implications exception to the ADA, certain expenses may be necessary for the recalled employees to return to work and perform their jobs. The exception is described in the Dellinger Memo, which concluded, “The 1981 Opinion concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well.” Dellinger Memo, *supra* note 23, at 4.

<sup>88</sup> Memorandum from Dep’t of Justice, subject: U.S. Department of Justice FY 2014 Contingency 2 (Oct. 11, 2013), available at <http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>.

<sup>89</sup> *Id.* at 3.

<sup>90</sup> The guidance from the DoJ is compelling because this department authored the Civiletti Opinions and the Dellinger Memo, and is also responsible for the prosecution of ADA violations.

In the absence of this all-encompassing DoJ policy guidance, practitioners may have to rely upon the DoD policy guidance.<sup>91</sup> This policy defines excepted legal activities as “litigation activities associated with imminent or ongoing legal action, in forums inside or outside of DoD, to the extent required by law or necessary to support excepted activities,”<sup>92</sup> and appears to be less inclusive than the aforementioned DoJ policy. With reference to support of excepted activities, a court-martial during the FY14 funding gap for a Soldier deployed to Afghanistan in support of OEF, for example, could continue without violating the ADA. Notably, OEF is an excepted activity,<sup>93</sup> and therefore, courts-martial in support of this operation are also excepted activities. In addition, court-martial expenses funded with prior year funds may also continue.<sup>94</sup> For example, assume the Army properly obligated FY13 funds for expert witness services that began in FY13 and extended into the funding gap for a non-excepted activity. Even if this court-martial began during the FY14 funding gap, there is no lapse in appropriations for these services because this expense was properly obligated (i.e., the contract was awarded) with FY13 funds before the beginning of the funding gap.<sup>95</sup> The DoD policy guidance also noted that ongoing litigation is excepted when required by law.<sup>96</sup> It is also likely that courts-martial are also “required by law” because of constitutional protections for accused personnel.

The constitutional right to a speedy trial,<sup>97</sup> for example, supports the assertion that courts-martial are excepted activities because they are required by the Constitution.<sup>98</sup>

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<sup>91</sup> Carter Memo, *supra* note 56, attachment, at 7.

<sup>92</sup> *Id.*

<sup>93</sup> ANNEX A3 TO EXORD, *supra* note 70.

<sup>94</sup> This policy guidance is firmly rooted in the Dellinger Memo, which found, “Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.” Dellinger Memo, *supra* note 23, at 3.

<sup>95</sup> In this example, assume that an additional expense for witness TDY requires the obligation of lapsed FY14 funds. Generally, the Army cannot obligate funds for this TDY expense in the absence of appropriations for non-excepted activities. If most other court-martial expenses required FY13 funds, however, an argument could be made that these expenses are a necessary implication of the prior allocation of FY13 funds. As such, these expenses might also be an excepted activity. *See id.* at 4.

<sup>96</sup> Carter Memo, *supra* note 56, attachment, at 7.

<sup>97</sup> This discussion does not include Rule for Courts-Martial 707 (Speedy Trial), only the right articulated in the Sixth Amendment. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 707 (2012).

<sup>98</sup> Even though Congress passed the ADA to enforce the constitutional power of the purse, it is still only a statute. If there is a way to interpret the ADA without conflicting with the constitutional right to a speedy trial (or

Just as certain obligations necessary for the execution of the President’s constitutional duties are excepted,<sup>99</sup> obligations necessary to provide an accused with a speedy trial in accordance with this constitutional right are also excepted.<sup>100</sup> When charges are preferred,<sup>101</sup> the government bears responsibility for a defendant’s right to speedy trial.<sup>102</sup> The balancing test for whether or not the government violated a defendant’s right to speedy trial includes the factor of prejudice to the defendant, of which the most serious violation of this prong is the potential prejudice caused by the unavailability of defense witnesses.<sup>103</sup> A trial delay for lapse in funding could impact the constitutional right of a defendant to a speedy trial, potentially resulting in dismissal of the charges with prejudice, meaning that the government could not later attempt to try the accused for alleged crimes.<sup>104</sup> Since the government cannot predict the prejudicial effect attributable to the delays during a funding gap, it is impossible to determine whether or not a violation of this right during a funding gap will occur. That being said, a three-week trial delay on its own under these circumstances is very unlikely to result in a violation of the constitutional right to a speedy trial.<sup>105</sup> The argument, however, does not rest upon the probability of success of the defense motion, but rather the mere possibility of prejudice to the defendant at this time. If the possibility exists for a violation of the right to a speedy trial during a funding gap, then one could argue that the Army is legally required by the

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other constitutional rights or powers), then this is the preferred interpretation. To also support this general assertion, the following two cases address the impact of the ADA on the constitutional right to a civil jury trial: *Hobson v. Brennan*, 637 F. Supp. 173 (D.D.C. 1986); *Armster v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 792 F.2d 1423 (9th Cir. 1986) (addressing the application of the limits of the ADA with respect to potential delays in civil trials due to lack of funding). Both of these cases held that the ADA must yield to the 7th Amendment right to a civil jury trial. Balancing the actual limits of the congressional power of the purse against other constitutional rights and powers poses an interesting question.

<sup>99</sup> Dellinger Memo, *supra* note 23, at 4.

<sup>100</sup> Another possible argument involves the presidential power as Commander in Chief.

<sup>101</sup> The preferral of charges by military personnel does not obligate funds, and therefore does not appear to violate the ADA.

<sup>102</sup> Captain Joseph D. Wilkinson II, *Speedy Trial Demands*, ARMY LAW. Dec. 2011, at 25; *Dickey v. Florida*, 398 U.S. 30 (1970) (“Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental, and the duty of the charging authority is to provide a prompt trial.”).

<sup>103</sup> *Barker v. Wingo*, 407 U.S. 514 (1972) (“A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: . . . (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.”).

<sup>104</sup> Wilkinson, *supra* note 102, at 25 n.8.

<sup>105</sup> *Id.* at 25 n.14.

Constitution to proceed with courts-martial during a funding gap.

#### D. Contracting

Generally, contract obligations<sup>106</sup> were only permissible for excepted activities<sup>107</sup> during the FY14 funding gap.<sup>108</sup> Excepted activities included, for example, obligations necessary to support activities that fell under the emergency exception to the ADA. Contract obligations for non-excepted activities were not lawful during the funding gap. In addition, the government was required to stop incrementally-funded contracts for non-excepted activities that required additional FY14 funds.<sup>109</sup> Finally, disbursement (payment) of FY14 funds to contractors for all contracts was also not authorized, even when those payments were required in accordance with the contract,<sup>110</sup> and regardless of whether or not the payment supported excepted or non-excepted activities.<sup>111</sup> To execute these aforementioned contract actions during the funding gap, the following authorities were necessary, and are described below: the Subject to Availability of Funds (SAF) clause, the Subject to Availability of End of Year Funds (SAEF) authority, the Obligations in Advance of Fiscal Year 2014 Funding (OAF) deviation clause, and modification of the contract to allow option exercise at a later date.<sup>112</sup>

#### 1. Subject to Availability of Funds (SAF) Clause— Federal Acquisition Regulation (FAR) 52.232-18<sup>113</sup>

This clause is normally used for the release of a solicitation (and award of the contract) prior to the availability of funds for the next fiscal year. For example, this clause would be used if the Army issued a solicitation before FY14 funds are available at the end of FY13. Contracting officers should use this clause (or FAR 52.232-19<sup>114</sup> for indefinite quantity contracts) in solicitations and contracts if the contract will be chargeable to funds of the next fiscal year and the contract action will be initiated before the funds are available.<sup>115</sup> If this clause is properly incorporated in the contract, the government has no legal liability under the contract until funds are available and may release the solicitation and award the contract prior to the funds being available.<sup>116</sup>

#### 2. Subject to Availability of End of Year Funds (SAEF)— Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2<sup>117</sup>

If a funding gap occurs at any time other than at the start of the next fiscal year,<sup>118</sup> the SAF clause is not applicable. As such, practitioners may find the SAEF authority useful.

<sup>106</sup> Contract obligation includes contract award, modification, task order, delivery order, and option exercise. See *supra* note 11.

<sup>107</sup> The DoD delegated this authority to the relevant Secretary. Therefore, the determination of whether or not a contract supported an excepted activity depended on the branch of service. As an example, the Secretary of the Air Force delegated this authority. Memorandum for ALMAJCOM-FOA-DRU/CC, to Distribution C, subject: Planning Guidance for Continuation of Operations in the Absence of Available Appropriation (24 Sept. 2013) (on file with author).

<sup>108</sup> E-mail from George M. Cabaniss, Jr., Senior Exec. Serv., Policy Guidance from the Mission & Installation Contracting Command (MICC) PARC (Principal Assistant Responsible for Contracting) (Oct. 10, 2013, 00:00 EST) [hereinafter MICC GUIDANCE] (on file with author).

<sup>109</sup> *Id.*

<sup>110</sup> See discussion *supra* Part II.B (Obligation Versus Disbursement).

<sup>111</sup> Ginman Memo, *supra* note 63. This clause specifically addressed the prompt payment act penalties for late payments to the contractor because of the government's inability to disburse funds.

<sup>112</sup> Appendix A (Authority for Contract Actions in Advance of Appropriations) (describing the three clauses and the contract actions that are permitted by them respectively).

<sup>113</sup> FAR 52.232-18 (2014). "Funds are not presently available for this contract. The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer." *Id.*

<sup>114</sup> *Id.* 52.232-19. "Funds are not presently available for performance under this contract beyond \_\_\_\_\_. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond \_\_\_\_\_, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer." *Id.* (appropriate dates are inserted in the blanks above).

<sup>115</sup> *Id.* 32.706-1.

<sup>116</sup> *Id.* 52.232-18 (2014); *id.* 52.232-19.

<sup>117</sup> AFARS 5101.602-2 (2014) "Solicitations may be issued for high priority requirements and Research, Development, Test and Evaluation (RDT&E) incrementally funded contracts before ensuring availability of funds when there is a high probability that the requirement will not be canceled." *Id.* "Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available." *Id.*

<sup>118</sup> For example, the funding gap from 1–17 October 2013 occurred at the beginning of FY14. In addition, the continuing resolution that ended this funding gap for FY14 expired on 15 January 2014. If another continuing resolution or additional legislation was not passed to appropriate funds before 15 January 2014, another funding gap could have occurred in the middle of the fiscal year.

This authority allows the Army to release solicitations prior to the availability of funds for high priority requirements<sup>119</sup> when there is a high probability that the requirement will not be cancelled.<sup>120</sup> The SAEF authority also differs from the SAF clause because the former only permits the release of the solicitation and not the award of the contract.

### 3. *Obligations in Advance of Fiscal Year (OAF) 2014 (Deviation 2014-O0001—Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7998*<sup>121</sup>

With this clause incorporated in the contract, any contract obligation<sup>122</sup> that required FY14 funding during the funding gap was legally permissible for excepted activities. Although this clause was rescinded on 17 October 2013,<sup>123</sup> practitioners can expect a similar clause to be released. The Office of the Under SECDEF for AT&L released this guidance on 9 October 2013 for the FY14 funding gap, which permitted contract obligation prior to the availability of FY14 funds.<sup>124</sup> This clause also addressed the inability of the government to make payments using this authority and the applicability of the prompt payment act for any late payments.

### 4. *Modification to Option Exercise Using the Authority in FAR17.204(d)*

Because option exercise was not legally permissible for non-excepted activities during the funding gap, the Mission Installation Contracting Command (MICC) recommended

modification of the contract to preserve the right of the government to exercise the option at a later date.<sup>125</sup>

## V. Recommendations to Prepare for Future Funding Gaps

The law and policy for funding gaps has remained fairly consistent since the early 1980s and the first Civiletti Opinion. The situation for future funding gaps, however, will most likely differ slightly from the FY14 funding gap circumstances discussed above. The key variables for legal practitioners in future funding gaps include determining whether there is any legislation appropriating funds for certain activities (for example, HFFSA and POMA),<sup>126</sup> and determining what policy restrictions—or flexibilities—are provided by higher HQs. To prepare for future funding gaps, this section recommends four strategies.

### A. Identify a Timely Source for the Policy Guidance

During the FY14 funding gap, different agencies and other offices released policy guidance at varying intervals. As discussed previously, the OMB, OPM, SECDEF, Deputy SECDEF, and DPAP all released policy guidance that impacted operations during the funding gap. In addition, HQDA released new policy guidance almost daily for the first week of the funding gap. This HQDA policy guidance changed frequently, restricted various activities, and required differing levels of approvals and reporting for different types of excepted activities. For this reason, legal practitioners should find a reliable source for current policy information and an avenue to discuss the requisite policy implications. During the FY14 funding gap, the JAG Corps' online resource center (MilBook JAGConnect) compiled all

<sup>119</sup> This clause is an Army-only authority and there is no definition of "high priority requirements."

<sup>120</sup> AFARS 5101.602-2.

<sup>121</sup> Ginman Memo, *supra* note 63 ("The Department of Defense has the authority to enter into this contractual action and to obligate the Government in advance of appropriations; however, appropriated funds are not currently available to make payments under this contract to liquidate this obligation. When appropriated funds become available, the Government will make payment in accordance with the terms of this contract, including the payment of interest where applicable under the Prompt Payment Act. This clause supersedes conflicting terms of any other provision in this contract dealing with contract payment or financing until funds are made available to the Contracting Officer for this contractual action.").

<sup>122</sup> See *supra* note 106.

<sup>123</sup> Memorandum from Richard Ginman, Dir., Def. Procurement and Acquisition Pol'y, for Commander, United States Special Operations Command (Attn: Acquisition Executive), et al., subject: Rescission of Class Deviation-Contract Obligations in Advance of Fiscal Year 2014 Funding (Oct. 17, 2013), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA005884-13-DPAP.pdf>.

<sup>124</sup> Ginman Memo, *supra* note 63.

<sup>125</sup> Normally, the government cannot exercise an option period after the previous period of performance ends. The MICC guidance recommended that contracting officers (KOs) execute a bilateral modification pursuant to FAR 17.204(d) to extend the period of time for the exercise of the option with following language: "In the event funds are not available for obligation in the fiscal year in which the contract would otherwise be completed, the period within which an option may be exercised by the Government extends to 30 days after the date Congress has made funds for obligation available." MICC Guidance, *supra* note 108 (providing sample draft language by Mr. Gary Shaw, Legal Counsel, MICC (Oct. 2013)). The contractor may not always agree to this bilateral modification if, for example, continuing to perform at the option price would result in minimal or lost profit.

