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Lore of the Corps

Articles

Book Reviews

Lore of the Corps

Mexican Soldiers in Texas Courts in 1916: Murder or Combat Immunity?

Fred L. Borch
Regimental Historian & Archivist

The Mexican Revolution began in 1910 and, in the bloody decade that followed, violence occasionally spilled over the border onto U.S. soil. One violent episode occurred on 15 June 1916, two months after Brigadier General (BG) John J. Pershing and his 5,000-man Punitive Expedition entered Mexico to chase the Mexican revolutionary fighter Francisco "Pancho" Villa and his *Villistas* (Villa's men). On that Thursday in June, under cover of darkness, Mexican government troops crossed the Rio Grande and attacked U.S. cavalry troops guarding the border at San Ygnacio, a small Texas town located about forty miles south of Laredo. In the thirty-minute firefight, the Americans drove off their attackers, but at the cost of three U.S. soldiers killed and six more wounded. Six Mexican soldiers were also killed and more than a few wounded.[1] At least six Mexicans were captured, including Jose Antonio Arce, Vicente Lira, Pablino Sanchez, and Jesus Serda.

The Army handed its Mexican captives over to civilian law enforcement authorities in Webb County, Texas. Shortly thereafter, a grand jury indicted Arce, Lira, Sanchez, and Serda for the murder of Corporal William Oberlies, who had died of his wounds after the attack on San Ygnacio. A Webb County District Court jury convicted the four accused of homicide and sentenced them to death. On appeal to the Court of Criminal Appeals of Texas, the four condemned soldiers insisted that their convictions must be reversed because they were members of the Mexican armed forces and, as soldiers participating in a war between Mexico and the United States, could not be convicted of murder. What follows is the story of *Arce v. State*,[2] and how the legal opinion of the Army Judge Advocate General helped determine the outcome of this most unusual state criminal case.

At the time of the attack, there had been no declaration of war by either Mexico or the United States. The widespread revolutionary violence in Mexico made a declaration of war by that country unlikely. As for the United States, it was just as unlikely that Congress would declare war on its southern neighbor; with the possibility of being drawn into the ongoing war between the Allied and Central Powers in Europe, President Woodrow Wilson was reluctant to get involved in a conflict with Mexico.[3]

But the Mexican Revolution—which was transformed "from a revolt against the established order into a multisided civil war"[4] by 1915—greatly affected American security: between July 1915 and June 1916, there were thirty-eight cross-border raids in which eleven American civilians and twenty-six Soldiers were killed.[5] This explains why, after Pancho Villa and at least 300 *Villistas* raided Columbus, New Mexico, on 9 March 1916, President Wilson ordered BG Pershing and his troops into Mexico to capture or kill Villa—but not to wage war against the de facto Mexican government led by Venustiano Carranza.[6]

Regardless of what Wilson may have wanted, the presence of six U.S. Army regiments (four cavalry and two infantry), along with two field artillery batteries and various support units, naturally provoked a response from Mexican forces. The most serious incident—prior to the attack on San Ygnacio—occurred just after noon on 12 April 1916, when Mexican soldiers began firing on 13th U.S. Cavalry troopers outside the town of Parral. A "running battle, during which two Americans were killed and six wounded," lasted late into the afternoon and "developed into a standoff between U.S. and Mexican forces that threatened to propel the nations to the verge of war."[7] Since Parral was 516 miles inside Mexican territory, it should have been no surprise to Pershing and his American troopers that the Mexican government did not look favorably on their military operations deep inside Mexico—even if the Mexicans considered Pancho Villa to be their enemy too. There is every reason to conclude that the Mexican attack on San Ygnacio two months later was a signal from the Mexicans to

[1] *Mexican Raiders Kill Three in Texas*, N.Y. TIMES, June 15, 1916, at 15.

[2] 202 S.W. 951 (Tex. Crim. App. 1918).

[3] Wilson's decision to avoid an all-out war with Mexico was prudent, since the United States ultimately did enter the war on the Allied side in April 1917, ten months after the fight at San Ygnacio.

[4] ALEJANDRO DE QUESADA, THE HUNT FOR PANCHO VILLA 5 (2012).

[5] *Id*. at 23.

[6] For more on President Wilson's decision to send Pershing to Mexico, see HERBERT M. MASON JR., THE GREAT PURSUIT 65–73 (1970). Most scholars believe Wilson's dispatch of Pershing's expedition was lawful as "extra-territorial law enforcement in self defense," as Mexican authorities were "powerless" to stop raids by bandits across the U.S.-Mexican border, and there was no other available remedy. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 218 (3d ed. 2001).

[7] DE QUESADA, *supra* note 4, at 48.

Washington, D.C., that there were consequences for the Americans if Pershing persisted in his pursuit of Villa.

After the trial and conviction of Jose Antonio Arce and his fellow soldiers, their defense counsel appealed to the Texas Court of Criminal Appeals. Although the defense raised a number of appellate issues, the court focused on a single question, which it saw would be dispositive: whether "a state of warfare" existed between Mexico and the United States. If so, reasoned the court, the question of any punishment for the defendants would be "within the jurisdiction of the United States and not the courts of Texas."[8]

Under customary international law and the 1907 Hague Convention III at the time, two nations would not commence hostilities until there had been a declaration of war. As stated before, there had been no such pronouncement between Mexico and the United States. Nevertheless, the Texas court looked to the facts of the case to determine if there was a state of war between the two nations. The court noted that the Mexican soldiers who attacked U.S. cavalrymen at San Ygnacio were commanded by Carranza officers and that one of these officers, a lieutenant colonel, was killed in the fight. The four defendants had testified at their trial in Webb County that they "belonged to the Constitutionalist Army of Mexico; that the band that attacked San Ygnacio consisted of 75 men; and that they were publicly organized and equipped in Monterey and Jarita, with the full knowledge of the de facto government of Mexico."[9]

The Texas court then examined the issue of whether a state of war existed and cited the "official opinion" of BG Enoch H. Crowder, the Judge Advocate General of the Army, in its discussion of the question.[10] Crowder had written:

> It is thus apparent that under the law there need be no formal declaration of war, but that under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner in which warfare is usually conducted. . . I am therefore of the opinion that the actual conditions under which the field operations in Mexico are being conducted are those of actual war. That within the field of operations of the expeditionary force in Mexico, it is a time of war within the meaning of the fifty-eighth article of war.[11]

After concluding that the defendants had participated in military operations at the behest of the Mexican government, and that a state of war existed between Mexico and the United States, the court reversed the convictions for murder. Judge P.J. Davidson, who wrote the opinion for the Texas Court of Criminal Appeals, did not rule that the defendants were lawful combatants entitled to combat immunity for their lawful acts on the battlefield. On the contrary, his stated rationale for reversing the conviction was simply that the Texas courts had no jurisdiction over Mexican soldiers participating in a war with the United States and that legal proceedings against the Mexican defendants, if appropriate, must be brought in federal court. Wrote Davidson:

> [U]nder the general rules with reference to warfare, the Mexican column that attacked the troops at San Ygnacio came within those rules, and that, if they were to be dealt with for crossing the river and fighting our troops, it should be done by the United States government and not by the Texas courts. Texas has no authority to declare war against Mexico nor create a state of war.[12]

Judge Davidson most likely did not know about the principle of combat immunity. If he had known about it, his opinion could have discussed how the Mexican defendants, participating in an otherwise lawful attack on U.S. Soldiers, had an absolute defense to a charge of murder. But Davidson did understand that, because wars occur between nation-states, the issue of whether Mexican soldiers could be charged with murder (or any criminal offense) was a question for the United States, and not Texas authorities.

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[8] Arce v. State, 202 S.W. 951, 952 (Tex. Crim. App. 1918).

[9] *Id.*

[10] For more on Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 21 (1955). *See also* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1.

[11] LOCKMILLER, *supra* note 10, at 952. Crowder had written this opinion in response to the question of whether Article 58 of the Articles of War applied to Pershing's operations in Mexico. Under the Articles of War as existed in 1916, a court-martial had no subject-matter jurisdiction over common law crimes such as murder, rape, or robbery unless the offense occurred "in time of war." Crowder's reasoning was entirely logical, and gave Pershing the expanded jurisdiction granted by Article 58. His official opinion also followed earlier case law enunciated in Winthrop's *Military Law and Precedents* (2d ed. 1920) ("a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war"). WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 668 (2d ed. 1920). Despite its logic, and longstanding precedent, Crowder's reasoning was rejected during the Vietnam era by the Court of Military Appeals in *United States v. Averette*, 41 C.M.R. 363 (1970) (holding that "time of war" means declared war). Crowder's reference to "Vattel" was a nod to Swiss jurist Emmerich de Vattel, whose 1758 *Le Droit de Gens ou Principe de la Loi Naturelle* was considered to be an authoritative text by lawyers of Crowder's era.

[12] *Arce*, 202 S.W. at 953.

While Davidson did not discuss combat immunity, he did appreciate that the mens rea required for murder might have been affected by the fact that Jose Antonio Arce and his fellow soldiers were acting under orders at San Ygnacio. Davidson wrote:

> [S]oldiers must obey the orders of their superiors, and failure to do so would subject them to discipline which rates from minor punishment to death. . . . When a soldier is ordered to fight, it is his duty to do so, and he may forfeit his life on refusal to do so. . . . These Mexican soldiers were ordered by their officers, commanded by their officers, headed by their officers to make the fight; the officers led them into the battle, and they fought. Some were killed; others escaped and fled. Some were wounded, one of whom was captured is under sentence in this case. . . . One at least of the defendants claimed to have been forced to go into battle by his commanding officer. He did not desire to fight, but under the rules of warfare if he deserted he would be tried and would be shot, or if he disobeyed orders and failed to engage in the fight he might forfeit his life.[13]

Davidson also noted that in fighting between Pershing's Punitive Expedition and Mexican government troops in Mexico, U.S. Soldiers captured on the field of battle "were not tried by the Mexican courts, but were turned over to the United States."[14] His conclusion was that if these American Soldiers were not prosecuted in Mexican courts, Mexican soldiers in the case before the court deserved the same treatment. This is why Judge Davidson's final words in the opinion were that even "if the state courts had jurisdiction of these defendants, we are of the opinion the conviction is erroneous."[15] While reversing the conviction on jurisdictional grounds, the court also recognized that, *even if the state courts had jurisdiction*, a conviction would have been unsupported in law for the following reasons: the four Mexican soldiers were acting under orders; Mexico had not prosecuted the captured U.S. Soldiers; or both. In any event, for the convicted Mexicans, the result was the same: they escaped the hangman's noose and returned to their homes in Mexico.

A final note. In August 1917, New Mexico state authorities prosecuted seventeen *Villistas* for the infamous 9 March 1916 raid on Columbus that had triggered Pershing's Punitive Expedition. The defendants pleaded guilty to second degree murder and "were sentenced to serve from 70 to 80 years in the [state] penitentiary."[16] In 1920, New Mexico Governor Octaviano A. Larrazolo pardoned fifteen of the seventeen convicted *Villistas*. He cited *Arce* as one basis for his decision.[17] More recently, attorneys representing John Phillip Walker Lindh, the infamous "American Taliban," cited *Arce* in a brief filed on their client's behalf in the Eastern District of Virginia in 2002. The relevance? That *Arce* was precedent for the proposition that the United States and Afghanistan were engaged in an international armed conflict and that Lindh consequently had combat immunity for his actions "as a foot soldier on behalf of the government of Afghanistan."[18] While Lindh's argument failed, that failure did not undercut the continued validity of *Arce*: that a de facto armed conflict between Mexico and the United States existed in 1916 and that combat immunity protected Mexican soldiers from a prosecution for murder in Texas state court.

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/8525736A005BE1BE

[13] *Id.*

[14] Davidson was almost certainly thinking of the 21 June 1916 "Battle of Carrizal," where an "impetuous" American officer, Captain Charles T. Boyd, violated orders to avoid a confrontation with Mexican government troops and instead attacked a detachment of Mexican soldiers in Carrizal. In the firefight that followed, Boyd was killed, his unit was routed, and at least twenty-three men were taken prisoners. ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 205 (1998). Ten days later, the Mexicans delivered these American prisoners to U.S. forces in El Paso, Texas. DE QUESADA, *supra* note 4, at 57.

[15] *Arce*, 202 S.W. at 953.

[16] DE QUESADA, *supra* note 4, at 65. They most likely entered pleas of guilty to avoid a death sentence; the seventeen men knew that four of their fellow *Villistas* had been convicted of murder and hanged in Deming, New Mexico, less than four months after the Columbus raid.

[17] *Id.* at 67. For more on Larrazolo's pardon, see Michael Miller, *Pardon of the Villistas—1917*, N.M. STATE RECORDS CTR. & ARCHIVES, http://www.newmexicohistory.org/filedetails.php?fileID=22053 (last visited May 13, 2012).

[18] Memorandum of Points and Authorities in Support of Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity), at 1, 7–8, United States v. Lindh, 212 F. Supp. 2d 541) (E.D. Va. 2002) (No. 02-37-A). For more on the legal status of Taliban fighters under the law of armed conflict, see GARY D. SOLIS, THE LAW OF ARMED CONFLICT 211–16 (2010).

Humanitarian and Civic Assistance: A Primer for the Judge Advocate

Commander Steven E. Milewski[*]

I. Introduction

The 2012 Defense Strategic Guidance places greater emphasis on building security partnerships between the United States and other countries, as exemplified by the excerpt below.

> Across the globe we will seek to be the security partner of choice, pursuing new partnerships with a growing number of nations—including those in Africa and Latin America—whose interests and viewpoints are merging into a common vision of freedom, stability, and prosperity. *Whenever possible, we will develop innovative, low-cost, and small-footprint approaches to achieve our security objectives*, relying on exercises, rotational presence, and advisory capabilities.[1]

One proven mechanism used to build security partnerships is conducting innovative, low-cost humanitarian and civic assistance (HCA) activities in conjunction with military operations overseas.[2]

Section 401 of Title 10, U.S. Code and related Department of Defense (DoD) policy guidance govern HCA.[3] The geographic combatant commands (GCCs), acting through their subordinate service component commands, plan and direct the execution of HCA activities throughout their assigned areas of responsibility.[4] From planning through execution, a judge advocate plays an important role by ensuring that HCA activities comply with the statutory and DoD policy requirements.[5] Despite the importance of the HCA mission and the judge advocate's role, there is a paucity of legal reference materials available that provide basic explanatory guidance to judge advocates regarding HCA matters.[6] This primer fills the gap.

Part II of this article begins with an overview of the legal framework for HCA activities and an analysis of the legislative history of 10 U.S.C. § 401. Part III then analyzes § 401's requirements, the DoD HCA implementing policy, and various combatant commands' HCA instructions. Part IV explores the legal bases for funding HCA activities and minimal cost HCA. Finally, the Appendices include a checklist for conducting legal reviews of HCA project proposals and a scenario-based example that applies § 401's requirements. The aim is to equip judge advocates with the foundational level of knowledge required to provide sound legal advice about HCA matters to commanders and their staffs.

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[1] U.S. DEP'T OF DEF., SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE 3 (Jan. 2012) [hereinafter 2012 DEFENSE STRATEGIC GUIDANCE] (emphasis in original) (issuing guidance to the Department of Defense (DoD) from the President of the United States and Secretary of Defense).

[2] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-9 to V-11, V-15, V-16 (11 Aug. 2011) (discussing the importance of the Humanitarian and Civic Assistance (HCA) mission, which supports military engagement, security cooperation, and deterrence missions, activities, and tasks).

[3] *See generally* 10 U.S.C. § 401 (2011); U.S. DEP'T OF DEF., INSTR. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (2 Dec. 2008) [hereinafter DODI 2205.02] (establishing overarching policy guidance and assigning responsibilities for DoD HCA activities); U.S. DEP'T OF DEF., INSTR. 2205.3, IMPLEMENTING PROCEDURES FOR THE HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROGRAM (27 Jan. 1995) [hereinafter DoDI 2205.3] (promulgating implementing procedures for the nomination, justification, and approval of annual HCA activity plans and reporting requirements).

[4] DoDI 2205.02, *supra* note 3, at 7.

[5] *See, e.g.*, DoDI 2205.3, *supra* note 3, at 2 (requiring the combatant commander's (CCDR) legal staff to review proposed HCA projects to ensure conformance with applicable statutory and DoD policy requirements).

[6] *See* W. Darrell Phillips, *Fiscal Law Constraints upon Exercise-Related Activities*, 42 A.F. L. REV. 259 (1997) (providing a thorough, but in some respects outdated, fiscal analysis of HCA conducted pursuant to 10 U.S.C. § 401); Major Sharad A. Samy, *Cry "Humanitarian Assistance," and Let Slip the Dogs of War*, ARMY LAW., Oct. 2007, at 52, 55–56, 58–64 (describing the requirements of 10 U.S.C. § 401 and proposing a statutory amendment that would eliminate restrictive conditions imposed by Congress on DoD HCA activities and clarify the meaning of "military operations"); Major Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW., Oct. 2008, at 1, 12, 15–16, 23–25 (providing a brief description of 10 U.S.C. § 401 and its limitations as applied to Stability, Security, Transition, and Reconstruction operations outside Iraq and Afghanistan); Lieutenant Colonel John N. Ohlweiler, *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW., Jan. 2011, at 22-23 (providing a brief discussion of 10 U.S.C. § 401 and its legislative history in the context of funding the DoD response to the January 2010 Haiti earthquake using the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation).

II. The Legal Framework for Conducting HCA

The U.S. Constitution provides the basic framework for the body of law governing the execution and funding of military operations, including HCA conducted by U.S. military forces overseas. Congress possesses the "power of the purse" and can influence the foreign affairs and military activities of the United States by enacting specific appropriations.[7] The general rule is that the Department of State (DOS) is responsible for conducting the foreign assistance activities of the United States with funding ordinarily provided by Congress via annual security assistance appropriations.[8] There are two exceptions to the general rule. First, DoD may finance the training of foreign militaries with operations and maintenance (O&M) funds only when the purpose is to enhance interoperability, familiarization, and safety during combined training.[9] Second, DoD can conduct foreign assistance activities if Congress has enacted a specific funding authorization or appropriation.[10] This second exception applies to DoD HCA activities—10 U.S.C. § 401 is the authorizing legislation that enables DoD to conduct HCA in conjunction with military operations overseas; the annual DoD Appropriations Act contains specific appropriations that fund the HCA activities authorized by § 401.[11] The origin of 10 U.S.C. § 401 provides insight into its purpose, substance, and limitations.

A. The Honorable Bill Alexander Opinion

The genesis of today's statutory HCA authority dates back to the early 1980s when the Reagan Administration expanded foreign assistance in locations such as Afghanistan, Central America, and South America, often by employing DoD forces to conduct HCA-type activities.[12] In 1983, U.S. military forces executed a broad range of HCA, construction, and training activities in support of the Honduran military during the joint combined exercise *Ahuas Tara II* in the Republic of Honduras.[13] The DoD financed all activities with service O&M funds, prompting the Honorable William "Bill" Alexander, a congressman from Arkansas, to request a formal legal opinion from the U.S. General Accounting Office (GAO) concerning the propriety of DoD's expenditures.[14] This GAO opinion laid the foundation for the present-day HCA authority in 10 U.S.C. § 401.

