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Articles

Notes from the Field

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Late Is Late: Should the GAO Continue to Employ GAO Created Exceptions to the FAR?

Major Robert E. Samuelsen II[*]

I. Introduction

Recently, the U.S. Court of Federal Claims (COFC) refused to follow well-established Government Accountability Office (GAO) precedent regarding the "late-is-late" rule.[1] This article explores the history and rationale behind a GAO-related exception to the late-is-late rule from a procurement perspective. The article contrasts the GAO's view with the COFC's opinion that late is late, without exception. After examining the two views, the article briefly discusses the likely effect of the COFC's position on contracting officers in the field.

The article concludes that the GAO and the COFC decisions reflect institutional differences: GAO focused its efforts on meeting the spirit of the Competition in Contracting Act of 1984's (CICA) enhanced competition mandate,[2] while the COFC adopted a plain-meaning judicial interpretation of the Federal Acquisition Regulation (FAR).[3] Ultimately, the results of the COFC's recent decision in *Geo-Seis Helicopters, Inc. v. United States*[4] may transform GAO's decisions and internal policies, not only in competitive negotiations, but across the spectrum of procurement statutes and regulations. An isolated award of attorneys' fees and costs against a federal agency for failing to follow the plain language of the FAR is one thing; however, multiple awards against the Government will likely draw the Comptroller General closer to COFC's approach.

II. *Seis Helicopters, Inc. v. United States*

In 2005, the Military Sealift Command (MSC) issued a solicitation to procure three two-helicopter detachments to provide vertical replenishment services in support of U.S. Navy operations in the Pacific and Indian Oceans and adjacent areas.[5] The MSC solicited for a firm, fixed-price contract[6] and received six proposals that were evaluated by a source selection evaluation board (SSEB).[7] Geo-Seis Helicopters, Presidential Airways, Inc., and four other companies submitted timely proposals, but the agency deemed the initial proposals to be unsatisfactory.[8] After further discussions with the bidders, the agency set 22 March 2006 at 2:00 p.m. as the date and time for receipt of final proposal revisions.[9]

Revisions by several offerors were timely received on 22 March, but Presidential Airways' proposal arrived thirty minutes late.[10] Earlier in the day, however, Presidential Airways e-mailed the MSC's contracting officer and contract specialist stating that weather delays might delay its revised submission.[11] The contracting officer amended the solicitation by extending the closing date and time to 23 March at 11:00 a.m., although she did not issue an amendment to the offerors

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[1] *See* Geo-Seis Helicopters, Inc. v. United States (*Geo-Seis Helicopters, Inc.*), 77 Fed. Cl. 633, 639–40 (2007).

[2] 31 U.S.C. §§ 3551–3556 (2006).

[3] GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Nov. 2009) [hereinafter FAR].

[4] *Geo-Seis Helicopters, Inc*., 77 Fed. Cl. 633.

[5] *Id.* at 635–36.

[6] *Id.* at 636.

[7] Geo-Seis Helicopters, Inc., Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, 2007 CPD ¶ 135, at 3.

[8] *Geo-Seis Helicopters, Inc*., 77 Fed. Cl. at 636.

[9] *Id.*

[10] *Id.* at 637.

[11] *Id.*

extending the closing date and time until after the original date and time for receipt.[12] Presidential Airways' proposal was accepted in light of the extension.[13]

In July 2006, the MSC concluded technical evaluations of the proposals, and on 4 August, the MSC announced that the date and time to receive a second round of revised submissions would be 15 August at 2:00 p.m.[14] As before, Presidential Airways' revised proposal arrived thirty minutes late, and as before, it contacted the agency stating that bad weather might delay delivery of its revision.[15] After the closing time for receipt of proposals, the contracting officer amended the solicitation *nunc pro tunc*[16] to extend the closing time to 4:00 p.m., notifying Geo-Seis Helicopters and Presidential Airways by e-mail at 3:29 p.m. and 3:31 p.m, respectively.[17] Presidential Airways' proposal arrived at 2:30 p.m.[18] The agency conducted a best value analysis of the second final revised proposals (FRPs), and while Geo-Seis Helicopters' past performance rating was higher, it could not overcome Presidential Airways' better price.[19] On 2 November 2006, the MSC awarded the contract to Presidential Airways.[20]

On 27 November 2006, Geo-Seis Helicopters challenged the agency's award by filing a bid protest with the GAO[21] alleging that the contracting officer's extension of the closing times was "improper and that MSC instead should have rejected the FRPs and eliminated Presidential from the competition."[22] The GAO denied Geo-Seis Helicopters' protest on 5 March 2007 citing a longstanding GAO-created exception to the late-is-late rule:[23] "the agency's motivation in extending the deadline was to enhance competition by keeping Presidential's proposal in the competition."[24] In response, Geo-Seis Helicopters brought a protest action in the U.S. Court of Federal Claims on 9 March 2007.[25] Geo-Seis Helicopters contended that the agency disregarded the Federal Acquisition Regulation's (FAR) late-is-late rule "by accepting Presidential's untimely submissions of its . . . proposals and that the Sealift Command had no authority to extend the deadlines."[26]

III. The Late-Is-Late Rule

A. The FAR Provision

The FAR was established in 1984[27] to provide "uniform policies and procedures for acquisition by all executive agencies."[28] For nearly four decades, federal procurement law was guided by the Armed Services Procurement Act of 1947 (ASPA) and the Federal Property and Administration Services Act of 1949.[29] The FAR governs all Federal Government

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[12] *Id.*

[13] *Id.* at 637, 639.

[14] *Id.* at 637.

[15] *Id.*

[16] Latin "now for then," meaning, "having retroactive legal effect through a court's inherent power." For example, "to correct a clerical error in the record." BLACK'S LAW DICTIONARY 1097 (7th ed. 1999).

[17] *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 637.

[18] *Id.*

[19] Geo-Seis Helicopters, Inc., Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, 2007 CPD ¶ 135, at 3.

[20] *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 638.

[21] *Id.*

[22] *Geo Seis Helicopters, Inc.*, 2007 CPD ¶ 135, at 5.

[23] *Id.* Although the Comptroller General cited Varicon Int'l, Inc., MVM, Inc., Comp. Gen. B-255808, B-255,808.2, Apr. 6, 1994, 94-1 CPD 240 at 4, the exception was first annunciated in the decision of Solar Resources Inc., Comp. Gen. B-193264, Feb. 9, 1979, 79-1 CPD ¶ 95, where the Comptroller General decided in favor of the Veterans Administration's extensions of the closing date for receipt of proposals when "the effect of which is to enhance competition." *Solar Resources Inc.*, 79-1 CPD ¶ 95.

[24] Geo Seis Helicopters, Inc., 2007 CPD ¶ 135, at 5.

[25] *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 635.

[26] *Id.* at 635.

[27] W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 37 (3d ed. 2003).

[28] 48 C.F.R. § 1.101 (2008).

[29] KEYES, *supra* note 27, at 34 (citations omitted).

purchases or leases of supplies or services (including construction) with appropriated funds.[30] The FAR is issued and maintained by a FAR Council consisting of the administrator for Federal Procurement Policy, the Secretary of Defense, the administrator of National Aeronautics and Space, and the administrator of General Services Administration.[31]

The FAR provides that all bids, proposals, or modifications submitted by contractors to a government agency office are deemed late if they are received after the agency solicitation's deadline.[32] This rule is often referred to as the late-is-late rule because the contractor's submissions are not considered by the agency. However, there are three regulatory exceptions which contractors may employ.

The FAR's late-is-late rule states that:

> Any proposal, modification, or revision received at the Government office determined in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition, and—
> 1. If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
> 2. There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or
> 3. It was the only proposal received.[33]

The main language is nearly identical for sealed bidding, competitive negotiations, solicitation provisions, and contracting clauses.[34] The reason for the rule lies with protecting the integrity of the structure in a sealed bidding system. Examining how and why the rule developed sheds light on the history and rationale behind one of GAO's exceptions to the late-is-late rule.

B. History of the Late-Is-Late Rule

1. Sealed Bidding

The Federal Government first required sealed bidding by statute during the Civil War.[35] Sealed bidding is a process that seeks competitive bids for goods or services, opens the bids publicly, and awards contracts.[36] Its purpose is to "give all qualified contractors the opportunity to compete for government contracts while avoiding favoritism, collusion, or fraud and to obtain for the government the benefits of competition."[37]

In sealed bidding, a bidder delivers a bid to the bid opening room and hands it to either the contracting officer (the agency's representative that is granted authority to enter into contracts on behalf of the U.S. Government)[38] or to a bid opening officer.[39] Bids are also commonly transmitted by mail, delivery service, electronically, or by facsimile, depending on the parameters of the agency's invitation for bid (IFB).[40] All bids timely received are kept secure in a locked bid box,

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[30] 48 C.F.R. § 2.101.

[31] Office of Mgmt. and Budget, FAR Council Members, http://www.whitehouse.gov/omb/procurement/far/farc_members.html (last visited July 10, 2009).

[32] FAR, *supra* note 3, § 15.208(b)(1).

[33] *Id.*

[34] *Id.* § 14.304 (sealed bidding), § 15.208 (competitive negotiations).

[35] KEYES, *supra* note 27, at 34.

[36] *Id.* at 304.

[37] *Id.* at 305.

[38] FAR, *supra* note 3, § 1.602-1.

[39] *Id.* § 14.402-1(a).

[40] *Id.* § 14.304(a). Invitations for bids are employed in sealed bidding to describe the requirements of the Government to prospective bidders. Invitations are "publicized through distribution to prospective bidders, posting in public places, and other such means as may be appropriate." *Id.* § 14.101(b).

safe, or a secured electronic bid box until the time set for the opening of bids,[41] which sometimes occurs immediately after the proposal deadline.[42] Once the time for opening bids arrives, bids that were timely submitted are publically opened and, if practical, read aloud to the persons present.[43] Award of the contract is based upon price alone.[44]

The late-is-late rule developed to "protect the integrity of the competitive procurement system" in sealed bidding.[45] It ensures bidders compete on a level playing field by requiring them to submit bids under the same general market conditions.[46] Prices for goods and services may change weekly, daily, or hourly, so without the rule, a bidder who submits a timely bid may lose an award to another bidder who obtained more competitive prices by waiting beyond the solicitation due date.[47]

A second reason supporting the nearly inflexible late-is-late rule in sealed bidding is simplicity. Sealed bidding rules were "designed so that they could be administered by personnel who would not be required to exercise judgment."[48] Permitting the receiving officer to simply reject all bids submitted after the deadline, without consideration of the best interests of the Government, simplifies the process.

2. Competitive Negotiations

With passage of the FAR in 1984, competitive negotiations became the law of the land, alongside sealed bidding.[49] The FAR drafters applied the same late-is-late rule for sealed bidding and competitive negotiations regulation.[50] However, in competitive negotiations, bids are not opened publicly, nor are awards based upon price alone.[51] Additionally, competitive negotiations require judgment and an actual evaluation of offers to determine which proposal provides the best deal for the Government.[52] The active assessment of bids distinguishes competitive negotiations from sealed bidding, where personnel do not exercise judgment.

Inflexibility in competitive negotiations runs the risk of "depriv[ing] the Government of significant advantages. The rationale for more flexibility is to allow the Government to take advantage of a better offer when lateness would not give the offeror an unfair competitive advantage."[53] Nevertheless, the same lateness provisions that apply to sealed bidding continue to apply to competitive negotiations.[54] In response to the FAR's rigid standard, GAO decisions in bidder protest actions evolved to provide some leeway for late proposals.

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[41] *Id.* § 14.401(a).

[42] *See, e.g.*, States Roofing Corp., Comp. Gen. B-286052, Nov. 8, 2000, 2000 CPD ¶ 182.

[43] FAR, *supra* note 3, § 14.402-1(a).

[44] *Id.* § 14.101(e).

[45] Ralph C. Nash & John Cibinic, *Late Proposals: In Search of a Sensible Rule*, 12 NASH & CIBINIC REP. NO. 11, ¶ 57 (1998) (quoting letter from William H. Butterfield to authors) (n.d.)).

[46] Timothy Sullivan et al., *The Government's Even More In "The Driver's Seat" Under FAR Part 15 Proposal*, 38 GOV'T CONTRACTOR NO. 36, ¶ 450 (1996).

[47] *Id.*

[48] Nash & Cibinic, *supra* note 45, at 7.

[49] FAR, *supra* note 3, § 6.401.

[50] *Id.* § 15.208(b).

[51] Ralph C. Nash & John Cibinic, *Postscript: Late Proposals*, 13 NASH & CIBINIC REP. NO. 2, ¶ 11 (1999).

[52] *Id.* at 4.

[53] *Id.*

[54] Nash & Cibinic, *supra* note 45, at 7.

IV. The GAO's Approach—The Exception to Enhance Competition

A. The GAO

The GAO is an independent agency under the Comptroller General of the United States.[55] Since 1925, the Comptroller General has decided federal contract bid protests under its settlement authority.[56] Settling "bid protests became a sizeable part of the GAO's duties because for many years it was the only venue available to frustrated bidders."[57] Not until the passage of CICA in 1984 was the GAO was "statutorily authorized for the first time to formally adjudicate bid protests."[58]

Approximately 130 attorneys at the GAO's Office of the General Counsel hear bid protests and prepare decisions, which the Comptroller General ultimately renders to the disputing parties.[59] While the attorneys are not judges and do not preside over courts, they render decisions after either reviewing the parties' record or upon conducting a hearing, which may be requested by the parties or initiated by the GAO.[60] A protest in this context is a plea by an interested party (i.e., an actual or perspective bidder) stating that an agency's solicitation for offers, the cancellation of a solicitation, or the termination of a contract violated applicable statutes and regulations.[61] Decisions are not binding, however, because federal law only grants the GAO the authority to recommend a remedy.[62]

The GAO dispute process limits standing to protest an award by a federal agency to "an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract."[63] Since 1991, hearings have been used and "are usually conducted either to assess witness credibility or due to the complexity of the issue."[64] A protest file includes the offeror's protest and documents from the procuring agency against which the protest has been filed.[65] Decisions by the Comptroller General must be issued within one hundred days of the protest.[66] In fiscal year 2008, GAO received 1563 protests and closed 1506 protests.[67]

B. GAO's Exception to the Late-Is-Late Rule

Since the adoption of the late-is-late rule, the GAO has regularly enforced both the rule and the written exceptions to the rule; it has also created an additional exception. The GAO-created exception permits an agency to consider a late bid proposal in order to enhance competition between the bids offered before the deadline and bids offered after the deadline.[68]

The GAO's exception to the late-is-late rule appears to have derived from a 1979 sealed bidding protest by Solar Resources, Inc. (Solar).[69] Solar Resources protested two closing date extensions for the receipt of proposals for a solar

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[55] "The [GAO] is an instrumentality of the U.S. Government independent of the executive departments . . . . The head of the Office is the Comptroller General of the United States." 31 U.S.C. § 702(a)–(b) (2006).

[56] Alexander J. Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636, 638 (1993).

[57] Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1229 (2007) (quoting Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) (holding that a disappointed bidder lacked standing to sue the Government in federal court; the result was GAO became the only venue for disappointed bidders)).

[58] Brittin, *supra* note 56, at 636–37 (citation omitted).

[59] U.S. Gov't Accountability Office, Office of the General Counsel, http://www.gao.gov/about/workforce/ogc.html (last visited July 10, 2009).

[60] 4 C.F.R. § 21.7(a) (2009).

[61] *Id.* § 21.1.

[62] Metzger & Lyons, *supra* note 57, at 1232 (citation omitted).

[63] FAR, *supra* note 3, § 33.101.

[64] *See* KEYES, *supra* note 27, at 750–51.

[65] FAR, *supra* note 3, § 33.104. The documents include the offer submitted by the protestor, the offer being considered for award or being protested, relevant documents, the solicitation, the abstract of offers, and other documents the agency determines are relevant. *Id*.

[66] KEYES, *supra* note 27, at 305.

[67] Letter from Gary L. Kepplinger, General Counsel, U.S. Gov't Accountability Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Dec. 22, 2008), *available at* http://www.gao.gov/special.pubs/bidpro08.pdf.

[68] Ivey Mech. Co., Comp. Gen. B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83.

[69] Solar Res. Inc., Comp. Gen. B-193264, Feb. 9, 1979, 79-1 CPD ¶ 95.

heating and cooling system issued by the Veterans Administration Hospital.[70] The Comptroller General's decision to deny Solar Resources' protest rested on the theory that when the purpose of permitting late proposals is to "enhance competition," the agency is justified in accepting late bids.[71] The GAO uses the same rationale to justify accepting late proposals in competitive negotiations.

After *Solar Resources*, the exception became institutionalized in a series of cases where GAO permitted late bids to enhance competition.[72] The "enhance competition" exception to the late-is-late rule makes sense from a procurement standpoint; allowing more bidders to compete for a contract increases opportunity for competition and prevents "undue restriction in solicitations."[73] One of GAO's missions is to meet CICA's mandate for full and open competition by offering recommendations in bid protests.[74] The logic behind accepting late bids is therefore obvious: more bids translates to more competition, resulting in lower costs to the Government.

The late-is-late rule is a creature of sealed bidding, and the same need for timeliness does not exist in competitive negotiations. In sealed bidding, proposals are opened publicly, so it makes sense that all proposals arrive on time and remain unopened until the time set for opening bids.[75] In contrast, in competitive negotiations, written and oral discussions often take place between the agency and offerors, and offerors are provided the chance to submit final proposal revisions.[76] These differences highlight the significant distinctions between the two contract methods and the need for different rules on late proposals. To appreciate the application of the GAO's exception to the late-is-late rule, three decisions are analyzed below.

C. Three GAO Interpretations of the Exception

1. Varicon International, Inc.; MVM, Inc.

In 1994, the GAO issued a protest decision in *Varicon International, Inc.; MVM, Inc.*[77] The protest involved an Air Force solicitation for a cost-plus-award-fee contract to manage and conduct personnel security investigations.[78] By the deadline for proposal submissions on 13 August 1993, the agency had received proposals from Varicon and MVM.[79] On 18 August, the contracting officer extended the due date for initial proposals to 26 August "in order to accept . . . two proposals received after the initial due date" of 13 August.[80]

After evaluating the proposals, the agency found the incumbent contractor, MSM Security Services, Inc., "showed a comprehensive understanding of the processes and procedures necessary to accomplish the yearly investigation caseload in the time periods allotted."[81] In contrast, the agency's evaluators concluded that while MVM proposed the lowest cost, its prior poor performance with the Federal Emergency Management Agency coupled with concerns about its ability to "obtain timely security clearances for its investigators" weighed heavily against selection[82]

On 16 November, the agency awarded the contract to MSM Security Services based upon its technically superior proposal.[83] In response, MVM protested the award contending that the Air Force improperly accepted a late proposal from

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[70] *See id.*

[71] *Id.* at 5.

[72] See Nash & Cibinic, *supra* note 51 (discussing several GAO decisions including Institute for Advanced Safety Studies-Recon., Comp. Gen. B-221330.2, July 25, 1986, 86-2 CPD ¶ 110).

[73] *Solar Res., Inc.*, 79-1 CPD ¶ 95, at 5.

[74] Brittin, *supra* note 56, at 637 (citations omitted).

[75] *See, e.g.*, Ralph C. Nash & John Cibinic, *Late Proposals: Still Fighting*, 14 NASH & CIBINIC REP. NO. 12, ¶ 66, at 3 (2000).

[76] *See* KEYES, *supra* note 27, 386–91.

[77] Varicon Int'l, Inc.; MVM, Inc., Comp. Gen. B-255808, B-255808.2, Apr. 6, 1994, 94-1 CPD ¶ 240.

[78] *Id.* at 2.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 3.

[82] *Varicon Int'l, Inc.; MVM, Inc.*, 94-1 CPD ¶ 250, at 5.

[83] *Id.* at 3.

the awardee.[84] It asserted that "the contracting officer ha[d] no authority to extend the proposal due date where there [was] no change in requirements and no basis for the extension apart from the desire to accommodate . . . offerors who failed to submit proposals on time."[85] In its decision, GAO developed the exception first enunciated in Solar by "finess[ing] the [FAR's late] rule merely by extending the closing date."[86] The GAO noted that the FAR did not prohibit extending the closing date and that extending the closing date when done to enhance competition is proper.[87] The GAO's ingenuity in expanding its in-house exception demonstrated its concern with CICA's overall mandate: open and full competition in federal procurement. Consistent with prior decisions, the GAO continued to invoke its own exception to the late rule, as exemplified in the following protest by a disappointed bidder.

2. Fort Biscuit Co.

In 1991, the Defense Personnel Support Center (DPSC) requested proposals to provide salted soda crackers as part of meals-ready-to-eat (MRE).[88] Fort Biscuit Company and three other contractors (including Interbake) submitted initial proposals before the 26 August closing date and were subsequently asked to provide best and final offers (BAFO) by 30 December at 2:00 p.m.[89] Interbake had not submitted a BAFO by the deadline, so the contracting officer extended the closing date to 3 January 1992.[90] Subsequently, DPSC awarded Interbake the contract.[91] The GAO dismissed Fort Biscuit's protest against the closing time extension on the familiar theme that enhancing competition justified extending the closing date in order to accept additional proposals.[92] Yet only a year later, the exception took a back seat to the rule, if only for a day.

3. The Staubach Co.—Embracing the Late-Is-Late Rule

The GAO's decisions on late proposals are not as monolithic as they may appear. Consider the decision to dismiss The Staubach Company's bid protest against the General Services Administration (GSA).[93] The GSA issued a competitive negotiation solicitation for real estate services and set the closing date for proposals as 21 February 1997.[94] Although Staubach's price proposal was submitted by 21 February, the required technical and key personnel portions were not delivered to the GSA bid room until a week later.[95] The contracting officer did not consider Staubach's additional material because the additional submission was late.[96] Staubach protested, yet GAO agreed with the agency's rejection determining that allowing a protestor to submit technical and key personnel proposals after "would be tantamount to improperly allowing the submission of a late proposal."[97] It applied a strict reading of the regulation by explaining that the late rule "alleviate[s] confusion, assure[s] equal treatment of all offerors, and prevent[s] one offeror from obtaining any unfair advantage that might accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors."[98] Of note, the decision argued against the enhance competition standard invoked in many GAO decisions.

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[84] *Id.*

[85] *Id.*

[86] Nash & Cibinic, *supra* note 45, at 3.

[87] *Varicon Int'l, Inc.; MVM, Inc.*, 94-1 CPD ¶ 250, at 3. Prior to major revisions to the FAR in 1997, FAR § 15.410(a)(3) permitted an agency to extend the closing date at any time prior to the date set for receipt of proposals; however, in the revised FAR, FAR § 15.206(c) states that "[a]mendments issued after the established time and date for receipt of proposals shall be issued to all offerors that have not been eliminated from the competition." FAR, *supra* note 3, § 15.206(c).

[88] Fort Biscuit Co., Comp. Gen. B-247319, May 12, 1992, 92-1 CPD ¶ 440.

[89] *Id.* at 2.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 3.

[93] The Staubach Co., Comp. Gen. B-276486, May 19, 1997, 97-1 CPD ¶ 190.

[94] *Id.* at 2.

[95] *Id.* The four boxes containing the materials were located at New York's La Guardia Airport's Lost and Found. *Id.* at 3.

[96] *Id.* at 3.

[97] *Id.* at 5.

[98] *The Staubach Co.*, 97-1 CPD ¶ 190, at 5.

> While the government's application of the late proposal rules sometimes may seem harsh, and the government may lose the benefit of proposals that offer terms more advantageous than those that were timely received, protecting the integrity of the procurement process by ensuring that fair and impartial treatment is guaranteed and maintaining confidence in the competitive system are of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement.[99]

Staubach, however, represents the exception rather than the rule. Generally, GAO decisions reflect a desire to consider late proposals in order to provide the contracting officer with potentially better bids.[100]

D. GAO's Interpretation is in Line with CICA's Goals

As mentioned above, CICA formally authorized the GAO to adjudicate bid protests,[101] yet it also requires executive agencies to use "full and open competition."[102] The GAO's enhance competition exception to the late-is-late rule meets CICA's competition requirements by ensuring the Government considers all proposals, thereby acquiring goods or services at the most competitive price. In sum, the GAO decisions overwhelmingly reflect an internalization of CICA's intent. Now consider the judicial forum's approach to the GAO's exception to the FAR's late-is-late rule.

V. COFC's Approach—Plain Meaning Judicial Interpretation

A. Introduction to COFC

The COFC is an Article I tribunal first established in 1855 with specific congressional grants of jurisdiction found largely in the Tucker Act, passed in 1887.[103] The COFC gained "broad government-contracts-related jurisdiction over bid protests" with the passage of the Administrative Dispute Resolution Act of 1996 (ADRA).[104] Prior to the ADRA, judicial bid-protest jurisdiction was generally split between the COFC (pre-award protests) and federal district courts (post-award protests).[105] Its regulatory standard of judicial review for agency actions is to determine if an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[106] Recently, the court addressed the GAO's internal precedent in providing late bidders exceptions to the FAR's late-is-late rule. The COFC's bright line determination stands in sharp contrast to the GAO's approach.

B. COFC's Concern with the GAO's Enhanced Competition Exception to the Late-Is-Late Rule

1. A Return to the Black Letter FAR

As recounted earlier, Geo-Seis Helicopters submitted a proposal to the MSC to provide three two-helicopter detachments to support U.S. Navy operations in the Pacific and Indian Oceans.[107] The agency awarded the contract to a late bidder, and resulted in Geo-Seis Helicopters protest to the GAO.[108] The GAO denied the protest. [109] In response, Geo-Seis Helicopters brought an action at the COFC on 9 March 2007.[110]

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[99] *Id.* (citing Phoenix Res. Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514, at 5).