<sup>126</sup> The POMA (and HFFSA) expired upon the enactment of the continuing resolution on 17 October 2013. POMA, *supra* note 46, § 3 ("Appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs: (1) the enactment into law of an appropriation (including a continuing appropriation) for any purpose for which amounts are made available in section 2.")). Without similar legislation, the following disbursements will likely be prohibited during a future funding gap: the disbursement of pay and allowances for civilian and military personnel, temporary duty pay, and payments of death gratuities. In addition, the SECDEF cannot recall additional civilian employees; therefore, a furlough will affect a larger percentage of employees for the duration of the funding gap.

the legal and policy guidance for Army lawyers.<sup>127</sup> In addition, a variety of useful funding gap links are listed in Appendix B of this article.<sup>128</sup>

#### B. Analyze the General Excepted Activities Guidance and Personnel Impact Before the Funding Gap

The first major issue for most commanders is the potential furlough of civilian personnel. In the early stages of a funding gap, local leaders make determinations on whether or not a civilian employee is supporting excepted activities and therefore, may continue to work. By using the resources in this article, legal practitioners can accurately predict the impact of a funding gap before the release of policy guidance.<sup>129</sup> In addition, lawyers can also skillfully advise their clients about the risks to operations, from both a legal and policy perspective. For example, even though obligations and disbursements for TDY during the FY14 funding gap were probably legal in accordance with POMA, HQDA policy restricted TDY.<sup>130</sup>

#### C. Review the Schedule for Courts-Martial, TDYs, Conferences, and Other Events

Funding gaps significantly impact TDY travel, training, conferences, courts-martial, and other events scheduled during the lapse in appropriations. Generally, if these events do not support an excepted activity, they must be terminated in an orderly fashion or delayed until funds are appropriated. In particular, TDY was significantly impacted by POMA and changing policy guidance during the course of the FY14 funding gap. Ultimately, HQDA required all TDY requests during the FY14 funding gap, even those in support of excepted activities, be submitted and approved at the HQDA level.<sup>131</sup> Although most TDYs required approval by G3/5/7,<sup>132</sup> the Secretary of the Army delegated the authority to approve TDYs for courts-martial to the TJAG and

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<sup>127</sup> The contract and fiscal law section of milBook was an excellent resource for current information during the October 2013 funding gap. The Army's Contract and Fiscal Action Branch (KFAB) administers this website, which is available to all federal government attorneys, both civilian and military, at <https://www.milsuite.mil/book/groups/army-contract-and-fiscal-law-attorneys> (login required).

<sup>128</sup> See Appendix B (Funding Gap On-Line Resources).

<sup>129</sup> The basic policy guidance from the FY14 funding gap, however, may change if there is a decrease or cessation in contingency operations, which will decrease the number of excepted activities. For example, recruiting activities were considered excepted activities during the FY14 funding gap in accordance with DoD policy guidance. Carter Memo, *supra* note 56, attachment, at 4. If the DoD is no longer engaged in contingency operations, recruiting activities may not be considered excepted activities.

<sup>130</sup> FRAGO 1 to EXORD, *supra* note 65.

<sup>131</sup> *Id.* 3.C.1.D.2.

<sup>132</sup> *Id.*

DJAG.<sup>133</sup> To prepare for a future funding gap, practitioners should recommend that their unit review TDY travel that begins slightly before or during the potential funding gap, and consider postponing or cancelling TDY that is not absolutely necessary. In addition, conferences, training, and other events funded with lapsed appropriations may also be affected. Commanders must weigh the risk of a lapse in funding and potentially restrictive policy guidance against canceling or rescheduling the event beforehand.

#### D. Review Contracting Actions that Require Administration Close to a Funding Gap

To properly advise contracting officers on the permissibility of contract actions during a funding gap, legal practitioners must first identify if the contract is in support of an excepted or a non-excepted activity. But this determination will ultimately be made by the requiring activity<sup>134</sup> during a funding gap, and not by the legal practitioner or contracting officer.<sup>135</sup> If the outcome of this determination is not clear before the funding gap, the safe course of action in most cases is to assume that this contract is in support of a non-excepted activity and take precautionary measures. The following section proposes precautionary measures and actions to take, both before and during a funding gap.

##### 1. Preventive Measures in Anticipation of a Funding Gap

Funding gaps can occur at any time and more than once during the fiscal year,<sup>136</sup> depending on the circumstances.<sup>137</sup> If the potential lapse in appropriations is likely to occur at the start of the new fiscal year, a solicitation should normally include the SAF clause at FAR 52.232-18.<sup>138</sup> If a funding gap occurs in the middle of the fiscal year, practitioners should recommend that KOs issue solicitations subject to the availability of funds using the SAEF authority at AFARS 5101.602-2 for "high priority requirements."<sup>139</sup>

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<sup>133</sup> HQDA EXORD, *supra* note 64, annex T, para. 6.d.(2).

<sup>134</sup> The requiring activity is the Army organization that actually receives the benefit of the goods or services provided by the service contract. In most cases the requiring activity will be the organization that both pays for and receives the benefit of the contract service being purchased. U.S. DEP'T OF ARMY, REG. 70-13, MANAGEMENT AND OVERSIGHT OF SERVICE ACQUISITIONS glossary, sec. II (30 July 2010), available at [http://www.apd.army.mil/pdffiles/r70\\_13.pdf](http://www.apd.army.mil/pdffiles/r70_13.pdf).

<sup>135</sup> This is either the requiring activity or another level in the requiring activity's chain of command, depending on the relevant delegation of this authority during a funding gap. See discussion *supra* note 107.

<sup>136</sup> TOLLESTRUP, *supra* note 1, at Summary.

<sup>137</sup> See discussion *supra* note 118.

<sup>138</sup> See discussion *supra* Part IV.D.

Contract award may be restricted during a funding gap for non-excepted activities. If possible, KOs should try to award contracts before the lapse in appropriations with funds available at the end of the fiscal year, as long as the award satisfies all fiscal law requirements, including the “bona fide needs” rule. If the award cannot occur before the lapse in appropriations, or if the potentially lapsed funds will be necessary for the requirement, potential consequences of a funding gap include delay in award or performance of the requirement, particularly if the contract supports a non-excepted activity.

Option exercises and the obligation of funds for incrementally-funded contracts may also be restricted during a funding gap for non-excepted activities. For severable services contracts, KOs can use the authority under 10 United States Code 2410(a) to maximize the flexibility of the obligation of funds to work around a funding gap. For example, KOs can modify the period of performance (PoP) for the relevant base or options periods, and then exercise the new option period before the funding gap begins. In this example, the Army obligates funds prior to the funding gap.<sup>140</sup> For non-severable services contracts in support of non-excepted activities, practitioners should advise their commands that option exercises will likely be prohibited during a funding gap, and therefore, contract performance may be delayed until completion of the funding gap.

In the same manner, if incrementally funded contracts will expire during a funding gap for non-excepted activities, the KO will probably have to issue a stop work order once the previously-obligated funds are exhausted.<sup>141</sup> Commands can avoid a stop work order on an incrementally-funded contract whose PoP extends past the likely duration of a funding gap, however, by obligating sufficient incremental funds to take them past the funding gap.<sup>142</sup>

## 2. Contract Actions During a Funding Gap

If a contract is funded with prior year or other than annual appropriations, performance may continue during a funding gap because these funds have not lapsed. Obligation of funds, disbursement of prior year funds, and contract administration is permissible for these contracts during a funding gap. If a contract is determined to be in support of an excepted activity, the solicitation, award, option exercise, or obligation of incremental funds is legally

permissible using the appropriate contract clause (OAF deviation clause).<sup>143</sup> Even if the obligation of funds is legally permissible in support of excepted activities, the disbursement of lapsed funds is not.<sup>144</sup> Any payments due in accordance with the terms of the contract must remain unpaid. The requisite interest penalties under the Prompt Payment Act apply to any late payments during a funding gap.

If a contract is deemed to be in support of a non-excepted activity, the following rules generally apply. The government may not award contracts in support of non-excepted activities during a funding gap because the obligation of these funds would violate the ADA. The contracting officer may issue the solicitation for the non-excepted activity contract (but not award) using the SAEF authority, as long as the KO satisfies the conditions of AFARS 5101.602-2. Along these same lines of logic, KOs may not exercise options for contracts in support of non-excepted activities. In accordance with the authority of FAR 17.204(d) the KO can modify the contract in order to allow the government to exercise the option after the funding gap, even if the end of the funding gap occurs after the contract's PoP ends.<sup>145</sup>

## VI. Conclusion

During a funding gap, the prohibitions by the ADA affect all aspects of Army operations and create numerous legal issues for all areas of practice within OSJAs. With such a broad impact, OSJAs must understand the law and policy that structures funding gaps so that they may successfully prepare for and manage potential future funding gaps. This article outlined the application of current law and policy to the difficult problems posed by a lapse in appropriations.

The U.S. political climate is constantly changing, and therefore, the risk of another funding gap is almost unpredictable. As a result, understanding the laws and HQDA policies of “government shutdowns” remains extremely important for judge advocates at all levels.

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<sup>143</sup> See discussion *infra* Part IV.D.

<sup>144</sup> See discussion *supra* Part II.B (Obligation Versus Disbursement).

<sup>145</sup> See *supra* note 125 (discussing the contract modification to extend the time to exercise the option for non-excepted activities). This course of action suggests that the government modify a contract that supports non-excepted activities to allow exercise of an option after the prior period of performance ends. There will be a break in service during the funding gap when the government cannot allow the contractor to continue to perform. When the contractor stops performance during the funding gap and subsequently restarts performance when the funding gap ends (assuming the option is exercised), costs may be incurred. Depending on the language of the contract and modification, the government may be responsible for some of these costs.

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<sup>139</sup> *Id.*

<sup>140</sup> See Appendix C (Examples of Potential Option Period Modifications Prior to a Funding Gap) (providing examples of potential modifications by KOs).

<sup>141</sup> MICC Guidance, *supra* note 108.

<sup>142</sup> Because of the significant implications of personnel law concerning government employees who are furloughed beyond thirty days, it is likely that the maximum duration of any funding gap would be thirty days.

## Appendix A

### Authority for Contract Actions in Advance of Appropriations

	<b>CONTRACT CLAUSE/AUTHORITY</b>		
<b>CONTRACT PHASE</b>	<b>SAF<sup>146</sup></b>	<b>SAEF<sup>147</sup></b>	<b>OAF Deviation<sup>148</sup></b>
<b>Solicitation</b>	X	X	X
<b>Award</b>	X		X
<b>Obligation</b>			X
<b>Disbursement</b>			

<sup>146</sup> This authority is used at the end of a fiscal year for contracts in advance of appropriations in accordance with FAR 32.706-1. The Subject to Availability of Funds (SAF) clause is at Federal Acquisition Regulation (FAR) 52.232-18; “Funds are not presently available for this contract. The Government’s obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.”; and also at FAR 52.232-19 (2014) for indefinite quantity contracts (“Funds are not presently available for performance under this contract beyond \_\_\_\_\_. The Government’s obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond \_\_\_\_\_, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.” *Id.* (appropriate dates are inserted in the blanks above).

<sup>147</sup> This authority might be used in the middle of a fiscal year in anticipation of a funding gap for contracts in advance of appropriations. The Subject to Availability of End of Year Funds (SAEF) authority is located at Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2. “Solicitations may be issued for high priority requirements and Research, Development, Test and Evaluation (RDT&E) incrementally funded contracts before ensuring availability of funds when there is a high probability that the requirement will not be canceled.” *Id.* “Funds are not presently available for this acquisition. No contract award will be made until appropriated funds are made available.” *Id.*

<sup>148</sup> This clause was used during the FY14 finding gap from 1-16 October 2013. The Obligations in Advance of Fiscal Year (OAF) 2014 (Deviation 2014-O0001) at Defense Federal Acquisition Regulation Supplement (DFARS) 252.232-7998 emanated from Memorandum from Director, DPAP, 9 October 2013. “The Department of Defense has the authority to enter into this contractual action and to obligate the Government in advance of appropriations; however, appropriated funds are not currently available to make payments under this contract to liquidate this obligation. When appropriated funds become available, the Government will make payment in accordance with the terms of this contract, including the payment of interest where applicable under the Prompt Payment Act. This clause supersedes conflicting terms of any other provision in this contract dealing with contract payment or financing until funds are made available to the Contracting Officer for this contractual action.”

## Appendix B

### Funding Gap On-line Resources\*

#### 1. JAGCNET LIBRARY–CONTRACT AND FISCAL LAW

- Over sixty FY14 Funding Gap Documents located at this site  
<https://www.jagcnet2.army.mil/Sites/contractandfiscallaw.nsf/homeLibrary.xsp>  
(CAC login required)

#### 2. MILBOOK–CONTRACT AND FISCAL LAW

- Contains the most current fiscal information in the form of blogs, news, etc.  
<https://www.milsuite.mil/book/groups/army-contract-and-fiscal-law-attorneys>  
(CAC login and JAGConnect membership required)

#### 3. TJAGLCS FISCAL LAW DESKBOOK 2013: CHAPTER 9 (CRA & FUNDING GAPS)

<https://www.jagcnet.army.mil/DocLibs/TJAGLCSDocLib.nsf/topicThread.xsp?action=openDocument&documentId=D545FC5B411C379785257B24006D1F31>

- Appendix A: Civiletti Opinion
- Appendix B: The Dellinger Memo
- Appendix C: OMB Bulletin 12-02
- Appendix D: DoD Funding Gap Guidance 2011

#### 4. DEPARTMENT OF JUSTICE

- **Publications and Resources**  
<http://www.justice.gov/jmd/publications/publications.htm>
- **FY14 Contingency Plan**  
<http://www.justice.gov/jmd/publications/doj-contingency-plan.pdf>

#### 5. DPAP (DEFENSE PROCUREMENT AND ACQUISITION POLICY)

Policy Vault: [http://www.acq.osd.mil/dpap/ops/policy\\_vault.html](http://www.acq.osd.mil/dpap/ops/policy_vault.html)

- **Class Deviation – Contract Obligations in Advance of Fiscal Year 2014 Funding**  
<http://www.acq.osd.mil/dpap/policy/policyvault/USA005738-13-DPAP.pdf> (9 Oct 13)

#### 6. OFFICE OF MANAGEMENT AND BUDGET (OMB)

<http://www.whitehouse.gov/omb>

- **FY1995 Memoranda**
  - **Contingency Planning for Agency Operations in Fiscal Year 1996**  
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-17.pdf>  
(17 Aug 95)
  - **Agency Plans for Operations During Funding Hiatus**  
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-18.pdf>  
(22 Aug 95)

- **Agency Plans for Operations During Funding Hiatus**  
<http://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/m95-21.pdf>  
 (25 Sep 95)
- **FY2011 Memoranda**
  - **Planning for Agency Operations During a Lapse in Government Funding**  
<http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-13.pdf> (7 Apr 11)
- **FY2013 Memoranda**  
[http://www.whitehouse.gov/omb/memoranda\\_2013](http://www.whitehouse.gov/omb/memoranda_2013)
  - M-13-24, Update on Status of Operations (30 Sep 13)
  - M-13-22, Planning for Agency Operations during a Potential Lapse in Appropriations (17 Sep 13)
- **FY2014 Memoranda**  
[http://www.whitehouse.gov/omb/memoranda\\_default/](http://www.whitehouse.gov/omb/memoranda_default/)
  - M-14-01, Reopening Departments and Agencies (17 Oct 13)
- **Impacts and Costs of the Government Shutdown**  
<http://www.whitehouse.gov/blog/2013/11/07/impacts-and-costs-government-shutdown>

<b>7. OFFICE OF PERSONNEL MANAGEMENT (OPM)</b>
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<http://www.opm.gov/>

- **Pay and Leave Furlough Guidance**  
<http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Shutdown-Furlough>
  - **Guidance for Shutdown Furloughs**
    - <http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf?nocache=6>
  - **OMB Bulletin M-95-18 transmitting 8/16/95 Department of Justice opinion** (22 Aug 95)
    - [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-1.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-1.pdf)
  - **OMB Memorandum M-91-02, Agency Operations in the Absence of Appropriations** (5 Oct 90)
    - [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-2.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-2.pdf)
  - **OMB Bulletin No. 80-14, Supplement No. 1, Agency Operations in the Absence of Appropriations** (20 Aug 82)
    - [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-3.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-3.pdf)