The GAO concluded that the DoD improperly expended O&M funds to finance the HCA.[15] The DoD justified its activities on the following three bases:

> (1) that they were "ancillary" to exercise events, (2) that in some cases, they provided training to participating U.S. units, and (3) that they contributed to U.S. regional readiness by improving relations with friendly foreign nations and by creating a positive image of the U.S. military among the indigenous population.[16]

The GAO, however, stressed that DoD had no separate authority for conducting HCA overseas with two exceptions: (1) an Economy Act transaction (i.e., under an order placed by another federal agency, such as the DOS, with authority to conduct foreign HCA activities) or (2) as an incidental activity to an authorized DoD security assistance program.[17] The GAO concluded that the HCA conducted by the DoD

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[7] U.S. CONST. art I, § 9, cl. 7.

[8] *See* The Honorable Bill Alexander, 63 Comp. Gen. 422, 433 (1984) [hereinafter The Honorable Bill Alexander]; *see also* Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (2011) (containing the general body of statutory authority governing the foreign assistance activities of the Department of State (DOS)).

[9] *See* The Honorable Bill Alexander, *supra* note 8, at 441 (discussing the exception known as "little t" training, which involves a few servicemembers, is short in duration, relatively inexpensive, and DoD is the primary beneficiary of the training experience vice the foreign partner).

[10] *Id.* at 445.

[11] *See generally* U.S. DEP'T OF DEF., DOD 7000.14-R, FINANCIAL MGMT. REG., vol. 2A, para. 010107, sec. B (Oct. 2008) (containing budget terminology and definitions). An authorization is legislation enacted by Congress that establishes or continues the legal operation of a federal program either indefinitely or for a specific period of time or permits a specific obligation or expenditure within a program. An authorization is usually a prerequisite for a subsequent appropriation. *Id.* An appropriation is the legal authority provided by an act of Congress (i.e., the DoD Appropriations Act) that permits a federal agency to incur obligations and to make payments out of the Treasury for specified purposes. *Id.* An appropriation is the most common means of providing budget authority and usually follows enactment of an authorization. *Id.*

[12] Captain Jangrumetta D. Shine, The Military Logistics Support of Humanitarian Relief Efforts During Low-Intensity Conflict 37–38 (Sept. 1991) (unpublished M.S. thesis, U.S. Air Force Air University), *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA246907 (discussing Reagan Administration efforts to deliver humanitarian assistance (HA) to the mujahedeen and refugees in Afghanistan during the Soviet occupation); Samy, *supra* note 6, at 53–54 (describing the DoD role in overseas HA operations during and after the Cold War).

[13] *See* The Honorable Bill Alexander, *supra* note 8, at 444 (noting that activities included the treatment of over 46,000 Honduran civilian medical patients, 7000 dental patients, 100,000 immunizations, and the veterinary treatment of more than 37,000 animals; the transportation of U.S. donated medical supplies, clothing, and food throughout Honduras; and construction of a 1600 square foot school using supplies from the U.S. Agency for International Development (USAID)).

[14] *Id.* at 422. In 2004, Congress changed the name of the U.S. General Accounting Office to the U.S. Government Accountability Office (GAO). The GAO issues legal opinions at the request of Congress, and they effectively bind executive agencies such as DoD. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW vol. I, at 1-46 (3d ed. 2004) [hereinafter GAO REDBOOK] (GAO legal opinions issued at the request of Congress "have the same weight and effect as [Comptroller General] decisions.").

[15] The Honorable Bill Alexander, *supra* note 8, at 445–46.

[16] *Id.*

[17] *Id.* at 445.

amounted to security assistance that should have been funded with other specific appropriations vice O&M.[18] With the GAO's legal opinion limiting DoD's authority to conduct overseas HCA to the Economy Act and a small number of authorized DoD security assistance programs, the executive branch acted quickly to seek broader legislative authority from Congress.

B. The Legislative History of 10 U.S.C § 401

In the wake of The Honorable Bill Alexander Opinion, Congress enacted the fiscal year 1985 DoD Appropriations Act, which contained an amendment authorizing DoD expenditure of O&M funds "for humanitarian and civic assistance costs incidental to authorized operations."[19] Budget authority, however, was limited to fiscal year 1985.[20] Subsequently, the Reagan Administration submitted a legislative proposal to Congress seeking to clarify the authority of U.S. Armed Forces to conduct HCA.[21] On July 8, 1986, the Senate Armed Services Committee introduced Senate Bill 2638, which included the first comprehensive draft HCA provisions sought by the Reagan Administration.[22] When Senate Bill 2638 proceeded to conference in the fall of 1986, members of the conference committee took special interest in the proposed HCA provisions.[23] The committee issued Conference Report 99-1001, which underscored congressional concerns about the nature, scope, and intent behind the Senate's proposed HCA provisions.[24] The report recommended *inter alia* that both houses agree to the committee's amended HCA provisions.[25] Congress ultimately complied with the committee's recommendation.

On November 14, 1986, Congress enacted a permanent statutory HCA authorization in section 333 of the National Defense Authorization Act of Fiscal Year 1987 (FY87 NDAA).[26] Section 333 of the FY87 NDAA added six sections to Title 10 that related solely to HCA.[27] These six sections were subsequently amended and consolidated into the current HCA authorization, 10 U.S.C. § 401.[28] As

[18] *Id.* at 445–46.

[19] Department of Defense Appropriations Act of 1985 (DoDAA FY85), Pub. L. No. 98-473, § 8103, 98 Stat. 1837, 1942 (1984).

[20] *Id.*

[21] S. REP. NO. 99-331, at 289 (1986); *see also* The Honorable Bill Alexander, *supra* note 8, at 444–45 (noting that a DoD Task Force on Humanitarian Issues was established in January 1984 to explore DoD's authority to conduct HCA, to identify DoD HCA requirements, and to determine necessary legislative changes); Shine, *supra* note 12, at 37–38 (discussing Secretary of Defense Weinberger's approval of the DoD Task Force on Humanitarian Issues report, which responded to a National Security Council request for DoD recommendations to expand HA worldwide).

[22] S. 2638, 99th Cong. § 1216 (1986) (proposing *inter alia* the following broad HCA definition:

> "§ 405. Definition
>
> In this chapter, the term 'humanitarian and civic assistance' means—
>
> (1) medical, dental, and veterinary care provided in rural areas of a country;
>
> (2) construction of rudimentary transportation systems;
>
> (3) well drilling and construction of basic sanitation facilities;
>
> (4) rudimentary construction and repair of public facilities; and
>
> (5) similar or related types of assistance.").

[23] 132 CONG. REC. H7079-01 (daily ed. Sept. 18, 1986); 132 CONG. REC. H10118-40, H10136 (daily ed. Oct. 15, 1986) (statement of Hon. Mr. Dante Fascell) (emphasizing that monetary caps were added to S. 2638 "to insure that the [HCA] program would remain small scale" and that the HCA definition was "tightened to insure that the program did not escalate in a new form of development and/or military assistance").

[24] H.R. REP. NO. 99-1001, at 1, 43–45, 467–68 (1986) (Conf. Rep.). Of particular significance was the following statement issued by the committee regarding concerns about the Senate's proposed HCA provisions:

> *The conferees were concerned with potential problems at both the low end and the high end of the civic action scale.* On the high end, to avoid the possibility of the legislation being interpreted as a major new foreign aid program, the conferees imposed an expenditure cap of $3 million for fiscal year 1987 and $16.4 million for the period of fiscal years 1987 through 1991. *The conferees also tightened the definitions of acceptable activities under this legislation, for example, clarifying that no funds could be spent on airstrips.*

Id. (emphasis added).

[25] *Id.*

[26] National Defense Authorization Act of 1987 (NDAA FY87), Pub. L. No. 99-661, § 333, 100 Stat. 3816, 3857–59 (1986) (amending Part I of subtitle A of title 10 of the U.S. Code by adding chapter 20, entitled "Humanitarian and Civic Assistance Provided in Conjunction with Military Operations").

[27] *Id.*

[28] *See* National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 332(B), 101 Stat. 1019 (1987) (amending the HCA authorization in 10 U.S.C. §§ 401–406 by consolidating the text into a single statute, 10 U.S.C. § 401); National Defense Authorization Act for Fiscal Year 1994 (NDAA FY94), Pub. L. No. 103-160, § 1504(b), 107 Stat. 1771, 1839 (1993) (amending § 401(c)(2) by inserting before the period "except that funds appropriated to the Department of Defense for operation and maintenance (other than funds appropriated pursuant to such paragraph) may be obligated for humanitarian and civic assistance under this section only for incidental costs of carrying out such assistance"); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1074(a)(2), 110 Stat. 2658, 2704 (1996) (amending the HCA definition in 10 U.S.C. § 401(e) by inserting "any of the following" after "means"); Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (NDAA FY01), Pub. L. No. 106-398, § 1235, 114 Stat. 1654, 1654A-331 (2000) (amending the HCA definition in 10 U.S.C. § 401(e)(1) by striking "rural areas of a country" and inserting "areas of a country that are rural or are underserved by medical, dental, and veterinary professionals, respectively"); National Defense Authorization Act for Fiscal Year 2006 (NDAA FY06), Pub. L. No. 109-163, § 1201(b), 119 Stat. 3136, 3455 (2006) (extending and clarifying the types of healthcare authorized under § 401(e)(1) by inserting "surgical" before "dental," both places it appears, and by inserting "including education, training, and technical assistance related to the care provided" before the period at the end).

discussed *infra*, section 333 of the FY87 NDAA is substantially similar to the current text of § 401.[29] Thus, the legislative history of section 333 of the FY87 NDAA is the legislative history for 10 U.S.C. § 401.

III. Section 401 HCA: Applying the Law and DoD Policy

Section 401 of Title 10 of the U.S. Code permanently authorizes the Secretary of Defense to issue regulations governing HCA activities executed by U.S. forces "in conjunction with authorized military operations" overseas.[30] When reviewing a proposed HCA project, a judge advocate must ensure that it conforms to § 401's requirements as well as additional policy requirements imposed by DoDand the respective geographic combatant commander (CCDR) in whose area of responsibility the HCA will be executed. Part III.A outlines the nature and scope of § 401 HCA by analyzing the statutory and DoD definitions of HCA. Part III.B then details seven key requirements of § 401. The aim is to provide judge advocates with a comprehensive knowledge of the legal and policy requirements for HCA.

A. The Nature and Scope of § 401 HCA

Congress enacted a restrictive HCA definition to limit the nature and scope of HCA conducted by U.S. Armed Forces.[31] The statutory HCA definition is codified in 10 U.S.C § 401(e).[32] Two DoD policy documents implement this definition: DoD Instruction (DoDI) 2025.02 and the FY08 DoD HCA Guidance Message.[33] The statutory HCA definition and DoD policy frame the permissible types of HCA authorized by Congress.

1. The Statutory HCA Definition

Section 401(e) of Title 10 contains the current legal definition of HCA:

> [T]he term "humanitarian and civic assistance" means any of the following:
>
> (1) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided.
>
> (2) Construction of rudimentary surface transportation systems.
>
> (3) Well drilling and construction of basic sanitation facilities.
>
> (4) Rudimentary construction and repair of public facilities.[34]

This definition is identical to the statutory HCA definition first enacted in the FY87 NDAA with the exception of three amendments that clarified the type of healthcare authorized and that limited the type of funds used for minimal cost HCA.[35] The plain meaning of this HCA definition suggests that a proposed activity must fit within one of § 401(e)'s four categories to be considered lawful.[36] The legislative history supports this interpretation.[37] The HCA definition in DoDI 2205.02 and the FY08 DoD HCA Guidance Message closely mirror the statutory HCA definition with one notable exception.

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[29] *Compare* 10 U.S.C. § 401 (2011) (current HCA authorization as amended), *with* NDAA FY87 § 333 (enacting the first HCA authorization at 10 U.S.C. §§ 401–406).

[30] 10 U.S.C. § 401(a)(1).

[31] *See* discussion *supra* Part II.B.

[32] 10 U.S.C. § 401(e).

[33] *See* DoDI 2025.02, *supra* note 3, at 8 (providing glossary of definitions including HCA); Message, 011802Z May 07, Sec'y of Def./DSCA-PGM, subject: Policy/Programming Guidance for FY 2008 Humanitarian and Civic Assistance (HCA) Projects and Activities, para. B(1)(A) [hereinafter FY08 DoD HCA Guidance Message] (defining HCA activities). The author confirmed with the Office of the Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations (DASD(PS&SO)) that the FY08 DoD HCA Guidance Message is the most recent version in force, that DASD(PS&SO) assumed the lead DoD office responsibilities for HCA originally assigned to the Assistant Secretary of Defense for Global Security Affairs in DoDI 2205.02, and that DoDI 2205.02 is currently under revision (e-mails on file with author).

[34] 10 U.S.C. § 401(e).

[35] *Compare id.* (current statutory HCA definition), *with* NDAA FY87, Pub. L. No. 99-661, § 333(a), 100 Stat. 3816, 3857-59 (1986) (enacting the first HCA definition as 10 U.S.C. § 405); *see also* NDAA FY94, Pub. L. No. 103-160, § 1504(b), 107 Stat. 1771, 1839 (1993); NDAA FY01, Pub. L. No. 106-398, § 1235, 114 Stat. 1654, 1654A-331 (2000); NDAA FY06, Pub. L. No. 109-163, § 1201(b), 119 Stat. 3136, 3455 (2006).

[36] United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.")

[37] *See supra* Part II.B and notes 20–23 (discussing how the conference committee limited the scope of HCA activities by "tighten[ing] the definitions of acceptable activities under [the proposed] legislation," in part by deleting the broad category "similar or related types of assistance" from the Senate's proposed HCA definition).

2. DoD's Implementation of the Statutory HCA Definition

The HCA definition in DoDI 2205.02 is essentially identical to the statutory definition in § 401(e); however, the definition in the FY08 DoD HCA Guidance Message, set forth below, contains one substantive change.[38]

> HCA activities constitute any of the following: medical, surgical, dental, and veterinary care provided in rural or otherwise underserved areas of a country, including education, training, and technical assistance related to the care provided; *engineering services, including* construction of rudimentary surface transportation systems; well-drilling and construction of basic sanitation facilities; or rudimentary construction and repair of public facilities.[39]

This language mirrors the definitions in § 401(e) and DoDI 2205.02, but inserts "engineering services, including" before "construction of rudimentary surface transportation systems." It is not clear why this phrase was added; however, the Office of the Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations (DASD(PS&SO)) interprets this phrase as merely describing the three categories of engineering-related HCA activities listed thereafter—construction of rudimentary surface transportation systems, well-drilling and construction of basic sanitation facilities, and rudimentary construction and repair of public facilities—and would consider any project outside the scope of these three statutorily authorized categories of "engineering services" objectionable.[40] In summary, no practical difference exists between the statutory and DoD policy definitions for HCA. To be lawful, a proposed HCA activity must fall within the scope of the HCA definition and must also comply with other key requirements in § 401.

B. Seven Key Requirements of § 401

Judge advocates must be familiar with the following seven key statutory requirements as amplified by applicable DoD policy. All seven requirements were present in the original statutory HCA authorization, section 333 of the FY87 NDAA.[41]

1. In Conjunction with Authorized Military Operations

Section 401 requires HCA to be executed "in conjunction with authorized military operations of the armed forces in a country."[42] The statute is clear that HCA must be conducted by U.S. Armed Forces in foreign nations; however, it does not define the phrase "in conjunction with authorized military operations." The DoD HCA implementing policy provides a useful definition of "military operation" and amplifying guidance.

Department of Defense Instruction 2205.02 defines "military operation" as "a military action or a strategic, tactical, service, training, exercise, or administrative military mission."[43] The instruction further mandates that HCA must "create strategic, operational, and/or tactical effects that support CCDR objectives in theater security cooperation or designated contingency plans."[44] Likewise, the FY08 DoD HCA Guidance Message states:

> *HCA projects should be planned, funded, and conducted as supplementary activities to operations, exercises or deployments-for-training that separately establishes the presence of US forces in the host country*. HCA project proposals must specifically delineate the exercise/operation with which the HCA project is associated.[45]

Thus, the DoD policy guidance is clear that a "military operation" includes a military action (i.e., a contingency operation), exercise, deployment-for-training, or administrative military mission that "separately establishes the presence of U.S. forces in the host country."[46] The

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[38] *Compare* 10 U.S.C. § 401(e) (current statutory HCA definition), *with* DoDI 2205.02, *supra* note 3, at 8 (providing glossary of definitions including HCA).

[39] FY08 DoD HCA Guidance Message, *supra* note 33, para. B(1)(A) (emphasis added).

[40] E-mail from Captain William J. Adams, Jr., Med. Serv. Corps, U.S. Navy, Global Health Coordinator, Office of Deputy Assistant Sec'y of Def. for P'ship Strategy & Stability Operations, to author (Feb. 21, 2012, 14:40 EST) (on file with author).

[41] *See* NDAA FY87, Pub. L. No. 99-661, § 333(a), 100 Stat. 3816, 3857–59 (1986).

[42] 10 U.S.C. § 401(a)(1).

[43] DoDI 2205.02, *supra* note 3, at 8.

[44] *Id.* at 2.

[45] FY08 DoD HCA Guidance Message, *supra* note 33, para. B(2) (emphasis added).

[46] *Id.*; DoDI 2205.02, *supra* note 3, at 8. As an example, U.S. Africa Command, U.S. Pacific Command, and U.S. Southern Command routinely conduct Partnership Station deployments on an annual basis in their respective areas of responsibility. These naval deployments involve U.S. Navy warships with embarked staffs that possess unique capabilities such as medical, engineering, and civil affairs teams. The Partnership Stations conduct planned HCA activities as a supplement to the primary deployment objective of increasing maritime security and cooperation with host nations in support of CCDR theater security cooperation objectives. Appendix B provides a scenario-based example of a proposed HCA project to be conducted during the Southern Partnership Station deployment in the U.S. Southern Command's area of responsibility.

inclusion of exercises and routine deployments-for-training within the definition of "military operations" comports with the legislative history.[47]

Finally, the FY08 DoD HCA Guidance Message permits the submission of HCA-type activities as humanitarian assistance (HA) projects in cases "where training/exercise opportunities requiring a unit deployment are not available nor desired by the host nation, but where projects encompassing HCA-type activities will still yield significant security cooperation benefits."[48] This provision is a mechanism to import HCA-type activities into the more flexible DoD HA Program authorized by 10 U.S.C. §§ 402, 2557, and 2561, and funded with the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation.[49]

2. Promote the Security Interests of the United States and the Host Nation

Humanitarian and civic assistance activities must promote "the security interests of both the United States and the country in which the activities are to be carried out" as determined by the Secretary of Defense or the respective secretaries of the military departments.[50] Ensuring that a particular HCA activity promotes U.S. and host nation security interests is a function of the nomination, justification, and approval process for the geographic CCDR's annual HCA activity plan as well as the incorporation of HCA into the geographic CCDR's theater campaign plan.[51] In this regard, judge advocates serving at combatant command level or below must be familiar with the applicable combatant command HCA instruction that outlines the internal responsibilities and procedures for the development, justification, and approval of the command's annual HCA activity plan.[52] Service component staffs are generally tasked with coordinating the development and planning of HCA activities via country teams, which liaison with the appropriate host nation civil authorities and U.S. Embassy.[53] Promoting the security interests of the United States and the host nation is a straightforward requirement that should not present contentious legal issues for judge advocates.