[100] *E.g.*, *Ivey Mech. Co*., Comp. Gen. B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83.

[101] 31 U.S.C. § 3553 (2006).

[102] 10 U.S.C. § 2304.

[103] Hannah Brody & David Hickey, *Jurisdiction in the U.S. Court of Federal Claims: A Primer*, 20 ANDREWS GOV'T CONT. LITIG. REP. 11, 12 (2006).

[104] *Id.* at 14.

[105] Metzger & Lyons, *supra* note 57, at 1225.

[106] Administrative Procedure Act, 5 U.S.C. § 706 (2006).

[107] Geo-Seis Helicopters, Inc., Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, CPD ¶ 135.

[108] *Id.* at 2.

[109] *Id.*.

[110] *Geo-Seis Helicopters, Inc*., 77 Fed. Cl. 633, 637 (2007).

In *Geo-Seis Helicopters v. United States*, the COFC ruled in favor of Geo-Seis Helicopters holding that the contracting agency circumvented the FAR's late-is-late rule.[111] The court stated that the FAR must be interpreted by its plain meaning: "As with a statute, this court presumes that an agency or other regulatory body says in a regulation what it means and means in a regulation what it says."[112] The plain language of the late-is-late rule requires submissions to be on time with few exceptions, reasoned the court.[113] It noted several GAO decisions where the GAO agreed that late proposals were acceptable if one of the exceptions applied.[114] Furthermore, the COFC held that the agency violated the late-is-late rule by issuing "post-expiration amendments to [Presidential's] solicitation extending the closing dates."[115] It dismissed the GAO's contention that extending the deadline was not prohibited by declaring the extension unwarranted because "a standard rule of statutory construction—and one equally applicable to interpreting regulations—is that a court must not give an enactment a construction that has been specifically considered and rejected."[116]

The "construction" that had been "specifically considered and rejected" turns out to be a rule the FAR Council had proposed but abandoned when revising the FAR in 1996 and 1997. As the next section will show, the court took a long look at the regulatory history of this FAR section when deciding the case.

2. Amendments to Solicitation Explicitly Rejected by FAR Council

In 1997, the FAR Council revised FAR Part 15, Contracting by Negotiation.[117] During the redrafting in 1996 and 1997, the Council proposed including a provision granting the contracting officer discretion to "accept late proposals when [it] . . . was in the government's interest."[118] A second rewrite limited the contracting officer's discretion to accept late proposals in cases when the Government or a third party was at fault for the late submission.[119] After considering public comments, especially those concerning the draft rule giving contracting officers more discretion, the FAR Council promulgated a hard and fast late-is-late rule without granting the contracting officer authority to deviate from the rule.[120]

Consequently, in deciding *Geo-Seis Helicopters*, the COFC reasoned that the agency must "adhere to the categorical reality of the 'late is late' rule" and not ask the court for an application of the FAR as "it should have been written."[121] The court then considered whether the agency's decision was arbitrary and capricious.

3. Arbitrary & Capricious in Application

The court viewed the agency's interpretation of the late rule as "allow[ing] the government arbitrarily to claim in some circumstances that the rule precludes it from considering a late proposal and in other circumstances to assert that the rule is not a bar to issuing amendments to the solicitation that would permit such consideration."[122] The court also validated the practical value of the late-is-late rule in the competitive negotiation system claiming that "it alleviates confusion, ensures equal treatment of all offerors, and prevents an offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors."[123] This article next explores the potential broader application of the court's holding.

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[111] FAR, *supra* note 3, § 52.215-1(c)(3)(ii)(A).

[112] *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 640.

[113] *Id.*

[114] *Id.* at 641.

[115] *Id.*

[116] *Id.* at 643.

[117] Ralph C. Nash & John Cibinic, *The FAR Part 15 Rewrite: A Final Scorecard*, 11 NASH & CIBINIC REP. NO. 12, ¶ 63 (1997).

[118] *Id.* at 67.

[119] *Id.* at 63.

[120] *Id.*

[121] *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 646.

[122] *Id.*

[123] *Id.* (quoting Argencord Mach. & Equip., Inc. v. United States, 68 Fed. Cl. 167, 173 (2005)).

VI. Effect of COFC Decision on GAO's Exceptions to the Late-Is-Late Rule

Contracting officers are unlikely to rely on GAO's created exceptions to the late-is-late rule because any protest to GAO may be further filed at the COFC for judicial adjudication.[124] In all probability, the *Geo-Seis Helicopters* decision will be followed by other COFC judges in future bid protest decisions because the FAR's language is unambiguous and the FAR Council's rejection of the exception is clear. In comparison, the GAO's internal exception is little more than precedence created and maintained by its attorneys.

Furthermore, contracting officers may be justified in expanding the interpretation of *Geo-Seis Helicopters* and forego any "reliance on internally developed [GAO] doctrines that are at odds with judicial interpretation of procurement statutes and regulations."[125] If a GAO-created rule is outside the black letter law, it may run aground if challenged at COFC.[126] Consider the aftermath of Geo-Seis Helicopters' victory at the COFC.[127] Geo-Seis Helicopters filed for attorneys' fees and costs under the Equal Access to Justice Act (EAJA).[128] Eligibility for fees is based upon meeting a four-prong test, of which one prong is relevant to this discussion: the Government's position was not "substantially justified."[129]

The Government responded by arguing that its position on the issue (the GAO-created exception to the late-is-late rule) was "substantially justified" because there was "significant GAO precedent."[130] Nonetheless, the COFC awarded attorney's fees and costs to Geo-Seis Helicopters holding that "the government's reliance on the set of GAO decisions is problematic"[131] because "there is no justification for the government's position when clear, unambiguous regulations directly contradict that position."[132] The court reasoned that the "explicit, unambiguous regulations [late-is-late rule] directly contradict" the agency's position that following GAO precedents was substantially justified.[133]

In the wake of the COFC's recent holding, the GAO should provide contracting officers clear guidance by incorporating COFC precedent into its decisions and internal rules, thereby "avoid[ing] conflicting guidance and [facilitating a] more unified procurement-law jurisprudence."[134] The GAO should do this even though it is not bound by COFC decisions.

VII. Conclusion

This article examined the development of the FAR's late-is-late rule in sealed bidding and competitive negotiations. It also considered how the GAO and COFC view its applicability, specifically in the matter of Geo-Seis Helicopters' protest of an award given to a competitor after the contracting officer extended submission deadlines. The differing conclusions of the GAO and COFC are institutional: GAO focused its efforts on meeting the spirit of CICA's enhanced competition mandate, while COFC responded with a letter-of-the-law, plain-meaning judicial interpretation.

The results of the COFC's decision in *Geo-Seis Helicopters* may transform GAO's decisions and internal policies, not only in competitive negotiations, but across the spectrum of procurement statutes and regulations. Ultimately, an isolated award of attorneys' fees and costs for failing to follow the plain language of the FAR is one thing; multiple awards are likely to bring the GAO closer to the COFC's way of thinking.

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[124] 28 U.S.C. § 1491(b)(1) (2006).

[125] Metzger & Lyons, *supra* note 57, at 1266.

[126] *Id.* at 1267.

[127] Ralph C. Nash, *Following Government Accountability Office Guidance: A Risky Move?*, 21 NASH & CIBINIC REP. NO. 12, ¶ 68 (2007).

[128] Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

[129] Geo-Seis Helicopters, Inc. v. Unites States, 79 Fed. Cl. 74, 76 (2007).

[130] *Id.* at 77.

[131] *Id.* at 78.

[132] *Id.* at 79 (quoting Filtration Dev. Co. v. United States, 63 Fed. Cl. 612, 621 (2005)).

[133] *Id.* at 78.

[134] Metzger & Lyons, *supra* note 57, at 1267.

Thinking Outside of the "Detained" Box:
A Guide to Temporary Seizures of Property Under the Fourth Amendment

Major Phillip B. Griffith[*]

I. Introduction

Captain (CPT) Virgil, a company commander, suspected one of his Soldiers, Specialist (SPC) Stoecker, of stealing electronic equipment from a unit warehouse.[1] As a result, CPT Virgil spoke with a military police investigator (MPI) and requested his assistance.[2] After meeting with the MPI, SPC Stoecker consented to a search of his barracks room in an attempt to locate the missing equipment.[3] Specialist Stoecker even assisted in the search of his barracks room, as he stood on a chair, removed boxes from the top of his wall locker, and handed them down to the MPI.[4] As Stoecker moved these boxes, he attempted to covertly slip a small, cigarette-sized, box into his pants pocket.[5] Believing the box might contain proceeds from the sale of the stolen electronic equipment, the MPI intercepted the box, searched it, and discovered that it instead contained a quantity of a green leafy substance that later proved to be marijuana.[6]

In *United States v. Stoecker*, the resulting 1984 Court of Military Appeals (COMA) case, the Government attempted to justify the search of the box on the grounds "that, if left in possession of the box, appellant might destroy or dispose of its contents."[7] The Government failed to persuade the court that an exigency to search the box existed under these circumstances.[8] The court did, however, provide advice on how the MPI should have proceeded in a similar situation.[9] If Stoecker did not provide consent to search the box, and his commander was unavailable or otherwise disqualified from authorizing the search, the investigator "could have retained custody of the box until he could seek suitable authorization to open it."[10] This option to temporarily seize property represents the established principle that "[l]aw enforcement authorities

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[1] United States v. Stoecker, 17 M.J. 158, 159 (C.M.A. 1984).

[2] *Id.* at 160. Army Regulation (AR) 190-3 explains the role of military police investigators (MPI). *See* U.S. DEP'T OF ARMY, REG. 190-3, MILITARY POLICE INVESTIGATIONS para. 4-1 (1 Nov. 2005). According to AR 190-3, MPI "fulfill a special need for an investigative element within the military police to investigate many incidents, complaints, and matters not within [United States Army Criminal Investigation Division Command] jurisdiction, but which cannot be resolved immediately through routine military police operations." *Id.* The U.S. Army Criminal Investigation Division (CID), on the other hand, is "the sole agency within the United States Army responsible for the investigation of felonies," with some exceptions. U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 1-5 (30 Oct. 1985).

[3] *Stoecker*, 17 M.J. at 160.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 161. During the suppression motion, the MPI stated specifically that he did not believe the box was large enough to contain any of the stolen electrical equipment items he was searching for during the consent search. *Id.*

[7] *Id.* at 164. Typically, the MPI would need an authorization to search the box. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (2008) [hereinafter MCM]. The Military Rules of Evidence (MRE), which are "the rules applicable in courts-martial," *id.* MIL. R. EVID. 101, define a search authorization as "an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person." *Id.* MIL. R. EVID. 315(b). Under MRE 315, however, not all searches require a search authorization. According to MRE 315(g),

> [a] search warrant or search authorization is not required . . . for a search based upon probable cause when . . . [t]here is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction, or concealment of the property or evidence.

Id. MIL. R. EVID. 315(g).

[8] *Stoecker*, 17 M.J. at 164.

[9] *Id.*

can properly take reasonable measures to assure that, until reasonable investigative steps can be completed, evidence is not destroyed, crime scenes are not disarranged, and suspects do not flee."[11]

A temporary seizure of property represents a government agent's tool to maintain the status quo prior to obtaining a search authorization.[12] Military law practitioners must examine Fourth Amendment[13] case law in order to understand and apply the temporary seizure framework.[14] Fortunately, case law shows that temporary seizures are reasonable so long as government agents demonstrate the appropriate level of diligence in light of the property owner's interest.[15] This primer will assist the military practitioner in analyzing temporary seizures that are based both on reasonable suspicion and probable cause.[16] The first section will discuss temporary seizures that effectively implicate no possessory interest. The second section will examine temporary seizures that implicate a possessory interest. The third section will consider temporary seizures that implicate both a possessory and liberty interest. These three sections will provide a framework for analyzing the constitutionality of virtually every temporary seizure scenario. A concise flowchart appears at the conclusion of this primer to help counsel evaluate temporary seizures of all varieties by moving step-by-step through the necessary analyses.

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[10] *Id.* The court stated that under the circumstances, "[w]e can perceive no problem if [the MPI] had retained the box until he could get authority to examine its contents from a military magistrate or a commander who was not disqualified to authorize a search." *Id.* According to the MRE, an impartial commander "who has control over the place where the property or person to be searched is situated or found" or an impartial military judge or magistrate has the power to authorize a search or seizure of property if probable cause exists. MCM, *supra* note 7, MIL R. EVID. 315, 316(d)(4)(A).

[11] *Stoecker*, 17 M.J. at 164 (quoting United States v. Glaze, 11 M.J. 176, 177 (C.M.A. 1981)).

[12] *See id.* There are a few differences between search warrants and search authorizations. In addition to the fact that military commanders may issue a search authorization, MCM, *supra* note 7, MIL R. EVID. 315, "[a]uthorizations to search and seize or search and apprehend may be issued on the basis of a [sworn or unsworn] written or oral statement, electronic message, or other appropriate means of communication. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 9-8 (16 Nov. 2005). A "search warrant," on the other hand, "is an express permission to search and seize issued by competent civilian authority." MCM, *supra* note 7, MIL R. EVID. 315(b). Although a federal magistrate may issue a search warrant based upon a written affidavit, sworn testimony (if reasonable), or by telephonic or other means, the warrant applicant must testify under oath (i.e., all communications must be sworn). FED. R. CRIM. P. 41(d).

[13] The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. " U.S. CONST. amend. IV.

[14] The broader Fourth Amendment framework is contained within Justice Harlan's concurring opinion in *Katz v. United States* where he wrote that a reasonable expectation of privacy exists when a person first "has exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Military practitioners must turn to case law for guidance in temporary seizure cases because the MRE fail to provide sufficient assistance on temporary seizures. *See generally* MCM, *supra* note 7, MIL R. EVID. 316. According to MRE 316, a Government agent may seize property if the agent possesses a search authorization, exigent circumstances exist, or the item is in plain view. *Id.* Specifically addressing temporary seizures, MRE 316 only provides that "[n]othing in this rule shall prohibit temporary detention of property on less than probable cause when authorized under the Constitution of the United States." *Id.* In other words, the MREs do not include explicit guidelines concerning temporary seizures, and one must look to Fourth Amendment case law to determine lawfulness of temporary seizures.

[15] *See generally* United States v. Place, 462 U.S. 696, 708–09 (1983). The Supreme Court has called reasonableness "the touchstone of the Fourth Amendment." United States v. Knights, 534 U.S. 112, 118 (2001). In finding reasonableness, the Court has stated that it "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Place*, 462 U.S. at 703.

[16] Probable cause exists when "there is reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." MCM, *supra* note 7, MIL R. EVID. 315. Understanding the precise meaning of "probable cause" and "reasonable suspicion," however, may be difficult. In *Ornelas v. United States*, the Supreme Court attempted to explain these concepts when it stated,

> Articulating precisely what "reasonable suspicion" and "probable cause" mean is not possible. They are commonsense, nontechnical conceptions that deal with "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." As such, the standards are "not readily, or even usefully, reduced to a neat set of legal rules." We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found . . . . We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence. They are instead fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.

517 U.S. 690, 695–96 (1996) (citations omitted).

II. Temporary Seizures and Three Levels of Interests

When government agents temporarily seize property based upon a reasonable suspicion, this action triggers a responsibility to diligently develop probable cause with regard to the seized property.[17] Once government agents establish probable cause, this accordingly triggers the obligation to diligently pursue an authorization to search the property.[18] Because temporary seizures impact a range of interests for the property owner, the type of interest involved dictates the level of government diligence required in establishing probable cause and obtaining a search authorization.[19] To understand how a temporary seizure's impact on the owner's interest dictates the level of diligence required by the Government, one must examine three seizure scenarios: seizures implicating no possessory interest, seizures implicating a possessory interest, and seizures implicating a possessory and liberty interest.

A. Temporary Seizures Implicating No Possessory Interest

According to the U.S. Supreme Court, a seizure occurs "when there is some meaningful interference with an individual's possessory interest in that property."[20] Temporary seizures implicate no possessory interest when government agents seize (but do not search) a piece of property that the property owner has already relinquished to a third party, and the owner does not anticipate regaining possession of the property throughout the seizure period.[21] Temporary seizures may implicate no possessory interest in situations where the seizure is based upon a reasonable suspicion[22] and those where the seizure is based upon probable cause.[23]

An example of a case involving a temporary seizure based on reasonable suspicion is *United States v. Van Leeuwen*, where the Supreme Court considered the seizure of packages sent through the postal system.[24] There, after Van Leeuwen dropped off two packages at a Washington state post office, a postal employee notified a police officer that he suspected the two packages—one sent to Tennessee and the other sent to California—contained illegal coins.[25] The officer noticed that the return address matched a vacant housing area and that Van Leeuwen was driving a car with Canadian plates.[26] Based upon their reasonable suspicion, postal employees held the packages while customs officials initiated an investigation that lasted a few hours for the package addressed to California and into the next day for the package addressed to Tennessee.[27] This delay allowed customs officials time to confirm that the package recipients were under investigation for illegal coin trafficking.[28] With probable cause established, the customs officials then obtained a search warrant for both packages twenty-nine hours after the mailing.[29] Van Leeuwen argued that customs officials took too long to obtain a warrant and to search the packages.[30] However, the Court rejected this argument and held that postal employees were justified in holding the packages and that this detention did not invade the property owner's privacy interest.[31]

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[17] *See generally Place*, 462 U.S. at 709.

[18] *See generally* United States v. Segura, 468 U.S. 796, 812 (1984).

[19] *See Place*, 462 U.S. at 705.

[20] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[21] *See* United States v. Visser, 40 M.J. 86, 90 (C.M.A. 1994).

[22] *See* United States v. Van Leeuwen, 397 U.S. 249, 252–53 (1970).

[23] *See* United States v. Visser, 40 M.J. 86, 89–90 (C.M.A. 1994).

[24] *Van Leeuwen*, 397 U.S. at 250.

[25] *Id.*

[26] *Id.*

[27] *Id.* "Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime." *Id.*

[28] *Id.* at 250–52.

[29] *Id.* at 253.

[30] *Id.* at 250.

[31] *Id.* at 252–53.

Another example of a temporary seizure implicating no possessory interest is *United States v. Visser*, which involved a seizure based upon probable cause.[32] In this case, the COMA considered a motion to suppress the temporary seizure of an airman's household goods that were in a transit status.[33] Staff Sergeant (SSG) Visser was in the process of shipping his household goods through the on-base Traffic Management Office (TMO) when security police investigators became suspicious that his household goods shipment included boating items stolen from the on-base Morale, Welfare, and Recreation storage lot.[34] The TMO directed the servicing off-post moving and storage company, which had already packed and stored the property pending shipment, to hold Visser's property.[35] The investigators established probable cause during the first day of seizure.[36] One week later, but still within the contractual transportation period, Air Force investigators applied for and received a search warrant from a federal magistrate to search Visser's household goods shipment.[37] During the search, investigators discovered the stolen boating equipment and also found several items of stolen government property.[38] Staff Sergeant Visser contended that the seven-day temporary seizure of his household goods violated the Fourth Amendment.[39] Yet, consistent with *Van Leeuwen*, the court held that Visser failed to demonstrate that the Government interfered with a possessory interest in his household goods throughout the detention period.[40]

Although the courts in *Van Leeuwen* and *Visser* dealt with temporary seizures based upon different levels of suspicion, the Government's ability to maintain the property owner's privacy interest dictated the same result in each case. The Court in *Van Leeuwen* initially acknowledged that the Fourth Amendment provides protection against unreasonable searches of one's papers, and the Court also observed that first-class mail sent through the U.S. postal system is free from inspection.[41] Simultaneously, the Court recognized that temporary seizures of packages in the postal system do not disturb privacy interests, and the duration of the seizure in this particular case did not implicate any other interest.[42] The Court found that the "[d]etention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them en route and enlisting the help of distant federal officials in serving the warrant."[43]

Analyzing a more lengthy temporary seizure based upon probable cause, the court in *Visser* likewise concluded that the accused failed to show "that any possessory interest on his part was interfered with by the detention of his property" during the seizure period.[44] The court determined that SSG Visser had no possessory interest in his property because he had contracted with the Government to transport his household goods throughout the seizure period.[45] Since the accused affirmatively allowed the Government to arrange for the shipment of his household goods, he relinquished any possessory interest in the goods during the transit period and could not then claim that the Government interfered with any interest.[46]

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[32] *See Visser*, 40 M.J. at 90.

[33] *Id.* at 89.

[34] *Id.* at 87–88.

[35] *Id.* at 88.

[36] *Id.* "Here, the detention was initially based on reasonable suspicion which after 1 day evolved into probable cause." *Id.* at 90.

[37] *Id.* at 89–90. Visser "requested in writing that the government transport his household goods at government expense from November 6 to November 14, 1989." *Id.* at 90. The civilian magistrate granted the search warrant on 14 November 1989. *Id.* at 89.

[38] *Id.* At least one of the other pieces of stolen Government property was a straight-back chair. *Id.*

[39] *Id.*

[40] *Id.* at 90.

[41] United States v. Van Leeuwen, 397 U.S. 249, 251 (1970).

[42] *Id.* at 253.

[43] *Id.*

[44] *Visser*, 40 M.J. at 90.

[45] *Id.*

[46] *Id.* Even assuming the involvement of some possessory interest, Government seizure of one's property may be reasonable where there are justifiable and yet lengthy delays in obtaining a search authorization. *See id.* Although the court in *Visser* found that the accused had no possessory interest in his stored household goods, for argument's sake it took an additional step by considering the lawfulness of the seven-day temporary seizure if the accused did have a possessory interest in that property. *Id.* at 90–91. The court still found this detention lawful because "[t]he Fourth Amendment prohibits only 'meaningful interference' with a person's possessory interests, not Government action which is reasonable under the circumstances." *Id.* at 90. The court noted that while this seven-day delay was much longer than the twenty-nine hour delay in *Van Leeuwen*, the military investigator's delay was justified by the

Van Leeuwen and *Visser* demonstrate that as long as a temporary seizure does not include any "meaningful interference with an individual's possessory interest in that property,"[47] this is not truly a "seizure of property" for Fourth Amendment purposes.[48] If a property owner relinquishes control of a piece of property to a third party, and the government seizure occurs prior to the time when the owner anticipates regaining possession, there is no intrusion on a possessory interest.[49] In the absence of such an intrusion, the courts in both cases declined to articulate the standard of government diligence required when a seizure's lengthy duration does implicate a possessory interest.[50] While the Court in *Van Leeuwen* hinted that the length of delay could make a temporary seizure unreasonable,[51] in cases where there is no interference with a possessory interest, the government delay in developing probable cause and obtaining a search authorization remains irrelevant.[52]

B. Temporary Seizures Implicating a Possessory Interest

The length of delay in developing probable cause and securing a search authorization can transform a temporary seizure from one that affects no possessory interest into one that implicates a possessory interest.[53] Temporary seizures implicate a possessory interest when government agents seize a piece of property directly from its owner or when government agents seize property the owner has relinquished to a third party, and the owner anticipates regaining possession of the property at some point during the seizure period.[54] Temporary seizures may implicate possessory interests in situations where the seizure is based upon a reasonable suspicion[55] and those where the seizure is based upon probable cause.[56]

An example of a case where the duration of a temporary seizure based on reasonable suspicion implicated a possessory interest is *United States v. LaFrance*, a case from the Court of Appeals for the First Circuit.[57] In *LaFrance*, police officers in Lewiston, Maine, received anonymous reports that LaFrance was receiving illegal narcotics from Florida through the carrier Federal Express (FedEx).[58] At approximately 9:00 a.m. one morning, a FedEx employee informed police about a newly arrived overnight package addressed to LaFrance, and the police asked FedEx to hold the package until they could expose it to a drug-sniffing dog.[59] While FedEx guaranteed delivery by noon, based on past experience, LaFrance anticipated taking

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requirement to seek a search authorization from a civilian magistrate, and "as noted above, the period of detention to secure this warrant did not exceed the 7-day transit period during which appellant himself had agreed to be without possession of his goods." *Id.* at 91.

[47] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[48] *See Visser*, 40 M.J. at 89–90.

[49] *See id.*

[50] *See Van Leeuwen*, 397 U.S. at 253; *see also Visser*, 40 M.J. at 89–90.

[51] *Van Leeuwen*, 397 U.S. at 252. The Court observed that "[t]heoretically . . . detention of mail could at some point become an unreasonable seizure of 'papers' or 'effects' within the meaning of the Fourth Amendment." *Id.*

[52] *See Visser*, 40 M.J. at 90.

[53] *See Van Leeuwen*, 397 U.S. at 252.

[54] *See* United States v. Place, 462 U.S. 696, 705 (1983). "The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent. The seizure may be made after the owner has relinquished control of the property to a third party or . . . from the immediate custody and control of the owner." *Id.*; *see also* United States v. LaFrance, 879 F.2d 1 (1st Cir. 1989).

[55] *LaFrance*, 879 F.2d at 4.

[56] United States v. Martin, 157 F.3d 46, 52 (2d Cir. 1998).

[57] *LaFrance*, 879 F.2d 1. Even though *LaFrance* has only persuasive authority in military courts, military courts have nevertheless relied upon its analysis. *See Visser*, 40 M.J. at 90.

[58] *LaFrance*, 879 F.2d at 3.