- **OMB Memorandum, Agency Operations in the Absence of Appropriations** (17 Nov 81)
  - [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-4.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-4.pdf)
- **OMB Bulletin 80-14, Shutdown of Agency Operations Upon Failure by the Congress to Enact Appropriations** (28 Aug 80)
  - [http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment\\_a-5.pdf](http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/attachment_a-5.pdf)

## 8. LIBRARY OF CONGRESS – CONGRESSIONAL RESEARCH SERVICE

<http://www.loc.gov/crsinfo/> (the first three links below provide access to various CRS articles, specific articles also listed below)

- <https://openocrs.com/>
- <https://www.fas.org/sgp/crs/index.html>
- <http://www.phibetaiota.net/2013/07/congression-research-service-catalog/>
  - Look under the following Headings: BUDGET, CONGRESS and DEFENSE; also use a keyword search (funding, gap, lapse, appropriation, shutdown, etc.)
  - Some of these documents are updated from time to time, so the dates may change
- **Federal Funding Gaps: A Brief Overview** (11 Oct 13)
  - <http://www.fas.org/sgp/crs/misc/RS20348.pdf>
- **FY2014 Appropriations Lapse and the Department of Homeland Security: Impact and Legislation** (24 Oct 13)
  - <http://www.fas.org/sgp/crs/homsec/R43252.pdf>
- **Government Shutdown: Operations of the Department of Defense During a Lapse in Appropriations** (15 Oct 13)
  - <http://www.fas.org/sgp/crs/natsec/R41745.pdf>
- **Reaching the Debt Limit: Background and Potential Effects on Government Operations** (21 Nov 13)
  - <http://www.fas.org/sgp/crs/misc/R41633.pdf>
- **Shutdown of the Federal Government: Causes, Processes, and Effects** (25 Sep 13)
  - <http://www.fas.org/sgp/crs/misc/RL34680.pdf>
- **Continuing Resolutions: Overview of Components and Recent Practices** (6 Aug 12)
  - <http://www.fas.org/sgp/crs/misc/R42647.pdf>
- **Past Government Shutdowns: Key Resources** (25 Nov 13)
  - <https://openocrs.com/document/R41759/>

- **In Brief: CRS Resources on the FY2014 Funding Gap, Shutdown, and Status of Appropriations** (23 Oct 13)
  - <https://opencrs.com/document/R43250/>
- **The FY2014 Government Shutdown: Economic Effects** (1 Nov 2013)
  - <https://www.fas.org/sgp/crs/misc/R43292.pdf>

## 9. U.S. DEPARTMENT OF DEFENSE

<http://www.defense.gov/>

- **Government Shutdown: What You need to Know (Oct 13)**  
[http://www.defense.gov/home/features/2013/0913\\_govtshutdown/](http://www.defense.gov/home/features/2013/0913_govtshutdown/)
  - **Guidance for Continuation of Operations in the Absence of Available Appropriations** (25 Sep 13)
    - [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Guidance-for-Continuation-of-Operations-in-the-Absence-of-Available-App.pdf)
  - **Contingency Plan Guidance for Continuation of Essential Operations in the Absence of Available Appropriations** (Sep 13)
    - [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Contingency-Plan-Guidance-Attachment.pdf)
  - **Potential Government Shutdown** (26 Sep 13)
    - [http://www.defense.gov/home/features/2013/0913\\_govtshutdown/Potential-Government-Shutdown-DSD-Memo-9-26-2013.pdf](http://www.defense.gov/home/features/2013/0913_govtshutdown/Potential-Government-Shutdown-DSD-Memo-9-26-2013.pdf)
- **SECDEF Publications**  
<http://www.defense.gov/pubs/>
  - **Guidance for Implementation of Pay Our Military Act (POMA)**
    - <http://www.defense.gov/pubs/POMA-implementation-guidance.pdf> (5 Oct 13)
  - **POMA Cover Letter**
    - [http://www.defense.gov/pubs/Hagel\\_Cover\\_Memo\\_POMA-FINAL.pdf](http://www.defense.gov/pubs/Hagel_Cover_Memo_POMA-FINAL.pdf) (5 Oct 13)
- **SECDEF Speeches**  
<http://www.defense.gov/speeches/>
  - **Message to the Force on the Potential Government Shutdown**  
<http://www.defense.gov/speeches/speech.aspx?speechid=1809> (30 Sep 13)
  - **Message to Department of Defense Personnel on Reopening the Government**  
<http://www.defense.gov/speeches/speech.aspx?speechid=1812> (17 Sep 13)

- **SECDEF News Releases (Oct 13)**  
<http://www.defense.gov/releases/default.aspx?mo=10&yr=2013>

- **Statement by Secretary Hagel on the Pay Our Military Act (5 Oct 13)**  
<http://www.defense.gov/releases/release.aspx?releaseid=16293>

## 10. HEADQUARTERS, DEPARTMENT OF THE ARMY

<https://g357.army.pentagon.mil/default.aspx>

- **PLANORD 226-13: Continuation of Operations (PLANORD, FRAGO 1-2, Annex)**  
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/PLANORD.aspx?PageView=Shared>
- **EXORD 228-13: Continuation of Operations (EXORD, FRAGO 1-10, Annex)**  
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/WebPages/EXORD228.aspx>
- **EXORD 049-12: Cont. OPNS in absence of Avail Appropriations (EXORD, FRAGO 1-2, Annex)**  
<https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/EXORD%2004912%20Cont%20OPNS%20in%20absence%20of%20Avail%20Appropri/Forms/AllItems.aspx>
- **Fiscal and Related Policy Guidance, HQDA EXORD Annex T**  
[https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC\\_Document\\_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf](https://g357.army.pentagon.mil/OD/ODO/ArmyOpCenter/AOC_Document_Library/ANNEX%20T%20-%20FISCAL%20AND%20RELATED%20POLICY%20GUIDANCE.pdf)

## 11. GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

<http://www.gao.gov/>

- **GAO Redbook, Vol II., Chapter 6-146, Funding Gaps** <http://gao.gov/assets/210/202819.pdf>
- **Funding Gaps Jeopardize Federal Government Operations, PAD-81-31 (3 Mar 81)**  
<http://www.gao.gov/products/PAD-81-31>
  - Appendix III: Comptroller Opinion for Honorable Gladys Spellman (3 Mar 80)
  - Appendix IV: Attorney General Civiletti Opinion (25 Apr 80)
  - Appendix V: OMB Director McIntyre Memorandum (28 Aug 80)
  - Appendix VI: OMB Director McIntyre Memorandum (30 Sep 80)
  - Appendix VII: OMB Director McIntyre Memorandum (15 Dec 80)
  - Appendix VIII: Attorney General Civiletti Opinion (16 Jan 81)

## 12. RELEVANT LEGISLATION

- **41 USC 11 (Feed and Forage Act)**  
<http://www.gpo.gov/fdsys/pkg/USCODE-2009-title41/pdf/USCODE-2009-title41-chap1-sec11.pdf>
- **31 USCA 1341-1342, 1511–1519 (Anti-Deficiency Act)**
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleII-chap13-subchapIII-sec1341.pdf>
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1511.pdf>

- <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1512.pdf>
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1512.pdf>
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title31/pdf/USCODE-2011-title31-subtitleII-chap15-subchapII-sec1515.pdf>
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1517.pdf>
  - <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title31/pdf/USCODE-2010-title31-subtitleII-chap15-subchapII-sec1518.pdf>
- **Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013)**  
<http://www.gpo.gov/fdsys/pkg/PLAW-113publ39/pdf/PLAW-113publ39.pdf>
  - **Department of Defense Survivor Benefits Continuing Appropriations Resolution, 2014, Pub. L. No. 113-44 (2013)**  
<http://www.gpo.gov/fdsys/pkg/PLAW-113publ44/pdf/PLAW-113publ44.pdf>

\* This list is current as of January 2014. Certain documents appear more than once on the list in the event the first link is no longer valid.

## Appendix C

### Examples of Potential Option Period Modifications Prior to a Funding Gap

#### **EXAMPLE I:**

Assume the continuing resolution (CR) expired on 15 January 2014. There had been no extension of the CR nor appropriation enacted and, therefore, a second funding gap occurred in FY14 on 15 January 2014. Also assume a contract for severable services had the following period of performance (PoP) and funding source:

Base period: 17 January 2013 to 16 January 2014 (using FY13 OMA)  
Option period I: 17 January 2014 to 16 January 2015 (requiring FY14 OMA)  
Option period II: 17 January 2015 to 16 January 2016 (requiring FY15 OMA)

Practitioners may recommend that KOs modify (must be bilateral) the PoP of the option periods as follows:

Base period: 17 January 2013 to 13 January 2014 (using FY13 OMA)  
Option I: 14 January 2014 to 13 January 2015 (requiring FY14 OMA from the CR authority)  
Option II: 14 January 2015 to 13 January 2016 (requiring FY15 OMA)

In this scenario, the Government loses a few days of performance at the end of the contract. However, with the modification, the new option period would have been exercised prior to the beginning of the funding gap. This action could allow potentially non-accepted services to continue during a funding gap.

#### **EXAMPLE II:**

Assume a funding gap may occur at the start of FY15 on 1 October 2014. Also assume a contract for severable services has the following PoP and funding source:

Base period: 1 October 2013 to 30 September 2014 (using FY14 OMA)  
Option period I: 1 October 2014 to 30 September 2015 (requiring FY15 OMA)  
Option period II: 1 October 2015 to 30 September 2016 (requiring FY16 OMA)  
Option period III: 1 October 2016 to 30 September 2017 (requiring FY17 OMA)

Practitioners may recommend that KOs modify (must be bilateral) the PoP of the option periods as follows:

Base period: 1 October 2013 to 28 September 2014 (using FY14 OMA)  
Option I: 29 September 2014 to 28 September 2015 (requiring FY14 OMA)  
Option II: 29 September 2015 to 28 September 2016 (requiring FY15 OMA)  
Option III: 29 September 2016 to 28 September 2017 (requiring FY16 OMA)

In this scenario, FY14 OMA was used for both the base period and option period I. This total period of performance was just under 24 months, funded with FY14 OMA.

# Supervising Paralegals in Accordance with the Rules of Professional Conduct

Major Todd W. Simpson\*

*Leadership, the lifeblood of any army, makes a difference every day in the United States Army. Since the formation of the Continental Army until today with Soldiers deployed around the globe, Army leaders have accepted the challenge before them.*<sup>1</sup>

## I. Introduction

The *Rules of Professional Conduct for Lawyers (Rules of Professional Conduct)*<sup>2</sup> inform every duty and professional obligation of the Army judge advocate (JA). Army Regulation (AR) 27-26 details the ethical rules that guide Army law practitioners in the performance of their duties. Among the many ethical rules JAs must keep steadfastly in mind are those regarding the use of paralegals in the military practice of law. Many JAs assume they are responsible for acts of paralegals that violate the *Rules of Professional Conduct*. While a JA may be responsible for the conduct of a paralegal under certain circumstances,<sup>3</sup> the intent of Rule of Professional Conduct 5.3 is to hold JAs accountable for their leadership failures, not for the actual conduct of the paralegals they lead.

The leadership requirement imposed by Rule 5.3(a) is quite straightforward. It requires senior supervisory lawyers to implement controls to guide subordinate JAs in supervising the paralegals in accordance with the *Rules of Professional Conduct*. These control measures, if implemented using Army leadership principles and existing Army regulatory requirements, will ensure that JAs meet their obligations under Rules 5.3 and 5.5; will improve the quality of legal services across the United States Army; and will develop better trained and more competent Army officers across the Judge Advocate General's Corps.

This article analyzes the obligation to appropriately supervise paralegals established by Rule 5.3.<sup>4</sup> Part II describes the responsibilities of senior leaders and JAs in general under that rule. Part III discusses other rules within AR 27-26 that may be the most problematic for paralegals. Finally, this article suggests a supervisory system that takes advantage of existing Army leadership doctrine and tools to enable JAs to meet the ethical standard for supervising paralegals and to grow as officers and leaders.

## II. The Duty to Supervise Paralegals

While the primary duty of JAs is to provide exceptional legal services, as Army officers, they also must lead Soldiers. By developing leadership skills in junior JAs, the JAG Corps can build the next generation of outstanding legal officers and use those skills to reinforce the importance of ethics in the legal community. The Army defines leadership as “the process of influencing people by providing purpose, direction and motivation to accomplish the mission and improve the organization.”<sup>5</sup> Whether a JA is leading one Soldier or an office of 100 officers, Soldiers, and Civilians, his mission is to deliver principled counsel and mission-focused legal services to the Army and the Nation.<sup>6</sup> In providing leadership, accomplishing the mission, and improving the organization, JAs must be vigilant in complying with their ethical obligations.

Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, is easy to overlook. It places a specific obligation on JAs to make reasonable efforts to ensure paralegals act in a manner consistent with the JA's obligations under the *Rules of Professional Conduct*.<sup>7</sup> The duty of a JA to supervise paralegals is similar to the duty to supervise subordinate JAs, both of which duties find their bases in the rules of agency<sup>8</sup> and in Army doctrine.<sup>9</sup>

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<sup>1</sup> U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP 1 (1 Aug. 2012) (CI, 10 Sept. 2012) [hereinafter ADP 6-22].

<sup>2</sup> U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

<sup>3</sup> *Id.* app. B (Rule 5.3 stating a lawyer is responsible for the conduct of a nonlawyer assistant where the conduct “would be a violation of these Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action”).

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

<sup>5</sup> ADP 6-22, *supra* note 1, at 1.

<sup>6</sup> Lieutenant General Dana K. Chipman, *One Team: The Judge Advocate General's Corps' Vision, Mission, and Priorities*, vol. 38-1, TJAG SENDS: A MESSAGE FROM THE JUDGE ADVOCATE GENERAL (2010).

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

<sup>8</sup> LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.3-1 (Ronald D. Rotunda & John S. Dzienkowski eds., 2012) [hereinafter LEGAL ETHICS] (citing to RESTATEMENT (SECOND) OF AGENCY § 503 (1958)).

However, the Rule requires a greater degree of supervision over nonlawyer assistants than over lawyers because it presumes they lack extensive legal training and because they are not covered by a professional disciplinary authority.<sup>10</sup> The supervisory obligations imposed by Rule 5.3 acknowledge the different roles lawyers assume within a law practice, providing different duties for those with general managerial authority and those who directly supervise the daily duty performance of paralegals.<sup>11</sup>

#### A. The Duty of Senior Supervisory Lawyers

The Rules require all JAs, including senior supervisory lawyers, to conduct adequate oversight of the paralegals they directly supervise.<sup>12</sup> Section B, below, analyzes this obligation. Senior supervisory lawyers have the additional responsibility to implement measures ensuring subordinate JAs adequately supervise the Soldiers in the law office.<sup>13</sup> These senior lawyers must design procedures to assure themselves that a paralegal's duty performance is compatible with the professional obligations of the JAs the paralegal supports. This obligation is mandatory. Failure to implement reasonable supervisory controls violates Rule 5.3, even if no paralegal in the office has acted improperly.<sup>14</sup> On the other hand, a lawyer who has implemented proper procedures to guide paralegals and has provided appropriate supervision will be held harmless if the paralegals misbehave.<sup>15</sup>

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<sup>9</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (26 Jan. 2012) (paragraph 4-23, stating the staff judge advocate (SJA) provides oversight and training of legal personnel, including professional responsibility training to judge advocates under the SJA's supervision; paragraph 4-42, stating the Chief, Trial Defense Service (TDS) exercises supervision, direction and control over the defense counsel and TDS mission; and paragraph 4-12, stating the brigade judge advocate supervises, trains and mentors the trial counsel, augmentees, and the brigade senior paralegal noncommissioned officer, and bears supervisory responsibility for the overall professional development of brigade legal section personnel).