3. Promote Specific Operational Readiness Skills of U.S. Armed Forces

The statutory requirement to promote "specific operational readiness skills" of the U.S. servicemembers "who participate in the [HCA] activities" can be traced directly to The Honorable Bill Alexander Opinion, wherein DoD justified its HCA activities in part on the basis that they provided training to the participating U.S. units.[54] Department of Defense Instruction 2205.02 defines "operational readiness skills" as "[s]kills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed."[55] The instruction further requires that "U.S. military occupational specialists

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[47] *See* H.R. REP. NO. 99-1001, at 467–68 (1986) (Conf. Rep.) ("The conferees did not put a specific dollar ceiling on the definition of diminimus [sic] but wish to make clear they had in mind activities that have been commonplace in foreign exercises for decades.").

[48] FY08 DoD HCA Guidance Message, *supra* note 33, para. B(3).

[49] *See* 10 U.S.C. §§ 402, 2557, 2561 (2011); Message, (n.d.), Sec'y of Def./USDP/SO/LIC, subject: Policy Guidance for DoD Overseas Humanitarian Assistance Funded by the Overseas Humanitarian, Disaster, and Civic Aid Appropriation (on file with author; obtained the message with no date-time-group from the Office of the DASD(PS&SO), but confirmed the date-time-group as 051431Z Jun 12). Humanitarian assistance activities conducted pursuant to 10 U.S.C. §§ 402, 2557, and 2561 have no requirement to be performed "in conjunction with authorized military operations." Because HA usually involves an urgent response to a disaster or catastrophe within a host nation, HA is often the primary military operation conducted by DoD forces.

[50] 10 U.S.C. § 401(a)(1); DoDI 2205.02, *supra* note 3, at 2.

[51] DoDI 2205.3, *supra* note 3, at 2–3 (directing unified CCDRs to comply with annual DoD HCA guidance, which reflects U.S. national security and foreign policy priorities, when developing HCA activity plans); DoDI 2205.02, *supra* note 3, at 2 (mandating that geographic CCDRs incorporate HCA activities into their security cooperation plans).

[52] *See* U.S. AFRICA COMMAND, GUIDANCE FOR PLANNING AND EXECUTION OF HUMANITARIAN ASSISTANCE PROGRAMS IN THE U.S. AFRICA COMMAND AREA OF RESPONSIBILITY (1 Mar. 2008) [hereinafter USAFRICOM HAP/HCA SOP] (issuing U.S. Africa Command standard operating procedures for identifying, categorizing, funding, obtaining authorization for, and nominating HA/HCA projects and activities); U.S. CENTRAL COMMAND, REG. 12-1, SECURITY COOPERATION–HUMANITARIAN ASSISTANCE, DISASTER RELIEF, AND MINE ACTION PROGRAM (18 Nov. 2011) [hereinafter USCENTCOM REG. 12-1] (establishing U. S. Central Command (USCENTCOM) Commander's policy and procedures for management of USCENTCOM HA, Disaster Relief, and Mine Action programs, including HCA); U.S. PACIFIC COMMAND, INSTR. 0601.11, UNIFIED COMMANDERS' CONDUCT OF COOPERATIVE PROGRAMS WITH FRIENDLY NATIONS (TITLE 10 PROGRAM) at 3-5, encl. 2 (15 Mar. 2010) [hereinafter USPACOMINST 0601.11] (assigning responsibilities and issuing procedures for the development and approval of annual HCA activity plans that support U.S. Pacific Command's theater security cooperation objectives); Message, 231526Z Nov 10, Headquarters, U.S. Southern Command, subject: USSOUTHCOM FY11 Humanitarian and Civic Assistance (HCA) Engagement Exercise Directive [hereinafter USSOUTHCOM FY11 HCA Message] (promulgating U.S. Southern Command's HCA mission, concept of operations, and intent for executing FY11 HCA activities in furtherance of U.S. Southern Command's theater campaign plan).

[53] USAFRICOM HAP/HCA SOP, *supra* note 52, at 6–7; USCENTCOM REG. 12-1, *supra* note 52, at 1-5 to 1-7; USPACOMINST 0601.11, *supra* note 52, at 4; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-359, HUMANITARIAN AND DEVELOPMENT ASSISTANCE: PROJECT EVALUATIONS AND BETTER INFORMATION SHARING NEEDED TO MANAGE THE MILITARY'S EFFORTS 13–15 (2012) [hereinafter 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT] (discussing recent DoD efforts to achieve better interagency coordination for HCA projects with the DOS and USAID).

[54] 10 U.S.C. § 401(a)(1); *see supra* Part II.A.

[55] DoDI 2205.02, *supra* note 3, at 8.

shall provide services relevant to their specialty."[56] Thus, a HCA activity that provides training to a U.S. servicemember in his occupational specialty would satisfy this requirement because such training enhances the operational readiness of the unit.

4. Serve Basic Economic and Social Needs of the Host Nation's People

Section 401's requirement that HCA "shall serve the basic economic and social needs of the people" originates from the congressional concern that DoD's HCA authorization "[not be] interpreted as a new major foreign aid program."[57] A judge advocate should apply this provision in conjunction with the restrictive HCA definition in § 401(e), which legislates four narrow categories of "basic" and "rudimentary" HCA activities.[58] It must also be read in concert with § 401's prohibition against providing HCA to any military or paramilitary unit because such units cannot be recipients of HCA.[59]

The requirement to serve "basic economic and social needs" also furthers DoD's interest in "managing the expectations" of the host nation populace that benefits from the HCA. The FY08 DoD HCA Guidance Message demonstrates this policy concern by issuing the following guidance about medical and dental HCA:

> Units undertaking [Medical Civic Action Programs] and [Dental Civic Action Programs] must ensure they do not drastically exceed the standards of care already provided by the host nation. Doing so undermines the local healthcare structure. Providing care, which exceeds local standards, can have a negative effect once the providing unit has departed. These effects can range from high expectations of similar care by the local populace, expected return visits by providing units, lack of sustainability for care provided, and no follow-up. A potential decline in the perception of the [U.S. Government] . . . may occur should any of these effects materialize. Additionally, the procurement of local pharmaceuticals and supplies is highly encouraged. This provides comparable standards as well as benefits the local economy.[60]

Thus, serving "basic economic and social needs" has a legislative purpose of minimizing the scope of HCA activities so they do not expand into a major new foreign aid program, while also furthering the DoD strategic communications purpose of safeguarding the perception of the U.S. Government in the minds of the host nation populace.[61]

5. Prohibition Against HCA to Foreign Military or Paramilitary Units

Section 401's legislative history conveys the view that only the civilian, non-combatant population of the host nation should benefit from HCA.[62] As a result, Congress enacted a provision that prohibits DoD from providing HCA, directly or indirectly, to "any individual, group, or organization engaged in military or paramilitary activity."[63] The Senate Armed Services Committee, however, recognized that U.S. forces would cooperate with host nation military or paramilitary units when planning and conducting HCA activities and endorsed such cooperation in Senate Report 99-331.[64] Language concerning cooperation between U.S. forces and host nation military or paramilitary forces was not enacted into law, but DoDI 2205.02 properly reflects the legislative history by stating: "HCA may [i]nvolve cooperation with host-nation military or paramilitary elements (to include the participation of third party organizations such as non-governmental or private and/or voluntary groups) to establish trust and enhance relations with those entities."[65] Cooperation between the United States and host nation military units is a common occurrence during the planning and execution of HCA projects and is not legally objectionable if it complies with the foregoing DoD policy.[66]

[56] *Id.* at 2–3 (providing example that U.S. military medical personnel, such as doctors, dentists, or nurses, should perform medical HCA activities).

[57] 10 U.S.C. § 401(a)(2); *see supra* Part II.B and notes 24–25 (discussing congressional concerns about the nature, scope, and intent behind the original HCA program proposal in S. 2638).

[58] *See supra* Part III.A.

[59] 10 U.S.C. §401(a)(3); *see infra* Part III.B.5.

[60] FY08 DoD HCA Guidance Message, *supra* note 33, para. B(1)(B).

[61] *See* 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT, *supra* note 54, at 20–23, 37–38 (discussing the impact of DoD's inconsistent evaluations of OHDACA and HCA projects and examples of projects that had negative effects on the local populace).

[62] *See* S. REP. NO. 99-331, at 290 (1986).

[63] 10 U.S.C. § 401(a)(3).

[64] S. REP. NO. 99-331, at 290.

[65] DoDI 2205.02, *supra* note 3, at 2.

[66] The author confirmed that cooperation with host nation military units is commonplace by reviewing various Engineering Civic Action Projects and Medical Civic Action Projects provided by the Joint Staff J5 Partnership Strategy Directorate.

The phrase "military or paramilitary activity" is not defined by § 401 or the DoD implementing guidance.[67] While the definition of "military activity" reasonably includes an activity conducted by the host nation's regular armed forces, the meaning of "paramilitary activity" is ambiguous and subject to interpretation.[68] The primary legal issue that judge advocates may face when evaluating compliance with this requirement is the meaning of "paramilitary activity" for purposes of § 401. In close cases, judge advocates should conduct an objective, fact-based analysis relying on information provided by the command's subject matter experts, DoD country team, U.S. Embassy, and appropriate host nation officials. Appendix B provides a practical example of a HCA project proposal involving potential support to a military or paramilitary organization.

6. Complement But Not Duplicate Any Other U.S. Assistance.

Humanitarian and civic assistance activities "shall complement, and may not duplicate, any other form of social or economic assistance which may be provided" to the host nation by another U.S. department or agency.[69] Meeting this requirement is served by the transparent planning and approval process for the geographic CCDRs' HCA plans. Service component staffs direct HCA planning activities through country teams, which interface with the host nation civil authorities and DOS representatives at the U.S. Embassy to ensure that proposed HCA activities complement social or economic assistance already being provided by another U.S. agency, such as the U.S. Agency for International Development (USAID).[70] Proposed HCA projects are then entered into the Overseas Humanitarian Assistance Shared Information System (OHASIS), an internet-based project nomination and approval system provided by the Defense Security Cooperation Agency.[71] Using OHASIS, the Joint Staff coordinates the review of proposed HCA activities with relevant DoD offices, the DOS, USAID, and other U.S. government agencies as required.[72] The OHASIS database provides a transparent mechanism for conducting interagency review of proposed HCA projects to ensure compliance with applicable statutory and policy requirements.

7. Secretary of State Approval

This requirement does not present any legal hurdles for the judge advocate. Coordination with the DOS occurs at various levels during the HCA planning and approval process.[73] Because DoD country teams are directed to seek the concurrence of the U.S. ambassador and USAID director prior to nominating a proposed HCA activity for approval in OHASIS, the approval process within the higher echelons of the DOS is generally an affirmation of the U.S. ambassador's prior approval.[74]

IV. Funding HCA

A judge advocate should not face difficult fiscal law issues during the planning and execution of HCA if such activities comply with the statutory and DoD policy requirements outlined above. Nevertheless, judge advocates should understand the legal bases for funding HCA above and below the minimal cost threshold of $10,000.[75] In general terms, a HCA project above minimal cost is a larger-scale, preplanned project approved by the Joint Staff J5 and DASD(PS&SO).[76] In contrast, minimal cost HCA is a small-scale, modest HCA activity conducted incidental to an authorized military operation costing less than $10,000, requiring approval by the cognizant geographic CCDR, and funded with O&M funds *other than* those funds specifically appropriated by Congress for HCA.[77]

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[67] *See generally* 10 U.S.C. § 401 (void of a definition for "military or paramilitary activity"); DoDI 2205.02, *supra* note 3 ("military or paramilitary activity" not defined).

[68] The word "paramilitary" is not defined in Title 10 or Title 22 of the U.S. Code. Joint Publication 1-02, the *DoD Dictionary of Military and Associated Terms*, defines "paramilitary forces" as "forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training, or mission." *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 259 (8 Nov. 2010) [hereinafter JOINT PUB. 1-02] (as amended through 15 Nov. 2011).

[69] 10 U.S.C. § 401(a)(2).

[70] *See* DoDI 2205.02, *supra* note 3, at 7 (assigning CCDRs with the responsibility to ensure that HCA activities are conducted with the approval of the Secretary of State through the appropriate U.S. Chief of Mission); USPACOMINST 0601.11, *supra* note 52, at 4 (directing service component staffs to coordinate proposed HCA projects with appropriate country teams and receive their concurrence before nominating HCA projects for approval); *but see* 2012 GAO HUMANITARIAN AND DEVELOPMENT ASSISTANCE REPORT, *supra* note 53, at 26–41 (discussing information-sharing challenges and potential for overlap among DoD, DOS, and USAID humanitarian and development assistance efforts).

[71] DoDI 2205.02, *supra* note 3, at 5 (indicating responsibility of the Defense Security Cooperation Agency to support the Chairman, Joint Chiefs of Staff by providing the Overseas Humanitarian Assistance Shared Information System (OHASIS) for HCA project nomination and approval).

[72] *Id.* at 6.

[73] *See* discussion *supra* Parts III.B.2, III.B.5, and III.B.6.

[74] DoDI 2205.3, *supra* note 3, enclosure 1 (requiring HCA project nominations to include a statement of concurrence from the U.S. ambassador and USAID director).

[75] *See* FY08 DoD HCA Guidance Message, *supra* note 33, para. B.(4) (setting the minimal cost HCA threshold at $10,000).

[76] *See* DoDI 2205.02, *supra* note 3, at 5–7; FY08 DoD HCA Guidance Message *supra* note 33.

[77] *See* DoDI 2205.02, *supra* note 3, at 8 (defining "minimal cost HCA").

A. Funding HCA Above Minimal Cost

Section 401(c)(1) of Title 10, U.S. Code states: "Expenses incurred as a direct result of providing humanitarian and civic assistance under this section to a foreign country *shall be paid for out of funds specifically appropriated for such purposes*."[78] Section 401 is therefore a HCA authorization that must be funded by a subsequent appropriation.[79] For over a decade, Congress has enacted two equally available appropriations to fund HCA activities above the minimal cost HCA threshold: OHDACA and military department O&M.[80] The existence of two equally available appropriations for the same purpose, when neither can reasonably be called the more specific of the two, triggers application of the GAO's Election Doctrine.[81] The DoD has elected military department O&M to fund HCA expenses above minimal cost.[82] Because of this election, DoD must continue to use O&M for these HCA expenses unless it informs Congress at the beginning of the next fiscal year of its intent to use another valid appropriation, i.e., OHDACA.[83]

Additionally, DoD policy guidance and some combatant command's HCA instructions contain useful amplifying guidance about funding HCA above minimal cost. The DoDI 2205.02 states that "[a]uthorized expenses include the direct costs of consumable materials, supplies, and services reasonably necessary to provide the HCA."[84] Conversely, it delineates unauthorized expenses to "include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and repair of equipment)," as well as the salaries of host nation participants and per diem expenses of the U.S. military personnel conducting the HCA.[85] The combatant command HCA instructions generally emphasize the limitations on authorized expenditures delineated in DoDI 2205.02 and impose specific limits on funding allocations for various categories of HCA projects.[86]

Overall, the funding requirements for HCA above minimal cost have remained static for more than a decade.[87] Nonetheless, Congress could alter the specific HCA appropriations, such as by eliminating O&M as an available appropriation for HCA above minimal cost, thereby necessitating the use of OHDACA funds. Judge advocates who handle HCA matters should understand this fiscal law framework, the types of authorized expenses that may be incurred, and should verify that O&M remains available to fund HCA above minimal cost by reviewing the National Defense Authorization Act and DoD Appropriations Act on an annual basis upon enactment by Congress. The legal basis for funding HCA above minimal cost is straightforward, but as discussed in Part IV.B *infra*, the funding regime governing minimal cost HCA can be more confusing.

B. Funding Minimal Cost HCA

Minimal cost HCA, originally called "diminimus HCA," is governed by § 401(c)(4), the annual DoD Appropriations Act, and DoD policy guidance.[88] When enacting the original HCA legislation in the FY87 NDAA, Congress did not want modest HCA activities that were "commonplace on foreign exercises for decades" to become administratively burdensome if subject to the same approval, financing, and reporting requirements as the large-scale HCA funded with a specific appropriation.[89] Minimal cost HCA is more flexible because approval and funding are under the geographic CCDR's purview, but the legal and policy requirements outlined in Part III *supra* must still be met.

Turning first to the statutory text, § 401(c)(4) states:

> Nothing in this section may be interpreted to preclude the incurring of *minimal expenditures* by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated pursuant to [§ 401(c)(1)], except that funds appropriated to the Department of Defense for operation

[78] 10 U.S.C. § 401(c)(1) (2011) (emphasis added).

[79] *See supra* note 11.

[80] *Compare* Department of Defense Appropriations Act, 1999 (DoDAA FY99), Pub. L. No. 105-262, tit. II, § 8009, 112 Stat. 2279, 2286, 2298 (1998) (appropriating OHDACA funds with a two-year period of availability and operations and maintenance (O&M) funds with a one-year period of availability for HCA expenses under 10 U.S.C. § 401), *with* Consolidated Appropriations Act, 2012 (CAA FY12), Pub. L. No. 112-74, div. A, tit. II, § 8011, 125 Stat. 786 (2011) (appropriating two-year OHDACA funds and one-year O&M funds for HCA expenses under 10 U.S.C. § 401 using language identical to the DoDAA FY99).

[81] *See* GAO REDBOOK, *supra* note 14, at 2-23 ("Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question.").

[82] *See* DoDI 2205.02, *supra* note 3, at 3 ("Expenses incurred as a direct result of providing HCA (other than minimal cost HCA) to a foreign country shall be paid for with funds specifically appropriated for such purposes (*included in Military Department operation and maintenance accounts*).") (emphasis added).

[83] GAO REDBOOK, *supra* note 14, at 2-23.

[84] DoDI 2205.02, *supra* note 3, at 3.

[85] *Id.*

[86] *See* USAFRICOM HAP/HCA SOP, *supra* note 52, at 7, 10–11; USCENTCOM REG. 12-1, *supra* note 52, at 1-7, 3-9; USSOUTHCOM FY11 HCA Message, *supra* note 52, paras. 3.D.(3)(C), 3.E.(5), 4.A.(1-2).

[87] *See supra* note 80.

[88] 10 U.S.C. § 401(c)(4) (2011); CAA FY12, Pub. L. No. 112-74, div. A, tit. II, § 8011, 125 Stat. 786 (2011); DoDI 2205.02, *supra* note 3, at 2–3, 8; *see also* H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.) (providing examples of authorized "diminimus activities").