[59] *Id.* at 4. In *United States v. Place*, discussed later, the Supreme Court determined that a sniff-test by a trained narcotics dog does not constitute a search for Fourth Amendment purposes. *Place*, 462 U.S. at 707. The Court explained this by stating,

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

delivery of packages by 11:00 a.m.[60] Because of police department inefficiency, the seizure continued beyond the noon deadline.[61] Since the case officer was off-duty and waiting for his wife to care for his infant son, and the drug-sniffing dog handler was also off duty and initially went to the wrong police station, the dog did not sniff the package until 1:15 p.m., seventy-five minutes after the guaranteed delivery time.[62] The sniff test took approximately one hour, during which time the dog alerted to the package and the agents established probable cause that it contained contraband.[63] Meanwhile, from 11:00 a.m. until the late afternoon, LaFrance called FedEx repeatedly, inquiring about the location of his package.[64] LaFrance argued for suppression of the evidence on grounds that the government detention of his package was too intrusive.[65] The court found that the seizure was reasonable, and the delay did not "approach[] the margins of the theoretical limit of reasonableness envisioned in *Van Leeuwen*."[66]

Another example of a temporary seizure implicating a possessory interest is *United States v. Martin*,[67] a case from the Court of Appeals for the Second Circuit, which involved a seizure based upon probable cause. In *Martin*, police in Burlington, Vermont, suspected Martin, the owner of an airplane restoration and parts supply business, of stealing avionics equipment from a hanger adjacent to his.[68] When a purchaser of some of these parts discovered their listing in a stolen parts registry, he contacted Martin and demanded a refund, and Martin agreed to take the parts back.[69] The purchaser mailed two packages containing the stolen parts, via FedEx and United Parcel Service (UPS), back to Martin and then notified police in Burlington of the package tracking numbers.[70] Upon police request, UPS employees in Vermont held one of the packages on arrival.[71] Eleven days later, police finally received a search warrant for the package, and they discovered the stolen airplane parts while conducting the search two days after obtaining the warrant.[72] Martin argued that "the government waited too long both in securing a warrant to search the package and in conducting the search."[73] The court decided that the Government acted reasonably.[74]

Because *LaFrance* and *Martin* involved different levels of suspicion, the courts' analyses demonstrate a heightened scrutiny for temporary seizures based on reasonable suspicion but also show a relaxed standard for seizures implicating only a possessory interest. In considering the reasonableness of the temporary seizure in *LaFrance*, the court looked at three factors: diligence, timeliness, and information.[75] First, the court found that in establishing probable cause, police must demonstrate diligence that is "fairly characterized by steady, earnest, energetic, and attentive application and effort toward a predetermined end."[76] The court tempered this standard by observing that while the police could have acted more expeditiously, their actions were reasonably diligent, because they "attempt[ed] to reduce any intrusion" by first arranging for the narcotics dog sniff test to establish probable cause and allowing enough time for the off-duty officers to be present for the test.[77] Second, the court looked to timeliness in relation to its impact on LaFrance's possessory interests and reasoned that

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Id.

[60] *LaFrance*, 879 F.2d at 5–6.

[61] *See id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *Id.* at 6–7.

[65] *Id.* at 4.

[66] *Id.* at 10.

[67] United States v. Martin, 157 F.3d 46 (2d Cir. 1998).

[68] *Id.* at 48.

[69] *Id.* at 49.

[70] *Id.* The purchaser mailed two packages to Martin—one on 11 December 1991 and the other on 16 December 1991. *Id.*

[71] *Id.* The package arrived at UPS in Vermont on 20 December 1991. *Id.*

[72] *Id.* Police obtained the search warrant on 31 December 1991 and searched the package on 2 January 1992. *Id.*

[73] *Id.* at 53.

[74] *Id.* at 54.

[75] United States v. LaFrance, 879 F.2d 1, 22–28 (1st Cir. 1989).

[76] *Id.* at 25.

[77] *Id.* at 23–24.

because the seizure did not affect LaFrance's liberty interests, the time he had to wait beyond the contractual delivery time was not unreasonable and did not outweigh the societal interest in crime prevention.[78] Third, the court considered whether the Government had an obligation to provide LaFrance with "information about where [the package] has been taken, for how long, and how it may be returned" and found this factor to be "insubstantial" where the owner relinquishes control of the property to a third party and the temporary seizure does not implicate a liberty interest (i.e., "the possessor's ability to travel").[79]

Similar to *LaFrance*, the court in *Martin*, which instead dealt with a probable cause seizure that extended for a much longer duration, also considered several factors in finding the temporary detention of a package to be reasonable.[80] First, the *Martin* Court looked at police diligence in obtaining a warrant.[81] The court found that because two weekends and Christmas occurred during the eleven-day seizure period, this "could explain the difficulty in promptly obtaining the warrant."[82] Second, the court examined the owner's privacy interest in the package and determined that by selling stolen parts to a third party, Martin assumed some risk that someone would reveal the contents of the package to authorities, thereby weakening his interest in the package.[83] Third, the court stated that because Martin had relinquished control of the property to a third party in the first place, the seizure was less intrusive.[84] Finally, just as in *LaFrance*, the court determined that "this is not a case where seizure of property would effectively restrain the liberty interests of the person from whom the property was seized, as is the case where officers seize a traveler's luggage and thereby cause 'disruption of his travel plans.'"[85]

While courts evaluate the impact of temporary seizures on a case-by-case basis, *LaFrance* and *Martin* demonstrate two critical factors for analyzing reasonableness: whether the Government was diligent in establishing probable cause or pursuing a search authorization and how the seizure's duration affected the property owner's liberty interests. For seizures based upon reasonable suspicion, government diligence involves putting forth a "steady, earnest, energetic, and attentive" effort to develop probable cause, even though this level of diligence may not be completely precise or efficient.[86] For probable cause seizures, the standard of diligence is more lenient in comparison to reasonable suspicion seizures, and courts may find any rational explanation for delay as excusable.[87] Finally, courts will consider strongly the fact that these seizures implicate no liberty interest, and this factor alone will weigh heavily in favor of the Government.[88]

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[78] *Id.* at 26.

[79] *Id.* at 28─29. In regard to whether the Government has an affirmative obligation to provide this information, the court stated,

> Where the intrusion implicates only a possessory interest . . . that interest is usually unaffected by the place at which the seized article is kept and what one is told, so long as the object's condition is undisturbed. Only information about how long the detention may last is relevant, because only such information relates to the length of dispossession. We need not decide, once and for all, whether information imparted is a factor worthy of substantial consideration in a third-party seizure which implicates only possessory, not liberty, interests. In this case, the government asked FedEx to watch for the package, and then to hold it—nothing more. Contrary to the [lower] court's suggestion, there is no rule of law which placed the police under an obligation, at least in these early hours, to telephone the parcel's intended recipient and tell him the nature and cause of the delay.

Id. (citation omitted).

[80] United States v. Martin, 157 F.3d 46, 54 (2d Cir. 1998).

[81] *Id.*

[82] *Id.* Interestingly, the *Martin* court's only discussion about the Government's conduct in relation to the delay appears to be the theoretical idea that because two weekends and a holiday occurred during the eleven-day period, this "could explain the difficulty in promptly obtaining the warrant." *Id.* Nowhere does the court mention that the two weekends and the holiday did in fact cause any delay. *See id.* In addressing the Government delay, the court also stated, "[W]hile we would normally expect police officers to secure a search warrant in considerably less time than was taken here, under the particular circumstances present here, we can not say that the delay in securing the December 31, 1991 warrant was so 'unreasonable' as to violate the Fourth Amendment." *Id.* Likewise, in *United States v. Visser*, the court took the additional step of considering the reasonableness of the seven-day delay in obtaining a search warrant. United States v. Visser, 40 M.J. 86, 90–91 (C.M.A. 1994). The court's only mention of what might be construed as Government diligence was the fact that the Air Force investigator had to get a civilian search warrant to search household goods held by a commercial moving company off the installation. *Id.* at 90; *see also supra* note 43.

[83] *Martin*, 157 F.3d at 54.

[84] *Id.*

[85] *Id.*

[86] *See generally* United States v. LaFrance, 879 F.2d 1, 23–28 (1st Cir. 1989). The *LaFrance* court emphasized this point when it stated that "[s]imply proving that more efficacious approaches were available does not prove that the method actually used was unreasonable." *Id.* at 15.

[87] While the Government's delay in securing a search warrant was reasonable in *Martin* and *Visser*, *see supra* note 77, a recent example of unreasonable Government delay is *United States v. Mitchell*. In this Eleventh Circuit Court of Appeals case, Immigration and Customs Enforcement (ICE) agents visited Mitchell's home in response to evidence that he had received electronic images of child pornography from a website. United States v. Mitchell, No. 08-10791, 2009 U.S. App. LEXIS 8258, at *2–3 (11th Cir. Ga. Apr. 22, 2009). When Mitchell told them that one of his computers probably contained child

C. Temporary Seizures Implicating a Possessory and Liberty Interest

A temporary seizure implicates both a possessory and liberty interest when government agents seize the owner's property (typically luggage), and this seizure effectively limits his ability to proceed with his travel plans or other activities because he must choose to remain with the seized property or arrange to get it back.[89] For temporary seizures based upon reasonable suspicion, the Supreme Court considers these to be a "*Terry*-type investigative stop"[90] requiring courts to look critically at the duration of the seizure to ensure that it is "so minimally intrusive as to be justifiable on reasonable suspicion."[91] Courts will impose a higher level of scrutiny for temporary seizures based upon reasonable suspicion than for those based upon probable cause.[92]

In *United States v. Place*,[93] the Supreme Court dealt with the government seizure of luggage initially based upon reasonable suspicion and later developing into probable cause. In this case, Drug Enforcement Agency (DEA) agents at the New York La Guardia Airport received a tip from law enforcement officers in Miami that Place might be transporting narcotics.[94] After Place arrived at La Guardia airport, claimed his two bags, and called a limousine, DEA agents approached

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pornography but refused to consent to a search, the agents removed the computer's central processing unit (CPU) and departed. *Id.* at *3–4. Two and one-half days later, the lead agent left for a two-week training program and finally sought a search warrant three days after his return. *Id.* The court found this twenty-one day delay unreasonable after balancing Mitchell's possessory interest in the computer against the Government's justification for its delay in obtaining a search warrant. *Id.* at *8–10.

First, the court determined that because computers are multi-use machines that may contain both contraband material and material of "exceptional value to its owner," the seizure had a significant impact on Mitchell's possessory interest. *Id.* at *8. Second, the court observed that no agent can be certain that a computer contains authentic child pornography until an examination of the computer occurs. *Id.* at *8– 9. Meanwhile, even though the actual warrant application was brief, the lead agent made no effort to seek a search warrant prior to his departure for training. *Id.* Also, the ICE agent who accompanied the lead agent to Mitchell's home was familiar enough with the investigation to apply for a warrant in the lead agent's absence but failed to do so. *Id.* at *9–10. Perhaps most significantly, the lead agent testified that he felt no sense of urgency to get a search warrant in light of Mitchell's acknowledgement that the computer contained child pornography. *Id.* at *10.

The court also rejected the Government's argument that because the lead agent was the only agent in his federal district capable of conducting a forensic examination of Mitchell's computer, the delay in securing the warrant while the lead agent was away had no practical effect on Mitchell's possessory interest. *Id.* at *10–11. The court found that as part of a nationwide investigation, ICE agents should have sought forensics assistance from someone outside the district in the lead agent's absence. *Id.* at *12–13. The court indicated that if the Government had at least attempted to seek assistance during the lead agent's absence, it would have been more forgiving of "legitimate and practical reasons" for delay associated with finding help when law enforcement resources are limited. *Id.* at *13 (citation omitted). However, the court was unwilling to excuse delay where "law enforcement officers simply believed that there was no rush." *Id.* at *14–15.

[88] *See Martin*, 157 F.3d at 54; *see also LaFrance*, 879 F.2d at 28.

[89] United States v. Place, 462 U.S. 696, 708 (1983). Explaining how a seizure of luggage can also implicate a liberty interest, the Supreme Court stated,

> The person whose luggage is detained is technically still free to continue his travels or carry out other personal activities pending release of the luggage. Moreover, he is not subjected to the coercive atmosphere of a custodial confinement or to the public indignity of being personally detained. Nevertheless, such a seizure can effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return.

Id.

[90] *Terry v. Ohio* concerned the temporary seizure of a person. Terry v. Ohio, 392 U.S. 1, 30 (1968). In *Terry*, the Supreme Court stated, "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person. *Id.* In that case, the Supreme Court held,

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the *Fourth Amendment*, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Id. at 30. For a discussion that *Terry*-type investigative stops do not require exigent circumstances, see United States v. Hensley, 469 U.S. 221, 228–29 (1985).

[91] *Place*, 462 U.S. at 708.

[92] *See* Segura v. United States, 468 U.S. 796, 812–13 (1984).

[93] *Place*, 462 U.S. 696 (1983).

[94] *Id.* at 698. According to the Court,

him, told him they suspected he was transporting narcotics, and requested consent to search his luggage.[95] According to the Court,

> [w]hen Place refused to consent to a search of his luggage, one of the agents told him that they were going to take the luggage to a federal judge to try to obtain a search warrant and that Place was free to accompany them. Place declined, but obtained from one of the agent's telephone numbers at which the agents could be reached. The agents then took the bags to Kennedy Airport, where they subjected the bags to a "sniff test" by a trained narcotics detection dog. The dog reacted positively to the smaller of the two bags but ambiguously to the larger bag. Approximately 90 minutes had elapsed since the seizure of respondent's luggage. Because it was late on a Friday afternoon, the agents retained the luggage until Monday morning, when they secured a search warrant from a Magistrate for the smaller bag. Upon opening that bag, the agents discovered 1,125 grams of cocaine.[96]

Claiming a violation of his Fourth Amendment rights, Place filed a motion to suppress the evidence.[97] The Supreme Court found the duration of the initial ninety-minute delay to be unreasonable and declared the evidence to be inadmissible.[98]

The Court in *Place* established the principle that government agents may briefly seize luggage directly from its owner "for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion."[99] However, in permitting this intrusion, the Court also provided several critical factors to determine whether the duration of such a seizure is reasonable.[100]

First, the Court determined that although lawful temporary seizures that are "longer than the momentary ones" may be reasonable, "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."[101] The Court found that absent probable cause, the ninety-minute delay resulting from the seizure of Place's luggage was not sufficiently brief in this situation.[102] Second, the Court examined the Government's diligence in pursuing the investigation and questioned whether the agents efficiently used their time to arrange for additional investigative procedures.[103] Because the agents knew Place's arrival time at La Guardia Airport well in advance, they had adequate time to pre-arrange for the sniff test locally in order to minimize the intrusion, rather than removing the luggage and taking it to another airport.[104] Finally, the Court considered the

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> Prompted by Place's parting remark that he had recognized that they were police, the [Miami] agents [who spoke with Place prior to his departure] inspected the address tags on the checked luggage and noted discrepancies in the two street addresses. Further investigation revealed that neither address existed and that the telephone number Place had given the airline belonged to a third address on the same street. On the basis of their encounter with Place and this information, the Miami agents called Drug Enforcement Administration (DEA) authorities in New York to relay their information about Place.

Id.

[95] *Id.* at 699.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 710.

[99] *Id.* at 702. The Supreme Court recognized the temporary seizure of Place's luggage to be similar to a temporary detention of a person during a *Terry* stop "on the basis of reasonable, articulable suspicion, premised on objective facts, that the luggage contains contraband or evidence of a crime." *Id.* The Court used a balancing test to determine that "[w]hen the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause." *Id.* at 703. The Court then observed that temporary seizures could vary in degrees of intrusion from those where Government agents seize property the owner has relinquished to a third person to those where agents remove property directly from its owner. *Id.* at 705. Additionally, the Court approved of the Government's discretion to "confine their investigation to an on-the-spot inquiry—for example, immediate exposure of the luggage to a trained narcotics detection dog—or transport the property to another location." *Id.* at 705–06.

[100] *See id.* at 708–10.

[101] *Id.* at 709.

[102] *Id.*

[103] *Id.*

[104] *Id.*

government agents' failure to provide Place with information regarding his property.[105] The agents should have "inform[ed] [Place] of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion."[106] This ninety-minute delay, although not *per se* unreasonable, was unreasonable in this particular case.[107]

While the Supreme Court established a high standard for temporary seizures based upon reasonable suspicion that implicate a possessory and liberty interest, there is a lesser standard for probable cause seizures.[108] In *Segura v. United States*, the Court revisited *Place* in justifying delays associated with the probable cause seizure of an apartment.[109] In this case, New York Drug Enforcement Task Force agents temporarily seized an apartment from within and waited nineteen hours to obtain a search warrant because of an "administrative delay."[110] The apartment's occupants were in custody for the duration of the seizure.[111]

Because considerable delay in securing a warrant resulted from this seizure, the Court in *Segura* used it as an opportunity to elaborate on the delay in *Place* that occurred after agents established probable cause. In a footnote, the Court stated,

> [I]n *United States v. Place* . . . we found unreasonable a 90-minute detention of a traveler's luggage. But the detention was based only on a suspicion that the luggage contained contraband, not on probable cause. After probable cause was established, authorities held the unopened luggage for almost three days before a warrant was obtained. It was not suggested that this delay presented an independent basis for suppression of the evidence eventually discovered.[112]

This interpretation of the three-day delay is somewhat problematic, because, as the dissent in *Segura* pointed out, the Court in *Place* "had no occasion to reach that issue" after it had already suppressed the evidence because of the length of the seizure when it was based upon reasonable suspicion.[113] However, case law supports lengthy delays resulting from temporary seizures when based upon probable cause and under similar circumstances.[114]

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[105] *Id.* at 710; *see also* United States v. LaFrance, 879 F.2d. 1, 28 (1st Cir. 1989). With regard to the information factor, the court in *LaFrance* observed,

> If accurate, information about where luggage has been taken, for how long, and how it may be returned, is important largely because it affects a liberty interest (the possessor's ability to travel); misinformation can obviously cause delay, disruption of routing and timing, or general inconvenience. Where the intrusion implicates only a possessory interest, however, that interest is usually unaffected by the place at which the seized article is kept and what one is told, so long as the object's condition is undisturbed. Only information about how long the detention may last is relevant, because only such information relates to the length of dispossession.

Id.

[106] *Place*, 462 U.S. at 710.

[107] *See id.*

[108] *See generally* Segura v. United States, 468 U.S. 796 (1984).

[109] *See id.* at 812–13.

[110] *Id.* at 801. A non-controversial subject was the idea that probable cause seizures, if conducted from the outside of the apartment, do not require exigent circumstances. *See id.* at 804, 824 n.15.

[111] *Id.* at 801. This primer is not intended to address all of the vast nuances of *Segura v. United States*. The Court provided the principle of this case when it stated,

> [W]e hold that where officers, having probable cause, enter premises, and with probable cause, arrest the occupants who have legitimate possessory interests in its contents and take them into custody and, for no more than the period here involved, secure the premises from within to preserve the status quo while others, in good faith, are in the process of obtaining a warrant, they do not violate the Fourth Amendment's proscription against unreasonable seizures.

Id. at 798.

[112] *Id.* at 824 n.8.

[113] *Id.* at 813 n.14 (Stevens, J., dissenting).

[114] United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982); *see also* United States v. Respress, 9 F.3d 483 (6th Cir. 1993). In *Respress*, an airport narcotics officer identified Respress as fitting the drug courier profile, questioned him about his travel plans, and requested consent to search his luggage, which Respress refused. *Id.* at 484. When Respress departed the airport without his luggage rather than proceeding on his connecting flight, the agent located and stopped him in a taxicab. *Id.* at 485. When Respress again provided inconsistent answers to the agent's questions, attempted to hide his ticket, and refused the agent's request to search his luggage, the agent obtained a search warrant the next day—ten hours after seizing his luggage from the airport. *Id.* The search revealed 2.8 kilograms of cocaine in Respress's suitcase. *Id.* After explaining why Respress's behavior established probable cause, the court found that the delay in securing the search warrant was reasonable. *Id.* at 487–88. Interestingly, while discussing the significance of probable cause in justifying

For instance, in *United States v. Jodoin*, federal DEA agents at a Florida airport observed that Jodoin's behavior matched the profile of a drug courier, so they contacted DEA agents in Boston (Jodoin's destination) who met up with Jodoin at his arrival terminal at Logan Airport.[115] After Boston DEA agents approached Jodoin and noticed more suspicious behavior, they requested consent to search his suitcase, which he refused.[116] Upon request, Jodoin agreed to accompany the agents to the airport DEA office where the agents told him they wanted to expose his luggage to a drug dog sniff test.[117] The agents did not place Jodoin under arrest, but they did keep his suitcase and tell him he was free to leave their office.[118] The next day, a drug dog sniffed the suitcase but did not alert to the presence of drugs.[119] Three days later, a magistrate granted a search warrant for the suitcase, based primarily on information obtained prior to the sniff test and on an informant's statement.[120] The search revealed that Jodoin was transporting several pounds of cocaine.[121] The court rejected Jodoin's claim that DEA agents acted unconstitutionally in detaining his luggage.[122]

After deciding the agents were justified in conducting a brief investigatory stop of Jodoin in the airport, the First Circuit held that the agents had probable cause to believe his suitcase was an instrumentality of a crime.[123] The court then determined that because the agents based their temporary seizure of the suitcase on probable cause, analyzing the reasonableness of the three-day delay in obtaining a search warrant was unnecessary.[124] The court stated,

> Because these facts satisfy the higher standard of "belief," we need not consider whether because of the length of time of the detention of the suitcase, it would have been unlawful if supported only by "reasonable suspicion"—an issue which, while not specifically raised here, has bothered the courts of appeals for other circuits.[125]

In other words, the court ceased to analyze the reasonableness of the three-day delay as soon as it found probable cause.[126] This supports the Supreme Court's notion in *Segura* that the three-day delay in *Place* occurring after government agents established probable cause was in fact reasonable.[127]

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temporary seizures, the court mentioned that "the [Supreme] Court's decision in *Place* would have been unnecessary had there been probable cause to seize the defendant's suitcase, because seizures based on probable cause have long been lawful." *Id.* at 486.

[115] *Jodoin*, 672 F.2d at 233.

[116] *Id.* at 234. When Jodoin arrived at the airport, one agent testified that he appeared to be nervous, as he stopped on several occasions to "scan[] the area." *Id.* at 233–34. As further evidence of this suspicious behavior, the court stated,

> When Jodoin left the baggage claim area, the agents approached him. Marchand identified himself as a DEA agent and asked Jodoin whether he could speak to him for a minute. Jodoin answered, "sure." Marchand asked him for his name, identification and where he was traveling from. Jodoin said his name was "Peter Jodoin" (not Paul Harper [a name he previously provided to Florida DEA agents]). He said he was returning from Fort Lauderdale where he had stayed with friends for a few days (not 17 hours [as indicated by his flight itinerary]). He added that he had left his clothing in Florida (although he carried a suitcase). He told the agents he had no identification and that he had thrown his ticket away. When agent Marchand asked him whether the suitcase he was carrying was his, he replied, "I don't know." He then said it was not his. The agents stated that Mr. Jodoin was nervous and that "perspiration began to form above his upper lip."

Id. at 234.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* Although the dog did not alert to the luggage, the DEA agents "obtained a warrant to search the suitcase—on the basis of the information [mentioned previously], along with an agent's statement that an informant had told a different agent that appellant had associated with known drug dealers." *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 235.

[124] *Id.*

[125] *Id.* One of the other circuits that was bothered by similar cases dealing with reasonable suspicions seizures at the time was *United States v. Place* when it was in the Court of Appeals for the Second Circuit. *See id.* No controversy surrounded the *Jodoin* decision, however. United States v. Respress, 9 F.3d 483, 488 (6th Cir. 1993).

[126] *Jodoin*, 672 F.2d at 235.

[127] *See* Segura v. United States, 468 U.S. 796, 824 n.8 (1984).

For temporary seizures implicating a possessory and liberty interest, *Place* and its interpretation in *Segura* demonstrate the dichotomy between the standard of reasonableness for seizures based upon reasonable suspicion and those based upon probable cause. In both cases, courts will determine reasonableness in light of the seizure's duration and how diligently the Government used the delay.[128] Where reasonable suspicion justifies the brief investigatory detention, government agents must diligently establish probable cause before the delay amounts to an unreasonable disruption in the owner's travel plans.[129] Where probable cause justifies the temporary seizure, however, government agents are no longer looking to dispel any suspicions with regard to the property.[130] In fact, once probable cause exists, a search authorization should be forthcoming, and the property owner's liberty interests in relation to the property should be a moot concern.[131] At that point, the duration of the delay in obtaining the search authorization must still be reasonable.[132] However, reasonable delay in probable cause cases may last hours or even days as opposed to a significantly shorter period—perhaps a matter of minutes—in reasonable suspicion cases.[133]

III. Conclusion

The framework for temporary seizures under the Fourth Amendment represents a balance between two competing interests.[134] On one side is the Government's desire to use temporary seizures as a tool to maintain the status quo while moving forward with the investigation.[135] On the other side is the owner's interest in avoiding government interference with the possession of his property.[136] Meanwhile, the principle of reasonableness weighs against both of these interests to create the proper balance.[137] The Government demonstrates the reasonableness of a particular temporary seizure by diligently developing probable cause and seeking a search authorization during the seizure period.[138]

By initiating a temporary seizure, government agents bear the responsibility to proactively gather vital pieces of information in order to understand whether reasonable suspicion or probable cause exists with regard to the property and how the seizure affects the property owner's interests.[139] This information consequently triggers the level of diligence required in developing probable cause and seeking a search authorization with regard to the property.[140]

The duration of a particular seizure in itself does not make a temporary seizure unreasonable.[141] However, armed with the proper analytical tools, a government agent should prepare for and execute a temporary seizure in a conscientious manner, as if a clock were ticking.[142] The appendix to this primer presents such a tool. For a temporary seizure based upon probable cause, the agent must progress methodically.[143] For a temporary seizure based upon a reasonable suspicion that implicates a possessory interest and more, the agent must move efficiently and swiftly.[144] Demonstrating the appropriate

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[128] *See* United States v. Place, 462 U.S. 696, 708–10 (1983).