<sup>10</sup> MODEL RULES OF PROF'L CONDUCT R 5.3 cmt. 1 (2004).

<sup>11</sup> Compare AR 27-26, *supra* note 2, app. B (Rule 5.3(a) "[T]he senior supervisory lawyer in an office shall make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."), and AR 27-26, *supra* note 2, app. B (Rule 5.3(b) "A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

<sup>12</sup> AR 27-26, *supra* note 2, app. B (Rule 5.3(b)).

<sup>13</sup> *Id.* (Rule 5.3(a)).

<sup>14</sup> *In re Galbasini*, 163 Ariz. 120 (1990).

<sup>15</sup> *People v. Smith*, 74 P.3d 556, 571 (Colo. O.P.D.J 2003) (holding there is no violation of Rule 5.3(a) where lawyer had reasonable measures in place to ensure legal assistant acted in a manner consistent with the lawyer's ethical rules, even if the assistant did not follow them).

Army Regulation 27-26 does not define the term "senior supervisory lawyer," but it does not include all JAs with subordinates. The term "Senior Supervisory Judge Advocate," as defined in AR 27-1,<sup>16</sup> does not appear to comport with the intent of Rule 5.3(a) or the language of the American Bar Association Model Rule on which it is based.<sup>17</sup>

The JAG Corps needs a clear definition of "senior supervisory lawyer." A common sense interpretation is that "senior supervisory lawyer," for purposes of Rule 5.3(a), means the supervisory JA with overall leadership responsibility for a law office. This would include staff judge advocates, brigade judge advocates, regional defense counsel, and similar leaders. Leaders at these levels can vigorously implement a supervisory program, while ensuring that the program is not so burdensome as to hinder military operations. These leaders are in a good position to quickly adapt supervisory measures to changes in law office operations.

Regardless of who takes on this task, senior supervisory lawyers should tailor control measures to the nature of the law practice, the skill set of paralegals assigned to the organization, and the duties actually performed by paralegals. Appropriate measures may include training on the JAs' ethical duties—including particularized training on whichever Rules the paralegals will most likely encounter—supervisory controls that prevent paralegals from engaging in the unauthorized practice of law, and identifying and resolving potential client confidence and conflict of interest issues involving the paralegals.<sup>18</sup>

While creating a supervisory plan, senior supervisory lawyers should be aware that the required measures can change as the practice of law and technology evolve. For example, due to changes to computer software, JAs are more likely to accidentally disclose confidential client information or attorney work product when disseminating digital copies

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<sup>16</sup> U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 7-4 (13 Sept. 2011) (noting "[t]he senior supervisory JA is the MACOM SJA or other JA in an equivalent supervisory position.").

<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R 5.3 (2004) (pointing out that "a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer").

<sup>18</sup> See, e.g., *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So.2d 196 (Fla. Dist. Ct. App. 2000) (A nonlawyer who formerly worked for a firm representing an adverse party was properly counseled to maintain the former clients confidences.); *In re Kellogg*, 4 P.3d 594 (Kan. 2000) (A lawyer's failure to train a nonlawyer assistant is a violation of Rule 5.3.); *In re Wilkinson*, 805 So.2d 142 (La. 2002) (finding a violation of Rule 5.3 where attorney admonished nonlawyer assistant to give no legal advice to client but allowed the assistant to meet privately with the client and took no active role in the representation).

of documents to persons outside the legal staff.<sup>19</sup> Senior supervisory lawyers must now implement procedures to ensure confidential client information is not transmitted in metadata.<sup>20</sup> In addition to ethical concerns raised by changing technology, senior leaders should pay attention to ethical issues raised by the expanding role of JAG Corps personnel on the battlefield; including issues raised by the detainee operations, rule of law, and counter-insurgency missions, as well as the asymmetrical nature of current and future operations. Senior leaders should include identifying emerging ethical considerations in periodic and mandatory ethics training requirements.<sup>21</sup> Part III below suggests control measures that may be effective for complying with other enumerated *Rules of Professional Conduct*.

## B. The Duty of Judge Advocates Directly Supervising Paralegals

In general terms, Rule 5.3(b) obligates JAs to oversee the duty performance of paralegals to ensure all activities are consistent with the other *Rules of Professional Conduct* and requires, at a minimum, that JAs provide adequate instruction when assigning projects, monitor the progress of those projects, and review them when complete.<sup>22</sup> Ensuring that JAs embrace the supervisory obligations of Rule 5.3(b) provides a continuing opportunity for them to learn and develop their skills as Army officers and leaders.

### 1. Supervise Each Subordinate

Every JA who assigns tasks to or directs a paralegal in the performance of his duties has an ethical obligation to provide appropriate oversight of all assigned tasks. Rule 5.3(b) requires lawyers having direct supervisory authority over nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional

obligations of the lawyer.”<sup>23</sup> While an individual paralegal may provide legal support to more than one JA, the rules require each JA to adequately supervise completion of the legal tasks he assigns. The nature and extent of supervision can be tailored to the experience and professional competence of the individual Soldier, the volume of work assigned, and the complexity of the tasks being performed.

### 2. Tailor the Level of Supervision to the Subordinate

To provide effective and efficient supervision, JAs must know their paralegals. “Internal controls and supervisory review are necessary precisely because dishonesty and incompetence are not identifiable in advance.”<sup>24</sup> Knowing the rank, length of service, and reputation for professional competence of the paralegals is only the beginning of the analysis. Leaders must also know about them as individuals and what is going on in their lives to craft an efficient supervisory system, particularly for Soldiers just joining the organization. This personal knowledge can prevent the inefficiency associated with overly stringent supervisory controls.

### 3. Avoid Micromanagement: Delegation

Too much supervision can hurt law office efficiency as much as too little supervision. Providing appropriate supervision to paralegals does not require JAs to be micromanagers. Any JA may eventually lead a team of other JAs, paralegal NCOs, and paralegals, all of whom have different roles and tasks across a spectrum of legal disciplines. It is permissible and appropriate to delegate supervisory responsibility to another person who has the requisite knowledge and ability to provide appropriate oversight and supervision.<sup>25</sup> However, if a JA delegates supervisory responsibility to another, he still must maintain oversight to ensure proper supervision of the paralegals and to take remedial action if it is inadequate.<sup>26</sup> No matter how he delegates supervisory responsibilities, the JA remains just as responsible for impermissible conduct as if he personally supervised the paralegal who committed it.

### 4. Use Noncommissioned Officers

Regardless of the JA’s personal responsibility for the conduct of paralegals, implementing internal controls and

<sup>19</sup> Major Brian J. Chapuran, *Should You Scrub? Can You Mine? The Ethics of Metadata in the Army*, ARMY LAW., Sept. 2009, at 1. “Metadata is information contained in an electronic document that is not immediately visible to someone viewing the document . . . . For example, Client A visits the legal assistance office to have a separation agreement prepared. The attorney pulls up the last agreement he drafted, saves the new agreement as a new file, and begins work. A few days later, the attorney e-mails Client A, attaching the draft separation agreement. Client A opens the document and, because metadata is present, Client A is able to find the name of Client B, for whom the previous separation agreement was drafted. . . thus, metadata led to a breach of client confidentiality.” *Id.* at 1.

<sup>20</sup> See N.C. Ethics Op. 1 (N.C. St. Bar. 2009) (stating “a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients”).

<sup>21</sup> Policy Memorandum 06-01, The Judge Advocate Gen. of the Army, subject: Professional Responsibility (10 Jan. 2006).

<sup>22</sup> *In re Comish*, 889 So.2d 236 (La. 2004).

<sup>23</sup> AR 27-26, *supra* note 2, app. B (Rule 5.3(b)).

<sup>24</sup> *In re Carter*, 887 A.2d 1 (D.C. 2005).

<sup>25</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAW § 11, cmt. C (2000).

<sup>26</sup> *Id.*

supervisory review should be a team effort. The NCO performs an essential function in all military organizations. In addition to technical competence honed over years of service, they provide leadership to ensure Soldiers complete the mission on time and to standard.<sup>27</sup> However, JAs cannot turn over responsibility for the day-to-day operation of legal services, or any part thereof, to a paralegal without continuous oversight.<sup>28</sup> While NCO leadership can never totally replace JA oversight under Rule 5.3(b), with appropriate guidance, NCOs can be a valuable resource to ensure timely and consistent duty performance in accordance with the Rules of Professional Conduct.

Even with diligent training and supervision, mistakes happen; so what is the appropriate response when a JA discovers that a paralegal has likely violated an ethical rule? The JA must take timely and reasonable steps to avoid or mitigate the consequences, or he risks running afoul of Rule 5.3.<sup>29</sup> In addition, the JA must take corrective action to ensure the paralegal understands the error, provide appropriate remedial training, and increase oversight of the Soldier's duty performance to ensure compliance with the ethical standard in the future.<sup>30</sup> Following these simple requirements can increase the quality of the legal services and ensure JAs do not accidentally violate the Rules of Professional Conduct.

### III. Selected Rules of Professional Conduct

Paralegals supporting JAs in providing legal services to the force are in a position to violate most, if not all, of the *Rules of Professional Conduct*. The section below identifies the rules paralegals will most likely encounter during their daily duties and discusses the supervisory attorney's obligations.

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<sup>27</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP para. 3-17 (12 Oct. 2006) [hereinafter FM 6-22] (stating "NCO leaders are responsible for setting and maintaining high-quality standards and discipline.").

<sup>28</sup> *People v. Smith*, 74 P.3d 566 (Colo. O.P.D.J. 2003) (noting in spite of having supervisory measures in place as required by Rule 5.3(a), lawyer delegated substantial authority to assistant without overseeing her work, contrary to Rule 5.3(b)).

<sup>29</sup> AR 27-26, *supra* note 2, app. B (Rule 5.3(c), stating "a lawyer shall be responsible for conduct of such a person that would be a violation of these Rules of Professional Conduct if engaged in by a lawyer if: [ . . . ] (2) the lawyer has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action").

<sup>30</sup> *In re Morin*, 878 P.2d 393 (Or. 1994) (A lawyer is responsible for unauthorized practice of law by a paralegal where, following an initial warning to the paralegal, the lawyer provide the paralegal with so little supervision that the lack of supervision amounted to aiding in the unauthorized practice of law.).

### A. Preventing the Unauthorized Practice of Law

Paralegals are likely to have the opportunity to engage in the unauthorized practice of law during their daily duties. In addition to the tasks they perform for JAs, paralegals work closely with and are directly accountable to commanders, command sergeants major, and first sergeants. Because of their rank and duty position, these leaders rightly expect to discuss legal issues with the paralegals assigned to their units, especially when it comes to legal issues facing the command. As the paralegals' technical chain supervisors, JAs must protect their Soldiers from the demands of senior-ranking Soldiers who might require or tempt paralegals to engage in the unauthorized practice of law. Instead, the supervising attorney should empower them to provide the broadest range of support to their units consistent with Army regulations and the *Rules of Professional Conduct*.

The prohibition against the unauthorized practice of law provides a clear benefit to the legal system. It aids in regulating the legal profession and protects the integrity of the judicial system.<sup>31</sup> Limiting the practice of law to qualified JAs increases the quality of legal representation provided to the Army and individual clients while increasing the efficiency of legal services and the Army as a whole.

The role of the paralegal within the law office is that of technical expert. "Paralegals provide support in all of the core legal disciplines, under the supervision of JAs, civilian attorneys, and paralegal NCOs."<sup>32</sup> However, "[t]hey do not provide legal advice, but support the legal services provided by judge advocates and civilian attorneys at all levels within the Army."<sup>33</sup> Because of this relationship, JAs may unwittingly aid in the unauthorized practice of law if they fail to provide proper training and supervision. Rule 5.5 states that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."<sup>34</sup> To avoid assisting a person in the unauthorized practice of law, JAs must provide appropriate training and supervision to ensure that paralegals do not give legal advice to clients or others.<sup>35</sup>

Unfortunately, AR 27-26 does not define "unauthorized practice of law." It simply states that a lawyer may delegate functions to nonlawyers "so long as the lawyer supervises the delegated work and retains responsibility for their

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<sup>31</sup> *Fla. Bar v. Schramek*, 616 So.2d 979 (Fla. 1993).

<sup>32</sup> FM 1-04, *supra* note 9, para. 4-32.

<sup>33</sup> *Id.*

<sup>34</sup> AR 27-26, *supra* note 2, app. B (Rule 5.5(b)).

<sup>35</sup> *In re Farmer*, 950 P.2d 713 (Kan. 1997) (stating attorneys "need to be pro-active" to ensure paralegals are not giving legal advice to clients).

work.”<sup>36</sup> State law does define the term,<sup>37</sup> but “[a] lawyer’s performance of legal duties pursuant to a military department’s authorization . . . is considered a federal function and not subject to regulation by the states,” which is why a military legal assistance attorney can advise clients on state law without being licensed by that state.<sup>38</sup> Still, state courts provide useful guidance on what functions cannot properly be delegated. These courts generally agree that paralegals may not give legal advice, accept cases, appear in court, plan strategy, make legal decisions, or chart the direction of a case.<sup>39</sup>

The practice of law relates to the rendition of service for others that calls for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body of and philosophy of law to a specified legal problem of a client.<sup>40</sup>

These broad concepts can be useful to individual JAs in deciding what conduct is permissible for paralegals under their supervision.

One effective solution to preventing the unauthorized practice of law is to give specific guidance to the paralegals. Each JA should identify the tasks that paralegals shall not perform under any circumstances; those tasks for which paralegals should attempt to obtain guidance before proceeding or notify the JA as soon as practicable after performance has begun; and those tasks paralegals should report to the JA but that are within the scope of the paralegal’s duties. Providing this specific guidance will make the role of the paralegal clear and empower the Soldier to decline to act when it is contrary to the orders of the supervising JA.

## B. The Army as Client

Paralegals must have a clear understanding of which master they serve. An individual can be a client only when the paralegal is supporting the Trial Defense Service or Legal Assistance mission. At all other times, the client is the

<sup>36</sup> AR 27-26, *supra* note 2, app. B (Rule 5.5 cmt.)

<sup>37</sup> MODEL RULES OF PROF’L CONDUCT R 5.5 cmt. 2; *see also* *Chambers v. Nasco*, 501 U.S. 32 (1991).

<sup>38</sup> AR 27-26, *supra* note 2, app. B (Rule 5.5 cmt.)

<sup>39</sup> Mary Kay Lieberman, *The Unauthorized Practice of Law (UPL): What It Is and How to Avoid It*, 2 ASS’N OF TRIAL LAWYERS OF AMERICA ANNUAL CONVENTION REFERENCE MATERIALS 2251 (2000).

<sup>40</sup> LEGAL ETHICS, *supra* note 8, § 5.3-1.

Department of the Army acting through its authorized officials.<sup>41</sup>

During the normal course of duties, paralegals provide support directly to unit representatives: normally commanders, command sergeants major, and first sergeants. A paralegal almost always works with personnel who are senior in rank to him and who are often in the Soldier’s chain of command. These leaders will have operational requirements and command priorities that are—unbeknownst to the paralegal—driving them to take actions that may not be in the best interests of the Army or consistent with law or Army Regulations. They likely do not have the experience or training in the law and ethics the paralegal might possess. Yet, Army training and culture has taught the paralegal to follow orders and complete the mission. This unique dynamic can cause confusion in the minds of paralegals about how to act.