[89] H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.).

> and maintenance (other than funds appropriated pursuant to such paragraph) may be obligated for humanitarian and civic assistance under this section *only for incidental costs of carrying out such assistance*.[90]

This fiscal authorization imposes two constraints. First, DoD may incur "minimal expenditures" for HCA activities out of funds *other than* those authorized for HCA under § 401(c)(1), i.e., OHDACA and military department O&M funds.[91] Second, when funding a "minimal expenditure" using O&M funds that are not specifically appropriated for HCA, the O&M funds may only be obligated for "incidental costs" of carrying out the modest HCA activity. These two constraints work in concert with the HCA O&M appropriation contained in the annual DoD Appropriations Act. The Consolidated Appropriations Act, 2012, contains the following specific HCA appropriation:

> Within the funds appropriated for the *operation and maintenance of the Armed Forces*, funds are hereby appropriated pursuant to section 401 of title 10, United States Code, for humanitarian and civic assistance costs under chapter 20 of title 10, United States Code. *Such funds may also be obligated for humanitarian and civic assistance costs incidental to authorized operations* and pursuant to authority granted in section 401 of chapter 20 of title 10, United States Code.[92]

The second sentence in the appropriation concerns minimal cost HCA and mirrors the authorization in § 401(c)(4) by permitting obligation of one-year O&M funds for the purpose of "[HCA] costs incidental to authorized operations." The terms "minimal expenditure" and "incidental costs" are not defined by § 401(c)(4) and the annual HCA O&M appropriation. Additional clarity is provided by DoDI 2205.02 and the FY08 HCA Guidance Message.

Department of Defense Instruction 2205.02 implements § 401(c)(4)'s authorization and the HCA O&M appropriation by providing a more concise definition of minimal cost HCA. Minimal cost HCA is defined as "HCA activities provided under [10 U.S.C. § 401] and *incurring only minimal expenditures for incidental costs*."[93] The definition also includes the following guidance for combatant commands regarding "minimal expenditures":

> The determination that an expenditure is "minimal" shall be made by the Commanders of the Combatant Commands:
>
> For activities within their respective AORs.
>
> In the exercise of the Commander's reasonable judgment.
>
> In light of the overall cost of the military operation in which such expenditure is incurred.
>
> For an activity that is incidental to the military operation.[94]

Thus, DoDI 2205.02 affords CCDRs with some flexibility to determine "minimal expenditures," but the maximum amount authorized for a minimal cost HCA project is $10,000.[95] The instruction also provides two examples of minimal cost HCA projects: a unit doctor's examination of villagers for a few hours with the administration of several shots and the issuance of some medicines, but not the dispatch of a medical team for mass inoculations; and the opening of an access road through trees and underbrush for several hundred yards, but not the asphalting of a roadway.[96] The requirement that minimal cost HCA must be "incidental to the military operation" is not defined, but is similar to § 401's requirement that HCA be executed "in conjunction with authorized military operations."[97] The military operation must separately establish the presence of U.S. forces in the host nation, and the minimal cost HCA project must be minor, low scale, and ancillary to the primary operation.

Finally, the FY08 HCA Guidance Message prohibits "project splitting," which is the unauthorized practice of dividing projects into various segments in order to avoid the $10,000 minimal cost HCA threshold.[98] Simplified acquisition procedures may be used to purchase supplies or

[90] 10 U.S.C. § 401(c)(4) (emphasis added).

[91] *See supra* Part IV.A (discussing how Congress appropriated two equally available appropriations to fund HCA—OHDACA and military department O&M).

[92] CAA FY12, div. A, tit. II, § 8011.

[93] DoDI 2205.02, *supra* note 3, at 8 (emphasis added).

[94] *Id.*

[95] FY08 DoD HCA Guidance Message, *supra* note 34, para. B.(4); *see also* DoDI 2205.02, *supra* note 3, at 8 ("The maximum amount authorized for a minimal cost project is included in the annual HCA guidance message.").

[96] DoDI 2205.02, *supra* note 3, at 8; *see also* H.R. REP. 99-1001, at 467–68 (1986) (Conf. Rep.) (providing the same examples used in DoDI 2205.02 but under the original lexicon of "diminimus activities").

[97] *See supra* Part III.B.1.

[98] FY08 DoD HCA Guidance Message, *supra* note 33, para. B.(4).

services below the $3,000 micro-purchase threshold.[99] Because the CCDR is responsible for minimal cost HCA, one would expect each combatant command to have detailed guidance for planning and executing minimal cost HCA projects; however, only U.S. Africa Command has detailed minimal cost HCA guidance in its standard operating procedure, which generally restates the requirements set forth in DoDI 2205.02 and the FY08 HCA Guidance Message.[100]

In closing, a judge advocate must ensure that a proposed minimal cost HCA project complies with the legal and policy requirements outlined in Part III and this section. Additionally, examples of past minimal cost HCA projects should be reviewed as a basis for evaluation and comparison because the respective combatant command HCA instructions lack detailed guidance on minimal cost HCA.

V. Conclusion

Judge advocates serving in the operational chain of command of GCCs that routinely conduct HCA should possess a thorough understanding of the foregoing legal, policy, and procedural requirements for § 401 HCA. For a judge advocate undertaking his first legal review of a proposed HCA project with little or no background in fiscal law and HCA, gaining a foundational level of knowledge can prove challenging. Section 401's numerous legal requirements, its unusual funding scheme, and the patchwork nature of the DoD implementing policy can pose a legal research nightmare for the inexperienced judge advocate who must render an opinion on short notice, whether during a HCA planning team meeting or in response to an urgent out-of-cycle HCA request. This primer is intended to fill the current gap in secondary legal resource materials by providing the requisite foundational level of knowledge about § 401 HCA.

[99] *Id.*; *see also* GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 13 (Mar. 2012) (governing simplified acquisition procedures).

[100] *See* USAFRICOM HAP/HCA SOP, *supra* note 52, at 8.

Appendix A

HCA Legal Review Checklist

HCA Legal Review Checklist

Instructions

- HCA projects above and below the $10,000 minimal cost threshold must comply with 10 U.S.C. § 401's requirements.
- If "NO" to questions 1-8, the proposed HCA activity is legally objectionable.
- Information to support a legal review of an HCA project proposal may be obtained from the appropriate command HCA point of contact, project subject matter expert(s), and the project proposal form submitted via the Overseas Humanitarian Assistance Shared Information System (OHASIS).
- Purpose and intent are the key factors in determining whether a specific activity is covered by 10 U.S.C. § 401. Source: DoDI 2205.02.
- Applicable geographic combatant command instructions should be reviewed to ensure compliance with local policy, guidance, and procedures. See References F–I below. Currently, U.S. European Command and U.S. Northern Command do not have local HCA instructions. Historically, U.S. Northern Command has not conducted HCA.

References (current as of 12 March 2012)

A. 10 U.S.C. § 401 (2011)
B. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. A. tit. II, § 8011 (2011)
C. DoDI 2205.02, Humanitarian and Civic Assistance (HCA) Activities (2 Dec. 2008)
D. DoDI 2205.3, Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program (27 Jan. 1995)
E. SECDEF WASHINGTON DC//DSCA-PGM// 011802Z May 07, Policy/Programming Guidance for FY 2008 Humanitarian and Civic Assistance (HCA) Projects and Activities
F. U.S. Africa Command Standard Operating Procedure, Guidance for Planning and Execution of Humanitarian Assistance Programs in the U.S. Africa Command Area of Responsibility (1 Mar. 2008)
G. U.S. Central Command Regulation 12-1, Security Cooperation - Humanitarian Assistance, Disaster Relief, and Mine Action Program (18 Nov. 2011)
H. U.S. Pacific Command Instruction 0601.11, Unified Commanders' Conduct of Cooperative Programs with Friendly Nations (Title 10 Program) (15 Mar. 2010)
I. HQ USSOUTHCOM MIAMI FL 231526Z Nov 10, USSOUTHCOM FY11 Humanitarian and Civic Assistance (HCA) Engagement Exercise Directive

	10 U.S.C. § 401 Requirements	**Yes**	**No**
1	Nature and Type of HCA. Will the proposed HCA activity involve one or more of the following:		
	(a) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or are underserved by medical, surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided.		
	(b) Construction of rudimentary surface transportation systems.		
	(c) Well drilling and construction of basic sanitation facilities.		
	(d) Rudimentary construction and repair of public facilities.		
2	Will the HCA activity be conducted in conjunction with an authorized U.S. military operation? If YES, specify the U.S. military operation: _____ A "military operation" is a military action or a strategic, operational, tactical, service, training, exercise, or administrative military mission. Reference C: DoDI 2205.02.		

3	Will the HCA activity promote the security interests of both the United States and the host nation? This determination should be made with the assistance of the U.S. country team/military group (Mil-Group), U.S. Embassy officials (i.e., defense attaché), and USAID representatives.		
4	Will the HCA activity promote the specific operational readiness skills of U.S. Armed Forces? "Operational readiness skills" are skills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed. U.S. military occupational specialists shall provide services relevant to their specialty. Reference C: DoDI 2205.02.		
5	Will the HCA activity serve the basic economic and social needs of the people?		
6	The HCA <u>will not be provided</u> (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity? 10 U.S.C. § 401 and the DoD HCA policy do not define "military activity" or "paramilitary activity." "Military activity" would include an activity conducted by the host nation's regular armed forces (e.g., Army, Navy). The determination of what is a "paramilitary activity" requires an objective, fact-based analysis using information provided by the appropriate host nation ministry, U.S. Embassy, and U.S. country team/Mil-Group. This information may be included in the OHASIS project proposal. Joint Publication 1-02, the *DoD Dictionary of Military and Associated Terms*, defines "paramilitary forces" as "forces or groups distinct from the regular armed forces of any country, but resembling them in organization, equipment, training, or mission."		
7	Will the HCA activity complement, and not duplicate, any other form of social or economic assistance provided to the host nation by another U.S. department or agency?		
8	Has the HCA activity been approved by the Secretary of State? Secretary of State approval is coordinated by the Joint Staff J5 Partnership Strategy Directorate via OHASIS. Judge advocates serving at commands below the Joint Staff level should ensure that approval has been obtained from the U.S. Ambassador and/or appropriate U.S. Embassy official in the host nation where the proposed HCA activity will be conducted. Such approval/coordination is usually reflected in the OHASIS HCA project proposal form.		
	Funding	**YES**	**NO**
9	Is this a minimal cost HCA project? If YES, go to question 10. If NO, go to question 11. Minimal cost HCA consists of HCA activities provided under 10 U.S.C. § 401 and incurring only minimal expenditures for incidental costs. The determination that an expenditure is "minimal" shall be made by the combatant commander for activities within his AOR, in the exercise of the commander's reasonable judgment, in light of the overall cost of the military operation in which such expenditure is incurred, and for an activity that is incidental to the military operation. Reference C: DoDI 2205.02		

10	The minimal cost HCA project is incidental to an authorized U.S. military operation, i.e., the U.S. military operation separately establishes the presence of U.S. forces in the host nation, and the minimal cost HCA is minor, low scale, and ancillary to the primary operation.		
	The total projected cost is less than $10,000.		
	The project will be funded with O&M funds.		
	"Project splitting" is not used. "Project splitting" is the unauthorized practice of dividing projects into various segments in order to avoid the $10,000 minimal cost threshold.		
	If the aggregate amount of supplies and/or services is less than the micro-purchase threshold (currently $3,000), will Simplified Acquisition Procedures be used to procure the supplies/services in accordance with Federal Acquisition Regulation Part 13?		
	If an acquisition of services to support the minimal cost HCA project is subject to the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§ 351–358, 29 C.F.R. Part 4, FAR Subpart 22.10, will the cost of the services be less than $2,500 in accordance with Federal Acquisition Regulation Part 2.101 (definition of micro-purchase threshold)?		
11	Does the HCA project (above minimal cost) meet the following requirements:		
	Expenses incurred as a direct result of HCA are paid for with funds specifically appropriated for such purpose—military department operations and maintenance (O&M) funds. As of FY12, Congress has authorized and appropriated two funds that are equally available to fund HCA above minimal cost—military department O&M funds and Overseas Humanitarian Disaster and Civic Aid (OHDACA) funds. Per Reference C (DoDI 2205.02), DoD has elected military department O&M funds for HCA above minimal cost. Any changes to this funding scheme would be effected via the annual National Defense Authorization Act and DoD Appropriations Act.		
	All expenses are authorized. Authorized expenses include the direct costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. Reference C: DoDI 2205.02. Unauthorized expenses include salaries of host nation participants, per diem expenses of U.S. Armed Forces conducting the HCA, and costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; repair of equipment). Reference C: DoDI 2205.02.		

Appendix B

Legal Review of a Planned HCA Activity

I. Scenario Fact Pattern

You are the assistant force judge advocate (AFJA) at U.S. Naval Forces South (USNAVSO), the assigned Navy service component command for U.S. Southern Command (USSOUTHCOM). You are a senior lieutenant (O-3) and this is your first job at an operational headquarters. You reported onboard in June, having just attended the Graduate Course at The Judge Advocate General's Army Legal Center and School, Charlottesville, Virginia, where you earned a master of laws in military law (specializing in international and operational law). You've been on the job for one month. Your boss, the force judge advocate (FJA), is currently on travel in Central America as a member of the USNAVSO Mobile Training Team. Your communications connectivity with the FJA is sporadic at best. You're in charge of the legal office during his absence.

You receive an e-mail invitation from a fellow staff officer in USNAVSO N5 requesting your attendance at the first cross-functional planning meeting for next year's *Southern Partnership Station* (*SPS*) deployment. Before he left on travel, the FJA mentioned that you'd probably receive an invitation and that legal support to *SPS* is "a big deal." Two days later, you attend the meeting. Nearly all N-codes and special staff are represented; you are the most junior officer present. Given the large staff turnover, the lead action officer (AO) from N5 Future Plans starts the meeting with an information brief about *SPS*.

You learn that *SPS* is an annual naval deployment involving various U.S. Navy units that possess unique capabilities such as medical, engineering, and civil affairs teams. The *SPS* mission is to support USSOUTHCOM theater security cooperation objectives by increasing maritime security and cooperation with partner nations in the USSOUTHCOM area of responsibility (AOR). U.S. units participating in *SPS* will make numerous port visits and conduct various engagement activities while in port. The deployment will commence in the Caribbean portion of the USSOUTHCOM AOR and then continue south along the Pacific coast of South America after a Panama Canal transit. Some units will continue operating along the Atlantic coast of South America after transiting through the Chilean fjords and Straits of Magellan. The Secretary of Defense approved the USSOUTHCOM/USNAVSO request for the hospital ship, USNS *Comfort* (T-AH-20), to deploy with *SPS*. The *Comfort* possesses many unique capabilities. The information brief notes that a Navy JAG (O-3) will be embarked on the *Comfort* for the deployment.

The lead N5 AO then briefs the plan of action and milestones. The core *SPS* planning team will be divided into numerous planning cells devoted to specific subject matter areas. The Humanitarian Assistance/Humanitarian Civic Assistance (HA/HCA) cell, among others, requires legal support. The staff lead for the HA/HCA cell is Lieutenant Commander (LCDR) Cables, an O-4 Civil Engineering Corps (CEC) officer assigned to USNAVSO N4. You just happen to be sitting next to LCDR Cables, who whispers in your ear that he has "a legal question" for you at the end of the brief.

The brief concludes with the N5 AO stressing the importance of "project sustainability," which is one of USSOUTHCOM Commander's main priorities for HA and HCA activities. The N5 AO notes that the commander's policy is outlined in the USSOUTHCOM message on HCA. You write down the message date-time-group in your wheelbook.

LCDR Cables asks if you have time to discuss a proposed HCA project to be conducted during *SPS*. You answer in the affirmative. LCDR Cables tells you the following:

> "I'm glad you're here. I reported to NAVSO in May and am still getting a handle on what I'm supposed to be doing in the N4 shop. My billet was gapped so I didn't have much of a turnover. I'm an engineer by trade and leading this HA/HCA cell makes my head hurt. There seems to be a lot of legal and funding constraints. The last two weeks, I've been flooded with e-mails and phone calls from our country teams concerning proposed projects for *SPS*. One HCA project raises some legal issues that I want to run by you.
>
> Our military group (Mil-Group) in country Orange is proposing an Engineering Civic Action Project (ENCAP) during the *Comfort*'s port visit to Porto Nuevo. The Mil-Group has been working with various Orange Ministries, the U.S. naval attaché, and the in-country USAID representative to identify some worthy HCA projects. Maybe you remember—country Orange was nailed by Hurricane Nicholas last October and suffered lots of damage. Apparently it will take Orange years to recover.

During some prior *SPS* deployments, Navy Seabees from an east-coast Construction Battalion provided HCA project support. The Mil-Group wants to employ the Seabees to do some minor construction and repair projects on some Orange Coast Guard facilities located at Porto Nuevo. Many facilities were destroyed during the hurricane. The Orange Coast Guard needs some repairs to its coastal control station and maintenance facilities. They also need a brand new medical facility, which was wiped out by the hurricane. It would be good training for the Seabees and the Orange Coast Guard really needs the help. The total project cost is $150,000.

The Mil-Group entered the project proposal into this online database called OHASIS. I reviewed the proposal a couple weeks ago and one of these so-called "compliance questions" asks something about support to military or paramilitary activities. I thought the Orange Coast Guard must be either a military or paramilitary organization, like the U.S. Coast Guard, so I asked the Mil-Group to provide more background. I just got a response today. Here's the e-mail. Now I'm more confused about the Orange Coast Guard's status.

Can you tell me if this proposed ENCAP is legal?"

You take the e-mail and inform LCDR Cables that you'll need some time to research the issues because you've never dealt with HCA. LCDR Cables asks for a legal review in "a couple days" because USSOUTHCOM's deadline for HCA project submissions in support of *SPS* is one week from today. You promise to report back ASAP. You return to the legal office, grab a cup of coffee, and read the e-mail.

-----Original Message-----
From: Jones, John P LCDR, Mil-Group Orange N51
Sent: Thursday, June 28, 2012 9:23
To: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Subject: RE: RE: Orange Coast Guard [U]

Hi Ted,

It took me a while, but here's what I found out about the Orange Coast Guard. Its official title is the Coast Guard Commission (CGC). The CGC is aligned under the Ministry of Justice and it functions as a unit of the Orange National Police. CGC operates primarily as a law enforcement agency, with secondary responsibilities in search and rescue. Our Ministry of Justice representative told me that it's one of the few law enforcement organizations in the world to combine water policing and Coast Guard duties while operating as a national policing unit. The Orange National Police provides for the public safety, the Judicial Police and law enforcement throughout the territory of country Orange.

I hope this helps. Let me know what else you need.

Vr/ JPJ

U.S. Mil-Group, Orange, N51
NIPR: john.paul.jones@navy.mil
SIPR: john.paul.jones@smil.navy.mil
Comm: 1-02-3456-78910.