[129] *See id.* Clearly, some disruption to a person's travel plans may be reasonable.

[130] *See generally Jodoin*, 672 F.2d at 235.

[131] *See generally id.* In other words, if a search warrant is forthcoming, the property owner should expect to lose possession of his property at least until the resolution of his case, regardless of his liberty interests.

[132] United States v. Respress, 9 F.3d 483 (6th Cir. 1993).

[133] *See* Segura v. United States, 468 U.S. 796, 812–13 (1984).

[134] *See id.* at 808.

[135] *See id.*

[136] *See id.*

[137] *See generally id.*

[138] *See generally* United States v. Place 462 U.S. 696, 709 (1983).

[139] *See generally id.* at 709–10.

[140] *See generally* United States v. Jodoin, 672 F.2d. 232, 235 (1st Cir. 1982).

[141] *See Place*, 462 U.S. at 709–10.

[142] *See generally id.*

[143] *See generally* United States v. Visser, 40 M.J. 86, 90–91 (C.M.A. 1994).

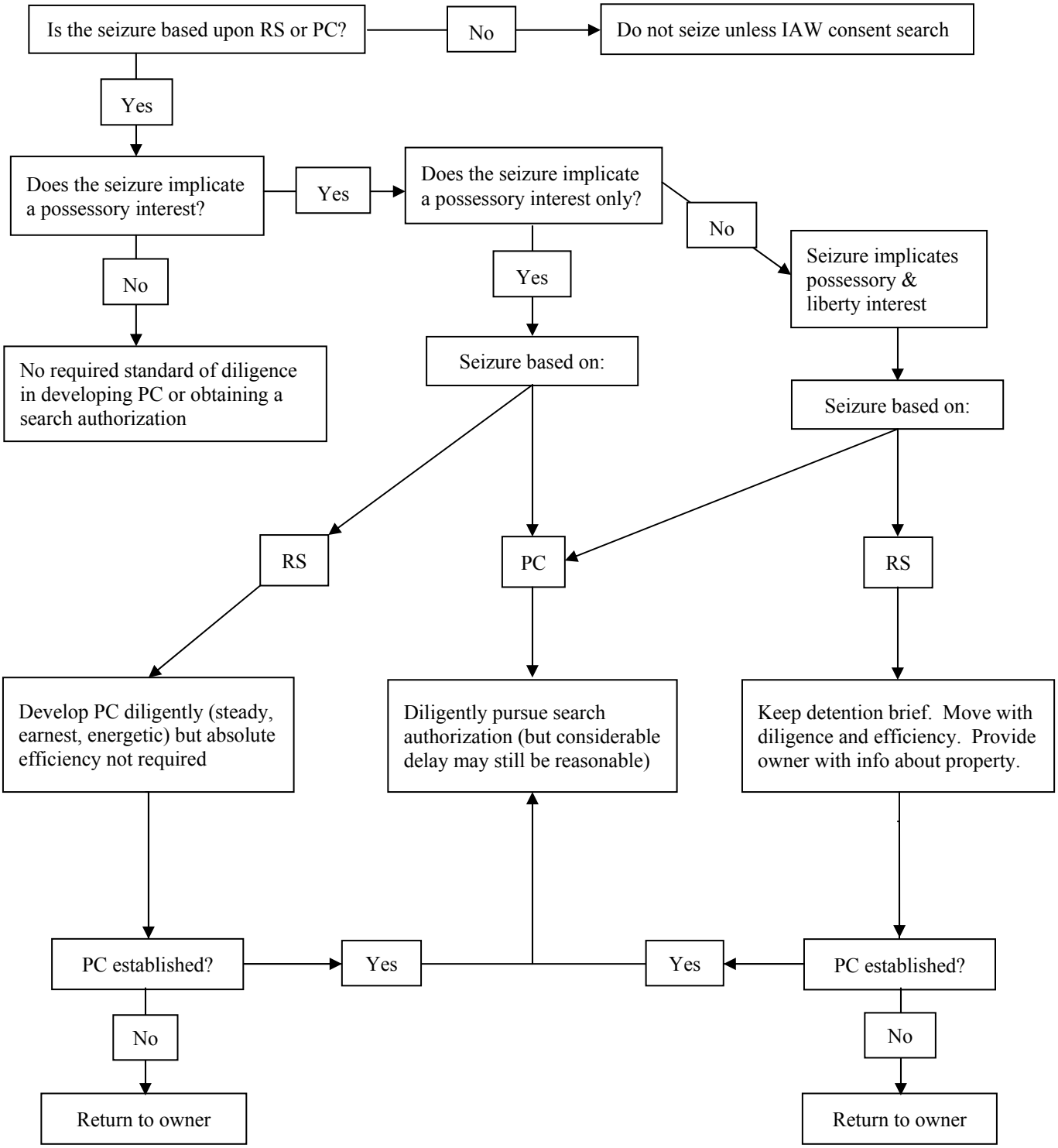
[144] *See Place*, 462 U.S. at 709–10; *see also* United States v. LaFrance, 879 F.2d 1, 25 (1st Cir. 1989).

diligence during temporary seizures, government agents maintain the balance between "society's interest in the discovery and protection of incriminating evidence from removal or destruction" and "a person's possessory interest in property."[145] Using the proper framework, government agents can use temporary seizures to their advantage while respecting Fourth Amendment protections.

[145] Segura v. United States, 468 U.S. 796, 808 (1984).

Appendix

Temporary Seizure Flow Chart



Notes from the Field

Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition[*]

Captain Matthew Greig[†]

A necessary condition for success in any counterinsurgent effort is the establishment of state institutions as the sole provider of key government functions.[1] Because of the massive civil unrest caused by an insurgency, "key government functions" is often associated with security and thought of primarily in terms of troops. Indigenous security forces are indeed a critical element of a counterinsurgency (COIN); Army Field Manual 3-24, *Counterinsurgency*, dedicates an entire chapter to the training and fielding of host nation security forces.[2] Increasing numbers of troops and police, however, can only keep a lid on a simmering population. "In the long term, public order . . . rests on a societal consensus about the legitimacy of state institutions and confidence in the capacity of such institutions to deliver basic services."[3] This includes confidence that the host nation's criminal justice system (often boiled down to cops, courts, and confinement) can fairly and efficiently convict suspected insurgents and incarcerate them for their crimes.

The ability to remove malign influences from the battlefield is indispensable in a counterinsurgency, and a portion of this article is devoted to aiding judge advocates in planning for this challenge during multi-national operations. Detention operations conducted by a multi-national coalition, however, can undermine the coalition's counterinsurgency goals because foreign detention operations, to some degree, may supplant the need for the indigenous justice system. Multi-national forces should avoid creating a total reliance on their ability to detain criminal suspects at the expense of lasting, long-term institutional gains. Commanders, however, have a competing interest in establishing security and ensuring malign actors are quickly and efficiently taken off the streets—a priority the local judiciary cannot (and perhaps should not) adopt. As such, commanders are faced with conflicting short- and long-term priorities regarding the prosecution of insurgents. Even when units are ostensibly supporting the local judiciary, there can be pressure to place "security first" and accept shortcuts in the system if it means suspected criminals are arrested (sometimes on dubious evidence) and held longer than host nation and international human rights standards would find appropriate. Judge advocates can mitigate this challenge by working with commanders to support host nation judicial standards, even if select actors in the host nation do not.

To speed installment of the rule of law, judge advocates and their units must be ready for the transition from security-based detention operations to criminal justice-based, host nation-conducted detentions. In the case of Iraq, from 8 June 2004 to 31 December 2008, individuals deemed by the coalition to pose a threat to the safety and security of the Iraqi people and the forces protecting them were temporarily removed from the battlefield.[4] This practice complied with the law of war, was specifically sanctioned by the U.N. Security Council, and was vital to restoring security in Iraq.[5] However, for a COIN effort to achieve lasting success, the host nation's own institutions must achieve legitimacy. Reaching this end should be the goal from day one.

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[*] This article is the first in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps' functional legal areas during the deployment. Articles in the series will cover issues in administrative law, rule of law, contract and fiscal law, operational law, criminal law, and foreign claims.

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 6-90 (15 Dec. 2006) [hereinafter FM 3-24].

[2] *Id.* § 6-1.

[3] JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 135 (2006).

[4] S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004) [hereinafter UNSCR 1546]; Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq., Nov. 17, 2008, http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf [hereinafter Security Agreement].

[5] UNSCR 1546, *supra* note 4; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The purpose of this article is two-fold: (1) discuss the legal limitations some of our coalition partners faced in conducting detention operations in Iraq and (2) use the transition in Iraq from security-based detention to criminal-based detention as a guide to aid future planning efforts. The article will first discuss the authority to detain individuals granted to the multi-national coalition in Iraq and the competing obligations of some of the multi-national partners. It will then discuss issues faced by the coalition in reintegrating or prosecuting former "security detainees" after the broad authorization to detain expired. Admittedly, the transition in Iraq is still in the early stages; the real effect of the detainee release process and, for some detainees, detainee prosecutions, will not be known for some time.

Detention Operations—Authorities & Restrictions

International and Host Nation Authorizations

On 8 June 2004, the U.N. Security Council unanimously passed Resolution 1546, which recognized the multi-national force then in place in Iraq and granted it "the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to [the] resolution . . . ."[6] One annexed letter, from then Secretary of State Colin Powell, specifically requested "internment where this is necessary for imperative reasons of security."[7] Coalition Provisional Authority (CPA) Memorandum No. 3, which granted the Coalition authority to apprehend persons suspected of having committed criminal acts, was later incorporated into Iraqi law.[8]

Based on these authorizations, a detainee could travel two possible paths within the detention system: that of a "security detainee" or that of a "criminal detainee." Until 1 January 2009, the process for determining a detainee's path was as follows:

> The detaining unit commander, in conjunction with Judge Advocates working at the [lower level internment facilities] [made] the initial determination either to hold the individual as a security threat or criminal suspect, or to release him. If it [was] necessary to continue holding the individual, he [was] transferred to Camp Cropper to be in-processed into one of the three [theater internment facilities]. The magistrate's cell at Camp Cropper perform[ed] a second due process review of the individual's case to again determine if sufficient evidence exist[ed] to hold the individual for security or criminal reasons. If no sufficient evidence exist[ed], the magistrate's cell [could] recommend the person be released. . . . Based upon their decision, the individual [would] either be immediately released, forwarded to the [Central Criminal Court of Iraq] liaison office for prosecution, or forwarded to the [Combined Review and Release Board] review section for continued internment for security reasons.[9]

Coalition Caveats

Although the U.N. granted broad authority to the multi-national force, individual Coalition partners were often forced to deal with conflicting international treaty obligations or domestic law requirements that restricted their ability to hold security detainees or prohibited them from transferring detainees to Iraqi authorities. For instance, the European Convention on Human Rights (ECHR), adopted by forty-seven states, guarantees habeas corpus-like protections and speedy trial rights to

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[6] UNSCR 1546, *supra* note 4, at 10.

[7] *Id.* at 11.

[8] Coalition Provisional Authority Memorandum No. 3 (Revised), Criminal Procedures § 5(1), at 3 (27 June 2004), http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf [hereinafter CPA Memorandum No. 3].

> A national contingent of the MNF [Multi-National Forces] shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter "criminal detainees") who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may retain criminal detainees in facilities that it maintains at the request of appropriate Iraqi authorities based on security or capacity considerations..

[9] Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY LAW., July 2007, at 76. The Central Criminal Court of Iraq (CCCI) is an Iraqi court that has nationwide jurisdiction to try primarily terrorism-related criminal charges. The Combined Review and Release Board (CRRB) presented cases to a board composed of Iraqi Government officials and coalition officers; it decided whether individuals who could not be criminally prosecuted posed a security threat and should, therefore, be detained as a security internee or released.

individuals held under the jurisdiction of signatory states, which effectively prohibits these states from keeping detainees in long-term confinement.[10] Further complicating the transition from security detentions to host nation rule of law, signatories to the Convention face significant hurdles when transferring detainees to host nation custody; if a detainee's Convention rights might be violated by a receiving state, Convention members are prohibited from transferring the detainee.[11] For instance, Iraq provides for and regularly applies the death penalty. Consequently, because forty-one of the forty-seven signatories to the ECHR have ratified a protocol to the Convention prohibiting the death penalty in all circumstances, those members are prohibited by treaty from transferring detainees to Iraqi custody.[12] Moreover, the ECHR, unlike many international treaties—especially those concerning human rights—has some teeth to it. Alleged violations of the ECHR can be brought directly to the European Court of Human Rights, and the Convention grants a right of compensation to anyone whose rights have been violated by a member state.[13]

Domestic law may also limit states' ability to perform the detention piece of a counterinsurgency strategy. For example, in 1998, the United Kingdom (U.K.) passed the Human Rights Act (HRA),[14] which was intended "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights (ECHR); essentially, it is a domestic law reinforcement to the U.K.'s obligations under the Convention."[15] Specifically, the Act made it unlawful for any "public authority," including the armed forces, to act in a way which is incompatible with an ECHR right.[16] The only defense to an alleged violation is that the public authority had acted in pursuit of a mandatory obligation imposed by the parliament.[17] In the case of Iraq, the U.K. House of Lords decided the HRA, in relation to the ECHR (an international obligation), was preempted by UNSCR 1546 (another international obligation) through Article 103 of the U.N. Charter, and, consequently, the U.K.'s detention operations in Iraq did not fall under the jurisdiction of the ECHR or HRA.[18]

The House of Lords' ruling on the legality of U.K. detainee operations has not been the final word on the subject, however.[19] The European Court of Human Rights continues to issue rulings on British detainees and recently held that the transfer of British detainees to Iraqi custody was unlawful.[20] Meanwhile, in Afghanistan, the U.K. does not conduct long-term detention operations. As part of the NATO-led International Security Assistance Forces (ISAF) mission, the U.K. and

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[10] Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter ECHR]. The forty-seven signatory states include all the states of Europe. *Id.*

[11] *See* MICHAEL FORDHAM QC ET AL., LEGAL OPINION ON DETAINEE HANDOVERS BY UK FORCES: IN THE MATTER OF THE ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION AND IN THE MATTER OF THE HUMAN RIGHTS RESPONSIBILITY ARISING FROM MILITARY DETAINEE HANDOVERS IN IRAQ [AND AFGHANISTAN] (All Party Parliamentary Group on Extraordinary Rendition 2008).

[12] Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, Europ. T.S. No. 187.

[13] ECHR, *supra* note 10, art. 34. Judge advocates and military planners should therefore be ready for situations where coalition partners, although granted complete responsibility for a battlespace, are unable to conduct detention operations. A memorandum of understanding between the United States and the coalition partner may allow for a transfer to U.S. custody; more likely, however, an American presence to handle detentions in the area will be required.

[14] Human Rights Act, 1998, c. 42 (Eng.) [hereinafter HRA].

[15] *Id.* at 1.

[16] Al-Skeini v. Secretary of State for Defence, [2008] 1 A.C. 153 (U.K.H.L 2007) (appeal taken from E.W.C.A.) (holding the HRA applies extraterritorially to the acts or omissions of British Soldiers in Iraq and interpreting the phrase "within the jurisdiction of the United Kingdom" to mean "within the effective control" of the United Kingdom); HRA, *supra* note 14, § 6(1).

[17] *Id.* § 6(2).

[18] Penelope Nevill, *Reconciling the Clash Between UK Obligations Under the UN Charter and the ECHR in Domestic Law*, 67 CAMBRIDGE L.J. 3, 448 (2008).

[19] The United Kingdom, whether due to a policy decision or because of uncertainties as the cases wound their way through the courts, continued to apply many of the tenets of the ECHR in Iraq, and, in an effort to avoid running afoul of their human rights obligations, avoided placing detainees into long-term U.K. confinement. In addition to legal restraints, political sentiment in partner countries can influence restrictions they place upon themselves. For instance, even before the expiration of UNSCR 1546 and the signing of its own bilateral agreement (which was even more restrictive than the one between the United States and Iraq), the United Kingdom almost completely absolved itself of any involvement in internment. The government restricted British troops to a supportive mission in United States and Iraqi detainee operations. Because the United Kingdom still had responsibility for a large area of operation (Basra Province) and had a handful of targets it wished to capture before leaving Iraq, maintaining the Coalition's ability to detain individuals in that area required some creative thinking. In the end, the Coalition agreed that a member of the U.S. or Iraqi forces would maintain legal custody and jurisdiction over detainees and U.K. forces would play a purely supporting logistical role in capturing and maintaining detainees until they could be transported to an American or Iraqi detention facility.

[20] Geoff Meade, *European Court Blocks UK Handover of Iraqi Detainees*, INDEPENDENT, Dec. 31, 2008, http://www.independent.co.uk/news/world/europe/european-court-blocks-uk-handover-of-iraqi-detainees-1218229.html.

Afghanistan have agreed that U.K. forces will detain individuals in only limited circumstances and all detainees must be transferred to Afghan authorities "at the earliest opportunity."[21]

The Transition

For many reasons, including prosecutorial resources, lack of evidence, and operational necessities, the vast majority of individuals captured by the coalition between 2004 and 2009 were processed as security detainees and confined under the authority of UNSCR 1546. This satisfied the immediate need to remove malign influences from the population, if only temporarily. The UNSCR's broad grant of detention authority expired on 31 December 2008, however, and the Security Agreement between the United States and Iraq replaced the UNSCR as the legal basis for detentions.[22] Article 22 of the Security Agreement addresses detention operations and also supersedes the authority granted to the multi-national force in CPA Memorandum No. 3, which permitted members of the force to apprehend persons suspected of having committed criminal acts.[23] As a result of the change from the UNSCR to the Security Agreement, American and Iraqi authorities were left scrambling to plan for the release of detainees for whom criminal prosecution was not necessary, while simultaneously gathering sufficient evidence to support the prosecution of approximately 5000 "dangerous radicals," previously held as security detainees before 2009, and transitioning the Coalition to a supporting role with respect to the Iraqi judiciary.[24] Article 22 of the Security Agreement is reproduced below.

> Article 22 – Detention
>
> 1. No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4 [of the Security Agreement].
> 2. In the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.
> 3. The Iraqi authorities may request assistance from the United States Forces in detaining or arresting wanted individuals.
> 4. Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this agreement.
> 5. The United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.[25]

The effect of Article 22 is twofold: (1) all security detainees held by the Coalition on 31 December 2008 (referred to as "legacy detainees") must either be released in a "safe and orderly manner" or must be transferred to Iraqi custody if Iraqi officials have a judicial order, and (2) any detentions after 31 December 2008 must be conducted in accordance with Iraqi law, including the Iraqi Law on Criminal Proceedings of 1971.[26]

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[21] Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, U.K.-Afg., Apr. 23, 2005, *available at* http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4412.htm.

[22] Security Agreement, *supra* note 4.

[23] CPA Memorandum No. 3, *supra* note 8.

[24] Allisa J. Rubin, *A Puzzle Over Prisoners as Iraqis Take Control*, N.Y. TIMES, Oct. 24, 2008, at A1.

[25] Security Agreement, *supra* note 4, art. 22.

[26] Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf [hereinafter Law on Criminal Proceedings] (last visited Nov. 23, 2009).

Legacy Detainees in Iraq

When UNSCR 1546 expired at midnight on 31 December 2008, the United States had roughly 15,000 detainees remaining in its custody.[27] To release them all at once would have been logistically impossible and would have posed a threat to the relative security in place at the time.[28] Pursuant to the requirements of the Security Agreement, Iraq and U.S. authorities established a system of transfer or release based on warrants; detainees named on Iraqi judicial warrants would be released to the Iraqis and all other detainees would be released in a "safe and orderly manner."[29]

A joint United States-Iraq committee on detainee affairs was established to share information and coordinate investigations between the two governments.[30] Together, the United States and Iraq settled on a schedule of fifty detainee releases per day, which represented the maximum number of individuals the United States could responsibly outprocess from the detainee facilities.[31] Operating through the joint committee, the United States would issue a list of scheduled releases to the Iraqis who would then vet the names through the police and judiciary.[32] Each list included 1200 to 1500 names per month, although the actual number of detainees released could be modified if required by security conditions in a particular area.[33] Detainees for whom a valid warrant existed would be transferred into Iraqi custody on the release date. In the absence of a validated warrant, a detainee on the list would be set free. The Iraqis could also identify detainees "of interest" on the release list. Designating an individual as "of interest" would postpone the detainee's release by one month to give the Iraqis time to gather further evidence for a valid criminal warrant.[34] Meanwhile, at the same time the Iraqis were vetting the names, U.S. forces would conduct their own vetting through intelligence, provost marshal, and judge advocate offices to ferret out evidence or leads that could be used by the Iraqis to prosecute a case.[35]

Reintegration

Formal release from detention involves more than merely dressing a detainee in civilian clothes, returning his belongings, and allowing him to walk out the front gate of Camp Bucca. The release process is part of a larger reintegration effort that includes post-detention mentoring and training. When scheduled for release, a detainee is transported to and released at or near his place of residence or point of capture; the release point can be modified if the detainee lodges a "fear for life" objection to the location, at which point the detainee, the detainee's family, and U.S. forces collaborate to determine a safe, alternate release location.[36] At the point of release, a ceremony is held, attended by family members, friends, local leaders, sheiks, and others, during which the detainee must take an oath of good citizenship, renounce violence, and affirm a commitment to the security and stability of Iraq.[37]

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[27] Press Release, Muti-National Force–Iraq, Coalition Begins Releasing Detainees Under New Security Agreement (Feb. 3, 2009), *available at* http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25249&Itemid=128.

[28] Interview with Lieutenant Commander Jeffrey Sutton, Chief of Detainee Operations, Multi-National Corps–Iraq, at Camp Victory, Iraq (Mar. 2, 2009) [hereinafter Sutton Interview].

[29] Security Agreement, *supra* note 4, art. 22(4).

[30] Sutton Interview, *supra* note 28; Brigadier General David Quantock, Deputy Commanding General of MNF–I Detainee Operations, Media Roundtable, Taji, Iraq (Feb. 23, 2009), *available at* http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25573&Itemid=131) [hereinafter Quantock Media Roundtable].

[31] Sutton Interview, *supra* note 28.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] For example, the first releases began on 1 February 2009; the list of 1500 names was given to the Iraqis in December. Of those 1500 individuals, the Iraqis returned with twelve arrest warrants and identified sixty-five detainees of interest; the twelve with arrest warrants were transferred into Iraqi custody, the release of the sixty five detainees of interest was delayed for one month, and the rest were released. The number of arrest warrants presented each month will likely rise as the investigatory process is improved and because the more serious offenders are being saved toward the end to allow the maximum time to gather evidence.

[36] Sutton Interview, *supra* note 28.

[37] *Id.*

Battlespace owners also endeavor to assign a "life coach" to mentor the detainee and monitor his post-release activities.[38] This individual's role varies, and some detainees may have more than one sponsor. Ideally, this "coach" should act as a guarantor in the form of a local sheik, leader, family member, or friend who takes responsibility for the former detainee's reintegration into society and counsels him not to return to insurgent activities. The role is akin to the job of a social worker who follows up with the former detainee, ensuring he has rejected violence, and whose duties include putting the detainee in contact with government-sponsored life-skills training programs, counseling, and employment assistance. Alternatively, these coaches might serve purely as employment assistance managers who work with the Iraqi Government and the private sector to assist the detainee to enroll in job training, locate employment opportunity programs, and secure a job. The guarantors are required to attend the release ceremony and sign an agreement outlining their responsibilities.[39]

It is still too early to gauge the effectiveness of this program, but it has been slow to gain traction in Iraq.[40] Besides a signature on a sheet, nothing obligates the guarantor to actually ensure the former detainee will not return to violence. The government has little leverage or oversight over the guarantors and cannot compel them to mentor or assist the detainees. Meanwhile, the high rate of unemployment and the sluggish economy in Iraq almost precludes the need for job assistance or training efforts. An early proposal suggested that the guarantor positions should be paid (e.g., guarantors would be paid $10 per detainee "guaranteed"), but with no leverage over the guarantor and the potential for corruption, the idea was rejected because of concerns that the program would spiral into little more than a "cash cow" for enterprising sheiks.[41]

Detainees who are not formally released may be transferred to Iraqi authorities for criminal prosecution if certain requirements are met. For example, the United States strictly prohibits the transfer of detainees to Iraqi custody without a valid arrest warrant or detention order issued by an investigative judge (IJ).[42] The joint system established for detainee vetting, both at the national and local levels, was designed to eliminate the need for last minute, unlawful detentions without a warrant by the Iraqis. On several occasions, however, Iraqi security forces at the local level have immediately taken former detainees into custody following their release, in full view of U.S. forces, without valid warrants or orders from a judge. For example, Iraqi Police once arrested twenty detainees as soon as U.S. forces released them, and the unit's only recourse was to verbally protest the action and report it to the Iraqi Police chain of command.[43] In other cases, irregularities have forced the suspension of releases altogether. For example, releases in Ninewa province were temporarily suspended because the local Iraqi commander had repeatedly arrested released detainees without judicial authorization and contrary to Iraqi law.[44] Once released from U.S. control, U.S. forces have limited options to prevent unlawful arrests, but pressure at the national level has helped reduce the number of post-release arrests. In the case of the twenty detainees described above, the Iraqi Ministry of Interior (MOI) ordered the local police to release the detainees with no outstanding warrants after the American unit had reported the unlawful arrests and coalition police advisors had expressed their objections. The former detainees were quickly re-released, measures were taken by the Iraqis at the national level to prevent similar arrests from happening again, and a noticeable decline of unwarranted post-release arrests occurred in March and April of 2009. [45]

Criminal Prosecutions

Since the expiration of UNSCR 1546, the United States has mostly ceased detaining Iraqis and has, instead, used its vast resources to support the Iraqi criminal judiciary with evidence gathering and processing. While the United States detained hundreds of individuals each month in 2008, only forty-eight detainees entered U.S. internment facilities in the first two

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, E-mail from Lieutenant Commander Jeffrey Sutton, Chief of Detainee Operations, Multi-National Corps–Iraq, to author (June 1, 2009) (on file with author).