The supervising attorney can avoid these issues through proper training and supervision. Paralegals should understand that all JAG Corps personnel act in support of the Army as an institution. The JA represents the Army. Paralegals support the JA in that mission. By focusing on the Army as the client, paralegals will better understand that they support the unit mission, not any specific individual in the unit. When a unit leader recommends or pursues a course of action that is not in the best interest of the Army or is illegal, the legal staff must act in a manner reasonably necessary to further the best interest of the Army.<sup>42</sup> This obligation extends to the paralegal as well as to the JA. The appropriate course of action is a matter of personal preference for the JA and the paralegal. At a minimum, the paralegal must immediately notify the JA of what is going on. This is usually the best way, as the lawyer is normally the appropriate person to counsel senior leadership about what they should or should not, and can or cannot do, in a given circumstance.

## C. Confidentiality of Information

A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer.<sup>43</sup>

<sup>41</sup> AR 27-26, *supra* note 2, app. B (Rule 1.13(a)).

<sup>42</sup> *Id.* (Rule 1.13(c)).

<sup>43</sup> MODEL RULES OF PROF’L CONDUCT R 1.6 cmt. 2.

## 1. Individual Clients

Paralegals working in TDS and Legal Assistance offices must act diligently to preserve confidentiality of client information. Rule 1.6 prohibits JAs, and the paralegals supporting them, from revealing information relating to the representation of a client unless the client consents after consultation.<sup>44</sup>

The nature of military culture makes disclosure of confidential information by a paralegal a very real concern. Any disclosure can undermine the credibility of the Army's legal system. Paralegals are often privy to the most private and salacious details of the client's life. Peers and superiors may well be interested in these details. Peer pressure may lead paralegals to reveal confidential information on purpose, or the paralegal may reveal it accidentally because he is unaware of who may be listening during an otherwise appropriate conversation. Each JA must ensure paralegals understand that they must zealously guard confidential client information.<sup>45</sup>

Similarly, JAs must prevent accidental disclosure of client confidences in the workplace. During the normal duty day, paralegals working in the TDS or Legal Assistance offices perform customer service duties for members of the military public in addition to handling confidential information. The senior JA should examine the layout of the law office and the duties assigned to those who have regular contact with the military public to prevent inadvertent disclosure of confidential information. Additionally, they should continually reinforce the obligation to maintain client confidences and be aware of their surroundings when discussing matters related to clients and client representation to ensure confidences are maintained.

## 2. Army as Client

Paralegals working on behalf of the Army as a client also have access to confidential client information. Rule 1.6 prohibits revealing information relating to representation of a client unless the client consents after consultation in this context as well.<sup>46</sup> When representing the Army as a client, the number of personnel who can have access to client

information is significantly greater, but the obligation remains the same.

Paralegals must understand the importance of maintaining client confidences. Most duties a paralegal performs in support of the unit lead to action by the commander. Every JA must ensure paralegals are mindful of their role on the commander's personal staff<sup>47</sup> when performing their duties. In particular, paralegals must understand that confidential command information should not be disclosed to third parties who do not "need to know," even when the information is already known outside command channels.<sup>48</sup> Those JAs who advise commanders should discuss access to legal actions with them, limiting access to those with a need to know. By identifying which personnel are authorized access to confidential command information, JAs can better protect it from accidental disclosure.

It is vital to remember that "third parties" in this context means "parties outside the Army," because the Army, not the commander, is the client:

When one of the officers, employees, or members of the Army communicates with the Army's lawyer on a matter relating to the lawyer's representation of the organization on the organization's official business, the communication is generally protected from disclosure to *anyone outside the Army* by Rule 1.6. This does not mean, however, that the officer, employee, or member is a client of the lawyer. It is the Army, and not the officer, employee, or member which benefits from Rule 1.6 confidentiality.<sup>49</sup>

Thus, in a criminal case, the Government may not properly conceal command information from an accused Soldier or his (civilian or military) defense counsel on the basis that it is "confidential." Whether it can be withheld on another basis is probably best left to the attorney rather than the paralegal staff.

<sup>44</sup> AR 27-26, *supra* note 2, app. B (comments to Rule 1.6(a), stating "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source").

<sup>45</sup> U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 4-8 (13 Sept. 2011) ("Those who assist attorneys providing legal assistance will maintain the same strict standards of confidentiality. Attorneys will ensure that those who assist them are fully instructed as to the nature and scope of privileged communications.").

<sup>46</sup> AR 27-26, *supra* note 2, app. B (Rule 1.6(a)).

<sup>47</sup> U.S. DEP'T OF ARMY, ARMY TACTICS, TECHNIQUES & PROCEDURES NO. 5-0.1 para. 2-113 (14 Sept. 2011) (paragraph 2-105 stating "[p]ersonal staff officers work under the immediate control of, and have direct access to, the commander").

<sup>48</sup> Lawyer Disciplinary Bd. v. McGraw, 194 W.Va. 788, 800 (1995) (noting "[t]he ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it").

<sup>49</sup> AR 27-27, *supra* note 2, app. B (Rule 1.13 cmt).

Accidental disclosure of confidential client information can easily occur in the workplace.<sup>50</sup> To efficiently complete the JAG Corps mission, law office personnel must have easy access to relevant documents and be able to freely discuss pending legal actions. To prevent an inadvertent disclosure of confidential information, JAs should limit access to the law office work areas to personnel identified by the commander and, to the greatest extent possible, include only commanders and senior enlisted advisors. By limiting access to the law office, JAs can limit the opportunities for inadvertent disclosure of client information and ensure documents remain secure.

Similarly, JAs must implement control measures to prevent unauthorized release of confidential information during routine staff functions. Paralegals are taking an increasingly active role on company and battalion staff. Judge advocates should proactively engage commanders regarding the information that is reportable during staff meetings to protect the confidentiality of command information. Once established, JAs should work with the NCOs to train all Soldiers on proper briefing techniques as well as identifying and protecting confidential information during staff meetings. For example, a paralegal should know not to brief the status of specific adverse actions during a Command and Staff briefing, but to instead offer to brief the commander in private immediately following the meeting.

#### D. Communications with Persons Represented by Counsel

Paralegals must be aware of restrictions on communicating with persons represented by counsel. In representing the Army, a JA and the paralegal staff “shall not communicate about the subject of the representation with a party known to be represented by another lawyer in the matter.”<sup>51</sup> In most instances, if a paralegal is approached about a legal matter within the scope of his duties, the legal action has already commenced and the Soldier knows that legal counsel is available at no cost to the Soldier.

Paralegals must be aware of restrictions on communication with Soldiers represented by counsel. Paralegals usually support their units and are often peers of and know the Soldiers who are the subjects of adverse government action. These Soldiers may be tempted to see them as accessible sources of information. The JA must ensure the paralegals understand they cannot discuss matters related to an adverse action with the subject of the action, who is or should be represented by counsel. They must

<sup>50</sup> For example, unit personnel conducting official business in the law office can easily learn confidential client information by listening to conversations among the legal staff who are collaborating on a legal action related to a Soldier in another unit.

<sup>51</sup> AR 27-26, *supra* note 2, app. B (Rule 4.2).

further ensure paralegals understand that the Soldier cannot waive this protection, unless the Soldier’s counsel consents.<sup>52</sup> While Rule 4.2 acknowledges Soldiers have the right to speak with government officials about the matters in controversy,<sup>53</sup> paralegals should not view themselves as an appropriate government officials and instead should assume Soldiers have counsel and refer them to TDS or Legal Assistance, as appropriate.

#### IV. Proposed System of Supervision

Supervisory JAs must implement measures to ensure paralegals conduct their duties consistent with the Rules of Professional Conduct. This paper proposes a system of supervisory and oversight measures that uses existing Army doctrinal concepts and leadership obligations and that are easy to implement. This system combines training, supervision, and counseling to provide ethical oversight in a clear, consistent, and predictable manner. Its purpose is to improve the overall quality of the Army legal system, and empower paralegals to provide the greatest breadth of support services consistent with the *Rules of Professional Conduct*. Incorporating ethical rules oversight and supervision into existing operational concepts and leadership obligations will allow JAs to implement the required oversight with little negative impact on law office operations.

#### A. Critical Information Flow

Each law office should use Critical Information Requirements (CIRs) to keep abreast of ethical issues that arise during daily operations. A CIR list is a useful tool to prioritize the flow of information within the law office. Commanders use CIRs to focus information collection to the relevant facts they need to make critical decisions throughout the conduct of operations.<sup>54</sup> Likewise, JAs should use CIRs to identify and prioritize the reporting of new legal issues, outline the format and content of CIRs, and establish timelines for reporting CIR events. Intra-office CIRs are an effective organizational component in the overall supervisory plan that will aid in identifying and

<sup>52</sup> See *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir. 1993) (holding that a prosecutor’s duty to refrain from speaking directly with represented parties was personal and could not be “vicariously waived” by the represented person himself because “[t]he rule against communicating with represented parties is fundamentally concerned with the *duties* of attorneys, not the *rights* of represented parties”); AR 27-26, *supra* note 2, app. B, Rule 4.2 (“In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. . . .”).

<sup>53</sup> AR 27-26, *supra* note 2, app. B (cmt. to Rule 4.2).

<sup>54</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS para. 12 (17 May 2012).

highlighting ethical issues which may arise in the law office, increasing timely reporting of ethical issues, and mitigating or avoiding ethical missteps that may arise.

#### B. Consistency and Predictability

Judge advocates should establish an office battle rhythm. A battle rhythm is the sequencing and executing of actions within an organization that is regulated by the flow and sharing of information that supports all decision cycles.<sup>55</sup> It is a published and set routine cycle of leader and staff activities intended to synchronize current and future operations.<sup>56</sup> Establishing an office battle rhythm will increase office efficiency, improve personnel accountability, and synchronize office lines of effort, thereby increasing the JA's oversight of legal activities. By establishing daily and periodic action update briefs and Significant Activities (SIGACTS) briefs, JAs can create a regular opportunity to provide guidance, assign tasks, track and review legal actions, and update priorities of work for the entire law office. Regular updates on daily office activities will increase oversight of staff actions, improve the timely identification of ethical issues, and enable JAs to avoid or mitigate any consequences arising from the ethical violation. Additionally, requiring JAs to develop and implement an office battle rhythm will aid their professional development and better prepare them to take an active role as a member of a commander's staff.

#### C. Delegating and Evaluating

Judge advocates should use Noncommissioned Officer Evaluation Reports (NCOERs), Support Forms, and periodic counseling to establish the NCO's duties within the supervisory system. A JA will counsel and rate most NCOs in the law office. In the role of rater, JAs must ensure that the NCO thoroughly understands the organization, its mission, the NCO's role in support of the mission, and the standards by which individual performance is evaluated.<sup>57</sup> When acting as a rater, JAs should use DA Form 2166-8-1, Noncommissioned Officer Evaluation Report Support Form, to explain the system of supervision they are using to ensure compliance with the *Rules of Professional Conduct* and the NCO's role in that system of supervision.

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<sup>55</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS, at IV-16 (30 July 2012).

<sup>56</sup> *Id.*

<sup>57</sup> U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-2(d) (5 June 2012).

Noncommissioned Officer Evaluation Report counseling is an ideal opportunity to develop a team approach to supervising paralegals. Addressing the NCO's role in ethics compliance during initial and follow-up NCOER counseling will establish the ethical rules as a leadership priority, motivate the NCOs to take ownership of maintaining compliance with the ethical rules, and provide them with quantifiable performance objectives. Using ethical performance objectives in the rating dialogue will better enable NCOs to develop subordinates, plan to accomplish the mission, modify processes, and set priorities of work for the entire legal staff.<sup>58</sup>

#### D. Take Advantage of Training Opportunities

Judge advocates should use Sergeant's Training Time to provide a regular opportunity to discuss professional ethics. Commanders emphasize individual Soldier training in support of Mission Essential Task List (METL) training by allocating dedicated training time for NCOs using sergeant's training time.<sup>59</sup> Ethical issues can arise in any area of the legal practice. By incorporating Rules of Professional Conduct elements into METL training for paralegals, JAs can demonstrate how the Rules of Professional Conduct affect daily duties with concrete examples within general Military Occupational Specialty training topics and thereby raise the awareness of paralegals in a practical and effective manner.

#### E. Regular Counseling and Feedback

Judge advocates should incorporate legal ethics into the performance counseling of all paralegals in the law office. Performance counseling can be an effective tool to raise awareness and set performance objectives related to compliance with ethical rules. All Soldiers should receive regular and effective performance counseling.<sup>60</sup> The leader and the subordinate must work together to establish performance objectives and evaluation standards for the next counseling period.<sup>61</sup> Including duty related ethical rules into regular performance counseling can set the standard for duty performance, highlight areas of particular concern within the office, and help to shape the system of supervision to ensure paralegals act in accordance with the *Rules of Professional Conduct*. In addition, reinforcing counseling requirements

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<sup>58</sup> *Id.* para. 3-4(b).

<sup>59</sup> U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT app. G-24 (4 Aug. 2011).

<sup>60</sup> U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (20 Sept. 2012) [hereinafter AR 600-20] (paragraph 2-3, noting that "[p]roviding regular and effective performance counseling to all Soldiers, not just those whose performance fails to meet unit standards, is a command function").

<sup>61</sup> FM 6-22, *supra* note 27, para. 8-72.

with junior leaders can provide opportunities to hone a skill that becomes increasingly important as JAs progress through their careers.

The supervisory measures listed above, if implemented and maintained, will decrease the likelihood of an accidental violation of the ethical rules and increase the probability that violations will be identified, should they occur. Corrective training—such as extra training, additional instruction, or on-the-spot correction—is among the most effective tools available to leaders to address these issues.<sup>62</sup> However, in assigning corrective training, JAs must be mindful that the training, instruction, or correction given to a Soldier must be oriented to improving the Soldier's performance in his or her problem area.<sup>63</sup> Corrective training—if completed and documented on DA Form 4856—will enable the JA to document appropriate additional training and increased supervision contemplated by Rule 5.3.

This system makes use of existing Army doctrinal concepts and processes. Each JA can easily tailor the timing of training, counseling, and regular oversight to the nature of the practice in the law office. If diligently followed, this system will significantly improve the paralegal's ability to identify ethical issues, report emerging ethical challenges, and seek guidance to avoid ethical violations or mitigate adverse consequences should an ethical violation occur. This plan will also familiarize junior JAs with systems and processes which are increasingly important as they advance in rank and experience.

## V. Conclusion

Rule 5.3 requires senior supervisory lawyers to implement a system of control measures they can reasonably expect paralegals to uphold in performing their duties in a manner consistent with the Rules of Professional Conduct. Senior supervisory lawyers should tailor the system to the nature of the organization's legal practice and review it periodically to identify emerging issues and revise the required control measures. If the control measures are stated in terms of existing Army leadership requirements and doctrinal concepts, the system of supervision can aid in the development of junior JAs as officers and familiarize them with concepts and processes which they will encounter in future assignments.

If they are required to implement a battle rhythm and critical information requirements, junior JAs will be familiar with the purpose and use these concepts before moving into staff positions, thereby becoming more effective staff officers. This will also create a structure for the timely flow of important information while minimizing the risk of violating the *Rules of Professional Conduct*. Ensuring JAs execute counseling requirements and METL-specific training requirements to include ethical considerations helps to increase the quality and efficiency of legal service support while limiting confusion about the Soldier's role; further, it empowers them to maintain ethical standards.