-----Original Message-----
From: Jones, John P LCDR, Mil-Group Orange N51
Sent: Friday, June 22, 2012 16:32
To: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Subject: RE: Orange Coast Guard [U]

Got it, Ted. I'll look into this. Thanks for your help with this one.

Vr/ JPJ

U.S. Mil-Group, Orange, N51
NIPR: john.paul.jones@navy.mil
SIPR: john.paul.jones@smil.navy.mil
Comm: 1-02-3456-78910.
-----Original Message-----
From: Cables, Ted A LCDR COMUSNAVSO/C4F N431
Sent: Friday, June 22, 2012 15:45
To: Jones, John P LCDR, Mil-Group Orange N51
Subject: Orange Coast Guard [U]

John,

I just reviewed your ENCAP submitted via OHASIS, the one that proposes some construction and repairs to Orange Coast Guard facilities in Porto Nuevo. One of the compliance questions in the OHASIS database asks whether the project will benefit host nation military or paramilitary organizations. Seems like Orange Coast Guard is either a military or paramilitary organization (like U.S. Coast Guard), but not sure. Can you find out more about the Orange Coast Guard's status? Is it a military or paramilitary organization? This seems like a legal hurdle to me so I'll run this by our Judge once I get more background. Thanks.

Vr/ Ted

Ted Cables
LCDR, CEC, USN
NAVSO/C4F N431
NIPR: theodore.a.cables@navy.mil
SIPR: Theodore.a.cables@smil.navy.mil
Comm: 904-123-4567

II. Analysis

This situation presents a planned HCA project that involves construction and repair activities. LCDR Cables's concern about providing HCA, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity is a valid legal issue under 10 U.S.C. § 401; however, the proposed HCA project must meet *all* legal requirements of 10 U.S.C. § 401, as well as other policy requirements imposed by DoD and the cognizant GCC, i.e., USSOUTHCOM. The approach outlined below applies the HCA Legal Review Checklist in Appendix A. In addition, the applicable USSOUTHCOM HCA instruction should be reviewed and applied (Reference I in Appendix A's checklist).

Question 1 - What is the nature and type of the proposed HCA activity?

Question 1 of the checklist refers to the nature and type of HCA. In this case, the project involves repairs to the Orange Coast Guard's coastal control station and maintenance facilities and the construction of a new medical facility. The applicable statutory category is "rudimentary construction and repair of public facilities."[101]

It is not clear whether the repairs and construction are "rudimentary," i.e., basic and minor in scope. The estimated total project cost of $150,000 suggests that they could be rudimentary, but more facts about the actual project scope are required to make an informed analysis. The first place to gather more information is the HCA project proposal in the OHASIS database, which contains a section entitled "Detailed Description of Work." Pictures of the site location and engineering schematics would also be useful.

Furthermore, you must determine that the coastal control station, maintenance facility, and medical facility are "public facilities." LCDR Cables stated that the damaged Orange Coast Guard facilities are located in Porto Nuevo. Per LCDR

[101] 10 U.S.C. § 401(e)(4) (2011).

Jones's e-mail, the Orange Coast Guard is a law enforcement organization under the Ministry of Justice and a unit of the Orange National Police with a secondary mission of search and rescue. The Orange National Police "provides for the public safety, the Judicial Police and law enforcement throughout the territory of country Orange." Based on these facts, the Orange Coast Guard is a domestic law enforcement organization that serves the public, i.e., the Orange civilian population. Thus, the coastal control station, maintenance facility, and medical facility may be considered "public facilities" because they are owned and operated by the government and serve a public purpose. Moreover, the medical facility is accessible to the Orange civilian population, i.e., those civilians who require emergent medical treatment in the immediate aftermath of a search and rescue mission.

Question 2 - Will the HCA activity be conducted in conjunction with an authorized U.S. military operation?

Based on the facts, there is no dispute that the proposed HCA activity will be conducted in conjunction with the *SPS* deployment, which is an authorized U.S. military operation as defined by DoDI 2205.02. Specifically, the proposed project will occur during USNS *Comfort*'s port visit to Porto Nuevo, Orange, and will supplement the primary *SPS* mission of supporting USSOUTHCOM theater security cooperation objectives by increasing maritime security and cooperation with partner nations in the USSOUTHCOM AOR.

Question 3 - Will the HCA activity promote the security interests of both the U.S. and the host nation?

The "Justification" section of the OHASIS HCA project proposal form should contain the factual bases for how the project will promote the security of both the United States and Orange. Moreover, the U.S. country team/Mil-Group, U.S. Embassy officials (i.e., defense attaché), and USAID representatives may provide other factual bases to support this requirement.

With respect to the U.S. security interests, the project will increase partner nation capacity by improving the Orange Coast Guard's command and control, maintenance, and medical facilities and will exemplify the U.S. Government's commitment to aiding Orange. Increasing the Orange Coast Guard's capacity benefits the security interests of Orange because the Coast Guard conducts maritime law enforcement, security, and search and rescue activities for the benefit of the Orange civilian population.

Question 4 - Will the HCA activity promote the specific operational readiness skills of U.S. Armed Forces?

LCDR Cables emphasized that the proposed construction and repair activities will provide good training for the Navy Seabees, and as such this project will benefit the Seabees' operational readiness skills. The DoDI 2205.02 defines "operational readiness skills" as "skills possessed by military personnel enabling them to contribute effectively to the capability of their unit and/or formation, ship, weapon system, or equipment to perform the missions or functions for which it was organized or designed." In this case, the U.S. Navy Seabees' occupational specialty is military construction. The HCA project to provide construction and repair services to the Orange Coast Guard is relevant to the Seabees' occupational specialty.

Question 5 - Will the HCA activity serve the basic economic and social needs of the people?

This proposed HCA project can serve the basic economic and social needs of the people in Orange in various ways. Repairing the Orange Coast Guard's coastal control station and maintenance facility will improve the Coast Guard's capacity to conduct maritime law enforcement, maritime security, and search and rescue activities. Likewise, constructing a new medical facility will increase the Coast Guard's capacity to provide emergent medical care to members of the Orange population who are rescued at sea. The increased capacity to conduct maritime law enforcement and security activities will benefit the people's economic and social needs by deterring maritime crime and ensuring the local sea lines of communication are safe for maritime commerce and tourism. Similarly, increasing the Coast Guard's search and rescue capacity will directly serve the social needs of the people who benefit from their Coast Guard's ability to provide emergent, life-saving maritime search and rescue services and the corresponding medical care.

Question 6 - Will the HCA be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity?

Providing HCA to a military or paramilitary activity was the specific concern raised by LCDR Cables and is a legitimate legal issue in this scenario. Section 401 of Title 10 and the DoD policy guidance do not define the terms "military activity" or "paramilitary activity." Based on the facts, the Orange Coast Guard is not a "military activity" because it is law enforcement organization under the Orange Ministry of Justice. Whether the Orange Coast Guard is a "paramilitary activity" is a much closer issue that will require a careful factual analysis.

A dispositive factor would be if Orange categorized its Coast Guard as a paramilitary organization. In this regard, it would be useful to obtain confirmation from the U.S. representative to the Orange Ministry of Justice as to whether the Orange Coast Guard is a paramilitary organization under Orange law. In the absence of such confirmation, the information provided by LCDR Jones's e-mail supports a conclusion that the Orange Coast Guard is a domestic law enforcement activity vice a paramilitary activity. LCDR Jones noted that the Orange Coast Guard "functions as a unit of the Orange National Police" and "operates primarily as a law enforcement agency, with secondary responsibilities in search and rescue." Because the Orange Coast Guard is a unit of the National Police, it assists the Orange National Police in providing for the public safety and law enforcement in maritime areas subject to Coast Guard jurisdiction. Finally, the Orange Coast Guard appears to be a very unique agency—based on LCDR Jones's e-mail, it is "one of the few law enforcement organizations in the world to combine water policing and Coast Guard duties while operating as a national policing unit." Based on these facts, the Orange Coast Guard may be considered a domestic law enforcement activity that serves the Orange civilian population, and would be eligible to receive HCA.

It would also be helpful to determine, with LCDR Cables's assistance, if USNAVSO or another USSOUTHCOM service component command provided direct HCA to the Orange Coast Guard in the past, and if so, what the findings were concerning the issue of support to a paramilitary activity.

Finally, once all facts have been gathered, you, as the judge advocate reviewing the HCA project proposal, would be wise to consult with your counterpart at higher headquarters, USSOUTHCOM, to discuss these specific issues. Combatant commands have the benefit of being staffed with fiscal law attorneys and HCA subject matter experts who possess a considerable amount of corporate knowledge and a unique perspective from the strategic level of command. Consultation with these experts is necessary when dealing with the challenging or novel issues.

Question 7 - Will the HCA activity complement, and not duplicate, any other form of social or economic assistance provided to the host nation by another U.S. department or agency?

This determination should be based on information provided by appropriate U.S. government officials in the host nation, including members of the DoD country team/Mil-Group, U.S. Embassy officials, and USAID representatives. The information should also be reflected in the OHASIS HCA project proposal form, which receives interagency review during the nomination and approval stages. The U.S. Government Accountability Office (GAO) has focused on the extent to which DoD, DOS, and USAID humanitarian and development assistance efforts overlap.[102] It remains to be seen whether Congress and/or DoD will promulgate more specific guidance in this area.

Question 8 - Has the HCA activity been approved by the Secretary of State?

In this case, Secretary of State's approval is premature. Because you're a judge advocate at the service component command level, you should ensure that project approval has been obtained from the U.S. ambassador and/or appropriate U.S. Embassy official in Orange. Record of such approval/coordination is often reflected in the OHASIS HCA project proposal form. If not, you should request assistance from LCDR Cables who can follow up on the issue with his points of contact in the Mil-Group or U.S. Embassy.

[102] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-359, HUMANITARIAN AND DEVELOPMENT ASSISTANCE: PROJECT EVALUATIONS AND BETTER INFORMATION SHARING NEEDED TO MANAGE THE MILITARY'S EFFORTS 26–41 (2012).

Question 9 - Is this a minimal cost HCA project?

No, this is not a minimal cost HCA project. The estimated total project cost of $150,000 far exceeds the $10,000 minimal cost HCA threshold. This project proposal consists of HCA that will be provided directly to the Orange Coast Guard. As a result, military department O&M funds that have been specifically appropriated for the purpose of providing HCA pursuant to 10 U.S.C. § 401 must be used to fund the project, if approved.

For this type of deployment, minimal cost HCA projects could arise on short notice during the actual deployment itself. For example, U.S. medical personnel embarked in USNS *Comfort* may see the need for minor, low-scale HCA projects that benefit the local population (e.g., issue vaccinations to a small group of 12 young children at a local school) while conducting other pre-planned engagement activities in Orange. The minor, low-scale HCA may satisfy minimal cost HCA requirements. In such event, the *Comfort*'s medical team must act quickly to nominate the project proposal in OHASIS and receive USSOUTHCOM approval via the chain of command. As the judge advocate at the service component level, you would liaise "down the chain of command" with the Navy judge advocate (O-3) embarked on the *Comfort*, as well as consult "up the chain of command" with the appropriate legal counterpart at USSOUTHCOM.

III. Summary

Normally, reviewing HCA project proposals should present few, if any, challenging or novel legal issues. This example, however, demonstrates that the restrictive conditions imposed by Congress in 10 U.S.C. § 401 could prove challenging in application. In such cases, the judge advocate must have a firm knowledge of § 401's requirements, the applicable DoD HCA policy, and the governing combatant command HCA guidance. The primer and Appendix A's checklist aim to package the requisite information into a single source, thereby enabling the judge advocate to provide competent and informed legal advice to commanders and staffs, and conduct thorough and accurate legal reviews of proposed HCA projects.

A Judge Advocate's Guide to the Flying Evaluation Board

Major Stephen P. Watkins[*]

I. Introduction

You are a defense counsel proudly and competently manning the U.S. Army Trial Defense Service (TDS) office at Fort Drum, New York, "the Army's best-kept secret."[1] Still relishing your latest "not guilty" panel verdict, you are feeling justifiably confident in your ability to "defend those who defend America."[2] A new client walking through the door piques your curiosity—a Chief Warrant Officer three (CW3). Thinking he may be lost, you personally greet him. "Hi Chief, how can I help you today?"[3]

"I need to see an attorney about this paperwork I received," he replies.

As you look over the stack of papers from the CW3, you suddenly feel your confidence drain away. "What is a flying evaluation board?" you ask yourself.[4]

That evening you consult applicable regulations and learn that when a commander questions a pilot's performance, justification for continued aviation service and aeronautical ratings are subject to a complete review.[5] The mechanism for this review is the flying evaluation board (FEB). The FEB is a traumatic event for a pilot. If the FEB terminates his aviation status, his career could end. A judge advocate (JA) typically presents the command's case; another JA will defend the pilot-respondent.[6] Most JAs, however, do not know FEBs exist, and even fewer have experience with them.

This primer is for all JAs involved with FEBs. These include the trial counsel (TC) for a combat aviation brigade (CAB), who will typically present the command's evidence at the FEB, and the legal assistance (LA) or TDS attorney who will represent the pilot at the board. Other JAs must also understand FEBs. The brigade judge advocate (BJA) for a CAB must have a solid understanding of the FEB to advise his commander about whether to convene a FEB in the first place. Any FEB which terminates a pilot's aviation service will likely cross the desk of the installation's chief of military justice, who is often the gatekeeper of actions requiring the signature of the general court-martial convening authority (GCMCA). The staff judge advocate (SJA), who typically briefs the GCMCA, must also be familiar with any FEB he presents for action. This article is designed to educate every JA with a need or desire to learn more about FEBs.

To do so, Part II of this article explores the background of aviation procedures and regulations, including who flies Army aircraft and how they achieve this qualification. Part III examines the reasons to convene a FEB and who may be the subject of a FEB. Part IV outlines the procedures governing the FEB. Finally, the primer proposes strategies for the JA presenting each side of the case, and how a pilot may appeal an adverse finding.

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[1] *Mission Vision Motto & Values*, FORT DRUM, http://www.drum.army.mil/AboutFortDrum/Pages/MissionVisionMottoValues_lv2.aspx (last visited Dec. 3, 2012).

[2] The motto of the U.S. Army Trial Defense Service (TDS). *See Trial Defense Services*, TRIAL DEFENSE SERVICES-FORT CAMPBELL, http://www.campbell.army.mil/campbell/SJA/Pages/TDS.aspx (last visited Dec. 5, 2012).

[3] Although tradition and practice dictates that Aviation Warrant Officers are addressed as "Mister" or "Miss," and never "chief," you don't know this yet. This is one of the many lessons you will shortly learn about Army Aviation!

[4] Representing a pilot facing a flying evaluation board (FEB) is an optional legal assistance mission and thus may be handled either by a legal assistance attorney or TDS counsel, depending upon the availability. U.S. DEP'T OF ARMY, REG. 27-3, THE LEGAL ASSISTANCE PROGRAM para. 3-6g (21 Feb. 1996) (RAR, 13 Sept. 2011); *see, e.g.*, *Trial Defense Service*, FORT CARSON, http://www.carson.army.mil/LEGAL/TDSWebsite/AboutUs.html (last visited May 2, 2013)

[5] U.S. DEP'T OF ARMY, REG. 600-105, AVIATION SERVICE OF RATED ARMY OFFICERS para. 6-1 (22 June 2010) [hereinafter AR 600-105].

[6] The respondent may decline representation or hire his own attorney. *Id.* para. 6-3.

II. Background

A. Who Flies?

All Army pilots are officers, either commissioned or warrant.[7] Duties performed by such officers pursuant to applicable regulations constitute "aviation service."[8] Army aviators receive their initial entry flight training on helicopters at Fort Rucker, Alabama.[9] However, piloting an aircraft is not the sole method of aviation service. Flight surgeons engaged in the practice of aviation medicine also perform aviation service.[10] Both pilots and flight surgeons are rated officers, meaning they hold an aeronautical rating.[11]

A second category of Army aviation personnel includes those who must perform "frequent and regular" aerial flight in performance of their assigned duties.[12] Though they have flight status, these personnel, typically enlisted, are not pilots or flight surgeons, and thus do not hold an aeronautical rating. They are nonrated Army aviation personnel.[13] These personnel must generally perform at least four hours of flight duty each month.[14] The most common examples are maintenance personnel, physician assistants, aviation platoon sergeants, avionics technicians, aerial photographers, flight engineers, and door gunners.[15]

B. Obtaining an Aeronautical Rating

Upon graduation from initial entry flight training, Army aviators receive the initial rating of "Army Aviator."[16] Upon successful completion of prescribed benchmarks, an Army aviator will achieve the rating of "Senior Army Aviator," and finally "Master Army Aviator."[17]

The readiness level (RL) is a measure of the pilot's flying abilities and qualifications.[18] At graduation, the aviator's RL is RL 3.[19] Ironically, this means that the pilot is "not qualified in the aircraft."[20] Pilots have time limits during which they must progress to RL 2 and finally to RL 1 in order to be fully qualified in their aircraft.[21] In addition, pilots undergo annual evaluations to determine their RLs.[22] If at any time a pilot is determined to have an RL other than 1, he must undergo refresher training until he re-obtains RL 1.[23]

Various major command-level commanders, and certain branch chiefs, may award flight status to nonrated Army aviation personnel, depending on the type of duty to be performed by the nonrated personnel.[24] All nonrated personnel must meet certain medical standards in accordance with Army Regulation (AR) 40-501,[25] as well as possess the qualifications outlined in AR 600-105, Chapter 2.

C. Focus of this Article

The procedures to remove nonrated aviation personnel from flight status are detailed in AR 600-105, chapter 2. These procedures are quite abbreviated compared to a FEB and will not be covered in this primer, nor will the process for disqualification of flight surgeons. Likewise, this primer will not deal with termination of aviation service for reasons not requiring a FEB.[26] The focus of this primer will be FEBs convened to review the performance of Army pilots.

III. Reasons to Convene a FEB

A FEB should convene if an officer "fails to remain professionally qualified," has "marginal potential for

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[7] *Id.* at 5 tbl.2-5. This primer is concerned only with manned aircraft; the information contained herein does not necessarily apply to remotely piloted unmanned aircraft.

[8] *Id.* ch. 2.

[9] U.S. DEP'T OF ARMY, REG. 611-110, SELECTION AND TRAINING OF ARMY AVIATION OFFICERS para. 1-6 (15 June 2005).

[10] U.S. DEP'T OF ARMY, FIELD MANUAL 3-04.300, C2, AIRFIELD AND FLIGHT OPERATIONS PROCEDURES para. 6-27 (10 Dec. 2010).

[11] AR 600-105, *supra* note 5, para. 2-5.

[12] U.S. DEP'T OF ARMY, REG. 600-106, FLYING STATUS FOR NONRATED ARMY AVIATION PERSONNEL para. 2-4 (8 Dec. 1998).

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

[14] U.S. DEP'T OF DEF., 7000.14-R, FINANCIAL MANAGEMENT REGULATION vol. 7a, para. 2201 (Oct. 2012) [hereinafter DODFMR].