[41] Sutton Interview, *supra* note 28

[42] *Id.* This requirement is based on the Iraqi Code of Criminal Procedure and its application to U.S. forces pursuant to the Security Agreement.

[43] *Id.*

[44] *Id.*

[45] Another recent concern has been the increasingly common practice of presenting arrest warrants to U.S. forces at the release ceremony. This practice raises concerns about the validity and authenticity of the warrants. To eliminate the need for last minute warrants, U.S. forces give the Iraqis every opportunity to carefully pre-screen the release list and conduct investigations before the releases. The ability to do this was inhibited in the early stages of the process because the Iraqis were slow to staff their side of the joint committee. However, they now have teams at Camp Bucca and Camp Cropper reviewing files for evidence or leads they can use to investigate criminal activity before individuals are released.

months of 2009, each at the request of a competent Iraqi authority and with the authority of an Iraqi IJ.[46] Intelligence gathering has evolved into evidence gathering in the form of witness statements, photographs, fingerprints, ballistics, DNA, and other evidence.[47] United States forces share this evidence with Iraqi security forces to support applications for arrest warrants and detention orders and to aid in prosecutions in the Iraqi criminal justice system.

All detentions now start with an arrest warrant issued by an Iraqi judge. The Iraqi criminal courts are modeled on the French inquisitorial system where "cases are controlled and investigated by the judiciary. Judges, not lawyers, direct the progress of a case."[48] The Iraqi Law on Criminal Proceedings generally requires police to have a warrant issued by an IJ prior to an arrest, with a few exceptions—for example, no warrant is required if the police witness a crime in progress.[49] The law, however, does not define the burden of proof setting a minimum evidentiary standard for warrant applications. The standard is flexible and specific to each judge. Therefore, even before the Security Agreement was finalized, units at the tactical level engaged the local judiciary to understand their standards and establish procedures for the presentation of evidence and the expeditious issuance of arrest warrants. The most stringent judges require the testimony of two Iraqi witnesses before issuing a warrant. This "two-witness" standard becomes important at the trial stage, where a minimum of two witnesses is needed to convict a defendant in the absence of a confession.[50] One Iraqi judge cited two reasons for enforcing this standard at the warrant stage: (1) the penalty for serious crimes, including terrorism, could result in death and (2) the issuance of a warrant can have significant consequences—for example, given the feeble state of the Iraqi criminal justice system, once arrested, a suspect could remain in confinement for quite a while before receiving a judicial hearing or being released, regardless of innocence or guilt.[51]

In comparison, other judges may accept the testimony of a single individual before issuing a warrant, especially when confronted with a very credible witness and other evidence to support the accusations. At the other end of the spectrum, some IJs will issue a warrant or detention order if merely informed of the nature of the accusations against an individual, without witness statements or other supporting evidence. Such a low burden of evidence allows authorities to keep an individual under government control and buys time to build an unclassified, evidence-based case against the suspect. However, the few judges that allowed individuals to be arrested on such little evidence kept a close eye on the apprehended individual's detention; if more substantial evidence was not presented soon after arrest, the judge would order the suspect's release.

From a military practitioner's perspective, units should be wary of judges who allow such a low burden of evidence and should avoid applying to them for warrants and detention orders. Securing high numbers of arrest warrants may appear to be an easy win, and the numbers will look good to headquarters; however, high warrant numbers can reflect artificial success and can ultimately undermine long-term rule of law gains. Judge advocates may face the difficult prospect of balancing arrests—and advising commanders against pursuing expeditious but dubious warrants for high-value targets—against long-term stability.

To overcome the limitations posed by individual testimony, the Coalition introduced the use of forensic evidence into the Iraqi criminal justice system. Forensics has often been touted as the surefire solution to ensure objectivity in Iraq's criminal justice system and wean it from its confessional, witness-based approach.[52] Indeed, a few judges will forgo the need for witnesses if they receive forensic evidence. The notion of forensic science, however, is still very novel to the average Iraqi judge, and, on the whole, judges tend to be skeptical of it. The acceptance of forensics is mostly limited to the Central

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[46] Sutton Interview, *supra* note 28.

[47] Soldiers now attend a three-day training course on crime scene management and evidence collection. They are taught how to photograph a scene, draw or sketch the environment, question witnesses, and handle evidence to ensure proper chain of custody is maintained and evidence is not contaminated.

[48] U.S. Department of State, 2004 Country Report on Human Rights Practices: Iraq § 1, para. (e), *available at* http://www.state.gov/g/g/drl/rls/hrrpt/2004/41722.htm (last visited Nov. 6, 2009) ("The criminal justice system is based on the French or civil system. It was modified under the Ottoman Turks and greatly influenced by Egypt.").

[49] Law on Criminal Proceedings, *supra* note 26, para. 92.

[50] Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT'L L. 1, 80 (2006).

[51] Interview with Judge Nouri al-Maliki, Investigative Judge, Basra Major Crimes Court, in Basra, Iraq (Jan. 14, 2009) [hereinafter Nouri al-Maliki Interview].

[52] UNITED KINGDOM: FOREIGN AND COMMONWEALTH OFFICE, ANNUAL REPORT ON HUMAN RIGHTS 2008—IRAQ, 26 Mar. 2009, http://www.unhcr.org/refworld/docid/49ce361a2d.html.

Criminal Court of Iraq, and mostly to those judges Coalition members interact with on a daily basis.[53] Judges in the lower courts and in the provinces, even those who have undergone coalition-sponsored forensics training, still see forensic science as a bit of voodoo and are reluctant to place any weight in it.[54] The Coalition is working to change this opinion by introducing forensic evidence into the system. Early in the conflict, a handful of Coalition forensic labs were established to help link insurgent activities to individuals for coalition intelligence use. Post-UNSCR 1546, however, the labs have taken on the secondary mission of providing evidence, in the form of lab reports, for use in Iraqi courts.[55] Units send evidence to the labs where they are examined for DNA, latent prints, and firearm and toolmark evidence; in return the units are provided a report they can then submit to an Iraqi IJ.[56] Convictions based on forensic evidence in the courts, however, have so far been few and far between.

One advantage of Iraq judicial practice relates to verbal warrants. Unlike American judges, Iraqi judges are accustomed to issuing verbal warrants over the phone on the condition that the proper evidence will be presented later, at the earliest possible date. The custom of verbal warrants has enabled the Iraqi Army and police, supported by their U.S. partners, to arrest high value targets on short notice, often after waking up a judge in the middle of the night. Judge advocates must ensure that before applying for a verbal warrant, the security forces, both American and host nation, are prepared to present sufficient, timely evidence in support of the arrest to encourage judges to adhere to due process standards.

Turning Intelligence into Usable Evidence

Individuals designated security detainees under the UNSCR regime were usually detained based on intelligence indicating they had committed acts posing a security threat and, if released, would commit similar acts. The acts considered a security threat, however, were often also violations of Iraqi law (e.g., the Anti-Terrorism Law of 2005).[57] As a result, the same information used to detain individuals for security reasons could also be used to build criminal case files against security detainees. After the expiration of UNSCR 1546, intelligence shops across theater began culling intelligence reports and questioning sources to find witnesses to testify against security detainees in U.S. custody. Increasingly, informants were approached about testifying in front of an Iraqi judge. Other sources of intelligence, such as video feeds from aerial surveillance, were also used with some success to contradict suspects' version of events.

Nevertheless, intelligence information is not a practical substitute for conventionally obtained evidence. The use of intelligence in open court is precarious because it risks disclosing means and methods of obtaining information. Encouraging sources to testify in court also poses a risk to those individuals and may eliminate their usefulness as sources of intelligence information. Further complicating the issue, the vast majority of intelligence is classified and cannot be publicly released without substantial review. This can be mitigated by involving a foreign disclosure officer as part of the evidence-building team. Foreign disclosure officers are knowledgeable on National Disclosure Policy-1, which sets the policy and procedures for the disclosure of classified military information to foreign governments and international organizations.[58] Some classified information, however, simply cannot be released, rendering it useless for prosecution purposes. The better solution is to engage in shoe leather police work from the start.

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[53] Interview with Lieutenant Justin McEwen, TF 134 CCC-I Liaison Attorney, at FOB Union III, Iraq (Mar. 11, 2009) [hereinafter McEwen Interview]. Most judges in Iraq have received some type of Coalition-backed training in forensics. The exact number is hard to know because of the many different agencies, both governmental and non-governmental, sponsoring training programs.

[54] Nouri al-Maliki Interview, *supra* note 51; McEwen Interview, *supra* note 53.

[55] Interview with Lieutenant Colonel Martin Rowe, Battalion Commander, 733d Military Police Battalion (Criminal Investigation Division), at Camp Victory, Iraq (Mar. 12, 2009) [hereinafter Rowe Interview].

[56] *Id.*

[57] Anti-Terrorism Law, No. 13, Nov. 7, 2005 (Iraq). The Anti-Terrorism Law broadly defines terrorism as "every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals." *Id.* art. 1. Anyone who "incites, plans, finances, or assists terrorists" may be convicted of the same penalty as the main perpetrator. *Id.* art. 4.

[58] NATIONAL POLICY AND PROCEDURES FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (2000) (on file with the Office of the Director for International Security Programs, Office of the Deputy Under Secretary of Defense for Security Policy) (provided to designated disclosure authorities on a need-to-know basis).

Investigative Training

The notion of Soldiers serving as heavily-armed Columbos arose slowly in Iraq; in the latter part of 2008 and early 2009, however, military involvement in law enforcement-like operations was made a priority.[59] In mid-2008, a military police (MP) battalion at the Corps level was tasked to formally train servicemembers on site exploitation; it also managed the forensic facilities noted above to aid Coalition members in interpreting raw materials picked up on the battlefield and identifying usable evidence.[60] Coalition forces also began training servicemembers in crime scene exploitation in an effort to link detainees to the crimes they were suspected of having committed. As part of this initiative, the MP unit created "train the trainer" courses to instruct members of police training teams in proper sensitive site exploitation and produced "smart cards" to be used as quick references in the field. At least one member of each police training team was required to undergo the training, and hundreds of others were certified after attending subsequent training.[61] The course included instruction on how to document sites through photographs, how to draw diagram of sites, how to gather at least two sworn statements from servicemembers or (preferably) Iraqis who had witnessed a crime (e.g., the possession of illegal weapons, discovered at a suspect's home), and how to record the evidence from a scene using DA Form 4137.[62] Site exploitation training was used as a force multiplier as well; commanders were encouraged to embed trained servicemembers with Iraqi police units to further enhance their development.

The Prosecution

In order to streamline operations, brigades were encouraged to set up a Combined Prosecution Task Force (CPTF) to support and monitor applications for warrants and detention orders and, hopefully, subsequent prosecutions of suspected criminals in their local area. Members assigned to the CPTF included a law enforcement professional, intelligence analyst, judge advocate, and foreign disclosure officer. The evidence this task force produced was fed to either local judges or, in some instances, up the chain to the national courts.[63]

At the national level, a small group of attorneys from Task Force 134, the military organization responsible for detainee operations in Iraq,[64] liaise with judges at the Central Criminal Court of Iraq (CCCI) to facilitate the flow of evidence and judicial orders between the Coalition and the Iraq judiciary. The CCCI is a creation of the Coalition Provisional Authority, which was dissolved in 2004 and was responsible for promoting "the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence of the Iraqi people."[65] The CCCI holds court in Baghdad, but has nationwide jurisdiction to investigate and try crimes committed in Iraq; its primary focus is terrorism.[66]

To ensure Iraqi penitentiary facilities have the capacity to absorb transfers, the United States built a new prison facility in Taji.[67] The facility is currently operated jointly and the United States uses the facility to train Iraqi correctional officers. When the detention release program is completed, the facility will be transferred entirely to Iraqi control.

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[59] Rowe Interview, *supra* note 55.

[60] *Id.*

[61] *Id.* Police training teams (PTTs) are U.S. military police units partnered with Iraqi police units whose mission is to mentor and instruct the Iraqis on proper police techniques and procedures.

[62] U.S. Dep't of Army, DA Form 4137, Evidence/Property Custody Document (1 July 1976).

[63] Nouri al-Maliki Interview, *supra* note 51. The judge explained that local courts sometimes refused to hear a case due to security concerns or because the prosecution would overwhelm local resources.

[64] *See generally* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., CTR. FOR LAW & MIL. OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 281 (2009).

[65] Coalition Provisional Authority, Order No. 13 (Revised) (Amended), The Central Criminal Court of Iraq (22 Apr. 2004).

[66] *Id.* § 18.

[67] Quantock Media Roundtable, *supra* note 30.

A Balancing Act

In future operations where the military is responsible both for security and the development of the rule of law, a delicate balance must be struck between security-based detention operations and host nation prosecutions. Future counterinsurgencies will undoubtedly require the expeditious removal of individuals from the battlefield; intelligence requirements and population security will demand it. During this period of security-based detention operations, judge advocates should anticipate the limitations of potential coalition partners to detain suspects and mitigate these restrictions before opportunities are lost. However, judge advocates should also always look ahead to the next stage of the conflict. Fortunately, the notion of Soldier-Columbos is not novel; it's more a matter of timing and emphasis.[68] Unlike Iraq, where the Security Agreement marked a clear end to security detentions, the next operation might not feature such a bright line between military-run detention operations and reliance on the local criminal justice system. Judge advocates must be ready to assist commanders in determining when security internments bring diminishing returns and when the emphasis should shift to host nation prosecutions.

Furthermore, judge advocates should balance the potential conflict between the detention operations mission and the rule of law mission. While acting under the guise of furthering the rule of law, units may be tempted to take advantage of corrupt judges or use their influence with local officials to circumvent the judicial process in order to achieve certain security goals. These quick wins may be operationally expedient but undermine the host nation's capacity-building process. While the counterinsurgency doctrine advocates responsible detention, it calls establishment of the rule of law the end game.[69] Eventually the hard decision to sacrifice operational expediency for long term gains must be made, even at the risk that an insurgent might go free due to lack of evidence or corruption in the system. In the long run, ensuring security through detentions is merely a step in the broader effort to establish respect for and adherence to the rule of law.

[68] *See* Annexstad, *supra* note 9, at 14 (describing Soldiers performing sensitive site exploitation and submitting evidence to Iraqi courts early in the conflict).

[69] FM 3-24, s*upra* note 1, ¶¶ 6-90 (rule of law) & 7-38 (detention).

Command Authority over Contractors Serving With or Accompanying the Force[1]

Lieutenant Colonel Charles T. Kirchmaier[2]

I. Introduction

With over 242,657 contractors serving with or accompanying the armed forces in the U.S. Central Command (USCENTCOM) area of operations, understanding the scope of military authority that may be exercised over these persons is paramount for military commanders who are responsible for maintaining good order, morale, and discipline in Iraq, Afghanistan, and other contingency operating areas.[3] The sheer number of contractors living and working on the battlefield alongside our nation's armed forces suggests that civilian misconduct incidents will likely occur during the course of a unit's deployment.[4]

The first half of this note will examine the policies and procedures commanders should follow when contractors engage in criminal misconduct. The second half of the note will examine the use of command authority over persons serving with and accompanying the armed forces in the field during a declared war or contingency operation. While contractor misconduct on the battlefield is not a recent phenomenon unique to the contingency operations in Iraq or Afghanistan, the policies, procedures, and laws governing how commanders may address contractor misconduct in a deployed environment are an evolving, dynamic, and increasingly important area of the law for military justice practitioners. On 1 January 2009, the United States entered into a security agreement with the Government of Iraq (USG–GOI Security Agreement) that resulted in the GOI assuming primary jurisdiction over contractor misconduct in Iraq.[5]

A. Understanding Command Policies for Handling Civilian Misconduct Incidents

Historically, one of the biggest challenges to gaining accountability over contractor misconduct on the battlefield was the perception that contractor misconduct was somebody else's problem and a distraction to the real business of conducting military operations. With so many contractors supporting daily military operations in Afghanistan and Iraq, the impact of contractor misconduct on operations has demanded the attention of commanders and judge advocates alike. Following the now infamous September 2007 Nisoor Square shooting incident in Baghdad, Iraq, involving several armed security contractors, the Deputy Secretary of Defense (DEPSECDEF) issued policy guidance emphasizing that contractor-employers

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[1] This article is the second in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps' functional legal areas during the deployment. Articles in the series will cover issues that arose in Administrative Law, Rule of Law, Contract and Fiscal Law, Operational Law, Criminal Law, and Foreign Claims.

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[3] *See* MOSHE SCHWARTZ, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS, CONG. RESEARCH SERV. REPORT, at CRS-4–5 (2009), *available at* http://www.fas.org/sgp/crs/nastec/R40764.pdf) (citing CENTCOM 2d Quarterly Contractor Census Report (as of Mar. 31, 2009)) (last visited Oct. 26, 2009); *see also* CONTRACTOR SUPPORT OF U.S. OPERATIONS IN USCENTCOM AOR, IRAQ, AND AFGHANISTAN, *available at* http://www.acq.osd.mil/log/PS/docs/5A_Feb2009.doc) (last visited Oct. 23, 2009). The total number of contractors serving in Iraq at the end of the 1st quarter for Fiscal Year 2009 were as follows: 39,262 (U.S. citizens); 70,875 (third country nationals) (TCNs); and, 37,913 (local or host country nationals) [hereinafter ADUSD Program Support Report]. *Id*.

[4] *See* MULTI-NATIONAL CORPS-IRAQ OFFICE OF THE STAFF JUDGE ADVOCATE DEPLOYMENT HISTORICAL REVIEW, FEB 2008-APR 2009 [hereinafter XVIII ABC EXSUM] (unpublished, on file with author). During the XVIII Airborne Corps' recent deployment as the Multi-National Corps–Iraq (MNC–I) Headquarters from January 2008 through April 2009, the XVIII Airborne Corps' Office of the Staff Advocate (OSJA) completed twenty-one Military Extraterritorial Jurisdiction Act (MEJA) prosecution referrals to the Department of Justice (DoJ); assisted commanders with imposing Uniform Code of Military Justice (UCMJ) pre-trial restraint or restriction upon thirty-eight civilians; helped facilitate the administrative debarment of over five hundred and fifty-eight individuals from working in the Iraq Theater of Operations (ITO) for committing acts of minor misconduct; and, successfully conducted a courts-martial of a military contractor. *Id.*

[5] *See, e.g.*, Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq art. 12, Nov. 17, 2008, *available at* http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Oct. 26, 2009) (entered into force Jan. 1, 2009) (providing the Iraqi Government with primary jurisdiction over all contractor misconduct in Iraq). The USG–GOI Security Agreement is unique to the Iraq Theater of Operations and should be carefully reviewed by judge advocates who will be conducting legal operations in Iraq.

who arrange for, facilitate, or allow contractor-employees to leave a country without authorization from the senior military commander in country would be subject to disciplinary action under either the Uniform Code of Military Justice (UCMJ) or the Military Extraterritorial Jurisdiction Act (MEJA).[6] As a result of the heightened scrutiny now given contractor criminal misconduct, contractor-employers also have an affirmative obligation to self-report suspected employee misconduct through contract administration channels.[7] To ensure that incidents of contractor misconduct are also reported through military command channels, the DEPSECDEF has required military commanders to "publicize the means" for instructing all persons how to notify the military chain of command whenever contractor criminal activity occurs.[8] Judge advocates should ensure that when commanders, law enforcement personnel, or, potentially, employers receive an initial report of suspected civilian misconduct, that information is immediately forwarded through the appropriate higher command reporting channels.

Since September 2007, all government contracts for services provided in forward deployed areas have required contractors to ensure their employees, including subcontractors, are familiar and comply with applicable U.S. law, host nation law, and other U.S. regulations, directives, instructions, policies, and procedures.[9] The Joint Contracting Command in Iraq/Afghanistan (JCC–I/A) has published guidance reinforcing the Department of Defense (DoD) policy by putting all contractors and their employees on notice that they are subject to U.S. law, command directives, and orders and may be disciplined by military commanders for disciplinary infractions.[10] While judge advocates are not responsible for implementing these notice provisions, they should at least advise their commanders that the overwhelming majority of contractors on the battlefield are third country nationals (TCNs) who may not understand the policy or may not have received notice of the policy.[11] Additionally, TCNs not only represent the largest group of contractors on the battlefield, they are often employed by subcontractors who may have limited interaction with the command or contracting officials. As a result of these cultural, informational, and organizational gaps between the workforce and the command, the largest group of contractors serving with or accompanying our armed forces may not realize they could be held accountable by the host nation government or the local U.S. military commander for any criminal misconduct.

On 10 March 2008, the Secretary of Defense (SECDEF) provided what is arguably the most important guidance to date concerning contractor misconduct on the battlefield when he stated, "Commanders retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation."[12] The SECDEF reminded both commanders and military law enforcement personnel that they have "significant authority" under the UCMJ to investigate and deal with criminal misconduct committed by persons serving with or accompanying the armed forces overseas during times of declared war and in contingency operations.[13] When it appears alleged misconduct constitutes a federal felony offense, the Department of Justice (DoJ) must be notified to determine whether it wishes to exercise MEJA jurisdiction over the person and pursue prosecution.[14] During the DoJ's review of a

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[6] Memorandum from The Deputy Sec'y of Def., for Secretaries of the Military Dep'ts; Chairman of the Joint Chiefs of Staff; Under Secretaries of Def.; Commanders of the Combatant Commands; Gen. Counsel of the Dep't of Def. Inspector Gen. of the Dep't of Def.; Assistants to the Sec'y of Def.; Dir., Admin. and Mgmt.; Dir., Program Analysis and Evaluation; Dirs. of the Def. Agencies; Dirs. of the DOD Field Activities, subject: Management of DOD Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007) [hereinafter DEPSECDEF 2007 Memorandum].

[7] Policy Letter, Headquarters, Joint Contracting Command-Iraq/Afghanistan, subject: Uniform Code of Military Justice Jurisdiction for Iraq and Afghanistan Contractors (5 Oct. 2007) [hereinafter JCCI/A 2007 Letter] (copy on file with author).

[8] Memorandum from The Deputy Sec'y of Def., for Secretaries of the Military Dep'ts; Chairman of the Joint Chiefs of Staff; Under Secretaries of Def.; Commanders of the Combatant Commands; Gen. Counsel of the Dep't of Def.; Inspector Gen. of the Dep't of Def.; Dir., Admin. and Mgmt., subject: Responsibility for Response to Reports of Alleged Criminal Activity Involving Contractors and Civilians Serving with or Accompanying the Armed Forces Overseas (Sept. 10, 2008).

[9] U.S. DEP'T OF DEF., DEF. FEDERAL ACQUISITION REG. SUPP. 252.225-7040 (Jan. 15, 2009), *available at* http://www,acq.osd.mil/dpap/dars/dfars/html/current/252225.htm#252.225-7040) [hereinafter DFARS] (last visited 26 Oct. 2009). On 25 September 2007, the DEPSECDEF required the inclusion of the above contract clause, among others, in DOD contracts requiring contractors and contractor personnel to accompany U.S. forces deployed outside the U.S. *See* DEPSECDEF 2007 Memorandum, *supra* note 6.

[10] *See* JCCI/A 2007 Letter, *supra* note 7.

[11] *See* ADUSD (Program Support) Report *supra* note 3 (noting that by February 2009 there were 70,875 TCN contractors compared to only 39,262 U.S. citizen contractors); *see also* Gordon Lubold, A DRAWDOWN OF CONTRACTORS IN IRAQ, CHRISTIAN SCI. MON., Mar. 4, 2009, at 3, *available at* http://www.csmonitor.com/2009/0304/p03s03-usmi.html (last visited Oct. 26, 2009).

[12] Memorandum from Sec'y of Def., for Secretaries of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Undersecretaries of the Def., Commanders of the Combatant Commands, subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (Mar. 10, 2008) [hereinafter SECDEF 2008 Memorandum].

[13] *Id*.

[14] *Id*.

potential MEJA referral, the commander and military law enforcement personnel should continue their investigation and take any necessary action to address the alleged incident.[15] In sum, the SECDEF has declared that addressing contractor misconduct on the battlefield is first and foremost a command responsibility.

B. Developing Procedures for Handling Civilian Misconduct Incidents

Contractor criminal activity can generate significant media interest, adversely impact strategic relationships with host nation governments, and require commanders to swiftly formulate a response when such incidents occur within their areas of operation. Judge advocates should carefully review the legal annex of their next higher headquarters' operations order to discern what command policies and procedures to follow when persons serving with or accompanying the force engage in criminal misconduct.[16]

Developing consistent procedures for handling civilian misconduct is essential to ensuring the transparent and consistent treatment of all contractors who are alleged to have engaged in some type of criminal activity. After a report of criminal activity is received, judge advocates should begin to gather as much information as possible about the incident and all potential witnesses. Trial counsel might first attempt to obtain key identifying information about the suspect, including a home address, last known address, passport number and country of origin, driver's license number, any available employment information including the employer's contact information, and a copy of the suspect's letter of authorization or employment contract.[17] After gathering information about the suspect, the inquiry should focus on obtaining similar information about the alleged victim's background, including information about how the victim had served with or accompanied the U.S. armed forces.[18] Information about the alleged incident should then be summarized in a situation report that can be forwarded to military law enforcement personnel, the local commander, and command judge advocate responsible for the area of operations where the incident had occurred; the staff judge advocate of the next higher headquarters should also receive a report for his situational awareness.