Additionally, by incorporating ethics oversight and supervisory systems into noncommissioned officers' duty descriptions, NCOERs, and Support Forms, JAs can effectively reinforce the importance of NCO ethics compliance and take advantage of the NCO's inherent leadership role to aid in monitoring duty performance.

If senior supervisory lawyers establish and enforce these standards, JAs directly supervising paralegals will be forced to consider the nature of their law practice and the role of paralegals within it. Additionally, all JAG Corps personnel will be intimately familiar with the nuances of the ethical rules and how those rules impact their regular duty performance. This will allow JAs to take better advantage of the skills and expertise of their Soldiers while ensuring compliance with their ethical requirements under the Rules of Professional Conduct.

Any system of supervision should begin with a thorough review of AR 27-26 to identify ethical rules that will be of particular concern to the law office. Each senior JA should meet with his NCOIC to establish and publish a workable battle rhythm to ensure appropriate training, supervision, and review of all work; outline a system for reporting critical information requirements; and identify individual leader responsibilities in the system of supervision. Judge advocates should publish the protocol to all members of the legal staff and review it as part of periodic performance counseling. This system can ensure all JAs meet their supervisory obligations under the Rules of Professional Conduct and improve the quality of legal services provided to the Army and its personnel.

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<sup>62</sup> AR 600-20, *supra* note 60, para. 4-6(b) (“One of the most effective administrative corrective measures is extra training or instruction (including on-the-spot correction).”).

<sup>63</sup> *Id.* para. 4-6(b)(1).

## Soldier's First Offense: Article 15 or Summary Court-Martial?

Major Takashi Kagawa\*

### I. Introduction

Under the Uniform Code of Military Justice (UCMJ), both Article 15 (or nonjudicial punishment (NJP)) and summary courts-martial (SCMs) enable commanders to swiftly dispose of “minor offenses.”<sup>1</sup> Because of their similar truncated processes with no trial, NJP and SCMs are often placed side-by-side on a linear continuum of commander’s disciplinary options, showing a SCM as a mere escalated version of NJP. This simple characterization, however, obscures the significant differences between them, often enticing commanders to prefer SCM over NJP for a first-time minor offense because of the possibility of “jail time.”<sup>2</sup>

This note explores the differences between an Article 15 and a SCM, and provides points commanders should consider before disposing of a Soldier’s first UCMJ offense. Part II briefly explains the origins of NJPs and SCMs and reviews their similarities. Part III then discusses five considerations commanders should contemplate before deciding between NJP and SCM: (1) the authority to initiate; (2) jurisdiction; (3) the degree of commander’s control and discretion; (4) the punishment of and the collateral consequences to the Soldier; and (5) the resources and time required. After weighing these five considerations, commanders will realize that an Article 15 is the preferred option to dispose of a first-time offense that does not merit a special or general court-martial.

### II. Background

To appreciate the difference between NJP and a SCM, one gains perspective by understanding their historical origins. Many of the similarities between NJP and SCM are due to how they came about.

### A. Origins of Article 15s and SCMs

Article 15s and SCMs originated from the same need— a commanders’ necessity to preserve the unit’s good order and discipline by quickly punishing Soldiers without a trial. This need existed from the time of the Continental Army.<sup>3</sup>

At the inception of the Army in 1775, commanders did not have statutory authority to punish Soldiers for minor offenses without resorting to a court-martial.<sup>4</sup> Experiencing difficulty with troop discipline, General George Washington requested the Continental Congress grant commanders authority to summarily punish Soldiers, pleading that “the Army will be totally ruined” otherwise.<sup>5</sup> Despite this request, the Continental Congress did little, granting only limited authority to punish.<sup>6</sup> Frustrated by the lack of statutory authority, through general orders, Washington authorized corporal punishments (i.e., lashes) for minor infractions.<sup>7</sup> This began the commander’s practice of summarily punishing Soldiers.<sup>8</sup>

In the 1800s, the Army added a regulation allowing regimental commanders to demote noncommissioned officers, but did not provide commander’s with disciplinary authority, forcing commanders to rely on their unsanctioned measures to discipline Soldiers who committed minor offenses.<sup>9</sup> To address the disciplinary issues during the Civil War, Congress created a “field officer’s court,” a wartime court to summarily dispose of minor offenses in lieu of regimental or garrison court (predecessors of today’s special courts-martial).<sup>10</sup> The field officer’s court consisted of one field grade officer who could summarily adjudicate enlisted Soldiers for noncapital offenses. Maximum punishment consisted of a fine of one month’s pay and one month’s confinement or hard labor.<sup>11</sup> In 1890, Congress then created a peacetime field officer’s court, a “summary court,” providing peacetime commanders with a system to try minor

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<sup>1</sup> Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶ 1e (2012) [hereinafter MCM] (defining “minor offenses” under the punitive articles of the Uniformed Code of Military Justice (UCMJ)), with *id.* R.C.M. 1301(b) (“The function of the summary court-martial is to promptly adjudicate minor offenses. . .”).

<sup>2</sup> Interview with Mr. Fred Borch, Regimental Historian, The Judge Advocate Gen.’s Legal Ctr. & Sch., Charlottesville, Va. (Dec. 4, 2013) (speaking from his professional experience having advised commanders at all levels as an active duty judge advocate for over twenty years, retiring as a colonel, and serving as the regimental historian who reviews and archives military justice records).

<sup>3</sup> See Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 38–39 (1965).

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

<sup>5</sup> *Id.* at 39 (quoting 6 WRITING OF WASHINGTON 91–92 (Fitzpatrick ed. 1932)).

<sup>6</sup> *Id.* (authorizing commanders to arrest or imprison for “reproachful or provoking speech or gesture”).

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

<sup>8</sup> *Id.* at 40.

<sup>9</sup> See *id.* at 41 (citing Army Regs. art. IX, para. 13 (1835)). A captain was able to reduce a first sergeant under this authority. *Id.*

<sup>10</sup> *Id.* at 42; see WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 490–92 (2d ed. 1920 reprint).

<sup>11</sup> Miller, *supra* note 3, at 42.

offenses.<sup>12</sup> Unlike the field officer's court, Congress provided the accused with a right to refuse the summary court by requesting a trial by court-martial.<sup>13</sup> This summary court, codified in Article 14 of the Articles of War, is the predecessor of today's SCM, codified in Article 20, UCMJ.<sup>14</sup>

Because of the swift nature of the summary court procedure, summary courts became the commander's choice for disposing of minor offenses—the caseloads in summary courts dramatically increased, raising Army court-martial statistics.<sup>15</sup> Concerned with the appearance of an Army discipline problem, the acting Judge Advocate General in 1892 reported to the Secretary of War that a majority of the summary court cases would have been disposed of by company commanders' unofficial measures used before the creation of summary courts.<sup>16</sup> In response, the Army officially sanctioned the commander's authority to discipline Soldiers for minor offenses in 1895; however, the regulation limited the commander's authority to "admonitions" and "withholding of privileges."<sup>17</sup> The Army further limited the commander's disciplinary authority by providing the accused the right to demand trial by court-martial in lieu of accepting the commander's punishment.<sup>18</sup> This authority became statutory law in 1912 as Article 104 of the Articles of War, forming the basis for the commander's disciplinary tool under Article 15, UCMJ, which came into existence in 1950.<sup>19</sup> In 1962, Congress amended Article 15 to its current form, strengthening the commanders' NJP authority.<sup>20</sup>

## B. Article 15 and Summary Court-Martial Today

Born out of the same need, NJPs and SCMs are very similar in terms of purpose, procedure, and punishment level. First, they have the same purpose: to dispose of minor offenses.<sup>21</sup> The UCMJ does not define what constitutes a "minor offense"; however, the *Manual for Courts-Martial (MCM)* and *Army Regulation 27-10, Military*

*Justice*, provide that "minor offenses" are those UCMJ offenses that, if tried at a general court-martial, carry a punishment no greater than a bad-conduct discharge or one year of confinement.<sup>22</sup> Commanders have the discretion to decide whether an offense (even ones carrying a maximum of dishonorable discharge or one year of confinement) is a "minor offense" or not, based on the nature of the offense, the circumstances, and the accused's rank and experience.<sup>23</sup> *Army Regulation 27-10* states that minor offenses for Article 15 should equate to an "average offense tried by summary court-martial," essentially stating that NJP and SCM are interchangeable as a disposition choice.<sup>24</sup>

As methods to punish Soldiers quickly without trial, both procedures are similarly truncated and simplified: (1) one officer decides the guilt of the accused and what punishment to impose; (2) the accused does not have a right to counsel at their proceedings; (3) both NJP and SCM proceedings are non-adversarial with minimal due process, but still ensure that the accused has notice of the charges and an opportunity to present matters in defense; and (4) the accused has a right to refuse either process by demanding a trial by court-martial.<sup>25</sup>

Lastly, though not exactly the same, their punishment levels are substantially similar. Neither method can separate an accused from the service, and both can impose punishments such as reprimand, forfeiture of pay, restrictions, and grade reduction. The punishment under SCM is slightly elevated above NJP maximum punishment: SCMs allow confinement for up to one month and hard labor; however, Article 15 has a similar punishment of correctional custody for thirty days, which may include hard labor.<sup>26</sup>

<sup>12</sup> *Id.* at 43.

<sup>13</sup> WINTHROP, *supra* note 10, at 493 (quoting Act of Oct. 1, 1890, ch. 1259, sec. 1).

<sup>14</sup> *Uniform Code of Military Justice: Hearing on H.R. 2498 Before the Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 972 (statement of Mr. Robert W. Smart, professional staff member); 10 U.S.C. § 820 (2012).

<sup>15</sup> Miller, *supra* note 3, at 43.

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

<sup>17</sup> *Id.* at 44 (quoting U.S. DEP'T OF WAR, REGS. para. 930 (Oct. 31, 1895)).

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

<sup>19</sup> *Id.* at 44–46.

<sup>20</sup> *Id.* at 46. As a result, it reduced the number of summary courts-martial (SCMs) drastically. *Id.* at 108 ("During the last nine months of 1963, 12,271 [SCMs] were conducted compared with 41,848 during the same period in 1962.")

<sup>21</sup> *Supra* note 1 and accompanying text.

<sup>22</sup> MCM, *supra* note 1, pt. V, ¶ 1e; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-9 (3 Oct. 2011) [hereinafter AR 27-10]; MCM, *supra* note 1, R.C.M. 1301(b) discussion (referring to Part V, ¶ 1e definition of "minor offenses").

<sup>23</sup> MCM, *supra* note 1, pt. V., ¶ 1e.

<sup>24</sup> AR 27-10, *supra* note 22, para. 3-9 ("Generally, the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court-martial (SCM).").

<sup>25</sup> Compare MCM, *supra* note 1, R.C.M. 1301(a), (e), R.C.M. 1301–04 (summary court-martial process), with *id.* pt. V, ¶¶ 3, 4 (Article 15 process).

<sup>26</sup> Compare *id.* R.C.M. 1301(d), with *id.* pt. V, ¶ 5. Though theoretically available, the current regulation on correctional custody fails to include "hard labor" as part of the duty. U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM ch. 15 (15 June 2006). For more insight on implementation of hard labor, see generally Major Joseph B. Berger III, *Making Little Rocks out of Big Rocks: Implementing Sentences to Hard Labor Without Confinement*, ARMY LAW., Dec. 2004, at 1.

### III. Analysis

Despite the similarities between NJP and SCMs, there are differences that commanders need to consider to assess which disposition is best for a particular minor offense.

#### A. Initiating Authority

The first crucial difference is the authority to conduct an Article 15 or a SCM. All commanders (company equivalent and above) have NJP authority; however, the authority to refer matters to a SCM is limited to the three court-martial convening authorities (summary,<sup>27</sup> special, and general).<sup>28</sup> Hence, if a commander lacks authority to refer a matter to a SCM on his own, he must consider whether it is serious enough to require a superior commander's action on the matter.

#### B. Jurisdiction

Article 15 and SCM also differ in their jurisdiction. Commanders may mete out NJP to Soldiers of any rank in the unit (provided superior authority has not withheld such authority over certain rank<sup>29</sup>); whereas, the SCM jurisdiction is limited to enlisted Soldiers only. Therefore, commanders must rule out SCM as an option when disposing of misconduct for officers and warrant officers.<sup>30</sup>

#### C. Commander's Control and Discretion

Commanders must also consider the difference in the level of commander's control and discretion between NJP and SCM. A commander retains a high degree of control and discretion over the Article 15 process as the imposing authority; whereas in SCMs, a commander must give away his control and discretion over to a neutral and detached SCM officer.

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<sup>27</sup> Interestingly, there is an issue concerning whether battalion commanders are SCM convening authorities in light of the plain language of Article 24, UCMJ, 8 U.S.C. § 824 (2012). Article 24 does not list battalion commanders as having authority to refer SCMs. Currently, the Office of the Judge Advocate General (OTJAG) permits battalion commanders to refer SCMs; however, it is recommended that a brigade commander make such a referral. Lecture by Major Jeremy Steward, Crim. L. Dep't, The Judge Advocate General's School, Survey of Military Justice (Nov. 4, 2013) (notes on file with author).

<sup>28</sup> Compare 10 U.S.C. § 815(a), with 10 U.S.C. § 824.

<sup>29</sup> E.g., III CORPS & FORT HOOD, REG. 27-10, MILITARY JUSTICE para. 4-2 (10 Nov. 2008), available at <http://www.hood.army.mil/dhr/pubs/fhr27-10.pdf> (stating that III Corps Commander withholds disposition of alleged UCMJ violations by commissioned officers, warrant officers, and senior NCOs in the rank of master sergeant and above).

<sup>30</sup> 10 U.S.C. § 820.

In the NJP process, the imposing commander determines the Soldier's guilt by weighing the evidence without concern for Military Rules of Evidence (MREs), except privileges.<sup>31</sup> Even after imposing the punishment, a commander has the authority to suspend, mitigate, remit, or set aside the punishment, giving maximum flexibility and authority to a commander to "correct, educate, and reform" a Soldier's behavior without unnecessarily tarnishing one's record with a "stigma of court-martial conviction."<sup>32</sup> In essence, the commander has full control and discretion over the Soldier's Article 15, providing certainty of the outcome.

On the other hand, upon referring the matter to the SCM officer, the commander loses control over the SCM until its completion. The SCM officer acts "as judge, fact[-]finder, prosecutor, and defense counsel," inquiring into the case impartially, looking out for both government's and defense's interests.<sup>33</sup> He conducts a trial starting with an arraignment and ensures that his findings are based on admissible evidence under the MRE.<sup>34</sup> During this process, commanders may not exert any command influence over the SCM officer.<sup>35</sup> Upon completion of the SCM, the SCM convening authority, who may not be the commander who sought the SCM, regains control over the case and may set aside or reduce the sentence; however, he cannot reverse a finding of not guilty.<sup>36</sup> Hence, the commander relinquishes control and discretion over the SCM during trial, resulting in uncertainty whether a Soldier is punished or not.

#### D. Punishment and Collateral Consequences

Despite similarities, there are significant differences between NJP and SCM in the allowable punishments—the reduction of senior noncommissioned officers (NCOs) and their collateral consequences on one's personnel and criminal records.

A senior NCO, a sergeant first class and above, can be reduced in rank by one grade at a SCM, but not under NJP. Article 15s allow commanders to reduce Soldiers in rank, but the reduction authority coincides with the imposing

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<sup>31</sup> MCM, *supra* note 1, pt. V, ¶ 4(c)(3). Section V of the Military Rules of Evidence covers privileges such as attorney-client, clergy, spousal, "psychotherapist-patient," "victim advocate-victim" and so forth. *Id.* MIL. R. EVID. sec. v.