[15] *Flight Pay Rated and Nonrated*, U.S. ARMY HUMAN RESOURCES COMMAND WEBSITE, https://www.hrc.army.mil/TAGD/Flight%20Pay%20Rated%20and%20Nonrated (last visited May 3, 2013).

[16] AR 600-105, *supra* note 5, at 5 tbl.2-5.

[17] *Id.*

[18] U.S. DEP'T OF ARMY, TRAINING CIRCULAR 3-04.11, COMMANDER'S AIRCREW TRAINING PROGRAM FOR INDIVIDUAL, CREW, AND COLLECTIVE TRAINING para. 3-11 (19 Nov. 2009) [hereinafter TC 3-04.11].

[19] *Id.* para. 3-33.

[20] *Id.* para. 3-17.

[21] *Id.* para. 3-37.

[22] *Id.* para. 5-24.

[23] U.S. DEP'T OF ARMY, REG. 95-1, FLIGHT REGULATIONS para. 4-10d (12 Nov. 2008) [hereinafter AR 95-1].

[24] DODFMR, *supra* note 14, para. 220114.

[25] U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (14 Dec. 2007) (RAR, 4 Aug. 2011) [hereinafter, AR 40-501].

[26] AR 600-105, *supra* note 5, para. 5-4.

continued aviation service," or if a currently non-medically disqualified officer seeks requalification.[27] This primer explores only the first two reasons, which deal with *disqualification*. While these reasons may seem simple at first blush, as is often the case, the devil is in the details, as there are several ways to establish them. These are generally categorized as "flying-related" and "not flying-related."

A. Reasons to Convene a FEB, Flying-Related

1. Lack of Proficiency

This is the broadest, most all-encompassing reason to convene a FEB. To proceed under this section, evidence must show that the pilot either "lacked proficiency in flying duties" or "failed to meet ATP [Aircrew Training Program] requirements."[28] The regulation offers no additional guidance as to what constitutes a "lack[] of proficiency in flying duties."[29] It does state that "failure to meet ATP requirements" covers proficiency, substandard performance on the Annual Proficiency and Readiness Test (APART)[30] task iterations, Pilot in Command (PIC) requirements,[31] and flying hours.[32] These requirements are outlined broadly in AR 95-1, Chapter 4. The particular technical requirements are set out in great detail in the operator's manuals for each particular aircraft.[33]

2. Flagrant Violation of Flying Regulations

Army flying regulations are laid out in AR 95-1. This regulation is not exhaustive, but incorporates applicable non-Army regulations for operating an Army aircraft.[34] Chief among these are federal aviation regulations, which Army aviators must also comply with.

Army Regulation 600-105 defines "flagrant" violation as a violation that "may show a lack of judgment or proficiency that renders the officer unfit or unqualified to perform flying duties" but gives no further guidance as to what constitutes such violation, leaving this to the FEB to determine.[35] A commander is free to use the full range of judicial, non-judicial, or administrative means to correct a violation, either in conjunction with or instead of a FEB.[36]

3. Insufficient Motivation

Examples include refusing to fly a specific aircraft, a particular mission or in a particular theater of operations, or a having a fear of flying without an underlying psychiatric illness.[37] No non-flying examples are given. Importantly, the regulation describes insufficient motivation as being a non-medical "*self-imposed* deficiency."[38]

If a commander discovers that a pilot has insufficient motivation, this regulation requires the commander to suspend the officer and order a medical examination in accordance with AR 40-501. If the flight surgeon performing the examination determines that the pilot is medically fit to fly, the commander may take UCMJ or administrative action against the pilot.[39]

B. Reasons to Convene a FEB, Not Related to Flying[40]

The non flying-related reasons for convening a FEB are familiar to most JAs. They are equally applicable to non-aviators. Therefore, a JA's experience in UCMJ or adverse administrative actions will directly benefit him in handling such a case.

1. Undesirable Habits or Traits of Character

The regulation enumerates examples of undesirable traits: abuse of alcohol, illegal drug use, civil confinement, emotional instability, or willfully failing to disclose a medical condition which would disqualify the officer from aviation duty.[41] This list, however, is not exhaustive: the provision is also a catch all one for other "inherent undesirable personality traits that may affect the officer's duties as an aviation officer."[42] A JA advising a commander

[27] *Id.* para. 6-1.

[28] *Id.*

[29] *Id.*

[30] AR 95-1, *supra* note 23, para. 4-2.

[31] PIC as used here is an acronym for Pilot in Command; however, the doctrinally correct acronym is "PC." *Id.* para. 4-19. In the author's experience, this mistake is not rare. *See, e.g.*, *id.* para. 5-1h(1).

[32] AR 600-105, *supra* note 5, para. 6-1(c)(1)(b).

[33] AR 95-1, *supra* note 23, paras. 4-1, 4-3, 4-5.

[34] *Id.* para. 5-1.

[35] AR 600-105, *supra* note 5, para. 6-1d.

[36] *Id.* para. 5-3(a).

[37] Valid safety concerns about a particular aircraft, for example, do not constitute insufficient motivation. *Id.* para. 6-1(e)(3).

[38] *Id.* (emphasis added).

[39] *Id.*

[40] An additional reason, an officer requesting to appear before a FEB, is outside the scope of this primer and will not be covered. *Id.* para. 6-1(e)(4).

[41] *Id.* para. 6-1e.

[42] *Id.* (qualifying that the undesirable traits "include, but not limited" to the ones listed).

who wants to remove an officer's flight status, but cannot fit the officer's deficiency into another category, may find it beneficial to consider whether the deficiency fits into this general provision.

a. Urinalysis Testing

This subsection covers any aviation officer who tests positive for illegal substances, as well as anyone who refuses to comply with an order to provide a urine sample for testing.[43]

b. Unsatisfactory Duty Performance

Unsatisfactory duty performance may be based on an officer's overall performance, including flying duties as well as duties not related to flying.[44] Conceivably, under this section, a commander could convene a FEB based entirely on an officer's non flying-related performance; however, as there are other more suitable options for dealing with deficiencies unrelated to flying, a FEB would not be the most efficient use of board members' time in such instance.[45] As a practical matter, FEBs convened under this section should concern an officer's inability to satisfactorily perform aviation duties.

2. Failure to Maintain Medical Certification

All aviation officers, even if not serving in an aviation billet, must remain medically qualified under AR 40-501.[46] If the officer fails to timely undergo a medical examination, the commander may refer him to a FEB; however, if the officer is examined and found medically unfit, the case is handled in accordance with chapter 4 of AR 600-105 rather than by a FEB.[47]

IV. FEB Procedures

Subject to some modifications made by AR 600-105, the FEB is governed by the rules for formal boards of officers found in AR 15-6, with the pilot being a designated respondent.[48] A complete understanding of the FEB process requires a careful reading of both AR 15-6 and AR 600-105. Consider the FEB a jigsaw puzzle. Assembling the final product requires pieces from two different puzzles, but not all the pieces of either. The government must take care not to miss any steps, because the result could be unreasonable delay or needless repetition. The defense counsel is wise to pay equal attention to the intricacies of the FEB puzzle—a government misstep may present an opportunity to improve his client's position.

A. Appointing the FEB

A brigade commander may appoint a FEB.[49] The commander must then suspend the officer from flying duties, pending the outcome of the FEB, and notify the officer as well as the local finance office in writing. Aviation Career Incentive Pay (ACIP) is suspended concurrently with the flying suspension. While suspended, the officer may not be assigned to flying duties, nor perform crew duties in a military aircraft or flight simulator. If the FEB is not completed within 365 days of the date the suspension is imposed, the appointing authority must request an extension from the GCMCA.[50]

The FEB must consist of at least three voting members. The members may be commissioned officers or commissioned warrant officers, but all must hold aeronautical ratings. If the respondent is a warrant officer, at least one voting member must be a warrant officer in the grade of chief warrant officer four (CW4) or higher and senior in grade to the respondent.[51] The FEB may have more than three voting members, so long as the number is uneven.[52] All members must be senior to the respondent.[53]

[43] *Id.* para. 6-1e(1).

[44] *Id.* para. 6-1e(2).

[45] For example, a commander might initiate UCMJ or adverse administrative action. A court-martial, non-judicial punishment, or "show cause" board does not specifically require the aviation assets that a FEB does.

[46] AR 40-501, *supra* note 25, ch.4.

[47] *Id.* This primer will not deal further with medical disqualifications. A JA advising a commander or a pilot concerning aeromedical disqualification should consult AR 40-501, which deals extensively with this subject. Likewise, close consultation with a flight surgeon, the subject matter experts in these cases, is strongly advised.

[48] AR 600-105, *supra* note 5, para. 6-1f. Though neither regulation explicitly states that the pilot is a designated respondent, the plain meaning of paragraph 5-4 of the AR 15-6 provides for no other logical result.

[49] Commanders of higher headquarters may also appoint a FEB. *Id.* para. 6-1g & at 17 tbl.5-1.

[50] Note that commanders below the brigade level may suspend the pilot for up to sixty days, and in fact must do so if they initiate a request for a FEB. *Id.* para. 5-3a & at 17 tbl.5-1.

[51] *Id.* para. 6-2.

[52] *Id.* "National Guard boards may include a rated officer from the U.S. Army Advisory Group to the ARNGUS of a State." *Id.* para. 6-2f (This is the only distinction the regulation draws between Active Army and National Guard FEBs).

[53] U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1 (2 Oct 2006) [hereinafter AR 15-6].

Army Regulation 15-6 also provides for the appointment of "members with special technical knowledge" as voting members.[54] Especially in cases where the respondent's flying ability is the subject of the FEB, the appointing authority may wish to appoint at least one member who flies the same aircraft as the respondent.

B. Recorder, Legal Advisor, and Respondent's Counsel

The appointing authority may also appoint a recorder, assistant recorder, and legal advisor as nonvoting members of the board.[55] In a FEB, as in a separation board or other formal 15-6 investigation, the recorder has duties similar to those of a court-martial prosecutor[56]; however, the recorder need not be a JA. The only requirement is that the recorder be an officer, either commissioned or warrant.[57]

The appointing authority may wish to appoint an experienced pilot, rather than a JA, as a recorder. Prior to doing so, he should consider the advantages and disadvantages of doing so. A JA will be familiar with the administrative duties of the recorder as well as, being a seasoned advocate, adept at presenting the command's case to the board in a clear, logical, and persuasive fashion. On the other hand, the JA will most likely be unfamiliar with the technical aspects of aviation, the subject matter of the board, thus limiting his ability to present an in-depth case. A pilot will be a subject matter expert on aviation but may not be able to effectively package his knowledge and present it to the board effectively.

The appointing authority may find that the best way forward is to appoint his trial counsel as a recorder and an aviator as an assistant recorder. This gives him the best of both worlds: an effective advocate in the JA and a subject matter expert in the pilot.

Details on appointing a legal advisor and notifying the respondent are found in chapter 5 of AR 15-6. The notification letter must include a Privacy Act statement, with FEB-specific language.[58] The inclusion of this special language is important, as the *Feres* doctrine does not preclude military members suing the government under the Privacy Act.[59]

In a significant expansion of the counsel rights afforded under AR 15-6, the respondent at a FEB also has a right to request military counsel of his choosing, and that counsel's rater will determine whether the counsel is available for the assignment.[60]

C. Board Recommendation

The FEB is conducted similarly to other AR 15-6 formal board proceedings. Thus, the standard of proof is a preponderance of the evidence,[61] and the rules of evidence in paragraph 3-7 of AR 15-6 apply. Modifications effected by AR 600-105 include a prohibition on making recommendations for disciplinary or UCMJ action and the requirement for the board to announce its findings and recommendations in open session prior to adjourning.[62]

The board's possible recommendations are tightly limited by AR 600-105: (1) "[o]fficers with proper training and skills [may] be awarded an aeronautical rating"; (2) orders suspending or disqualifying the respondent from flying may be rescinded and the respondent restored to aviation service; (3) when aviation operations or the flying ability of the respondent can be improved, other recommendations, such as additional training or flight time, may be made; (4) the respondent's aviation service may be terminated, either permanently or not; and (5) his aeronautical ratings (and thus his authorization to wear the Army Aviation Badge) may also be terminated, either permanently or not.[63] If a termination is not permanent, the officer may apply for reinstatement "when the original reasons for the disqualification and current circumstances warrant reconsideration."[64]

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[54] *Id.* para. 5-1e.

[55] *Id.* para. 5-1c, d.

[56] *Id.* para. 5-3 (describing duties of recorder, including arranging for support personnel, recording equipment, administering oaths, and conducting the presentation of evidence).

[57] *Id.* para. 5-1c.

[58] "The purpose for soliciting this information is to provide the commander a basis for a determination regarding your flying status." *Id.* para. B-2b(4).

[59] Cummings v. Dep't of the Navy, 279 F.3d 1051, 1055–58 (D.C. Cir. 2002). This case indirectly arose from a field naval aviator evaluation board, the Navy equivalent of the FEB.

[60] Under AR 15-6, a respondent who declines appointed counsel does not have a right to a different counsel. It should be noted that the "counsel" appointed under AR 15-6 need not be an attorney; however, the counsel rights of AR 600-105 clearly contemplate an attorney being assigned as counsel. *Compare* AR 15-6, *supra* note 53, para. 5-6 (mentioning "counsel" but not referring to "legal counsel"), *with* AR 600-105, *supra* note 5, para. 6-3a (referring to "legal counsel").

[61] AR 15-6, *supra* note 53, para. 3-10b; Captain Michael P. Ryan, *Flying Evaluation Boards: A Primer for Judge Advocates*, ARMY LAW., Aug. 1998, at 43, 44.

[62] AR 600-105, *supra* note 5, paras. 6-1, 6-3.

[63] *Id.* para. 6-3c.

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

D. Legal Review

Following adjournment, the file is sent for a legal review by "the servicing legal advisor."[65] Determining the content of the legal review and who performs the review requires a reconciliation of the two applicable regulations. Army Regulation 600-105 contains but a single sentence addressing legal review: "The findings will be reviewed for legal sufficiency by the servicing legal advisor before being submitted to the appointing authority"[66]; however, AR 15-6 is more detailed and mandates that the legal review address the following: "(1) [w]hether the proceedings comply with legal requirements"; "(2) [w]hat effects any errors would have"; "(3) [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority"; and "(4) [w]hether the recommendations are consistent with the findings."[67]

There is also an apparent conflict between the legal review requirements of the two regulations. Army Regulation 600-105 requires a legal review *before* the report is submitted to the appointing authority; however, AR 15-6 requires the legal review to encompass findings, if any, substituted or added by the appointing authority.[68] If the legal review occurs before submission to the appointing authority, then logically, any action taken by him cannot be part of the review. By the explicit terms of both regulations, AR 600-105 controls and the legal review should occur before submission to the appointing authority.[69]

Read too narrowly, this leads to the unacceptable result that significant actions of the appointing authority are not reviewed. The better practice is to review the report before submitting it to the appointing authority, and then, if he makes revisions, perform a supplemental review. Certainly, the drafters of the regulations did not intend a FEB go forward with only a partial legal review. Further, AR 15-6 directs the appointing authority to obtain a legal review of cases "where the findings and recommendations may result in adverse administrative action . . . or will be relied upon in actions by higher headquarters."[70] Because AR 600-105 does not forbid a supplemental legal review, there is no real conflict.

There is also some ambiguity as to who should perform the legal review. Army Regulation 600-105 requires the legal review to be performed by the "servicing legal advisor," while AR 15-6 names the "servicing JA" as the reviewer.[71] Presumably the "servicing legal advisor" means the legal advisor to the command (i.e., the BJA or SJA) rather than the legal advisor to the board. To have the same attorney who advised the board during the FEB also review its findings is a conflict of interest on its face. Rare is the attorney who can review a proceeding which was guided by his own advice and opine that the process was done incorrectly. The best practice is to forward the file to the SJA and allow him to make arrangements for the legal review.

E. Actions After Legal Review

Strict time limits apply to FEB processing; deviation at any phase must include written justification.[72] No later than thirty days after the board convenes (note: "convenes," not "adjourns"), the president must send the report to the appointing authority.[73] As a practical matter, this time is shorter because legal review must occur before the report goes to the appointing authority. At the same time the report is transmitted to the appointing authority, a copy should be furnished to the respondent or his counsel.[74] The respondent has ten days thereafter to submit a brief to the appointing authority.[75] This is an excellent opportunity for counsel to highlight information favorable to his client and urge a favorable outcome.

The appointing authority is not bound by the findings or recommendations of the board, and has wide discretion in reviewing the case. He may revise, substitute, or add to the findings and recommendations. He may set the entire proceeding aside and start over, regardless of whether the result favors or disfavors the respondent, and he may base

[65] *Id.* para. 6-3d.

[66] *Id.*

[67] AR 15-6, *supra* note 53, para. 2-3b.

[68] *See supra* text accompanying notes 68–69.

[69] AR 15-6, *supra* note 53, para. 1-1 ("In the case of a conflict between the provisions of this regulation . . . and the provisions of the specific directive authorizing the investigation or board, the latter will govern"); AR 600-105, *supra* note 5, para. 6-1f ("When AR 15-6 and this regulation conflict, the guidance found in this regulation will prevail.").

[70] AR 15-6, *supra* note 53, para. 2-3b. Of course, the termination of flying status is an adverse action. Furthermore, the appointing authority is likely to be a brigade commander, AR 600-105, *supra* note 5, at 17 tbl.5-1 (FEB may be appointed by the commander of a brigade, regiment, or detached battalion), and the approving authority is the general court-martial convening authority (GCMCA), *id.* para. 6-1h, so action will likely have to be taken by a higher headquarters as well.

[71] Neither term is defined further. AR 600-105, *supra* note 5, para. 6-3d; AR 15-6, *supra* note 53, para. 2-3b.

[72] AR 600-105, *supra* note 5, para. 6-5.

[73] *Id.* para. 6-5b.

[74] *See* AR 15-6, *supra* note 53, para. 3-19 (requiring the board to provide an additional copy of the report to the appointing authority for each respondent, clearly to be forwarded to the respondent).

[75] AR 600-105, *supra* note 5, para. 6-5c.

her decision on any relevant information, even information that was not before the board.[76]

If the board's action, either in its initial form or after revision by the appointing authority, restores the appellant to aviation service, the appointing authority may take final action; the action is not forwarded further up the chain of command.[77] But, if the appointing authority finds that termination of the respondent's aviation service is appropriate, he must forward the report to the approving authority, typically the GCMCA, within fifteen days.[78] There is not a specified time within which the approving authority must take final action, except that final action must be taken within six months of the date of respondent's initial suspension from aviation service.[79]

At any time after final action, but only if new evidence is discovered, or unexpected circumstances arise, a respondent may appeal an action terminating his aviation status. The appellate authority is the commander of the Army command (ACOM), Army service component command (ASCC), or direct reporting unit (DRU) to which appellant is assigned. If the appellant is not assigned to an ACOM, ASCC, or DRU, the appellate authority is the Commander, U.S. Army Human Resources Command (HRC). Appeals should be transmitted to the appellate authority through the same channels as the original FEB, with the commander at each level making recommendations. Once the appellate authority has acted, no further direct appeals are permitted.[80]

In some cases, a respondent may make a collateral attack on unfavorable board results in federal district court. An officer has no entitlement to assignment to aviation duties and, thus, no property interest in aviation status.[81] Nevertheless, if a FEB terminates an officer's aviation status, and the Army failed to follow any applicable portion of a regulation in the process, federal courts will not hesitate to review the case.[82] The standard of review is "whether an action of a military agency conforms to law or is instead arbitrary, capricious or contrary to statutes and regulations governing that agency."[83]

V. Strategies for Presenting the Case to the Board[84]

A FEB is an administrative, not criminal, proceeding. The objective of a FEB is to ensure the presentation of all information relevant to an individual's qualifications to be an aviator, during fair and impartial proceedings.[85] The intent of this section is not to advocate "putting one over" on the other counsel, but rather exploring options that may assist counsel in presenting the most complete and effective case for their side. Full and fair presentation of all evidence enables the best, most correct decisions. This section focuses primarily on strategies applicable to FEBs wherein one or more underlying reasons for convening is flying-related.