One of the preliminary legal determinations that must be made following the receipt of a civilian misconduct report is whether the suspected offender is subject to the UCMJ.[19] After receiving a report of civilian misconduct, judge advocates should gather sufficient information about the contractor's employment status and relationship to the U.S. armed forces to determine whether he will be subject to a commander's UCMJ authority. Article 2(a)(10), UCMJ, states that jurisdiction attaches over persons either serving with or accompanying the armed forces during a declared war or contingency operation.[20] A person is considered to be "serving with" the armed forces if he is a DoD employee, a contractor, contractor-employee, or subcontractor (at any tier), whose employment occurs outside of the United States while supporting the armed forces, and who works alongside or is supervised by military personnel or performs work that has a direct bearing on the efficiency, discipline, and reputation of the forces in the area in which they are operating.[21] In contrast, a person is

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[15] *Id*.

[16] During the XVIII Airborne Corps' deployment as the MNC–I Headquarters, the XVIII Airborne Corps OSJA developed procedures for reporting, investigating, and disposing of alleged instances of contractor misconduct within the command's jurisdiction throughout Iraq. The MNC–I commander opted to withhold the authority for disposing of all civilian misconduct at his command level. HEADQUARTERS, MULTI-NATIONAL CORPS–IRAQ, APPENDIX 2 TO ANNEX U TO MNC–I OPERATIONS ORDER 09-01 (U) (EXERCISE OF ARTICLE 2 U.C.M.J. AUTHORITY OVER CIVILIAN MISCONDUCT para. 3.b (1 Dec. 2008) [hereinafter OPORD 09-01] (copy on file with author). The corps commander's decision to withhold the authority to dispose of alleged civilian misconduct at his command level was made pursuant to Rule for Courts-Martial (R.C.M.) 306. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(a) (2008) [hereinafter MCM].

[17] *See* Captain James C. Cunningham, Civilian Misconduct: Short History & Guide (Nov. 2008) (unpublished notes and observations on addressing civilian misconduct in the ITO since December 2007) [hereinafter Civilian Misconduct Guide] (copy on file with author).

[18] *See* MNC–I OPORD 09-01, *supra* note 16, para. 5.b.(9).

[19] UCMJ art. 2(a)(10) (2008).

[20] *Id.*; *see also* United States v. Burney, 21 C.M.R. 98, 107 (C.M.A. 1956) (upholding UCMJ article 2(a)(10) courts-martial jurisdiction over all persons serving with or accompanying an armed force in the field).

[21] *See* U.S. DEP'T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS 28, 29 (3 Mar. 2005) [hereinafter DoDI 5525.11]. The directive states in relevant part that any person employed by the armed forces outside the United States may include the following individuals:

> A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); a DoD contractor (including subcontractor(s) at any tier); an employee of a DoD contractor (including subcontractor(s) at any tier); a civilian employee, contractor (including a subcontractor(s) at any tier), and a civilian employee of a contractor (or subcontractor(s) at any tier) of any other Federal Agency, or any provisional authority, to the extent such employment relates to supporting the mission of

considered to be "accompanying" the force if he is embedded within a military unit or operating as a member of a military team, or present within a military installation for reasons that are more than merely incidental; the presence must be connected with or dependent upon the U.S. armed forces, its activities, or its personnel.[22] Depending on the circumstances, a person may also be considered to be accompanying the force, even though his service or government contract has ended, if the individual's continued presence with the force requires the armed forces to secure, house, feed or otherwise exercise pervasive military control over him.[23]

The MEJA complements UCMJ authority by providing jurisdictional authority over civilians employed by or accompanying the armed forces outside the United States, members of the armed forces, and former members of the armed forces, including their dependents for U.S. federal criminal statute violations.[24] Whenever a contractor has engaged in serious criminal misconduct involving a felony offense, the subsequent investigation and notifications are most often reviewed as a potential MEJA referral by the DoJ.[25] Initiating a MEJA referral is an administrative process that requires detailed coordination between military law enforcement personnel, the military chain of command, the contractor's supervisor or employee representative, and the DoJ Domestic Security Section (DSS).[26] Within fourteen days of receiving a referral, the DoJ must determine whether it intends to exercise MEJA jurisdiction over the alleged offenses.[27] During the review period, a DSS attorney evaluates whether the alleged misconduct constitutes a MEJA violation and conducts a venue analysis to determine where the potential case could be tried.[28] After completing the initial review, the DSS attorney forwards the MEJA referral to the U.S. Attorneys' Office (USAO) where venue would properly lie, thereby transferring responsibility for conducting further investigation and for coordinating with the command's legal advisor to the USAO.[29] The USAO retains discretion over the MEJA referral and decides whether to accept or decline the referral for prosecution.[30] If the referral is accepted for prosecution, an Assistant U.S. Attorney (AUSA) is assigned to coordinate the investigation, the arrest of suspects, and the prosecution of the alleged offenses with the assistance of the referring SJA office.

When incidents of civilian misconduct are referred to the DoJ under MEJA, commanders and their legal advisors should prepare for the possibility that the USAO may elect to decline prosecution.[31] Meanwhile, pending the DoJ's decision on prosecution, judge advocates should determine whether the alleged offenses might be prosecuted under UCMJ jurisdiction.[32] If the DoJ declines an investigation for MEJA prosecution, the military commander who exercises authority over the suspect must then decide whether compelling reasons exist to assert military jurisdiction under Article 2(a)(10)[33] and pursue the matter by means of court-martial, non-judicial punishment, or some other adverse administrative action.[34]

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the Department of Defense overseas; and, when the person: is present or resides outside the United States in connection with such employment; and, is not a national of or ordinarily resident in the host nation.

Id.; *see also* OPORD 09-01, *supra* note 16, para. 6.a(1).

[22] *Burney*, 21 C.M.R. at 110.

[23] *See* Perlstein v. United States, 151 F.2d 167, 170 (3d Cir. 1945) (stating that court-martial jurisdiction over a civilian accompanying the force did not expire upon employment termination).

[24] DoDI 5525.11, *supra* note 21.

[25] A copy of the MEJA checklist developed for use when making a MEJA referral to the DoJ is located at the end of this article at Appendix A. Military Extraterritorial Jurisdiction Act Jurisdiction Determination Checklist (Version 1, Aug. 2008).

[26] UNITED STATES ATTORNEY'S MANUAL, TITLE 9, § 9-20.116D, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm [hereinafter USAO MANUAL] (last visited Oct. 21, 2009).

[27] SECDEF 2008 Memorandum, *supra* note 12, attachment 3.

[28] USAO MANUAL, *supra* note 26, § 9-20.116D.

[29] *Id*

[30] *Id.*

[31] For example, of the nineteen MEJA referrals made by the XVIII Airborne Corps OSJA during its last deployment, at least seven were declined by the DoJ for prosecution. *See* XVIII ABC EXSUM, *supra* note 4, at 8.

[32] DEPSECDEF September 2007 Memorandum, *supra* note 6.

[33] *See* UCMJ art. 2(a)(10)(2008).

[34] SECDEF 2008 Memorandum, *supra* note 12, attachment 2 (stating that only those commanders assigned or attached to the combatant command who possess general court-martial convening authority may exercise court-martial convening authority and impose nonjudicial punishment over persons subject to UCMJ Article 2(a)(10) jurisdiction).

Before asserting Article 2(a)(10) jurisdiction, commanders should carefully weigh the impact of the contractor's alleged criminal misconduct on the preservation of good order, morale, and discipline to the command.[35] Ultimate authority to initiate court-martial charges or nonjudicial punishment over persons subject to Article 2(a)(10) is reserved to the geographic combatant commanders.[36] Before initiating any UMCJ disposition, the commander must forward the matter to the first general court-martial convening authority (GCMCA) in the chain of command for that GCMCA's consideration under Rule for Courts-Martial (RCM) 407.[37] Ultimately, regardless of the DoJ's final decision on prosecution, judge advocates should be familiar with the MEJA referral process and how the process impacts a commander's authority to exercise Article 2(a)(10) jurisdiction over contractor misconduct on the battlefield.

II. The Commander's UCMJ Article 2(a)(10) Authority

One of the most complex and challenging legal issues facing military commanders on the battlefield is knowing how their inherent command authority may be used to preserve the good order, morale, and discipline over persons who serve with and accompany the armed forces in the field during a declared war or contingency operation.[38] The SECDEF has adopted the view that commanders are authorized under Article 2(a)(10) to respond proportionately and judiciously to acts of civilian misconduct, including, if necessary, the imposition of pre-trial restrictions in lieu of arrest, apprehension and detention of persons who have engaged in criminal misconduct while serving with or accompanying the armed forces.[39] Because Article 2(a)(10) limits jurisdiction to those civilians serving with or accompanying the force in the field, contractors who successfully leave forward deployed areas are no longer part of the command or subject to the commander's UCMJ authority. Consequently, it is imperative that commanders take swift and affirmative steps to restrict the movement of persons alleged to have engaged in criminal misconduct immediately after receiving misconduct incident reports.

A. Restriction

Commanders may order conditions on liberty or place restrictions in lieu of arrest on contractors, as an administrative measure, to ensure their presence in forward deployed areas pending completion of a law enforcement investigation.[40] Commanders' authority to impose conditions on a person's liberty derives from RCM 304(a)(1) while the authority to impose certain restrictions in lieu of arrest stems from RCM 304(a)(2).[41] Commanders use verbal or written orders to impose these restrictions. Commanders may also opt to confiscate documentation that might facilitate a contractor's departure from a deployed area, including the immediate vicinity of a Forward Operating Base (FOB). Such documentation can include an individual's administrative letter authorizing entrance onto the FOB; a DoD-issued common access card (CAC), which is required to manifest on military air and ground transportation; and, if necessary, the individual's passport.[42] Commanders should memorialize any restrictions imposed on civilians in writing, and written orders are preferable to verbal orders since written orders can be shared with law enforcement and the suspect's immediate supervisor or employer.

Pretrial restrictions may only be imposed as an administrative measure and not as punishment.[43] Additionally, various forms of pretrial restraint may be used in combination but should be no more restrictive than is required to maintain

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[35] *Id.* attachment 3.

[36] *Id.*

[37] *Id.*

[38] *Id*. (referring to the John Warner National Defense Authorization Act for Fiscal Year 2007, [H.R. 5122], § 552, which amended paragraph (10) of section 802(a) of title 10, UCMJ Article 2(a)(10), by extending the application of the UCMJ during a declared war or contingency operation)).

[39] *Id*. (referring to the pre-trial authorities that may be exercised in accordance with R.C.M. 302 (Apprehension), R.C.M. 304 (Pretrial restraint), R.C.M. 305 (Pretrial confinement) and R.C.M. 306 (Initial disposition)); *see also* DEPSECDEF 2007 Memorandum, *supra* note 6; MCM, *supra* note 16, R.C.M. 301 discussion.

[40] *See* SECDEF 2008 Memorandum, *supra* note 12 ("Commanders possess significant authority to act whenever criminal activity may relate to or affect the commander's responsibilities, including situations in which the offender's precise identity or actual affiliation is to that point undetermined.").

[41] MCM, *supra* note 16, R.C.M. 304(a)(1), 304(a)(2).

[42] The temporary seizure of an individual's passport to ensure the person's continued presence in a forward deployed area of operation during the pendency of an investigation is a subject worthy of further examination. Arguably, the passport is the property of the country that issued it and is not the personal property of the individual that possesses it. Coordination through the consular office of the country that issued the individual's passport and U.S. Embassy channels should therefore be conducted whenever a passport is seized from a TCN.

[43] MCM, *supra* note 16, R.C.M. 304(f).

administrative accountability over an individual until completion of the law enforcement investigation or to prevent the individual from committing additional criminal misconduct.[44] For example, a commander may require a contractor to check in with the local provost marshal's office on a daily basis to maintain physical accountability over the person.[45] A commander may also restrict a person's movement by ordering the suspect to avoid any area where an alleged victim or key witness may live or work; any violation of the commander's restriction would, therefore, be a violation of a lawful order. Overall, commanders have a great deal of discretion to fashion appropriate restrictions or conditions on liberty so long as the restrictions are carefully tailored to ensure the contractor's presence in the forward area of operations or to prevent future misconduct.

B. Apprehension

Under RCM 302, military law enforcement officers, military criminal investigators, and all commissioned, warrant, petty, and noncommissioned officers on active duty may apprehend a civilian serving with or accompanying the force when there is probable cause to believe the person has committed a felony offense.[46] These individuals are authorized to "use such force and means as may be required to accomplish the apprehension."[47] Meanwhile, the apprehending official should ensure any civilian taken into military custody is provided a UCMJ Article 31 rights advisement regarding compulsory self-incrimination.[48] If an individual requests the presence of legal counsel before law enforcement has questioned the individual, the interview should be terminated until the individual has had the opportunity to consult with either civilian legal counsel retained at personal expense or detailed military defense counsel assigned by the Army's Trial Defense Service (TDS).[49] Judge advocates should advise military law enforcement personnel to treat civilians in the same manner as servicemembers who have been placed under arrest; the same procedural rights and protections extended to military suspects under the UCMJ should also be applied, without exception or variation, to civilian suspects.

Once a person serving with or accompanying the force has been restrained, apprehended, or detained, the contractor's employer or supervisor should be contacted to discover whether the individual will be immediately terminated from employment.[50] Once an employer has been notified of an employee's alleged criminal activities, the employer will usually seek to terminate the employee from further employment. Because the command and a contractor employer have no contractual obligation to continue an individual's employment pending an investigation into alleged misconduct, the employer will often choose to terminate the suspect's employment immediately and stop salary payments to the individual. At this point, if the person under investigation was not already attached to a military command for UCMJ purposes, then the individual should be attached to a command for administrative purposes.[51] Once the person has been attached to a command, which will usually be the FOB where the person was living or working, the designated commander then becomes responsible for providing the individual with food, shelter, and other life support necessary to provide for his welfare until his release or transfer from the deployed area.

C. Temporary Confinement

The most restrictive form of restraint a commander may impose is temporary confinement in accordance with RCM 305.[52] Commanders should only confine persons subject to UCMJ Article 2(a)(10) when they are suspected to have committed a grave or serious felony offense and temporary confinement would also be warranted under the circumstances. The need to confine a contractor should be rare, but, when military necessity requires pretrial confinement, judge advocates and military law enforcement should understand who has authority to confine the contractor and what procedures must be followed to protect the individual's rights.

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[44] *See id.* R.C.M. 304(c) discussion.

[45] *See generally* United States v. Mack, 65 M.J. 108 (C.A.A.F. 2007) (noting that commanders may order pretrial restrictions to ensure an individual remains within a specific geographic location, to report periodically to a designated official, and to refrain from having contact with other specified persons).

[46] MCM, *supra* note 16, R.C.M. 302(b)(1), (b)(2), (b)(3).

[47] SECDEF 2008 Memorandum, *supra* note 12; *see also* MCM, *supra* note 16, R.C.M. 302(d)(3).

[48] UCMJ art. 31 (2008); *see also* MCM, *supra* note 16, MIL. R. EVID. 305.

[49] *See* DoDI 5525.11, *supra* note 21, paras. 6.3.1, 6.3.2.

[50] Civilian Misconduct Guide, *supra* note 17, at 4.

[51] OPORD 09-01, *supra* note 16 para. 5.d.(3).

[52] MCM, *supra* note 16, R.C.M. 305.

A geographic combatant commander, or an appropriate designee, may order the temporary detention of a person who has been arrested and charged with a felony offense outside the United States.[53] Additionally, military law enforcement officers and military criminal investigators may arrest and temporarily detain a person subject to MEJA jurisdiction when there is probable cause to believe the individual committed an offense.[54] Under RCM 304(b), civilians subject to trial by court-martial may only be placed under pre-trial restraint by a commanding officer exercising authority over the civilian.[55] Therefore, persons subject to MEJA or UCMJ jurisdiction may only be placed in pre-trial confinement by a military commander or a law enforcement official to whom proper authority has been designated by the SECDEF.

Judge advocates should follow the guidelines outlined in RCM 305 to ensure confinement conditions comport with both substantive law and applicable administrative requirements. If appropriate temporary detention facilities are not available in the forward deployed area where the alleged misconduct occurred, judge advocates may have to coordinate on behalf of their commanders to have the confinee transferred to a regional confinement facility. The command's legal advisor should notify the local TDS office whenever a person subject to Article 2(a)(10) has been placed into military confinement. Military defense counsel may be provided to assist civilians in pre-trial confinement during any pre-trial confinement proceedings.[56] Military defense counsel may also represent civilians for the limited purpose of making an initial appearance in federal court for an alleged MEJA violation.[57]

It is, therefore, possible for a person subject to Article (2)(10) to be placed into pre-trial confinement while awaiting an initial appearance for an alleged MEJA violation. In those situations, pretrial confinement may last several weeks as the DoJ makes its initial MEJA referral determination and the initial appearance is scheduled in federal court. Judge advocates should be prepared to assist commanders with planning, including organizing necessary logistical and guard support, when a contractor is detained prior to an initial appearance in federal court or a military court-martial.

III. Conclusion

Our nation's armed forces will continue to rely on the invaluable skills and support contractors provide during military operations in Afghanistan, Iraq, and other contingency operating areas outside the United States. However, when persons subject to UCMJ Article 2(a)(10) engage in criminal misconduct, commanders have the authority and flexibility to immediately address these incidents in the field. Judge advocates can assist commanders by ensuring proper policies and reporting procedures for contractor misconduct are followed within their immediate chain of command. Additionally, judge advocates fulfill their traditional advisory role by providing commanders with technical legal advice on how to deal with contractor criminal activity when it occurs during a deployment. As this dynamic area of military justice continues to evolve, it is important to remember that our commanders owe a solemn duty to exercise their UCMJ authority wisely to ensure the safety, good order, morale, and discipline for all members of the command—including those persons serving with or accompanying our nation's armed forces in the field during a declared war or contingency operation.

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[53] DoDI 5525.11, *supra* note 21, para. 6.2.5.1.

[54] *See* SECDEF 2008 Memorandum, *supra* note 12, attachment 1.

[55] MCM, *supra* note 16, R.C.M. 304(b).

[56] *Id.* R.C.M. 305(f).

[57] *See*, *e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 26-2.a.(2)b (16 Nov. 2005).

A View from the Bench

Deferring and Waiving Forfeitures: Help the Government Help Your Client

Lieutenant Colonel Christopher T. Fredrikson[*]

Introduction

Assume for a moment you are a defense counsel. You have just finished the presentencing phase of a court-martial against your client, Sergeant John P. Smith. You are confident your argument has engendered some mercy from the panel, particularly with respect to the economic impact your client's conviction will have on his wife and three children. Now, as the panel returns from deliberations, you wonder: Did your argument have an impact on the panel's sentence determination?

"Defense counsel and accused please rise. COL Jones, please announce the sentence."

"Sergeant John Preston Smith, this court sentences you:

to be reduced to the grade of E-1;
to forfeit all pay and allowances;
to be confined for 18 months; and
to be discharged from the service with a bad conduct discharge."

"Please be seated."

The court adjourns and you hear Mrs. Smith sobbing in the gallery. Sergeant Smith turns to you and asks, "How is my family going to survive while I'm in prison? Is there anything I can do now? Will they have any financial support at all? Help me."

In the recent case of *United States v. Moralez*,[1] the Army Court of Criminal Appeals (ACCA) published an opinion solely "to highlight a common and recurring problem in the Army: misinterpretation of the rules governing deferment and waiver of forfeitures . . . [and] to reinforce military justice practitioners' professional responsibility to recognize and properly apply Congressionally-created deferment and waiver rules on a case-by-case basis."[2] The court believed it was necessary to write this opinion despite the practical guidance[3] and case law[4] already published regarding this admittedly complicated topic.

It should be noted, however, that the published guidance and case law, including *Moralez*, focuses primarily on the Government's processing of deferment and waiver requests. This brief article, on the other hand, gives some practical guidance to defense counsel and starts with the assumption that the accused desires to provide maximum monetary support to his family while in confinement. Although the ACCA emphasized applying the deferment rules on a case-by-case basis,[5] Sergeant Smith's hypothetical case can be used to provide an example of how to apply the guidance to most cases.

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[1] 65 M.J. 665 (A. Ct. Crim. App. 2007).

[2] *Id.* at 666.

[3] *See, e.g.*, Captain Joel A. Novak, *Forfeitures, Recommendations, and Actions; Discretion to Insure Justice and Clemency Warranted by the Circumstances and Appropriate for the Accused*, ARMY LAW., Mar. 2000, at 16, 16–20; Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1, 11–13.

[4] The seminal case discussing forfeitures is *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002). Every defense counsel should read this case and keep a copy available when preparing deferment and waiver requests.

[5] *Moralez*, 65 M.J. 665.

Adjudged versus Automatic Forfeitures: What's the Difference?

Before requesting deferment or waiver of forfeitures, defense counsel should read and understand the specific provisions governing forfeitures: Articles 57 and 58b, Uniform Code of Military Justice (UCMJ),[6] and Rule for Courts-Martial (RCM) 1101.[7] Under these provisions, there are two types of forfeitures that can result from a court-martial: (1) *adjudged forfeitures*, which are included as part of the sentence announced in court; and (2) *automatic forfeitures*, which take effect only by operation of law during a servicemember's confinement or parole, if the adjudged sentence[8] includes confinement for more than six months *or* a punitive discharge in conjunction with *any* amount of confinement.[9]

The effective date for both types of forfeitures is fourteen days after a sentence is adjudged.[10] However, upon application of the accused, the convening authority has the discretion[11] to *defer* both types of forfeitures up to, but not beyond, the date of action, which can be several weeks, if not months, later.[12] Furthermore, at any time before action or at action, the convening authority has the personal discretion to *waive* automatic forfeitures and *direct payment* of the waived automatic forfeitures to the accused's dependents for a total of six months.[13] This waiver option is not available for adjudged forfeitures and is also not available if the accused is not otherwise entitled to pay and allowances; for example, after adjudged total forfeitures go into effect or after the accused reaches his expiration term of service (ETS) date.

Before advising their clients on the submission of deferment or waiver requests, defense counsel must understand the following distinctions between adjudged and automatic forfeitures: (1) a convening authority may defer both adjudged and automatic forfeitures only upon application by the accused, but he or she may waive automatic forfeitures *sua sponte*; (2) only automatic forfeitures may be waived; (3) deferment of forfeitures ceases at the date of action, whereas waiver of automatic forfeitures can extend up to six months after action; and (4) a convening authority may not direct deferred forfeitures to be paid to dependents,[14] but a convening authority must direct that waived automatic forfeitures be paid to dependents.[15]

Finally, any reduction in rank will obviously impact the amount of pay to which an accused is entitled and will consequently impact the amount of any deferred or waived forfeitures. Therefore, defense counsel must understand that Article 57, UCMJ, and RCM 1101 also apply to adjudged reductions in grade. Like adjudged forfeitures, any adjudged reduction in grade is effective fourteen days after the sentence is adjudged and may be deferred until action. However, unlike automatic forfeitures, an automatic reduction in grade under Article 58a, UCMJ,[16] is not effective until action and cannot be waived.

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[6] Note that in Subchapter VIII of the UCMJ (Sentences), there are actually eight distinct articles: Articles 55, 56, 56a, 57, 57a, 58, 58a, and 58b. Forfeitures are addressed in just two of these articles: Articles 57 and 58b. Beware, many practitioners sometimes reference Article 58(b), a separate paragraph addressing hard labor, instead of referencing Article 58b, the article addressing automatic forfeitures.

[7] Defense counsel should also read *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002), in conjunction with the forfeiture chart in the Appendix to this article.

[8] If the portion of the adjudged sentence that includes confinement for more than six months or a punitive discharge in conjunction with any amount of confinement is not approved by the convening authority at action, the Government must pay back the forfeitures. UCMJ art. 58b(c) (2008).

[9] As the Court of Appeals for the Armed Forces (CAAF) pointed out in *United States v. Emminizer*, prior to the addition of Article 58b to the UCMJ in the National Defense Authorization Act for Fiscal Year 1996, unless forfeitures were part of the approved sentence, servicemembers continued to receive pay and allowances in confinement, even while serving extended sentences. 56 M.J. at 443.

[10] Or upon action, if by some extremely unusual circumstance the convening authority takes action within fourteen days of an adjudged sentence. UCMJ arts. 57 and 58b.

[11] The convening authority has complete discretion and the accused has "the burden of showing that the interests of the accused and the community in deferral outweigh the community's interests in imposition of the punishment and its effective date." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1101(c)(3) (2008) [hereinafter MCM].

[12] UCMJ arts. 57 and 58b, and MCM, *supra* note 11, R.C.M. 1101(c). Note that any forfeitures (either adjudged or automatic) deferred belong to the accused.

[13] *Id.*

[14] Any deferred forfeitures (either adjudged or automatic) belong to the accused.

[15] After all, provision for the family, not the accused, is the only reason Congress provided for this waiver authority.

[16] Article 58a, UCMJ, provides that an approved sentence that includes a punitive discharge, confinement, or hard labor without confinement results automatically in a reduction to E-1, effective at action. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-29(e) (16 Nov. 2005).

Requesting Deferment and Waiver of Forfeitures

So, back to your client, Sergeant Smith, who has just been sentenced to reduction to E-1, forfeiture of all pay and allowances, eighteen months confinement, and a bad conduct discharge. What can you do to effectively represent your client and meet his goal of providing financial support to his family? The process can be summed up in three steps.