<sup>32</sup> *Id.* pt. V, ¶ 6; AR 27-10, *supra* note 22, para. 3-2.

<sup>33</sup> MCM, *supra* note 1, R.C.M. 1301; *Middendorf v. Henry*, 425 U.S. 25, 32 (1976).

<sup>34</sup> MCM, *supra* note 1, R.C.M. 1304(b)(1) ("During the trial, the summary court-martial will not consider any matters, including statements previously made by the accused to the officer detailed as summary court-martial unless admitted in accordance with the Military Rules of Evidence.")

<sup>35</sup> 10 U.S.C. § 837 (unlawfully influencing action of court).

<sup>36</sup> MCM, *supra* note 1, R.C.M. 1107, 1306.

commander's promotion authority.<sup>37</sup> Because the promotion authority for E-7 and above resides with Commander, Army Human Resources Command, commanders cannot reduce E-7 and above with an Article 15.<sup>38</sup> However, a SCM officer can reduce E-7 and above by one rank, regardless of promotion authority.<sup>39</sup>

Commanders have discretion over how Article 15 records are filed, but none over how SCM records are filed. Depending on the Soldier's rank and the commander's discretion, the NJP record may or may not be filed in the performance section or the restricted section of the Army Military Human Resource Record (AMHRR), formerly known as the Official Military Performance Fiche (OMPF).<sup>40</sup> Article 15s for E-4 and below are never filed in their AMHRRs; for E-5 and above, the commander must file the NJP in the AMHRR, but has the discretion to file it in the restricted section rather than in the performance section.<sup>41</sup> On the other hand, commanders have no discretion for SCM convictions—they must be filed in the performance section of the Soldier's AMHRR and can never be filed locally or in the restricted section.<sup>42</sup>

Commanders have no discretion regarding criminal records: both field grade Article 15s and SCM convictions for certain offenses are reportable to the FBI's Criminal Justice Information Services if investigated by DoD law enforcement.<sup>43</sup> Though neither are federal convictions, Soldiers would have a criminal record either stating "[s]ubject found guilty by [SCM]" or "nonjudicial disciplinary action."<sup>44</sup> Despite the Supreme Court's holding

in *Middendorf v. Henry* that SCM is not a "criminal prosecution" triggering Sixth Amendment protections, there is a stronger stigma attached to a SCM conviction than for NJP action.<sup>45</sup>

#### E. Resources and Time Required

Finally, the most important concern for commanders is the time and resources required. There is no question that a SCM would require more time, manning, and resources than NJP would. A SCM requires referral of charges; the selection, appointment, and training of a SCM officer; a SCM officer and recorder's preparation for trial; the trial itself; post-trial actions and approval by the SCM convening authority, and, if adjudged confinement, personnel to transport to confinement facility, and in some cases, monitoring during confinement.<sup>46</sup> On the other hand, a commander can notify the accused of NJP and impose the punishment within days.<sup>47</sup>

#### IV. Conclusion

Based on the above considerations, commanders will usually prefer an Article 15 over a SCM for a first-time offender. The only time a commander should consider SCM is when the first-time offense was so egregious that the extra punishment of "jail time" is worth the extra time and effort needed to conduct a SCM, yet not too egregious for a special court-martial that the Soldier does not deserve more than thirty days' confinement. A commander should also consider whether the first-time offense is worth the risk of potential acquittal or less severe punishment due to a SCM's independent decision or legal error. Of course, it is the commander's prerogative to decide whether a first-time offense deserves a SCM conviction rather than NJP; however, it would be prudent for commanders to count the cost before seeking SCM rather than NJP—the unit's interest in punishing a first-time offender through SCM must outweigh the unit's interest in faster disposition, fewer resources, and rehabilitating the Soldier for future service.

<sup>37</sup> See AR 27-10, *supra* note 22, tbl. 3-1. Company commanders can reduce E-4 and below, and field grade (and above) commanders can reduce E-5 and E-6 by one rank. *Id.*

<sup>38</sup> U.S. DEP'T OF ARMY, REG. 600-8-19, ENLISTED PROMOTIONS AND REDUCTIONS para. 4-1a (30 Apr. 2010) (RAR, 27 Dec. 2011).

<sup>39</sup> MCM, *supra* note 1, R.C.M. 1301(d).

<sup>40</sup> See AR 27-10, *supra* note 22, para. 3-6; U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCES RECORD MANAGEMENT app. B (2 Aug. 2012) [hereinafter AR 600-8-104].

<sup>41</sup> AR 27-10, *supra* note 22, para. 3-6; AR 600-8-104, *supra* note 40, app. B ("DA Form 2627"). However, if a commander chooses to file an Article 15 for Soldiers in the grade of sergeant (SGT) or higher in the restricted section, the Army Military Human Resource Record (AMHRR) must first be reviewed. If the restricted section contains a previous Article 15, then the present Article 15 must be filed in the performance section. AR 27-10, *supra* note 22, para. 3-6(b).

<sup>42</sup> AR 600-8-104, *supra* note 40, app. B ("COURT MART").

<sup>43</sup> U.S. DEP'T OF ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 4-10 (30 Mar. 2007) [hereinafter AR 190-45]; U.S. DEP'T OF DEF., INSTR. 5505.11, FINGERPRINTING CARD AND FINAL DISPOSITION REPORT SUBMISSION REQUIREMENTS enclosures 2, 3 ¶ 2.b.(1) (9 July 2010) (C1, 3 May 2011) [hereinafter DODI 5505.11].

<sup>44</sup> DODI 5505.11, *supra* note 43, enclosure 4, para. 2.d.(1)-(2) (requiring the recording of adverse findings for SCM and NJP for purposes of reporting to the FBI in accordance with DoD Instruction 5505.11 requirements). *Contra* AR 190-45, *supra* note 43, para. 4-10 (stating that SCM results will not be reported to FBI).

<sup>45</sup> 425 U.S. 25, 42 (1976) ("[W]e conclude that a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment."); see AR 27-10, *supra* note 22, para. 3-2b (advising that NJP is preferred to "[p]reserve a Soldier's record . . . from unnecessary stigma by record of court-martial conviction").

<sup>46</sup> See generally, MCM, *supra* note 1, ch. XIII; U.S. DEP'T OF ARMY, PAM. 27-7, GUIDE TO SUMMARY COURTS-MARTIAL TRIAL PROCEDURES (15 June 1984).

<sup>47</sup> There is a regulatory guideline to provide the Soldier twenty-four hours to decide whether to accept the Article 15; however, it may take several days, depending on the Trial Defense Service's schedule to see the Soldier. AR 27-10, *supra* note 22, para. 3-16c.

# Primal Leadership: Unleashing the Power of Emotional Intelligence<sup>1</sup>

Reviewed by Major Daniel Mazzone\*

*I don't want to be at the mercy of my emotions. I want to use them, to enjoy them, and to dominate them.*<sup>2</sup>

## I. Introduction

American culture is dominated by the lure of making money. People are always looking for new ways to become successful and wealthy. As this cash-first mindset has consumed the American public, many authors have thrived as they provide people with different blueprints for financial success. The theories and strategies in each book vary, but a consonant theme is that ultimately, to truly become wealthy, you must be a leader. You cannot follow; followers make money for other people. Leaders are the profiteers, the successful ones whom people long to be. In *Primal Leadership*, the authors argue that “[g]reat leadership works through emotions.”<sup>3</sup> Leaders must not only possess “emotional intelligence,” which is the ability to understand how emotions impact people and performance, but must also learn to cultivate positivity.<sup>4</sup> A great leader must have complete control of his emotions and foster a positive environment in the work place. Doing so will ultimately create the foundation for a successful venture because, quite simply, “[w]hen people feel good, they work at their best.”<sup>5</sup> Leaders who are able to connect with positive emotions create resonance in the workplace. Resonance is contagious, spreads easily, and creates a greater commitment to the leader’s vision or mission.<sup>6</sup> Though not a foolproof methodology, the theories contained in *Primal Leadership* are valuable tools that should be considered by all judge advocates. Nevertheless, judge advocates can just as easily turn to readily available Army publications on leadership that address this topic more thoroughly.<sup>7</sup>

## II. Leadership Matters

Mastering leadership is the baseline of competency for a Soldier at any level; a Soldier may never know when he will be called upon to lead others in highly stressful situations. *Primal Leadership* provides some useful advice that judge advocates should consider when developing a leadership style from the moment they enter military service. While the authors do not provide an exact formula for success as a leader, they do stress that to be successful, leaders must exude positivity and empathy.

According to Goleman, Boyatzis, and McKee, a successful leader must be competent in the four core domains of emotional leadership: “self-awareness, self-management, social awareness, and relationship management.”<sup>8</sup> Success in each of the four domains depends on mastery of eighteen competencies,<sup>9</sup> or “learned abilities, each of which has a unique contribution to making leaders more resonant, and therefore more effective.”<sup>10</sup> At first glance, it appears that creating emotionally intelligent leaders is a difficult task, but the key learning point of this book is that positivity fosters leadership success. Positive people are well received and can motivate those around them to perform to higher standards.

Cultivating highly effective leaders is essential in the military.<sup>11</sup> Because the Army’s mission can be daunting, the Army is keenly aware of the importance of leadership to its

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<sup>1</sup> DANIEL GOLEMAN, RICHARD BOYATZIS & ANNIE MCKEE, *PRIMAL LEADERSHIP: UNLEASHING THE POWER OF EMOTIONAL INTELLIGENCE* (2013).

<sup>2</sup> OSCAR WILDE, *THE PICTURE OF DORIAN GRAY* 103 (1890).

<sup>3</sup> GOLEMAN ET AL., *supra* note 1, at 3.

<sup>4</sup> *Id.* at 5.

<sup>5</sup> *Id.* at 14.

<sup>6</sup> See generally *id.* at 20–21 (explaining that the concept of emotional intelligence easily spreads and stays with employees if they are encouraged to believe in the mission and the team).

<sup>7</sup> See *infra* notes 13, 18, 22, 23, 25 and accompanying text.

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<sup>8</sup> *Id.* at 38.

<sup>9</sup> *Id.* app. B, at 38, 253–56 (Emotional Intelligence). The leadership competencies and techniques are: emotional self-awareness; accurate self-assessment; self-confidence; self-control; transparency; adaptability; achievement; initiative; optimism; empathy; organizational awareness; service; inspiration; influence; developing others; change catalyst; conflict management; and teamwork and collaboration.

<sup>10</sup> *Id.* at 38 (highlighting the point that the listed competencies are not innate talents, but learned abilities).

<sup>11</sup> Principles of successful leadership within the Army culture are not easily learned, especially for officers receiving a direct commission. See U.S. DEP’T OF ARMY, REG. 601-100, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY (21 Nov. 2006) (explaining the sources and requirements for commissioning officers in the U.S. Army). Direct commissionees do not receive the leadership training instilled in other officers during Officer Candidate School, the U.S. Military Academy, or in the Reserve Officer Training Corps; rather, they come directly into the Army from law school. Law school teaches students to question everything and to zealously advocate a position. It can be difficult to transition from a mindset of questioning everything to one requiring the attorney to balance the questioning mindset with immediately following orders and upholding standards.

mission.<sup>12</sup> “The military is set apart from other professions because Soldiers must be prepared to use deadly force and have the courage to overcome hostile forces. Army leaders exercise a profound responsibility because the consequences of their decisions . . . affect the lives of Soldiers, their families, the enemy and non-combatants.”<sup>13</sup>

To provide structure to the concept of leadership, the Army defines it as “the process of influencing people by providing purpose, direction and motivation to accomplish the mission and improve the organization.”<sup>14</sup> Essentially, Army leaders must be aware that their attitude is contagious, for better or worse. This is precisely what the authors in *Primal Leadership* explain throughout their book.<sup>15</sup> So the reader is left asking, “Where do I start if I want to become a successful leader?”

### III. Steps to Leadership

*Primal Leadership* explains that to become an effective leader, one must look inside oneself to become aware of how one behaves and how that behavior impacts others. A leader’s ability to shape the attitude of a workplace is remarkable; he can elevate a team to new heights or knock that same team down to new lows, simply by behaving in a positive or negative manner. A truly positive leader who wants to see the best out of his subordinates inspires his employees to do their best. At the end of the day, if an employee believes his leadership cares for him and truly wants him to succeed, he will go to great lengths to see that he does not let his leaders down. Subordinates will dig deeper when things become difficult; they will strive to ensure that the leader’s vision becomes a reality and that his expectations are exceeded.<sup>16</sup>

Leaders must be cognizant that their attitudes are contagious. Employees are watching their leader and they learn from his strengths and weaknesses; this carries over to job performance.<sup>17</sup> Judge advocates must understand this from the moment they are sworn in. As commissioned officers, judge advocates are the bearer of all standards. Soldiers look to officers to set the standard for behavior and appearance; it is necessary that officers act appropriately at all times. It is much too easy to complain about a tasking or a requirement from higher headquarters than it is to remain positive, grin and bear the inconvenience, and set a positive tone for everyone working in the office.

<sup>12</sup> See generally U.S. DEP’T OF ARMY, REG. 600–100, LEADERSHIP (8 Mar. 2007).

<sup>13</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 1-1 (1 Aug. 2012) (C1, 10 Sept. 2012).

<sup>14</sup> *Id.* para. 3.

<sup>15</sup> GOLEMAN ET AL., *supra* note 1, at 5, 9–14, 19–31, 91–112, 225–48.

<sup>16</sup> *Id.* at 9–13.

<sup>17</sup> *Id.*

The authors are precisely accurate when they explain that empathy is the major emotion that will bond you with your subordinates. A leader must be demanding because a mission needs to be accomplished, but when he shows that he cares about his employees, morale will soar.<sup>18</sup> When a leader is in tune with the struggles or achievements in an employee’s life, the employee develops a sense of belonging within the workplace.<sup>19</sup> The seemingly impossible can be easily achieved with a positive leader who shows his subordinates that he cares about and believes in them; his employees will strive to emulate the positivity he puts forth and exceed the standards he has set for them.<sup>20</sup>

Given the effect that attitude can have on an organization, it is imperative that leaders are cognizant that their behavior impacts those around them. Leaders must learn to hone the emotions that surface during stressful times so that the stress of the mission is not complicated by a leader’s pervasive negativity. While the authors give minimal guidance regarding how a leader can understand his strengths and weaknesses, they believe the most important tool for becoming self-aware is performance feedback.<sup>21</sup> Improvement and self-awareness relies on frank evaluations by everyone you encounter in the workplace, ranging from immediate supervisors, to peers, to subordinates.<sup>22</sup> The purpose of performance feedback is not to belittle or demean a co-worker, but rather to promote improvement.

Having caused an exodus of mid-level leaders,<sup>23</sup> the wars in Iraq and Afghanistan made clear the critical need for excellent leadership in the military.<sup>24</sup> Recognizing the need to develop new and adaptive leaders, Army leadership has recently adopted significant portions of the ideas of emotional intelligence in leadership with the Multi-Source Assessment and Feedback (MSAF) 360 program.<sup>25</sup> The goal of the MSAF is to develop “competent, confident and agile leaders.”<sup>26</sup> This program provides superiors, subordinates, and peers the ability to honestly and anonymously evaluate the individual participating in the program. This requirement is precisely what *Primal Leadership* envisions,

<sup>18</sup> *Id.* at 20–21.

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

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

<sup>21</sup> *Id.* at 91–94.