A. Strategies for the Command-Government

When a commander intends to convene a FEB, government counsel should immediately and thoroughly review the facts of the case and determine whether a FEB is appropriate. Do the grounds for convening the FEB fall into one of the categories enumerated in AR 600-105, paragraph 6-1? If not, a FEB is not proper, and the command should explore other adjudication options. Even if the facts fall into an enumerated category, would disposition under another regulation be more appropriate? This scenario is most applicable when a commander seeks to convene a FEB for reasons unrelated to flying. Often, UCMJ or other adverse administrative action (an officer elimination board, for example) are a more efficient way to deal with such transgressions.[86] If a UCMJ proceeding finds the officer guilty of one or more offenses, the government can use

[76] AR 15-6, *supra* note 53, para. 2-3a. Note that if making revisions adverse to the respondent and relying on new information, the respondent must be given notice and a chance to respond. *Id.* para. 1-9d.

[77] AR 600-105, *supra* note 5, para. 6-3f. A copy must, however, be forwarded to Human Resources Command (HRC) to issue orders restoring respondent's aviation service.

[78] *Id.* para. 6-5d. If there is a commander in the chain between the appointing and approving authorities, he serves as the reviewing authority and may take action within the same parameters as the appointing authority. There need not be, and often is not, a reviewing authority; the approving authority serves the dual purpose. *Id.* para. 6-1i.

[79] *Id.* para. 6-5f. An extension may be granted by the aviation service termination authority (commander of HRC for active Army). *Id.* para. 6-5f & at 3 tbl.2-3.

[80] *Id.* para. 6-4. However, within three years from final action in the case, respondent may petition the Army Board for Correction of Military Records (ABCMR) for review of the case. The ABCMR has the power to correct errors in or remove injustices from Army records. *The Army Board for Correction of Military Records*, ARMY REVIEW BOARDS AGENCY, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited May 3, 2013).

[81] Wilson v. Walker, 777 F.2d 427, 429 (8th Cir. 1985).

[82] *See* Woodard v. Marsh, 658 F.2d 989, 992–93 (5th Cir. 1981).

[83] Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979).

[84] The suggested strategies advanced in this section are based on the author's experiences prosecuting and supervising six FEBs while serving as BJA, 10th Combat Aviation Brigade, at Fort Drum, New York, Contingency Operating Base Speicher, Iraq, and Bagram Air Base, Afghanistan, from 2009–2012; reviewing, and processing for GCMCA action, two FEBs while Chief of the Criminal Law Division for 10th Mountain Division (Light Infantry) at Fort Drum, from 2008–2009; and representing respondents at two FEBs in TDS, Fort Wainwright, Alaska from 2006–2008.

[85] AR 600-105, *supra* note 5, para. 6-3.

[86] *See* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (13 Sept. 2011) [hereinafter AR 600-8-24]. Note that there are numerous similarities and overlap between non-flying related reasons to convene a FEB and reasons supporting involuntary separation of an officer.

evidence of the guilty finding at a FEB, rather than essentially trying the underlying offense in front of the FEB. Likewise, if the officer commits an offense which warrants discharge from the Army, and an elimination board involuntarily separates him, a FEB may be unnecessary.[87]

Once the decision is made to proceed to a FEB, government counsel should immediately seek the advice of a competent and trusted pilot on the brigade staff.[88] The brigade standardization instructor pilot (SP) is a good prospect. The SP is in charge of the brigade aircrew standardization and training program.[89] An FEB is necessarily a technical proceeding, and the knowledge and experience of an SP are invaluable to a JA seeking to understand the finer points of a FEB case.

Because the board often delves into intricate and detailed aspects of piloting an aircraft, an area where most JAs are inexperienced, counsel may find it helpful to have the appointing authority appoint an expert as an assistant recorder, to assist with preparing the case and to sit at the counsel table during the FEB to advise on questioning witnesses.

At the outset, such an expert can assist counsel with understanding the nature of the respondent's alleged deficiencies. Flying deficiencies are classified into two broad categories: aircraft-specific and general. Most flying regulations of general applicability are found in AR 95-1 and other publications referenced therein; regulations and procedures specific to particular aircraft models are found primarily in the aircrew training manual (ATM) for the aircraft. In official Army nomenclature, these are Training Circulars 1-211 through 1-272. If the violation(s) alleged are of a general nature, the board members, by virtue of being pilots themselves, will probably not require expert testimony in order to understand the deficiency and its significance; however, it is unlikely that all board members will have a deep familiarity with respondent's aircraft model. If a respondent is alleged to have aircraft-specific deficiencies, counsel, in close coordination with the assistant recorder, must decide whether the testimony of an expert on that airframe would benefit the board in understanding the case.

After determining a plan of action for the case, counsel should then, with the guidance of the advisor, begin interviewing witnesses and reviewing relevant documents. The obvious first choices are the respondent's company and battalion[90] commanders, to get their overall impression of the respondent as both a Soldier and a pilot. From there, it is often helpful to interview as many pilots as possible who have flown with the respondent. If interviews identify substandard conduct, interview the other pilot(s) present as well as any flight crew. If there were other aircraft on the mission, their pilots may also have relevant information. Flight logs are available from the company. Counsel should also speak with the company and battalion SP. If the respondent flies an OH-58 ("Kiowa") or AH-64 ("Apache"), and any alleged deficiencies relate to gunnery, a visit to the company and battalion Master Gunners might prove beneficial to understanding the issues involved. Appendix C contains suggested interview questions.

After reviewing relevant documents and interviewing witnesses, counsel should get a sense of the respondent's qualities. Asking, "Is this [the respondent] someone I would trust to pilot an aircraft in which I was a passenger?" may help distill the case to its essence; it is not unreasonable to conclude that the board members will be asking themselves the same question, as well as considering whether they would select respondent to be a co-pilot in an aircraft they were piloting. Asking potential witnesses these very questions may elicit useful insights.

While documents and witnesses provide a wealth of information, some of that information may not be relevant or useful. For example, some witnesses may express negative personal opinions of the respondent. Government counsel should not allow the proceeding to deteriorate into a personal attack on the respondent. Remember, winning the case at a FEB does not require the government to portray the respondent as bad, immoral, unethical, or criminal. Many upstanding Soldiers and officers would make lousy pilots, and there is no shame in this fact. The focus of the board is on the respondent's potential for continued aviation service, nothing more, and counsel should keep that purpose foremost in their thought process while preparing and presenting the government case. The closing argument to the board should be concise and highlight the evidence and testimony presented which weighs in favor of termination of aviation service.

[87] There may be occasions where the respondent's transgression is of a nature, or so egregious, that principle warrants the command convening a FEB anyway, in an attempt to prevent the officer from wearing the aviation badge. Such offenses may include incidents of violence (homicide, manslaughter, armed robbery, etc.) or extreme depravity (rape, child molestation, etc.), for example.

[88] Ryan, *supra* note 61, at 45.

[89] TC 3-04.11, *supra* note 18, para. 1-34; AR 95-1, *supra* note 23, para. 4-26.

[90] In the air cavalry, the company-size element is referred to as "troop," while the battalion-equivalent is "squadron."

B. Strategies for the Pilot-Respondent

The defense counsel may employ many of the same strategies outlined for the government, albeit with an eye toward securing evidence and witnesses adverse to the government's position and favorable to their own. Therefore, defense counsel's first task should be to obtain the services of a consultant of roughly equal qualifications to those of the government's consultant. With all haste, draft a memorandum to the appointing authority requesting appointment of a qualified consultant to assist the defense. It may be tempting to rely on the advice of the client-respondent, rather than going to the trouble of securing a consultant. Counsel should avoid this temptation; the respondent is a client because he is allegedly unqualified as an aviator. Counsel should be skeptical of any expert advice he renders, and press the request for appointment of a consultant.[91]

As soon as possible, arrange a meeting with the appointed consultant to review respondent's file. It may be helpful to explain to the consultant up front that it is not important whether they agree with respondent's position, but rather, that they have been appointed to assist the counsel in understanding the case and presenting relevant evidence and testimony at the hearing.

If the command refuses to grant the consultant, counsel should get expert opinions anyway by talking to experienced pilots[92] who were *not* involved in the incidents in question, preferably not from the respondent's battalion. Obviously counsel may not reveal confidential facts to such persons, but the "public" facts of the case are likely to be substantial, and such an "outside" opinion can give the defense a more realistic assessment of the client's case than the client's own opinions.

While understanding the issues of the case is imperative, counsel must also know the members comprising the board. Counsel may determine that one or more of the board members have flown with the respondent in the past. If this is the case, the member(s) may be challenged for cause as not impartial.[93] Counsel should tread carefully in attempting to determine whether the member may be impartial, and, if so, the member's actual opinion of the respondent's potential for continued aviation service. Consult the client before lodging a challenge; he may have relevant information. The best way to challenge a member is to raise the issue with the appointing authority, rather than waiting until the board convenes and bringing it there. Therefore, it is important to determine as early as possible whether there may be cause to challenge any members.

When preparing and presenting the case before the board, counsel should pay close attention to the guidance in AR 600-105, paragraph 6-3. Is the basis for convening the board a single incident? Isolated incidents should not normally form the basis for terminating aviation status.[94] Even if it appears the respondent is a poor aviator, the board must consider not just his current status but also his potential for improvement with additional training and flying experience.[95] Present evidence and testimony which speaks to these points. Review the respondent's flight records. Has he been given adequate flying time? As with any skill, maintaining aviation proficiency requires periodic and regular practice. If the client's flying opportunities have been sporadic, argue that he has potential for improvement and therefore should be given additional training and flight time.

The government may produce pilot-witnesses who testify they would not fly with respondent. If possible, find pilots who would fly with respondent, call them to testify, and explore the reasons behind this trust. When questioning potential witnesses, the suggestions in the government section, above, are equally applicable, as are the sample questions in Appendix C. The decision whether to call the respondent to testify in his own behalf is crucial. Counsel should carefully weigh any potential for incrimination against the board's likely desire to hear the respondent tell, in his own words, why he should be allowed to continue to fly.

In addition to presenting the substantive case, counsel must pay close attention to procedure. Because a FEB is not a criminal proceeding, and the respondent is not in danger of being deprived of life or liberty, procedural protections are not as strong. Army Regulation 15-6, paragraph 2-3, identifies in detail various errors that may occur during a board proceeding, and how they may be remedied; however, even substantial errors—that is, those having a material, adverse impact on the substantial rights of the respondent—are waived if not objected to at the appropriate time. In a FEB, there are no appellate courts to review the proceedings and grant relief for errors which prejudiced the respondent; the only option available to the defense counsel may be to raise the issue with the appointing authority and attempt to persuade him to grant relief. Thus, the defense should not raise objections just to "preserve the error"—object with an eye to getting relief right there at the board, or do not object at all. An objection missed is likely waived; it is therefore critical to raise any objections on the record.[96] If defense

[91] Because the services of a knowledgeable consultant are so critical to fully understanding the case at a FEB, a proposed revision to AR 600-105, codifying the requirement for a defense consultant, is attached at Appendix A. When seeking an appointment of a defense consultant, counsel may use Appendix B as a sample memo effecting this appointment.

[92] Ryan, *supra* note 61, at 45.

[93] AR 15-6, *supra* note 53, paras. 3-3, 5-7a.

[94] AR 600-105, *supra* note 5, para. 6-3d(1).

[95] *Id.* para. 6-3d(2).

counsel anticipates "objectionable" conduct by the government, he should bring copies of the relevant pages of ARs 15-6 and 600-105 with the relevant rules highlighted, and not rely on the legal advisor's "on the spot" memory.

Finally, the defense counsel should remember that, although a FEB is not a separation board, it may have the same effective result. If a pilot's aviation status is terminated, it may be difficult for him to reclassify to a new military occupation specialty (MOS). Warrant Officers, because they are specialists in their field, may well find it impossible. An officer who becomes unqualified in his MOS and cannot obtain a new one is subject to administrative separation on several grounds.[97] This can be a strong argument for defense counsel to make to the board—it makes them aware that their decision may not just ground the officer, but end his career.

VI. Conclusion

Because most JAs are unfamiliar with the FEB, it is especially important to adequately prepare for this proceeding. Fully understanding the issues presented, the procedures followed, and strategies by which to present their side's case in its most favorable light is essential to competent and zealous representation, and is not difficult.

Becoming familiar with the applicable sections of AR 600-105 and AR 15-6, obtaining the assistance of a qualified expert, and thoroughly reviewing all evidence will prepare any JA to be a competent advocate at a FEB.

[96] AR 15-6, *supra* note 53, para. 2-3b(4). A list of potential objections is attached at Appendix D.

[97] Examples include "[A]ctions that result in the loss of a . . . professional license . . . or certification that is . . . necessary for the performance of one's military duties"; "Failure of an officer to absorb technical proficiency required for grade and competitive category"; and "[A]ctions by a warrant officer resulting in a loss of special qualifications (such as . . . loss of flying status) that directly or indirectly precludes a warrant officer from performing in MOS and is necessary for the performance of those duties." AR 600-8-24, *supra* note 86, para. 4-2.

Appendix A

Recommended Revision to AR 600-105

6-3. Procedures

Insert the text below as new subsection (b), renumber existing subsection (b) as (c), and renumber all following subsections accordingly.

b. Expert Assistance. Upon request of counsel for respondent, the appointing authority shall designate an officer currently qualified as a standardization instructor pilot (SP) to be a confidential consultant for the respondent and respondent's defense counsel. The consultant shall be designated as a member of the respondent's defense team, cloaked with the attorney-client privilege under the provisions of Military Rule of Evidence (MRE) 502, and instructed that all communications with the respondent, defense counsel, and other members of the defense team must be kept confidential and not disclosed to outside parties or the government. If no qualified SP is available, an instructor pilot (IP), qualified on the same primary aircraft as respondent and holding the rank of CW3 or higher, may be appointed. Assistance rendered by the consultant shall include, but not be limited to, the following:

(1) Advising the respondent and defense counsel as to the strength of the government case.
(2) Suggesting questions to be asked of government witnesses.
(3) Opining as to the evidence to be offered by the defense and arguments to be made.
(4) Assisting in general understanding of the aviation issues in the case.
(5) Unless specifically authorized by the appointing authority, the duties of the consultant should not ordinarily include testifying at any session of the board.

Appendix B

Sample Appointment Memo for Consultant

DEPARTMENT OF THE ARMY
10TH COMBAT AVIATION BRIGADE
10TH MOUNTAIN DIVISION (LIGHT INFANTRY)
FORT DRUM, NEW YORK 13602-5000

REPLY TO
ATTENTION OF:

AFDR- BDA 25 January 2013

MEMORANDUM FOR CW4 Charles E. Hughes, Task Force Phoenix, 10th Combat Aviation Brigade, Fort Drum, NY 13602

SUBJECT: Appointment to Defense Team as Expert Consultant In the Flying Evaluation Board of CW2 Abe Fortas

1. You are appointed to assist the defense team in the above-referenced case.

2. Your assistance shall include, but not be limited to, advising the respondent and his counsel as to the strength of the government case, suggesting questions to be asked of government witnesses, opining as to the evidence to be offered by the defense and arguments to be made, and assisting in general understanding of the aviation issues in this case.

3. Unless further directed by separate memorandum, your duties do not include testifying at any session of the board.

4. Defense counsel shall, to the greatest extent practicable, make due consideration for and deference to your normal duties when utilizing your services in conjunction with this case.

5. You are designated as a member of the defense team and are cloaked with the attorney-client privilege under the provisions of Military Rule of Evidence (M.R.E.) 502. Your communications with the accused, defense counsel, and other members of the defense team must be kept confidential and not disclosed to outside parties or the government.

6. POC for the defense team and for this memorandum is CPT John M. Harlan, lead defense counsel, at DSN 555-5555.

ROGER B. TANEY
COL, AV
Commanding

Appendix C

Suggested Questions for Witness Interviews

Note: The following questions are intended primarily to start a dialog and frame conversations with relevant witnesses, not as an exhaustive repository. Counsel should ask follow-up questions as appropriate. Unless there is reason to believe the witness would somehow be stifled by his presence, the appointed consultant should attend witness interviews whenever possible, to assist with appropriate follow-up questions.

Pilots Who Have Flown with Respondent

1. Describe the mission(s) on which you have flown with [Respondent]. (Dates, times, places, etc.)

2. Have you ever witnessed [Respondent] [commit an unsafe act, violate flying regulations, maneuver the aircraft unskillfully, etc.—tailor question to deficiencies alleged] while flying an aircraft?

   a. Describe the incident(s).

   b. What should [Respondent] have done in the situation(s)?

   c. What dangers did the incident pose?

3. What is your opinion of [Respondent]'s flying ability?

   a. (If poor) Do you believe he has the ability to improve with additional training and/or experience? Why or why not?

   b. Would you willingly fly with [Respondent] as your co-pilot? Why or why not?

   c. Would you feel safe as a passenger in an aircraft piloted by [Respondent]? Why or why not?

Standardization Instructor Pilot

1. Describe the nature and significance of [Respondent]'s alleged transgression(s).

2. Are [Respondent]'s acts prohibited by regulation or contrary to recommendations in a TM, FM, TC, etc.? How so? Please show me the applicable provision(s) violated.

3. Based on a review of [Respondent]'s flight records, has he gotten sufficient flying time to develop and maintain his flying skills? (Note: This question is especially important if respondent has failed RL progression.)

4. Did [Respondent]'s acts pose a danger to life or property? How so?

5. Do you believe [Respondent] would benefit from additional training and/or experience?

Company/Troop Commander

1. How many flying hours does [Respondent] have in the last month and year?

2. May I see the log book?

3. How does [Respondent]'s flying hours compare with other pilots in your [Company/Troop]?

4. (If [Respondent] has significantly fewer hours than other pilots) Why does [Respondent] have fewer hours than other pilots in your command?

5. Has [Respondent] been in any trouble or involved in any incidents not recorded? Have you noticed any changes in [Respondent]'s demeanor, attitude, or behavior recently?