Step 1: (Pretrial) Advise, Coordinate, and Prepare

Let's go back in time; your first and most important step in effectively representing your client occurs during pretrial preparation. Before trial, you should discuss with Sergeant Smith the ramifications of possible punishments in his case and whether, in the event of adjudged or automatic forfeitures (and/or an adjudged reduction in grade), he would like to pursue a course of action that would provide his family with the most financial support.[17] Since Sergeant Smith desires to provide maximum financial support to his family, you should notify the Government[18] that, depending on the outcome of the court-martial, Sergeant Smith intends to immediately submit a request for deferment of forfeitures and deferment of reduction in grade.

Before trial, you must dedicate time to preparing a persuasive deferment request.[19] You should specifically reference adjudged forfeitures, automatic forfeitures, and an adjudged reduction in grade.[20] You should also advocate for deferment utilizing the RCM 1101(c)(3) factors,[21] placing the most emphasis on Sergeant Smith's family situation. Because the convening authority cannot direct deferred forfeitures (either adjudged or automatic) to be paid to dependents, he may not be inclined to approve a deferment request without substantial documentation showing that (1) the dependents need such support; and (2) the dependents will actually receive the support. You can substantiate need by providing documentary evidence such as an itemized list of expenditures and income, copies of bank records and credit reports, leases or mortgage statements, medical records if there are family medical problems, pay stubs, etc. Sergeant Smith can demonstrate his intent to provide his pay and allowances to his family by filling out an allotment form directing pay to his wife's bank account or by providing a sworn statement from his wife assuring the convening authority that she has access to the bank account where his direct pay is deposited.[22]

Step 2: (Date Sentence Is Adjudged) Request Deferment of Adjudged and Automatic Forfeitures

Now you are back in the office with Sergeant Smith, and his escorts are waiting to take him to the confinement facility. Since forfeitures have been adjudged and the other aspects of the sentence will result in forfeitures automatically by operation of law, you should have Sergeant Smith sign the deferment request specifically requesting deferment of the adjudged forfeitures, the automatic forfeitures, and the reduction in grade. Give the entire packet to the Government immediately, so they can prepare it for submission to the convening authority for action within the next fourteen days.[23]

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[17] All this should be done early in trial preparation and should be part of your post-trial appellate rights advisement. Also make sure to check your client's ETS date, because if the accused's ETS date arrives during confinement, he is no longer entitled to pay and allowances and, therefore, neither the deferment nor the waiver option are possible courses of action.

[18] Since trial counsel do not normally participate in the post-trial process, I recommend you notify both trial counsel and the chief of military justice via e-mail.

[19] Just as you advocate orally in front of the panel during the presentencing case, you must advocate in writing to the convening authority.

[20] Because all three types of punishments may not be applicable, be prepared to adjust the content of the request based on the final adjudged sentence.

[21] Rule for Court-Martial1101(c)(3) provides,

> Factors that the authority acting on a deferment request may consider in determining whether to grant the deferment request include, where applicable: the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; the accused's character, mental condition, family situation, and service record.

MCM, *supra* note 11, R.C.M. 1101(c)(3). These deferment factors apply to adjudged forfeitures, automatic forfeitures, and adjudged reductions in grade.

[22] Make sure to advise your client that the convening authority can rescind any deferment should the dependents stop receiving the deferred forfeitures. *Id.*

[23] If the deferment request is granted, your next submission will be RCM 1105/1106 matters. *Id.* R.C.M. 1105, 1106. If the deferment request is denied, however, you should immediately submit a request to waive automatic forfeitures and defer the adjudged forfeitures and reduction in grade.

Step 3: (Post-Trial Submissions) Request Disapproval/Suspension/Mitigation[24] of Adjudged Forfeitures and Waiver of Automatic Forfeitures

In Sergeant Smith's post-trial submissions, you must specifically address both the adjudged forfeitures and the automatic forfeitures. As previously discussed, a convening authority can waive the automatic forfeiture of pay and allowances only if the accused is otherwise entitled to such pay and allowances. Therefore, in order for waiver and payment to Mrs. Smith to occur, Sergeant Smith's adjudged total forfeitures must not be in effect. Consequently, you must first request that the convening authority disapprove, suspend, or mitigate the adjudged forfeitures. Finally, you should request that the convening authority waive the automatic forfeitures and direct payment to Mrs. Smith for six months after action.

Like the deferment request, this request must also be persuasive and supported by documentary evidence. However, the waiver request is entirely distinct from the deferment request you submitted earlier. You cannot simply use the deferment request and replace the word "defer" with "waive." Unlike the deferment request, the request for waiver should only refer to automatic forfeitures. Also, the convening authority may consider different factors; therefore, this time you should advocate using the "waiver" factors set forth in RCM 1101(d)(2),[25] rather than the "deferment" factors.

Conclusion

In Sergeant Smith's case, if the convening authority approves the deferment request prior to action and the waiver request at action, you will have effectively obtained financial support for Sergeant Smith's family for at least eight to ten months.[26] By following these three simple steps and submitting clear, concise, and legally accurate requests supported by family circumstances, you have helped the Government help your client's family.

[24] Mitigation and commutation are synonymous. Some courts use the term commutation, whereas the RCM uses the term mitigation.

[25] Rule for Court-Martial 1101(d)(2) provides,

> Factors that may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of the accused's confinement, the number and age(s) of the accused's family members, whether the accused requested waiver, any debts owed by the accused, the ability of the accused's family members to find employment, and the availability of transitional compensation for abused dependents permitted under 10 U.S.C. 1059.

Id. R.C.M. 1101(d)(2).

[26] Since forfeitures were deferred until action, which normally takes at least two to three months, the deferment and the waiver add up to at least eight to ten months of financial support to the family. Note that if the convening authority had simply "waived" forfeitures from Day 14, the family would have only received six months total of relief.

Appendix[27]

Waiver and Deferment of Adjudged and Automatic Forfeitures

Type of Forfeitures	14 Days after trial	14 Days after trial until Initial Action	Initial Action
Adjudged Forfeitures (1) Adjudged by MJ or Panel (2) Maximum amount: (a) GCM: all pay and allowances (b) SPCM: 2/3ds pay only (3) Effective Date: 14 days after sentence is adjudged.	No forfeitures in effect until 14 days after trial.	**Defer**[28] (1) Only valid until Action or if rescinded earlier (2) Money goes to the accused (3) No sua sponte deferments	**Disapprove, Mitigate,* or Suspend**[29] ***** i.e., change duration or amount of forfeiture provided that total forfeiture amount is not increased
Automatic Forfeitures (1) Applies by operation of law if: (a) Confinement > 6 months; or (b) Discharge & Confinement (2) Maximum amount: (a) GCM: all pay and allowances (b) SPCM: 2/3ds pay only (3) Effective Date: 14 days after sentence is adjudged.	No forfeitures in effect until 14 days after trial.	**Defer**[30] (1) Only valid until Action or if rescinded earlier (2) Money goes to the accused (3) No sua sponte deferments **Waive**[31] (1) Goes to dependents only (2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first (3) CA can waive sua sponte	**Waive**[32] (1) Goes to dependents only (2) Valid for up to 6 months, duration of confinement, or ETS, whichever comes first (3) CA can waive sua sponte

[27] This chart is a handout of the TJAGLCS Military Justice Managers' Course. CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, POST-TRIAL PROCEDURES DESKBOOK (24 July 2009). It should be read in conjunction with *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002).

[28] UCMJ art. 57(a)(2); MCM, *supra* note 11, R.C.M. 1101(c).

[29] MCM, *supra* note 11, R.C.M. 1107(d) & 1108.

[30] UCMJ arts. 57(a)(2) & 58b(a)(1); MCM, *supra* note 11, R.C.M. 1101(c).

[31] UCMJ art. 58b(b); MCM, *supra* note 11, R.C.M. 1101(d).

[32] UCMJ art. 58b(b); MCM, *supra* note 11, R.C.M. 1101(d).

BOOK REVIEWS

GALLIPOLI: THE END OF THE MYTH[1]

REVIEWED BY LIEUTENANT COMMANDER BRIAN W. ROBINSON[2]

"Are there not alternatives than sending our armies to chew barbed wire in Flanders?"[3]

I. Introduction

In his latest book, *Gallipoli: The End of the Myth*, Robin Prior[4] adds an insightful, well-researched, and concise narrative to a robust library about one of the most storied campaigns of the Great War. Prior's myth-busting target is the Gallipoli campaign and the notion that Gallipoli offered a potential turning point to the carnage on the Western Front. British leadership conceived of the Gallipoli adventure as a way to use comparatively limited naval and ground forces to accomplish four strategic objectives at low cost: knock Turkey out of the war by taking Constantinople, force Germany to divert resources away from the stalemate on the Western Front, relieve pressure on Russia, and bring fence-sitting Balkan states (most notably Greece and Bulgaria) into the war on the side of the Entente. Many historians have opined that these objectives and the overall plan to achieve them were sound but that a lack of attention to details, bad timing and poor execution tragically undermined the campaign.[5]

Prior challenges the premise that Gallipoli was "the great lost opportunity of the First World War."[6] In Prior's view, Gallipoli offered no chance of achieving strategic success. Prior often revisits ground other historians have already traveled and devotes more of the book to collateral Gallipoli myths than to the question of Gallipoli's strategic importance. Nevertheless, Prior largely succeeds in attacking this central myth of the Gallipoli campaign. In Prior's analysis, even flawless execution of the plan would not have produced the great strategic results its architects had hoped to achieve. In debunking the idea that the Gallipoli campaign was a fundamentally sound plan that was wrecked by mismanagement, lack of initiative in the field, bad luck, and other misfortunes, Prior reminds us that the momentum of a bad idea often masks its lack of merit. That wisdom is as true today as it was in 1915.

II. Of Myths and Men: How British Leaders Conceived a Schizophrenic Plan

Prior presents Gallipoli as a case study in military planning gone awry and provides a cautionary tale for leaders. Gallipoli began as a concept with low risk and low cost, but the actual operation morphed into a massive sacrifice of men and machines that its planners never intended. Many historians attribute the concept of the Gallipoli campaign almost exclusively to the fertile mind of Winston Churchill,[7] but while Prior acknowledges Churchill's involvement, he lays responsibility for the failure of Gallipoli on the entire British War Council.[8] Early in the war, Churchill presented three different schemes for

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[1] ROBIN PRIOR, GALLIPOLI: THE END OF THE MYTH (2009).

[2] Judge Advocate, U.S. Coast Guard. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] PRIOR, *supra* note 1, at 10 (quoting an informal note from Winston Churchill, First Lord of the Admiralty, to Herbert Henry Asquith, Prime Minister of Great Britain, advocating the use of the British Navy to engage the Central Powers in a new theater of war to relieve the stalemate on the Western Front).

[4] Prior, a professor and fellow at the University of Adelaide and the Australian Defense Force Academy, is highly qualified to provide a new look at the Gallipoli campaign. As a professor of military history in Australia, Prior understands the Gallipoli campaign and the experience of the troops that fought there as few others can. Prior is particularly well-versed in the history of the Great War having co-authored two previous books about WWI: PASSCHENDALE: THE UNTOLD STORY (1996) and THE SOMME (2005).

[5] *See, e.g.*, JOHN KEEGAN, THE FIRST WORLD WAR 237 (1998) (noting that "the Fisher [First Sea Lord] plan might have worked, for the Turks were only slowly repairing and strengthening the Dardanelles defenses, had the War Council acted immediately . . . ."); PHILIP J. HAYTHORNTHWAITE, GALLIPOLI 1915, at 9 (1991) (noting that the Gallipoli campaign is traditionally viewed as "the only truly innovative concept of the entire war"); ALAN MOOREHEAD, GALLIPOLI 363–65 (1956) (noting that Gallipoli was "the most imaginative conception of the war, and its potentialities were almost beyond reckoning."); DAVID FROMKIN, A PEACE TO END ALL PEACE: CREATING THE MODERN MIDDLE EAST 1914–1922, at 166 (1989) (noting that "[o]n April 25, 1915, the Allies could have won an easy, bloodless victory . . . and, with it, the Middle Eastern war . . ."); G.S. PATTON, JR., LT. COL., THE DEFENSE OF GALLIPOLI, A GENERAL STAFF STUDY 62 (1936) (Patton noted, "Had this sound plan been executed with resolution and energy, it would had (*sic*) effected very far reaching results.").

[6] PRIOR, *supra* note 1, at xiii.

[7] *See, e.g.*, KEEGAN, *supra* note 5, at 236; MOORHEAD, *supra* note 5, at 45; HAYTHORNTHWAITE, *supra* note 5, at 8–9; FROMKIN, *supra* note 5, at 159.

[8] PRIOR, *supra* note 1, at 237–38.

major naval operations, which eventually lead to the Gallipoli plan, but the War Council rejected most of Churchill's proposals as impractical, believing they carried unsavory ratios of risk to reward. Churchill's proposal for a naval action in the Dardanelles, however, lingered and eventually gathered momentum. The operation was designed to support a hoped-for attack by Greek forces on the Gallipoli Peninsula, and the idea became a seed the entire War Council nurtured. That seed grew rapidly and eventually produced disastrous fruit.

Prior suggests that late in 1914 and early 1915, military action against Turkey gradually gained support as an appealing alternative to the growing stalemate on the Western Front.[9] Most notably, Russia appealed to the British to open a front against Turkey that would draw Turkish resources away from Russia's hard-pressed defense of the Caucasus.[10] Two days later Churchill called a special meeting of the Admiralty War Group, and "the subject of operations against Turkey 'was brought forward by the First Lord [Churchill]' and thoroughly discussed."[11] Admiral Fisher had previously suggested that a fleet of older, pre-Dreadnaught battleships could "force the Dardanelles" if the Navy planned and executed the operation quickly.[12] Notably, the Fisher proposal did not contemplate the use of infantry to neutralize Turkish shore batteries.[13]

Fisher and other leaders began to view the battleship plan as a low-cost option.[14] The Admiralty believed (foolishly, in Prior's view) that it could deliver Constantinople with a force of outdated warships that Britain could easily sacrifice to the effort. The Admiralty plan initially presumed that almost no ground troops would be needed for the campaign other than a small occupying force to keep the lights on and trains running in the Ottoman capital. The Admiralty believed Turkey, the "sick man of Europe"[15] (and getting sicker by the day) would collapse at the sight of the British fleet, new allies (Greece, Bulgaria, Rumania and perhaps others) would come running to the Entente, and Russia could then re-direct her forces against Germany with arms and other support from Britain and France. What could go wrong?

These rosy assumptions are absurd, of course, but that is precisely Prior's point. These assumptions were equally absurd in 1915. Prior summarizes the folly of each of these predictions and criticizes the underlying assumptions to underscore his core argument—that no amount of tactical success at Gallipoli would have yielded a strategic victory.[16] Apologists might forgive the War Council's reliance on these assumptions as an unfortunate example of out-of-the-box thinking,[17] but Prior's assessment is not as charitable:

> This was the War Council at its worst—unable to stick to a thorough discussion of any subject, discursive, rambling, incoherent . . . . [N]ot surprisingly the War Council's conclusions reflected the discussion . . . [:] the 'Admiralty should . . . prepare for a naval expedition in February to bombard and take the Gallipoli Peninsula, with Constantinople as its objective.'[18]

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[9] *Id.* at 9–14.

[10] *Id.* at 13; *see also* FROMKIN, *supra* note 5, at 128 (discussing the influence of the Russian plea on Kitchener, Churchill, and others); MOOREHEAD, *supra* note 5, at 35 (noting that the Russian plea "could not be ignored" and that Kitchener and Churchill considered the Dardanelles the only feasible theater for the attack that the Russians requested).

[11] PRIOR, *supra* note 1, at 14.

[12] *Id.* at 13. Vice Admiral Carden, the on-scene British Navy commander, verified that such a fleet might sustain heavy losses but could force its way into the Sea of Marmara. *Id.*

[13] *Id.* at 16, 18; *see also* FROMKIN, *supra* note 5, at 130–34 (discussing the Admiralty War Council meeting on 3 January and Admiral Cardin's confirmation that the concept of a Navy-only action could succeed).

[14] Indeed, Fisher had advocated scrapping the entire class of pre-Dreadnaughts only a month before. PRIOR, *supra* note 1, at 13.

[15] HAYTHORNTHWAITE, *supra* note 5, at 6.

[16] PRIOR, *supra* note 1, at 7–11, 65–67, 249–52. For example, Prior points out the following: long held cultural and political animosity between many of the Balkan states made the contemplated "Balkan alliance" against Turkey and Germany a fantasy. The Balkan states showed, at best, a luke warm reaction to the campaign after it started. Greece had no trained troops for any serious move against Turkey or for a major contribution to any other Allied effort, making her possible entry into the Triple Entente inconsequential to the stalemate in France. The Allies had enough trouble keeping their own troops in France stocked with ammunition and supplies so there was no surplus of war materials to give to Russia even if Britain re-opened a route through the Black Sea. There was no available shipping to move Russian wheat to the West so the "arms for wheat" concept was never viable. The Turks manned and supplied batteries and constructed trenches and other defenses around Constantinople making it clear that Turkey planned to defend rather than abandon its capital. The evacuation of civilians and the movement of gold reserves and government documents from Constantinople were merely the same sort of precautions that the French took at Paris in 1914 and not evidence of an imminent collapse. *Id.*

[17] *Id.* at 30.

[18] *Id.* at 19.

By early January 1915, the War Council had cast the die that would send men to their deaths by the tens of thousands over the next year.

As British leadership began to lose their collective nerve over the likely success of a purely naval operation, the plan was steadily revised and became more convoluted. The members of the War Council eventually persuaded themselves troops would be needed to take Turkish defenses along the Gallipoli Peninsula if the naval attack faltered.[19] Even Lord Kitchener, who initially opposed committing any troops to the campaign, came around to the idea of the use of land forces. By mid-February, Kitchener determined he could use Australia and New Zealand (ANZAC) forces at Gallipoli after Turkish forces retreated from the Suez Canal. Kitchener later added the entire British 29th Division to the campaign. In the end, British leaders had shifted their support from a small occupying force to an attack force of between 80,000 and 130,000 troops in the span of a few weeks.[20]

Prior offers a new and articulate summary of the curious steps that transformed the War Council's plan from a low-cost naval operation to a complex naval and amphibious assault the likes of which no military power had ever attempted. British leaders had misgivings about the plan, and Prior highlights the concerns they shared with each other in private correspondence.[21] Prior's most powerful criticism derives from his description of the inability of admirals, generals, and politicians to stop what they had begun to suspect was a bad idea because the highest levels of leadership had already set the wheels of the campaign in motion. As Prior persuasively concludes:

> [W]hat we can say with . . . certainty is that had the naval advice been of a higher caliber and identified all of the difficulties . . . and drawn them to the attention of the Admiralty War Group, it is a reasonable proposition that the operation would have met the same fate as Borkum, the Baltic and other Churchillian schemes. After all, trenchant criticism from admirals such as Jellicoe had stopped those adventures in their tracks. It is therefore probable that had good naval advice been tendered there might have been no naval attack at the Dardanelles and no land campaign at Gallipoli.[22]

In Prior's analysis of Gallipoli, the lack of thoughtful naval advice was another great tragedy of the campaign. Those that knew or should have known that the plan was doomed kept mum—or at least did not voice sufficiently strong objections to obvious flaws in the plan—and the Gallipoli juggernaut proceeded to its inevitable end.

III. The Naval Campaign

Prior also analyzes Britain's aborted attempt to force the Dardanelles. Most historians contend that the British Navy stopped just short of victory in mid-March 1915.[23] The conventional view suggests that the British fleet could have fought its way into the Sea of Marmara with one last push through the Dardanelles because the Turks were nearly out of ammunition.[24] Prior completely debunks this myth with two lines of attack. First, Prior provides an exhaustive analysis of the minimal damage that British warships inflicted on Turkish artillery.[25] Second, Prior estimates that the heavy Turkish guns defending the straight were equipped with fifty-five shells per battery and that the lighter guns had between seventy and

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[19] Prior persuasively points out that even a complete success on the European side of the Dardanelles, in which British troops rendered every Turkish gun on the Gallipoli Peninsula impotent, would have done nothing to silence the 111 high caliber guns located along the Asiatic side of the straight. *Id.* at 31–32. The official British inquiry into the Gallipoli campaign addressed this, but Prior uses the obvious oversight as another example of the planners' willing ignorance of the perils of the operation.

[20] PRIOR, *supra* note 1, at 23–25, 27–29, 33–34, 60–62, 66–71.

[21] In particular, Prior sheds light on Admiral Fisher's subtle attempts to undermine the scheme through other senior leaders of the Navy and Admiralty and Fisher's apparent unwillingness to confront Churchill head-on. *Id.* at 23–27.

[22] *Id.* at 43.

[23] *See* KEEGAN, *supra* note 5, at 239–40; FROMKIN, *supra* note 5, at 154.

[24] *Id.*

[25] PRIOR, *supra* note 1, at 39–59. Prior confirms that the poor results were the result of a number of factors: the older pre-Dreadnaughts that made up the bulk of the fleet had aged and inaccurate guns; even the best naval gunfire from modern Dreadnaughts was typically ineffective against fixed fortifications and earthworks; the flatter trajectories of naval gunfire made it extremely difficult to destroy or damage the Turkish guns; and the extremely strong currents in the Dardanelles further decreased the accuracy of the British naval guns. Using the same methodology that an official British inquiry into Gallipoli used, Prior calculates that the British fleet would have hit the Turkish guns it targeted with only 3% of the shells it fired.

two-hundred and fifty shells per gun;[26] therefore, the Turkish batteries had sufficient ammunition to defend against at least two more British attacks. Moreover, Prior argues that the real threat to the British fleet was the extensive series of mines in the Dardanelles.[27] From the beginning of the naval operation through 18 March 1915, the mines had sunk one-third of the British fleet and severely damaged another third. Like other historians, Prior concludes the Admiralty's decision to use fishing trawlers, with civilian crews, for minesweeping in the Dardanelles was a farce. The trawlers could barely make headway against the strong currents in the straight and were completely ineffective. Most significantly, Prior argues that Britain's heavy losses in the first attack left the fleet with no ship capable of confronting the battleship *Goeben* that Germany had given to Turkey at the beginning of the war. Based on this evidence, Prior makes a strong case that another British naval attack would likely have been as disastrous as the attack on 18 March.

IV. "Never Get Involved In A Land War In Asia [Minor]"[28]

Prior's analysis of the campaign includes an examination of the infantry action on the Gallipoli Peninsula, from the initial landings at Helles and ANZAC cove on 25 April 1915 to the comparatively well-orchestrated evacuation of the troops in early January 1916. The book vividly describes the land operation, including the numerous attacks and repulses, the difficult terrain (which offered extraordinary defensive positions to the Turks), and the appalling loss of life on both sides, particularly during the repeated British attacks on the Turkish lines south of Krithia that mirrored the suicidal assaults on the Western Front.[29] Prior tells the story of the land campaign well, but he does not break much new ground in reviewing the chronology of the operation. On the other hand, Prior does convincingly challenge two additional myths about the infantry assault: that the ANZACs could have opened a road to Constantinople if they had seized and held the Sari Bair ridge and that successful landings and advances at Sulva Bay in August 1915 could have won the entire campaign.

Prior makes quick work of the myth that the ANZACs were "within an ace of success" at Sari Bair.[30] Prior points out that the combination of Sari Bair's topography and the strong Turkish positions on the ridge would have made holding the ridge for long completely untenable for any assault force. The Turks could have ripped any attacking unit that managed to seize Sari Bair to pieces from other defensive positions.[31] Attacking, seizing, and holding the entire ridge line would have been equally impractical because it would have taken the whole force at ANZAC Cove to attempt it.[32] Finally, even if the ANZACs had accomplished the impossible, there were no reserves available to follow up on the success, and the British remained completely bogged down at Helles. Thus, even a tactical success at Sari Bair would not have opened a road to a larger strategic victory.

The badly coordinated attacks that followed the British landing at Sulva Bay have also been criticized as a low-point in the Gallipoli fiasco. Prior agrees, but offers a fresh perspective. Prior explains that the Sulva Bay operation was supposed to establish a supply base for all forces north of Helles and ANZAC Cove.[33] Criticism of the Sulva Bay operation, Prior persuasively argues, amounts to an objection that the landings did not produce a victory they were never intended to produce. Moreover, Prior correctly points out that while the British attempts to take the Anafarta ridge above the bay were suicidal and badly planned, none of the strategic objectives of the campaign lay beyond that ridge.[34] Accordingly, a victory at Sulva Bay, like Sari Bair, would not have opened the expected road to Constantinople.

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[26] *Id.* at 57–58. This estimate contradicts evidence from reports of the Turkish General Staff that came to light after the war, suggesting that the Turks were critically short of artillery shells after the first naval attack. *See* KEEGAN, *supra* note 5, at 239–40; FROMKIN, *supra* note 5, at 154. Prior cites his own analysis of Winston Churchill's *The World Crisis* in support of his calculation. This is disappointing. The question of how much ammunition the Turks had available after 18 March 1915 has been a key Gallipoli discussion point almost since the troops evacuated the peninsula. Prior should have reiterated or more fully summarized the basis for his calculation of Turkish artillery reserves to support his point.

[27] PRIOR, *supra* note 1, at 36, 41–42, 58; *see also* WEST POINT ATLAS FOR THE GREAT WAR 44 (Thomas E. Greiss ed., 2003) (depicting location of eleven separate mine belts in the Dardanelles).

[28] THE PRINCESS BRIDE (20th Century Fox 1987).

[29] PRIOR, *supra* note 1, at 72–81 (difficulties of terrain and Turkish dispositions), 133–42; 149–59 (losses and failures of attacks at Krithia and the southern end of the peninsula).

[30] *Id.* at 185.

[31] *Id.* at 181–88.

[32] *Id.*

[33] *Id.* at 190–93.

[34] *Id.* at 204–09.