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

<sup>23</sup> TIM KANE, BLEEDING TALENT: HOW THE U.S. MILITARY MISMANAGES GREAT LEADERS AND WHY IT’S TIME FOR A REVOLUTION (2012).

<sup>24</sup> Andrew Tilghman, *The Army’s Other Crisis*, WASH. MONTHLY, Dec. 2007, available at <http://www.washingtonmonthly.com/features/2007/0712.tilghman.html>.

<sup>25</sup> U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT app. K (Multi-Source Assessment and Feedback) (18 Dec. 2009) (RAR, 4 Aug. 2011) [hereinafter AR 350-1].

<sup>26</sup> MULTISOURCE ASSESSMENT AND FEEDBACK, <http://msaf.army.mil/LeadOn.aspx> (last visited Dec. 20, 2013).

but depends on candid evaluation so that leaders can fully evaluate themselves and develop a plan for self-improvement.

Although the Army has embraced several principles outlined in *Primal Leadership*, the MSAF fails because it has not been properly implemented with direction and enthusiasm, as the authors advocate in the book.<sup>27</sup> The goals of the MSAF are admirable; however, the Army has fallen short on cultivating an environment where these tools and techniques are truly embraced. The intended outcomes of the MSAF have not been adequately explained to many officers; because of this, the program is not used as a productive tool. Instead, it is viewed as a required activity to be completed as part of a check-list rather than being utilized to improve leadership capabilities.<sup>28</sup> As a result, the Army has failed to completely incorporate the principles of emotional intelligence.<sup>29</sup> Despite the good intentions surrounding the MSAF program, it will not be successful if the program's purpose is not made clear to the people that it impacts most directly. This leadership development program must be embraced at the highest levels and pushed down enthusiastically to the lowest levels of the organization.<sup>30</sup>

By focusing on the skills identified in the book, a negative leader who creates dissonance in the workplace can become aware of the impact his negativity has on those around him. Such recognition allows the negative leader to take corrective steps to change that behavior. The techniques outlined in this book are not the panacea that will cure all leadership pitfalls in society; but combining self-awareness with positivity and empathy is surely a strong starting point.

#### IV. Flawed Presentation

Despite the many sound ideas contained in *Primal Leadership*, the book falls short on several fronts. First, the book never addresses what an effective plan for developing emotionally intelligent leaders looks like. Rather, the authors encourage hiring "executive coaches"<sup>31</sup> and going on

<sup>27</sup> GOLEMAN ET AL., *supra* note 1, at 221–22, 227.

<sup>28</sup> U.S. DEP'T OF DEF., DIR. 2011–16, CHANGES TO THE ARMY EVALUATION REPORTING SYSTEM (15 Sept. 2011); *see also* AR 350-1, *supra* note 25, app. K (Multi-Source Assessment and Feedback).

<sup>29</sup> The Army's MSAF mission became clear to this author upon reading *Primal Leadership*. The goals of MSAF were never fully explained when the program was implemented. However, it is clear that it is designed to receive feedback regarding your strengths and weaknesses by those who are your superiors, peers, and subordinates. This constructive criticism should be used as a catalyst to make you a more effective leader.

<sup>30</sup> GOLEMAN ET AL., *supra* note 1, at 227, 239–41.

<sup>31</sup> *Id.* at 165, 228–29. An executive coach is an individual hired by a leader who assists a business leader with improving their leadership skills. "Most executive coaching processes involve leadership assessment and an ongoing focus on development." *Id.* at 228. The ultimate goal of an executive coach

retreats to exotic locations.<sup>32</sup> It appears that this book is nothing more than a tool to encourage businesses to hire these coaches to figure out how to create leaders who will elevate their business to the next level. As a result, it is difficult to truly accept all of the ideas and concepts set forth in the book.

Second, the authors completely ignore the idea that sometimes employees are the problem in the workplace, especially in government jobs. Although not expressly stated in the text, the authors intimate that they would simply fire a problem employee whose bad attitude undermines the mission. Such an approach is complicated in the Army where Soldiers are afforded many rights if they are to be terminated.<sup>33</sup> Many of the techniques explored in the book can be easily undermined by an employee who is malcontent. Even the most empathetic leaders cannot connect with this type of employee on an emotional level that will help them to fully embrace the mission. These employees are motivated by a selfish desire to serve themselves. The tools Army leaders are given to correct this behavior do not resonate with these types of employees.<sup>34</sup> Many of these corrective tools can drive a bigger wedge between the leader and employee. They are simply ineffective if the employee refuses to support the idea of a team. Until the employee is empowered to change the vision of the organization or section himself, he will continually be dissatisfied and cause problems. The authors clearly establish that leaders must carry the burden of changing the culture of a workplace, but do not address what a leader should do if the employees refuse to conform. Failing to provide the leader with tools to address such employees is a major failure of the book.

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is to learn what a leader's passions and fears are to help him become a more effective and motivating leader. Doing so will ensure that the leader prospers financially. *Id.* at 228–29.

<sup>32</sup> *Id.* at 240–41. For example, the authors explain that in order for leadership development to truly prosper within an organization, employers must "create buy-in throughout the organization." *Id.* This is done by making an emotional connection with the company's employees. The authors highlight a strategy employed by the corporation, Unilever. Unilever created an effective leadership development program in part by holding an "executive's kick-off retreat" in Costa Rica. The trip involved physical challenges and large group conversations concerning leadership development. "Through this simple but profound series of conversations, held in the context of a magnificent and fragile ecology, people learned new ways of communicating with one another that would translate to new ways of operating together as a business." *Id.* at 241.

<sup>33</sup> U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2005) (RAR, 6 Sept. 2011); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR, 13 Sept. 2011).

<sup>34</sup> *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3-3 (3 Oct. 2011); U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY paras. 2-3, 4-7 (18 Mar. 2008) (RAR, 20 Sept. 2012) (explaining administrative measures a commander may take to correct performance and behavior).

Additionally, the authors assume that employees will not work to their fullest potential if they do not work in a resonant environment.<sup>35</sup> While it is apparent that positive environments can foster excellent results, it is inconceivable to believe that employees will strictly perform to the lowest of acceptable standards in negative situations.<sup>36</sup> Clearly, a dissonant work place is not ideal, but such an environment cannot possibly cause people to perform poorly to intentionally sabotage the mission. The idea that people will not do a good job simply because they work for a mean person is preposterous, especially in a professional setting. Professionals demand a certain level of performance from themselves. These performance ceilings are usually high and only become higher if working for a difficult personality. An employee who quits or undermines the mission intentionally risks long-term professional fall out. If their behavior is pervasive enough to undermine a corporation, it is unlikely that they will ever work again in that field, never mind securing a situation where they have the ability to work for a resonant leader that will cause them to reach their fullest potential. As such, it is unrealistic to believe that poor leadership can lead directly to intentionally poor work product. The authors can make a more effective point by simply stating that a negative work environment can distract people from achieving their fullest potential at all times. While this point is addressed,<sup>37</sup> the authors fail to state why people can be distracted by negativity. Perhaps certain types of negativity cause employees to focus on issues that truly do not matter simply to appease the idiosyncrasies of their leaders.

Finally, the authors hint that emotionally intelligent leaders are not necessary in the military due to the nature of the Army mission. They imply that the demands of the battlefield require military leaders to act in a militant manner and order their subordinates to complete the mission, versus embracing the principles of resonance and empathy detailed in *Primal Leadership*.<sup>38</sup> This argument must assume that those who join the military do so because they already

believe in the Army's mission: "To fight and win the Nation's wars."<sup>39</sup> This argument is flawed for two reasons.

First, despite the demanding mission placed upon military leaders, there is no place for the militant-type leader. Although military commanders must make difficult decisions at a moment's notice, they do not have to be demeaning while doing so. If the authors were suggesting that a militant style of leadership is necessary in the military to insulate commanders from the guilt associated with deciding who must complete difficult or nearly impossible missions, then the argument deserves more credence. However, leaders in tune with the principles of emotional intelligence will inspire Soldiers. They will want to fight not just for their lives, or for a sense of valor, but for the leader who truly cares about them. This type of connection is extremely powerful and can lead to amazing accomplishments.<sup>40</sup>

Second, it is extremely difficult to pinpoint precisely why an individual joins the military. Presumably, someone commits to the military because on some level he believes in its mission. Consequently, the person joining the military already believes in the Army's mission or vision, and it is unnecessary to commit the resources to get employees to fully commit to the mission. Even so, many people who join the military are not fully prepared for the demands that will be placed upon them in carrying out this mission. It takes emotionally intelligent leaders to motivate Soldiers, Sailors, Airmen, and Marines to make the sacrifices necessary to successfully execute their given tasks. Great leaders will always inspire servicemembers to make the necessary sacrifices.

## V. Conclusion

The major concepts contained in *Primal Leadership* could have been presented in an abridged format and achieved the same result. The concepts of self-awareness, positivity, and empathy should be espoused by all leaders in the Army. Embracing these core values will surely make leaders a force multiplier, and they will no doubt have a positive impact on organizations. The book will not provide

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<sup>35</sup> *Id.* at 19–26 (“In any work setting, the emotional and the business impact of a dissonant leader can be gauged easily: People feel off-balance, and thus perform poorly.”).

<sup>36</sup> The authors acknowledge that “[c]limate in itself does not determine performance.” They also note that predicting success is exceedingly difficult and that the world of business is “notoriously complex.” GOLEMAN ET AL., *supra* note 1, at 17. Despite acknowledging these shortcomings early on in the book, they are rarely addressed again throughout the text.

<sup>37</sup> GOLEMAN ET AL., *supra* note 1, at 21–31, 171–90.

<sup>38</sup> *Id.* at 77. The authors explain that the concept of ordering people to perform tasks is not appropriate in the workplace, but is on the battlefield. They go on to say that many “modern military organizations” employ a commanding leadership style with other techniques such as esprit de corps and teamwork. *Id.* Aside from this short entry, the authors do not apply the techniques described in the book to the military at any other point. Therefore, the strategy set forth does not neatly fit into what Soldiers do on a daily basis.

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<sup>39</sup> ARMY MISSION STATEMENT, <http://www.army.mil/info/organization> (last visited Jan. 3, 2014).

<sup>40</sup> STEPHEN E. AMBROSE, D-DAY, JUNE 6, 1944: THE CLIMACTIC BATTLE OF WORLD WAR II, at 193–94 (1994). In the hours after ordering the invasion into Normandy, General Eisenhower met with the paratroopers of the 101st Airborne Division to check on their morale and provide them with encouragement. He understood the gravity of his decision to invade and that the Normandy mission could fail, as evidenced by the letter he drafted informing the American public that the landings had failed. Despite these concerns, General Eisenhower remained positive and confident when he met with the troops that evening. As a result, his visit was met with enthusiasm and confidence. In fact, one Soldier is said to have remarked: “Now quit worrying, General, we’ll take care of this thing for you.” *Id.* at 194.

the reader with the blueprint for success, but it highlights some of the major leadership theories the Army has embraced over the past few years.<sup>41</sup> Rather than reading *Primal Leadership* to aid with professional development,

judge advocates should turn directly to Army publications concerning leadership;<sup>42</sup> their time will be better spent.

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<sup>41</sup> See *supra* notes 16, 25, 26.

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<sup>42</sup> *Id.*

## CLE News

### 1. Resident Course Quotas

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

b. Active duty servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3172.

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

Go to Self Service, My Education. Scroll to ATRRS Self-Development Center and click on "Update" your ATRRS Profile (not the AARTS Transcript Services).

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

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

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

### 2. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: <https://www.jagcnet.army.mil>. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: [http://www.jag.navy.mil/njs\\_curriculum.htm](http://www.jag.navy.mil/njs_curriculum.htm). Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: <http://www.afjag.af.mil/library/index.asp>. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

### 3. Civilian-Sponsored CLE Institutions

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

- AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552
- ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600
- ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990
- CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973
- CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747
- CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662
- ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1815 H Street, NW, Suite 408  
Washington, DC 20006-3697  
(202) 638-0252

FB: Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300  
(850) 561-5600

GICLE: The Institute of Continuing Legal Education  
P.O. Box 1885  
Athens, GA 30603  
(706) 369-5664

GII: Government Institutes, Inc.  
966 Hungerford Drive, Suite 24  
Rockville, MD 20850  
(301) 251-9250

GWU: Government Contracts Program  
The George Washington University Law School  
2020 K Street, NW, Room 2107  
Washington, DC 20052  
(202) 994-5272

IICLE: Illinois Institute for CLE  
2395 W. Jefferson Street  
Springfield, IL 62702  
(217) 787-2080

LRP: LRP Publications  
1555 King Street, Suite 200  
Alexandria, VA 22314  
(703) 684-0510  
(800) 727-1227

LSU: Louisiana State University  
Center on Continuing Professional Development  
Paul M. Herbert Law Center  
Baton Rouge, LA 70803-1000  
(504) 388-5837

MLI: Medi-Legal Institute  
15301 Ventura Boulevard, Suite 300  
Sherman Oaks, CA 91403  
(800) 443-0100

MC Law: Mississippi College School of Law  
151 East Griffith Street  
Jackson, MS 39201  
(601) 925-7107, fax (601) 925-7115

NAC National Advocacy Center  
1620 Pendleton Street  
Columbia, SC 29201  
(803) 705-5000

NDAА: National District Attorneys Association  
44 Canal Center Plaza, Suite 110  
Alexandria, VA 22314  
(703) 549-9222

NDAED: National District Attorneys Education Division  
1600 Hampton Street  
Columbia, SC 29208  
(803) 705-5095

NITA: National Institute for Trial Advocacy  
1507 Energy Park Drive  
St. Paul, MN 55108  
(612) 644-0323 (in MN and AK)  
(800) 225-6482

NJC: National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers' Association  
P.O. Box 301  
Albuquerque, NM 87103  
(505) 243-6003

PBI: Pennsylvania Bar Institute  
104 South Street  
P.O. Box 1027  
Harrisburg, PA 17108-1027  
(717) 233-5774  
(800) 932-4637

PLI: Practicing Law Institute  
810 Seventh Avenue  
New York, NY 10019  
(212) 765-5700

TBA: Tennessee Bar Association  
3622 West End Avenue  
Nashville, TN 37205  
(615) 383-7421

TLS: Tulane Law School  
Tulane University CLE  
8200 Hampson Avenue, Suite 300  
New Orleans, LA 70118  
(504) 865-5900

UMLC: University of Miami Law Center  
P.O. Box 248087  
Coral Gables, FL 33124  
(305) 284-4762

UT: The University of Texas School of Law  
Office of Continuing Legal Education  
727 East 26th Street  
Austin, TX 78705-9968

VCLE: University of Virginia School of Law  
Trial Advocacy Institute  
P.O. Box 4468  
Charlottesville, VA 22905

#### **4. Mandatory Continuing Legal Education**

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

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

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

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

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

## Current Materials of Interest

### 1. The Legal Automation Army-Wide Systems XXI—JAGCNet

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

b. Access to JAGCNet:

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

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

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

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

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: [LAAWSXXI@jagc-smtp.army.mil](mailto:LAAWSXXI@jagc-smtp.army.mil).

c. How to log on to JAGCNet:

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

(2) Follow the link that reads “Enter JAGCNet.”

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

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

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

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

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

### 2. TJAGSA Publications Available Through JAGCNet ([www.jagcnet.army.mil](http://www.jagcnet.army.mil))

a. The Judge Advocate General’s School, U.S. Army (TJAGSA), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows Seven Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please

contact Information Technology Division Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

### **3. The Army Law Library Service**

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

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





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