Master Gunner (If gunnery deficiency is alleged)

1. Describe the nature and significance of [Respondent]'s alleged transgression(s).

2. In your opinion, would [Respondent] improve to a satisfactory level if given additional gunnery training or practice?

3. (If respondent would not improve with additional gunnery training or practice) In your opinion, does [Respondent] have the potential to succeed as a pilot if he re-trains to fly a utility or cargo helicopter as his primary aircraft?

Appendix D

Potential Defense Objections at a FEB

Note: The following list is not exhaustive. Counsel should be constantly aware of, and raise a timely objection to, any issue which potentially improperly prejudices his client.

1. Government seeks to introduce evidence that is not relevant.
2. Government seeks to introduce evidence which was the subject of a privileged conversation (e.g., attorney-client, husband-wife, or communication with clergy).
3. Government seeks to introduce evidence of the results, taking, or refusal of a polygraph (lie detector) test without consent of the person involved in such test.
4. Board composition does not comply with requirements of AR 15-6 or AR 600-105.
5. Respondent's incriminating statement, obtained by unlawful coercion or inducement likely to affect its truthfulness, is sought to be introduced.
6. Government seeks to introduce evidence which is the fruit of an unlawful search.
7. Respondent has been denied his right to counsel (including a constructive denial, if the defense counsel was not given adequate time to prepare for the hearing).
8. A potential witness (other than an expert) is allowed to sit in on the proceeding in advance of giving testimony.
9. Board seeks to exclude respondent or counsel while receiving advice from the legal advisor.
10. Board seeks to convene without a quorum.
11. Board, after convening, seeks to seat an alternate member without ensuring he is thoroughly familiar with all proceedings up to that point. (*See* AR 15-6, para. 5-2).
12. Failure to grant a reasonable extension of time in order to allow for adequate defense preparation.
13. Challenge to the impartiality of any board member(s).
14. Failure to allow or provide for the testimony of defense witness(es).
15. Exclusion of, or failure to assist in securing, documentary or other evidence.
16. Attempt to exclude respondent from any open session of the board (unless respondent lacks proper security clearance).
17. Recommendations exceed the limits of AR 600-105, para. 6-3.
18. Proceeding violates other procedural requirements of AR 15-6 or AR 600-105.

The Holocaust by Bullets: A Priest's Journey to Uncover the Truth Behind the Murder of 1.5 Million Jews[1]

Reviewed by *Major Travis W. Elms*[*]

Everyone seemed to be ignorant of—or eager to hide—the very existence of the 10,000 Jews who had been shot in this little town back in 1942. Ten thousand people shot cannot go unnoticed. I come from a small village and I know if one person had been shot there, everyone would remember it—imagine 10,000![2]

I. Introduction

Violence showcased on television and the Internet with gripping, up-to-the-minute, raw footage is evidence that the human toll in a conflict can be vast and deplorable. With modern technology spanning most of the globe, media outlets and novice reporters routinely occupy a space in our smartphones and flat-screen televisions, providing us with vivid images and reports. Given the innovative and transformative role technology and journalism play in memorializing these events in our psyche and data servers, it seems logical to conclude that the human toll in current conflicts is being accurately and, perhaps more importantly, fully recorded for future generations.

Father Patrick Desbois, in his 2008 *Holocaust by Bullets*, brings us back, however, to the reality that deplorable human tolls can still be forgotten or hidden away, exposing the virtually unknown murder of over 1.5 million Jews in Eastern Europe during World War II. His work serves as a reminder that evidence of mass atrocities can quietly disappear into an abyss and never see the annals of history, despite the fact that a conflict is well-documented and widely remembered.

II. The Other Holocaust: Unexpected Discovery

For most people, the Holocaust is defined by the death of millions of Jews who were exterminated by Nazi Germany in the 1940s, most dying in industrialized killing centers by way of large gas chambers and human ovens.[3] Astonishing is Desbois's discovery that over 1.5 million Jews were murdered during that same time at Nazi gunpoint in Eastern Europe and, in large part, written history is void of these acts.[4] Perhaps more obscure is the reality that, while the Germans ordered the executions and physically pulled the trigger, ordinary citizens of all ages, many of whom were friends of the Jewish victims, participated in or witnessed this secret extermination of entire Jewish communities.[5]

This profoundly disturbing reality was unearthed by the most unsuspecting of persons, a Catholic priest in search of what his grandfather had witnessed in World War II in war-torn Rawa-Ruska, Ukraine.[6] An unsuspecting Christopher Columbus, Father Desbois began his quest for one answer to a very specific question but discovered a land bubbling with answers that had been a secret for over sixty years—unmarked mass graves of Jews buried in Rawa-Ruska.[7] While he never found the answer entirely, his connection to the Holocaust spurred an "irrevocable decision to search" for answers to larger questions about humanity,[8] provided closure to a generation of Jewish families who lost their loved ones,[9] and impacted research around the globe.[10]

III. Opening Act

For many readers, the foreword of a book is either read swiftly, often out of a sense of obligation, and quickly forgotten or simply skipped to get the reader to the real reason he selected the book, the story. This book is an exception. The foreword in this book is riveting, enlightening, and informative; it sets the tone for the remainder of the book. Also, unless the reader possesses an extensive working knowledge of these events and the Holocaust in general, it is an essential reading for a complete understanding of the work.[11] In fact, it should be read again upon completion of the book because it succinctly ties all of the book's information and historical references together, something Desbois does little of. Paul Shapiro, Director, Center for Advance Holocaust Studies, U.S. Holocaust Memorial Museum, Washington, D.C., expertly proclaims the value and significance Desbois's book represents to the

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[1] FATHER PATRICK DESBOIS, THE HOLOCAUST BY BULLETS: A PRIEST'S JOURNEY TO UNCOVER THE TRUTH BEHIND THE MURDER OF 1.5 MILLION JEWS (2008).

[2] *Id.* at 29.

[3] *Id.* at vii.

[4] *Id*. at viii.

[5] *See, e.g.*, *id*. at vii, 174.

[6] *Id.* at 8 (recalling a break in his grandfather's silence about Rawa-Ruska, stating: "For us, the camp was difficult; there was nothing to eat, we had no water, we ate grass, dandelions. But it was worse for the others!").

[7] *Id*. at 35.

[8] *Id*. at 15.

[9] *Id*. at 101.

[10] *Id*. at xii.

[11] Kyle Jantzen, Book Review, *Uncovering the Holocaust in Ukraine*, H-NET (July 2009), http://www.h-net.org/reviews/showrev.php?id=24952 (reviewing DESBOIS, *supra* note 1).

Jewish community and the world; something Desbois, a seemingly humble and dutiful Catholic priest, would likely never overtly state or covertly imply. The reader is put on notice that a different, but equally horrifying, version of the Holocaust awaits when Shapiro summarizes the murders of 1.5 million Jews.

> These victims—mostly women, children, and old people—were taken from their homes, on foot or by cart or by truck, to locations just outside the towns and villages where they lived, if even that far. There they were shot, usually the same day or hour, at close range, face to face or in the back, one human being killing another, and all in the presence of local residents, the victims' non-Jewish neighbors, even friends.[12]

He further details the rigor applied and the accuracy demanded by Desbois in the crafting of this account. Simply stated, the foreword reaches out to the reader and provides a gripping preview of what is looming inside.

IV. Facts and Diligence

You will not find pithy quotes or complex words here: just a fair mix of personal stories from the author and historical context that are artistically welded to the core structure of the book—the cold, hard facts. If you are desperately searching for voluminous paragraphs requiring multiple readings to glean the pearl of wisdom, look elsewhere. But if your aim is a book based on solid research, coupled with a passion for the truth and some outrageous but dutifully researched facts, you are in the right place. Desbois researched millions of pages of archives, traveled to all ends of Eastern Europe to question emotionally scarred Ukrainians about the horrors they had experienced, and ultimately produced an enjoyable read—a feat in and of itself. Moreover, Desbois's humble and workmanlike prose proves to be effective: the result is a simple yet captivating story.

If your inclination is not World War II history or you have concerns that the subject matter is not interesting enough to keep your attention, fear not. The book is certainly not an autobiography or a dull non-fiction. It is, however, a well written, methodical piece that efficiently and effortlessly guides the reader through an incredibly complex period in World War II history. The book is a quick read at 220 pages of text, sixteen pages of pictures that breathe life into the many names and scenes, and three pages of regional maps detailing the Jewish population and the Nazi Germany's invasion of the Soviet Union. The pictures and maps are neither a necessity nor a distraction, but will likely appeal to most readers in some regard. Finally, if you like to peruse the table of contents before beginning, you will note that the book's organizational structure is difficult to decipher, but such difficulty is ultimately forgotten once the reader begins the story.

Those who are concerned that their World War II historical knowledge base may not be sufficient to undertake such a book can take solace in the fact that Desbois presents a quaint mixture of simple geography and history to sufficiently orient the reader. The foreword and narrative of the story combine to provide the reader with sufficient information to grasp the material. The descriptions of the people, landscape, and emotion are well detailed,[13] preserving for the reader an opportunity to climb into the story and live for a moment in 1942.

V. Colloquy and Methodology

For those who may question the truth of the statements rendered or facts espoused, or feel the previously unknown or seemingly unfathomable atrocities appear to have sprung to life at the tip of Desbois's pen, the veracity of the almost unbelievable eyewitness accounts of the murders is bolstered by his subsequent verification of key facts extracted from other, unrelated sources.[14] These colloquies open a secret societal door, bringing to light the dark and unpalatable truth; many Ukrainian citizens witnessed and participated in the murder of over 1.5 million Jews. Desbois discovered many of these people are alive and willing to recite, some for the first time, the painful memories.

The stories are brought to life by the face-to-face interviews with eyewitnesses, most of which are not simply summarized, but published in a raw question and answer format. Desbois provides a mixture of several detailed question and answer transcript excerpts that add a sense of credibility to the eyewitness accounts. While at first this practice interrupts the pace of the book and has a tendency to leave the reader wondering why the excerpts, which pale in comparison to the facts developed to that point, were provided at all, the question and answer sessions do become more interesting and relevant as the book progresses. The colloquies ultimately add an element of realism to the emotion in the answers that could be fairly summarized.[15] On more than one occasion, it felt possible to see the pain on the face of an elderly Ukrainian woman recalling her worst childhood memories, those of her Jewish schoolmates being marched outside of town, stripped naked, robbed of their jewels, slaughtered, and pushed into a pit of bleeding,

[12] Paul A. Shapiro, *Foreword* to DESBOIS, *supra* note 1, at vii–viii.

[13] *See, e.g.*, DESBOIS, *supra* note 1, at 68–71, 88–94, 156–59.

[14] *Id*. at 173.

[15] *Id*. at 90, 198.

moaning human waste.[16] This practice legitimizes the work significantly and adds a layer of personality to each witness, all of which aids the reader in truly gaining a perspective of the acts detailed. Whether by design or happenstance, this practice systematically dispels any doubts of the veracity of the facts presented.

These interviews, coupled with the millions of documents his team reviewed to verify the accuracy of these stories,[17] leave the world to wonder how a generation of Jews could vanish from the Earth without a trace. Desbois distills years of work into a manageable and enjoyable written history.[18] The facts uncovered are placed neatly into context, the underlying and overarching history is thoroughly explained, but not cumbersome, and the processes used by the author are detailed and meticulous. While the book is very ably written, Father Desbois's genius is not, however, in his literary gift, but rather in his tremendous passion for the truth, unwavering commitment to revealing the human toll to protect future generations,[19] and his incredible dedication to preparation.[20] It is obvious that many of the eyewitnesses interviewed had survived over sixty years without telling their story and could, without any reservation, have lived out their remaining days without revealing the horror they witnessed or participated in.[21] Many people refused to speak out of a lingering fear of persecution or prosecution.[22] For them, it appeared easier to deny any knowledge and move on with their lives,[23] but Desbois's preparation left the villagers with little choice but to tell their respective stories once confronted with facts about their knowledge of the atrocities.[24]

Desbois's decision to detail his childhood may not appeal to all readers, but does provide the reader with a rather interesting, although lengthy, description of his path to priesthood.[25] Given the premise for the research was a journey to find answers about his grandfather and not an academic research project, these facts provide a better understanding of how Desbois evolved as a man.[26] This serves as a benefit, not a detriment or distraction. It was also rather enjoyable to read about the author, now a middle-aged Catholic priest, searching to find his way as a young man, making a pass at a young woman who, in the process of rebuffing his advances, set him on a path to God and ultimately priesthood. Desbois's background aids the reader in gaining a better understanding of the author's purpose, experience level, and background. It also serves to amplify the fact that Desbois is a novice investigator who, like many of his readers, will empathize with his reaction to the gruesome details he discovers.[27]

VI. The Requisitioned

Uncovering the secret execution of 1.5 million Jews would seem to be a significant discovery in its own right. While these deaths at the hands of Nazi soldiers is tragic and masked by over sixty years of secrecy, the unimaginable human dynamic discovered by Desbois is the plight of the requisitioned Ukrainian citizens—men, women, and children—who were often initially detailed at gunpoint by Nazi soldiers, but ultimately walked a fine line between simply being requisitioned and being guilty of murder themselves.[28] Their participation was essential to the death of so many Jews.

> There were those who mixed lime with the blood of Jews; those who tied the Jews' clothes up in bundles and loaded them onto carts; those who patched up the clothes; those who prepared food for the oppressors during the executions; those who drove carts full of hemp or sunflowers with which to burn the bodies; . . . those who tore out the Jews' gold teeth while they awaited their execution . . . ; those who transported Jews in their carts from villages to the pits; . . . those who packed down the bodies of Jews in the pits and covered them with sand between shootings; those who surrounded the groups of Jews who arrived at the pits until all the families were shot; those who guarded the Jews . . . from escaping; and those who brought ash to clean up the ground after the executions.[29]

[16] *See*, *e.g.*, *id*. at 96, 97, 155, 177, 200.

[17] *Id*. at x.

[18] *See* Jantzen, *supra* note 11.

[19] Randy Herschraft, *Priest Documents 'Holocaust by Bullets' in Eastern Europe*, WASH. TIMES, Feb. 2, 2009, http://www.washingtontimes.com/news/2009/feb/2/priest-documents-holocaust-by-bullets-in-eastern-e/?page=all#ixzz25WRL5sk9.

[20] DESBOIS, *supra* note 1, at 105 ("Thorough and competent archival research was vital for my work. One cannot simply saunter nonchalantly into a Ukrainian farm without having first carried out solid historical research."); *see also id*. at 105, 175, 177.

[21] *Id*. at 74.

[22] *Id*. at 206.

[23] *Id*. at 206–07.

[24] *Id*. at 166.

[25] Jantzen, *supra* note 11.

[26] Jake Turk, Book Review, *The Holocaust by Bullets: A Priest's Journey to Uncover the Truth Behind the Murder of 1.5 Million Jews*, UNIVERSAL BOOK REVIEWS (Mar. 16, 2009), http://universalbookreviews.com?p=118.

[27] DESBOIS, *supra* note 1, at 109 (describing the horror confronted during the interviews) ("We had to calm ourselves down, catch our breath, drag ourselves out of the narrative, and detach ourselves from the obscenities performed on women and children.").

[28] *Id*. at 96.

[29] *Id*. at 97.

Despite their inextricable ties to these murders, Desbois managed to not only locate many of those requisitioned, but also to secure their gut-wrenching statements.[30] Desbois's persistence provides an insight into the last moments of these victims before being shot and exhumes the memory of countless innocent Jews killed at the hands of murderers.[31] With history void of the term "requisitioned,"[32] Desbois sufficiently exposes the brutal reality that ordinary citizens played such an integral role in the death of their Jewish friends and neighbors.

VII. Failure to Report

Avoided almost entirely by Desbois was one unique fact: the rampant sexual abuse of young Jewish girls by the Nazi soldiers.[33] Several times the witnesses alluded to, or directly referenced, Nazi soldiers taking attractive, young, naked girls, who were awaiting execution, and temporarily sparing them from death.[34] They lived with the German soldiers, served as sex objects, and were described as later becoming pregnant and being killed. Notably, Desbois never asked a follow-up question when a witness posited these incidents, nor did he asked for greater clarification or even seem interested in exploring the sexual abuse when the witnesses mentioned the abuse spontaneously.[35] These facts are simply cast into the background.

Desbois's failure to analyze the sexual abuse signals a missed opportunity. The references were not excluded from the book entirely so it is fair to assume Desbois wanted to reveal the sexual abuse. All evidence suggests he chose not to ask follow-up questions about sexual abuse to the witnesses.[36] Hidden is the human dynamic wherein the Nazi soldiers were unable, or unwilling, to carry out the executions of the Jewish girls they had impregnated, instead requisitioning other people to kill them. [37] Ironically, despite committing callous murders of Jewish men, women, and children without any regard for their status as humans, they were unable or unwilling themselves to kill the girls they had become intimate with. This fact certainly opens a door to the psyche of Nazi soldiers, raising the potential that Nazi soldiers could not kill women bearing their children: it signals the potential effect intimacy has on humanity and exposes a weakness of these hardened executioners. Failure to seize, exploit, and further examine and investigate these facts in the heat of an interview appears to be a misstep by Desbois. Deciding to abandon the discussion altogether is an epic failure of Desbois to satisfy his main purpose for creating the work.

VIII. Conclusion

Father Desbois's *Holocaust By Bullets* is a must-read for anyone with knowledge of the Holocaust, but military leaders could benefit as well. The book provides a better appreciation for the harsh realities resulting from armed conflicts. Understanding that the true human toll is critical to a leader's development, regardless of experience, and recognizing that great atrocities can go unnoticed and unreported, regardless of the magnitude of the conflict or the technology available. This account of the Holocaust reminds our leaders to not only protect human rights in the midst of the conflict, but to strive to preserve an accurate portrayal of history for the future.

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[30] *Id.* at 74.

[31] *Id.* at 82.

[32] *Id.* at 104.

[33] *Id.* at 168 (stating many witnesses recount Jewish women being used as sex slaves by the German soldiers and later killed, but noting his archival research failed to confirm these accounts and acknowledging this area constitutes a chapter that has barely been opened).

[34] *See, e.g.*, *id.* at 126, 167, 168, 182, 185.

[35] *Id.* at 126.

[36] *Id.*

[37] *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 3307.

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

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

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

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

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

2. 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. 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

NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968

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

4. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, students must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

5. 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 (formerly 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. Training Year (TY) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
31 May – 2 Jun 13	Northeast Region 4th LOD Focus: Client Services	Philadelphia, PA	LTC Leonard Jones ltcleonardjones@gmail.com SSG James Griffin james.griffin15@usar.army.mil CWO Chris Reyes chris.reyes@usar.army.mil
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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 Vista™ 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 or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

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

4. The Army Law Library Service

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

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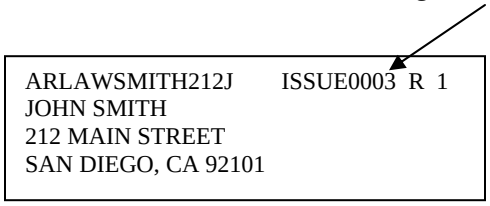

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