V. Conclusion

Prior provides a remarkably thorough discussion of the Gallipoli campaign in a concise narrative. The book puts a bright spotlight on the British War Council's collective mismanagement and its haphazard and negligent planning of the ill-fated attack. Prior also brings many facts to light that debunk much of the conventional wisdom about the naval action in the straights and the hard fighting on the peninsula. In doing so, Prior delivers on his promise to dispel many of the Gallipoli myths that have perpetuated the notion that the campaign might have succeeded with only a bit more effort or a bit more luck. His discussions of the naval and land operations are fascinating, but they are collateral to Prior's main target, the really *big* myth about Gallipoli: that success on the peninsula would have guaranteed the capture of Constantinople and a separate peace with Turkey, which, in turn, would have shortened the war on the Western Front. Although the book spends fewer rounds on this main target than on the many collateral myths it attacks, Prior still persuasively debunks the belief that Gallipoli could have produced any significant strategic result.

Prior's detailed chronicle of the defalcations of the British War Council should also resonate with judge advocates struggling to provide legal counsel that may be perceived as the laying of legal minefields in the paths of operational commanders. As lawyers and officers, judge advocates are rightly encouraged to help commanders "get to yes," but Prior reminds us that there are times when getting to "yes" is an invitation to disaster. At such times, offering sound counsel to halt the momentum of a bad idea may be the best service a lawyer can provide. Prior's fresh view of a well-studied campaign highlights one such bad idea and is certain to inspire additional scholarship.

PRISONER OF THE STATE: THE SECRET JOURNAL OF PREMIER ZHAO ZIYANG[1]

REVIEWED BY MAJOR E. JOHN GREGORY[2]

I told myself that no matter what, I refused to become the General Secretary who mobilized the military to crack down on students.[3]

I. Introduction

Beginning on 17 April 1989, a student rally in memory of recently-deceased reformist Premier Hu Yaobang quickly morphed into an unprecedented nationwide protest movement.[4] Within the Chinese Communist Party (CCP), conservatives, led by Premier Li Peng, advocated a violent crackdown against the protesters.[5] On 17 May 1989, then General Secretary of the CCP, Zhao Ziyang, went to Tiananmen Square, ground zero of the protest.[6] Appearing "close to tears," Zhao personally, yet unsuccessfully, pleaded with the protesters to go home.[7] In the power struggle that ensued, the paramount leader of the CCP, Deng Xiaoping, sided with the conservatives whose call for a crackdown prevailed over Zhao's position advocating restraint.[8] The Tiananmen Square Massacre of 4 June 1989 followed.[9] Seemingly silenced, Zhao would spend the rest of his life under house arrest. He died on 17 January 2005.[10]

From the grave, Zhao now breaks his silence with the posthumous publication of *Prisoner of the State*. Zhao describes his efforts to reform the economy, his political struggles against conservative party ideologues, his views on how the Tiananmen Massacre unfolded, and his thoughts on the future of China. Zhao presents no unifying thesis for the work as whole, but he has a theme: China cannot realize real economic reform without profound political reform.[11] This review addresses the value of publishing Zhao's memoirs as a posthumous book, the book's contribution to the history of the period, the timeless lessons Zhao exemplifies, the book's role in providing a better understanding of China today, and, finally, the book's effect on China's reform movement.

II. Analysis

In a turn of events reminiscent of a Cold War drama, Zhao secretly recorded over thirty hours of memoirs while under house arrest.[12] Drawn from those recordings, Zhao's first person perspective makes *Prisoner of the State* an important

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[1] ZHAO ZIYANG, PRISONER OF THE STATE: THE SECRET JOURNAL OF PREMIER ZHAO ZIYANG (Bao Pu et al. eds., 2009).

[2] Judge Advocate, U.S. Army. Student, 58th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] ZHAO, *supra* note 1, at 29.

[4] JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 739 (1991). More than one million Chinese citizens protested in Beijing alone. *Id.* By 4 June 1989, when the government cracked down, the protest had spread to all segments of society. *Frontline: The Tank Man* (PBS television broadcast Apr. 11, 2006), *available at* http://www.pbs.org/wgbh/pages/frontline/tankman/view/ (last visited Sept. 5, 2009). The interests of the protesters varied, from the demands of municipal workers seeking better pay to students seeking democracy. *See id.* Groups from the various Chinese professional societies, such as journalists, teachers, and doctors, all proudly grouped together under their particular organizations' banners in a grand show of solidarity. *Id.* People streamed in from the countryside to participate in the protest. *Id.*

[5] ZHAO, *supra* note 1, at 23.

[6] SPENCE, *supra* note 4, at 741.

[7] *Id.* For the most part, no one would ever see Zhao in public again; however, Zhao explains how he cleverly manipulated the ambiguous legality of his house arrest to leave his home to play on a golf course. ZHAO, *supra* note 1, at 74. Foreign news outlets picked up on his brief departures from house arrest. *Zhao Reportedly Seen Playing Golf*, CHI. TRIB., June 18, 1989, at C8; Lena H. Sun, *China Upholds Ex-Leader's Ouster*, WASH. POST, Oct. 10, 1992.

[8] ZHAO, *supra* note 1, at 25–34. The term "paramount leader" comes from the Chinese term "Dang he guojia zuigao lingdaoren" [the highest leader of the Party and the State]. The term, which often appears in both Chinese and English language material, can refer to someone who either officially or unofficially exercises ultimate power in China. Despite only holding the official position of Chairman of the Central Military Commission at the time of the Tiananmen Massacre, Deng was still widely regarded as the unofficial paramount leader of China. *See id*. at 290–91 (noting Deng's position on the Central Military Commission).

[9] SPENCE, *supra* note 4, at 743.

[10] ZHAO, *supra* note 1, at 287.

[11] *Id.* at 265–73. It should not come as a surprise that Zhao presents no unifying thesis. Zhao simply recorded his recollections and thoughts for posterity.

[12] Jane Macartney, *Purged Leader Reveals Story of Tiananmen from Beyond Grave*, TIMES (LONDON), May 15, 2009, at 39.

primary source for historical research about this period of reform (1980–1989) as well as about the Tiananmen Massacre.[13] China watchers already knew the general outline of Zhao's views of the reform movement and the Tiananmen crackdown prior to the book.[14] The book's greatest contribution, however, comes in the form of details of the period as described by the ultimate credible insider. For instance, scholars knew Zhao had been ousted after he appeared before the Tiananmen protesters,[15] but the book reveals an additional detail: the lack of any formal Politburo vote on the crackdown.[16]

The editors have done more than merely provide a transcript of Zhao's recordings. They have taken thirty hours of mostly monologue, culled out relevant material, arranged the material into a narrative, and added valuable editorial content. The foreword, preface, and epilogue, for example, provide enough background to assist readers unfamiliar with Chinese politics in contextualizing Zhao's details.[17] Likewise, the editors have provided an excellent summary at the start of each chapter to further place Zhao's narrative in context.[18] The editors also rearranged Zhao's original order by opening with the Tiananmen Massacre[19] followed by Zhao's house arrest, which reflects the book's dramatic English-language title.[20] Finally, thirteen excellent photographs, including the iconic photograph of Zhao using a bullhorn to warn protesters on 19 May 1989, provide visual context to the events.[21]

The book helps bolster the view that Zhao demonstrated courage and independence when he openly disagreed with Deng Xiaoping on the Tiananmen crackdown. As nominally the most powerful person in the CCP at the time of the crackdown, history could judge Zhao harshly.[22] This book, however, does not support a harsh judgment. At the time of the protest, Zhao resolved that he would not be remembered as the general secretary who had called in the military.[23] At the height of privilege and power, Zhao easily could have accepted Deng's ruling and continued with the business of pragmatic economic reform.[24]

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[13] The *New York Times* has made available some of Zhao's actual audio recordings on its website. *Excerpts From Zhao Ziyang's 'Prisoner of the State,'* http://www.nytimes.com/2009/05/15/world/asia/15zhao-transcript.html (last visited Sept. 5, 2009). The author has compared some of these audio recordings with the English text, and the English translation proves very true to Zhao's original words. Inevitably, the translation loses some of Zhao's tone and emphasis. Zhao's voice comes across rather tired and aged, but determined. He seems, at times, deep in thought and occasionally searches for precisely the right word. He never comes across as a man with an ax to grind or a score to settle. As a matter of style, the editors deserve praise for leaving Zhao's text mostly undistorted. While this direct transcription results in some repetition and awkwardly simplistic phrasing, it better captures Zhao's way of speaking.

[14] For instance, Zhao's explanation of his use of the terms "initial stage of socialism" and "[s]ocialism with Chinese characteristics" as euphemisms for a market economy confronted by elder party ideologues is nothing new. ZHAO, *supra* note 1, at 204. Likewise, China scholars already knew that Deng Xiaoping occupied the paramount leader position in the party. SPENCE, *supra* note 4, at 729.

[15] SPENCE, *supra* note 4, at 745.

[16] ZHAO, *supra* note 1, at xiv, 29–30.

[17] Roderick MacFarquhar, a well-known China scholar, wrote the foreword. *See* About the Department—Roderick Macfarquhar, http://www.gov.harvard.edu/people/faculty/roderick-macfarquhar (last visited Sept. 5, 2009). MacFarquhar lays out Zhao's attempts to reform the economy, his overcoming of ideological obstacles, his evolving political thought, and his downfall during the Tiananmen crises. ZHAO, *supra* note 1, at xviii–xix, xxii. Adi Ignatius, another China expert, wrote the preface for the book. Recently Ignatius and MacFarquhar appeared on the program, *The Online News Hour*. A streaming video link is available on the Internet. *Newshour: Legacy of Tiananmen Crackdown Lingers Over China's Politics* (PBS television broadcast June 4, 2009), *available at* http://www.pbs.org/newshour/bb/asia/jan-june09/tiananmen2_06-04.html (last visited Sept. 5, 2009).

[18] For instance, in the chapter in which Zhao discusses that the CCP wanted him to make a "self-criticism," the chapter summary explains that "self-criticism" is an "important tool in the Party's efforts to maintain one official version of the truth." ZHAO, *supra* note 1, at 35.

[19] *Id.* at 3–49. Zhao did not record his memoir in this order, but the editors' rearrangement of the material makes sense because putting the Tiananmen Massacre first helps put later events into context.

[20] In Chinese, the book is titled *Gaige Licheng* which literally means "The Path of Reform." *See Wei Zhaoziyang Luyin de Qianguanuan Mei Yudao Mafan* [*The Former Officials who Recorded Zhao Ziyang's Memoirs have not Encountered Trouble*], VOICE OF AMERICA (CHINESE) NEWS, May 21, 2009 (translated by the instant reviewer), http://www.voanews.com/chinese/archive/2009-05/w2009-05-21-voa47.cfm?moddate=2009-05-21. The content of the last two-thirds of the book better support this Chinese-language title. No indication exists that Zhao himself provided input for the title of this posthumous book. This reviewer believes that neither the English title nor the Chinese title captures the essence of Zhao's memoirs as a whole. For reasons that should become apparent in this review, this author suggests the better titles of "How I Tried to Avoid Folly," or "Nearly Not on my Watch." The former title would borrow from Barbara Tuchman's excellent book about the self-destructive decisions governments make. *See* BARBARA W. TUCHMAN, THE MARCH OF FOLLY (1985). Zhao likely would have found persuasive Ms. Tuchman's thesis that governments throughout history have taken actions (i.e., folly) which ultimately undermine their authority (e.g., the Tiananmen Massacre) despite warnings by credible officials (e.g., Zhao himself). *See id.*

[21] ZHAO, *supra* note 1, at 134. Curiously, current PRC Premier Wen Jiabao stands somberly behind Zhao in the photograph as he speaks to the students. *Id.*

[22] For instance, at least one historian has postulated that Zhao's purge may have resulted from his own failed attempt to manipulate the Tiananmen incident to increase his power at the expense of conservatives like Li Peng. SPENCE, *supra* note 4, at 740. This motive finds precedent in Mao Zedong's technique of consolidating his own power against rivals in the CCP by manipulating students during the Cultural Revolution. *See id.* at 602–09.

[23] ZHAO, *supra* note 1, at 29.

[24] History may not have even judged Zhao harshly for such acquiescence. After all, most people remember Deng Xiaoping fairly favorably—for opening China to the world). Moreover, history has not entirely excoriated Li Peng, the official who pushed Zhao aside and actually imposed martial law to crush the protesters. *See id.* at 32.

When Zhao instead chose to go to Tiananmen Square and plead with the protesters, he achieved a place in history somewhat akin to that of Boris Yeltsin.[25] In both cases, career Communist officials who had everything to lose stood up for principle despite intense pressures from the unique circumstances of their respective countries and political systems.

Zhao does not attempt to whitewash history or embellish his motives for reform, and this honesty adds to the credibility of his self-portrayal. He even downplays the risks that he must have known existed in defying the paramount leader.[26] He never presents himself as anything other than an economic reformer, but he does conclude that a Western style parliamentary democracy may serve as the best vehicle for stability and economic growth.[27] Nevertheless, he makes clear that the economic necessity of political reform drove the evolution of his political thought,[28] not the other way around. Similarly, he concludes that the new economy requires an independent judiciary, specifically to limit bribery and other forms of corruption, which represent additional economic concerns.[29]

Judge advocates can learn from Zhao's memoirs in two respects. First, Zhao's refusal to condone the use of force against the protesters demonstrated the ability to remain intellectually independent despite intense pressure, a critical capability for judge advocates. Second, Zhao's comments regarding the necessity for rule of law highlighted the importance of a judge advocate's duties in a society of laws. Consider Zhao's indignation at the CCP's failure to adhere to minimum administrative due process standards while investigating him and keeping him under house arrest.[30] Additionally, after a long career at all levels of the CCP and years of house arrest, Zhao ultimately concluded that a true market economy cannot exist without the rule of law.[31]

This book helps to explain the seemingly absurd adoption of capitalism by a Communist Party founded on the promise of socialism and class struggle. By the time of Zhao, the party had long lost its original legitimacy as the guarantor of a socialist paradise.[32] Instead, Deng Xiaoping tried to substitute the attainment of economic prosperity as a new source of Party legitimacy.[33] As Bao Pu's epilogue notes, Deng made it clear that economic reforms would continue even after Zhao's purge.[34] The absence of another Tiananmen-type demonstration further suggests that the CCP and the people agreed to a tacit deal that would allow the CCP to maintain its political monopoly so long as the people prospered.[35] Deng's support for economic reform and lack of concern with socialist orthodoxy provides the key to understanding this transformation.[36]

Two fundamental differences between Zhao's China and the China of today limit the book's utility as a tool for predicting future action by the People's Republic of China (PRC). First, the PRC no longer has an unofficial paramount

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[25] Zhao did not stand on top of a tank and plead for no bloodshed as Yeltsin did, nor did he do anything as outwardly dramatic as Rommel's involvement with the plot to assassinate Hitler, but the comparison remains valid nonetheless. *Yeltsin Calls on Troops, Citizens to Oppose Coup*, SAN DIEGO UNION-TRIBUNE, Aug. 19, 1991, at A1.

[26] Zhao's focus on the CCP's failure to follow its own administrative due process procedures while keeping him under house arrest, e.g., ZHAO, *supra* note 1, at 8–23, led one *Washington Post* reviewer to question whether Zhao was naïve about the CCP. *See* Perry Link, *From the Inside, Out*, WASH. POST, May 17, 2009. The instant reviewer suggests that Zhao was anything but naïve at the time he made the decision to disagree with Deng. Zhao himself was purged in the 1960s. *See* ZHAO, *supra* note 1, at xii–xiii. Moreover, Zhao would have known the fate of other senior officials who had disagreed with the paramount leader during the course of his lifetime. For example, he would have known that President Liu Shaoqi's differences with Mao had resulted in Liu's loss of office and ultimate death. *See* JOHN K. FAIRBANK, CHINA: A NEW HISTORY 390–91, 393, 404 (1991).

[27] ZHAO, *supra* note 1, at 270–71.

[28] "Based on this, we can say that if a country wishes to modernize, not only should it implement a market economy, it must also adopt a parliamentary democracy as its political system. Otherwise, this nation will not be able to have a market economy that is healthy and modern . . . ." *Id.* at 269–73.

[29] *Id.* at 265. Zhao never holds himself out as anything but an economic reformer. In the book, he not only does not attempt to distinguish himself favorably from Deng Xiaoping, but the most profound regret he expresses is that Deng Xiaoping may have died under the mistaken impression that Zhao disliked him. *See id.* at 48–49.

[30] *Id.* at 53–87.

[31] "Another important issue—in fact the most essential—is the independence of the judiciary and rule of law. If there is no independent enforcement of law, and the political party in power is able to intervene, then corruption can never be effectively resolved." *Id.* at 158.

[32] The same Roderick MacFarquhar who provided the foreword also gave a televised talk sponsored by the University of California Berkley School of Journalism. In that talk, Mr. MacFarquhar discussed this issue of CCP legitimacy. *See Mao's Revolution, What Remains* (U. Cal. Television broadcast Dec. 12, 2005), *available at* http://www.uctv.tv/search-details.aspx?showID=11239 (last visited Sept. 5, 2009).

[33] *See id.*

[34] ZHAO, *supra* note 1, at 280.

[35] In the introduction, Adi Ignatius correctly characterizes the book as describing contemporary China as a nation in which "leaders accept economic freedom but continue to intimidate and arrest anyone who tries to speak openly about political change." *Id.* at xii.

[36] *See id.* at 119–24.

leader like Deng Xiaoping.[37] Much of Zhao's narrative centers on attempts by various officials to secure Deng's support behind the scenes, and, in the absence of a single, authoritative leader, the system Zhao describes has less relevance today.[38] Second, the PRC's integration into the world, both in terms of its economy and its participation in international forums, has reached an unprecedented level. Although anecdotal, the PRC's careful cultivation of its image before the 2008 Beijing Olympics provides a window into how this new interconnectedness may affect the CCP's decision-making calculus.[39]

Notwithstanding the changes that have occurred in China since Zhao's time, the PRC's handling of the Tiananmen protests offers some parallel's to modern China. For example, Zhao explains that conservatives had labeled the Tiananmen protesters "counterrevolutionaries" and "antisocialists" as a prelude to the government's use of force against them.[40] Similarly, the PRC has more recently labeled Uighur protesters, members of an ethnic minority in Xinjiang Province, "criminals" and "terrorists" prior to using force to crack down on Uighur demonstrations for independence.[41] Zhao's discussion of opposing politicians' attempts to discredit him by starting rumors that his family was corrupt may also provide some insight into the motives behind China's recurrent anti-corruption campaigns. As insinuated by Zhao's discussion of this incident, Chinese "anti-corruption" efforts sometimes serve as tools to discredit political opponents.[42] Finally, the lack of transparency and genuine adherence to the rule of law that Zhao complained of continues to remain a source of irritation and tragedy for the Chinese people.[43]

Perhaps most importantly, Zhao's example continues to embolden reformers with the release of this book. To understand the book's importance to the reform movement, one must understand Zhao as a symbol of reform who has continued to inspire reformers even today. Tellingly, just five days after his death, more than ten thousand people attended a memorial held in his honor in Hong Kong.[44] The book's publishers took serious risks by releasing the book but felt Zhao's memoir was important to the reform movement. The editor, Bao Pu, is the son of Bao Tong, who served as Zhao's secretary.[45] Bao Tong was purged along with Zhao following the Tiananmen protests, but unlike Zhao, Bao Tong spent seven years in prison before beginning his house arrest.[46] Bao Tong, who still lives in Beijing, has publicly taken responsibility for the production of the memoir, despite the potential repercussions.[47] Zhao's book also appears to have emboldened others to come forward with criticism of the government.[48] In August 2009, a lengthy speech of an undisclosed CCP "elder statesmen" made its appearance on the Internet.[49] In the speech, the author raised many of the same complaints against the political system that Zhao had raised, including the CCP's failure to establish a genuine electoral system, the

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[37] Current leaders, such as President Hu Jintao and Premier Wen Jiabao, rose up as mere Communist technocrats who will likely retire from public life following their terms in office rather than control the levers of power from the shadows.

[38] *See, e.g.*, ZHAO, *supra* note 1, at 28, 32, 35, 106.

[39] This new calculus could play out in unexpected ways. For instance, one might contend that a globally-connected China would never again risk the public relations nightmare associated with sending tanks against innocent protesters. On the other hand, Chinese officials allegedly withheld information about poisoned milk from their own citizens in the months surrounding the 2008 Beijing Olympics in order to protect China's image. Antoaneta Bezlova, *Penalities for Melamine in Milk Upset Victims' Parents*, PRESS SVC./GLOBAL INFO. NETWORK, Jan. 23, 2009.

[40] *See* ZHAO, *supra* note 1, at 11–13.

[41] *More on China's Hu Holds Meeting on Xinjiang, Vowing "Severe Punishment,"* BBC MONITORING ASIA PAC., July 9, 2009.

[42] *See* ZHAO, *supra* note 1, at 236. China is currently engaged in a massive anti-corruption campaign. *See* David Barboza, *The Corruptibles*, N.Y. TIMES, Sept. 4, 2009, at B1. Some allege that politics motivates the selection of targets for investigation. *Id.*

[43] After reading this book, it should not come as a surprise that the Chinese Government would first try to cover up its nation's SARs epidemic in order to prop up the CCP's image.[43] *See* ZHAO, *supra* note 1, at xii.

[44] *Chinese Mainlanders Join Hong Kong Vigil to Mourn Zhao Ziyang*, S. CHINA MORNING POST, Jan. 22, 2005. The PRC did not hold a memorial for Zhao. *See id.*

[45] *See* Jane Macartney, *Tiananmen Square Rebel is Banished Before Anniversary*, TIMES (LONDON), May 26, 2009, at 30. As noted in the "Who Was Who" section of the book, Bao Tong was a member of the Central Committee and Zhao's secretary. ZHAO, *supra* note 1, at 289. Bao Pu also wrote the epilogue with a detailed overview of the path of Zhao's rise and fall that specifically addresses the impact of such Maoist campaigns as the Great Leap Forward and other economic disasters on Zhao's thinking. *See id.* at 275. The real value of Bao Pu's association with Zhao's memoirs is that it lends credibility to the sincerity and truthfulness of Zhao's account.

[46] *See* Macartney, *supra* note 45.

[47] According to Bao Tong, "If the [PRC] authorities want to pursue someone for political or legal responsibility for these memoirs then I will bear everything." *Id.*

[48] *Internet Speech of Unnamed Chinese 'Elder Statesmen' Criticizes Party*, BBC MONITORING ASIA PAC.– POL., Aug. 4, 2009.

[49] Some have speculated that the author is reformist politician Wan Li, the former chairman of the National People's Congress, discussed in Zhao's memoirs. *Id.* The "Who Was Who" section of the book also contains an entry for Wan Li. ZHAO, *supra* note 1, at 299.

CCP's existence above the law, and the CCP's intolerance for diverging opinions.[50] Significantly, the book, which was intentionally published immediately before the twentieth anniversary of the Tiananmen Massacre, an event commemorated by thousands,[51] sold out on its first day in bookstores in Hong Kong.[52]

III. Conclusion

Although *Prisoner of the State* does not offer profound or new insight into Chinese politics of the 1980s, the memoir does provide personal, insider detail into the peculiar relationships and conflicts that result in decision-making in the absence of real rule of law. The book contributes to the view that Zhao was a pragmatic economic reformer who demonstrated true courage at a critical juncture in Chinese history. For leaders and citizens, Zhao serves as an example of someone who, despite having everything to lose, exercised independence when it counted most. For judge advocates, Zhao's willingness to take a principled stance against the rash use of force during the Tiananmen protests should serve as an example. The book's emphasis on the need for rule of law and proper legal procedures also highlights the role lawyers can play in ensuring fairness and transparency. Finally, Zhao's book is inspiring the current reform movement in China. Thanks to this book, Zhao may end up becoming a real force for political reform in death though he only aspired to economic reform in life.

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[50] *See id.* at 261–68.

[51] *See* Keith Bradsher, *Thousands Gather in Hong Kong for Tiananmen Vigil*, N.Y. TIMES, June 5, 2009, *available at* http://www.nytimes.com/2009/06/05/world/asia/05hong.html.

[52] Ng Kang-chung, *Hong Kong Stores Swamped by Orders for Prisoner of the State*, S. CHINA MORNING POST, May 16, 2009, at 6. The PRC government barred the book from sale in mainland China. *See id.* It appears that a mainland Chinese audience is reading the book anyway by means of pirated text versions readily available on the Internet. Searching the Internet, the instant reviewer found several sites posting the pirated Chinese text. *E.g.*, Zhaoziyang Luyinhuiyi: Gaige Licheng (Quanwen) [Zhao Ziyang's Memoirs: Path of Reform (Complete Text)], http://www.minzhuzhongguo.org/Article/wl/sx/200906/ 20090618155032.shtml (last visited Sept. 5, 2009).

CLE News

1. Resident Course Quotas

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

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

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

d. The 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 Globe Icon (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. TJAGLCS CLE Course Schedule (2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	180th JAOBC/BOLC III (Ph 2)	6 Nov 09 – 3 Feb 10
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	210th Senior Officer Legal Orientation Course	25 – 29 Jan 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10
5F-F55	2010 JAOAC	4 – 15 Jan 10
5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10

5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
5F-F301	27D Command Paralegal Course	1 – 5 Feb 10
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	8 Mar 10 Apr 10
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	17 May – 22 Jun 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	12 Jul – 17 Aug 10
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	17 May – 22 Jun 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 Jul – 17 Aug 10
WARRANT OFFICER COURSES		
7A-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	6 – 30 Jul 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th 27D BCT NCOIC/Chief Paralegal NCO Course	10 – 14 May 10
5F-F57	2010 BCT Symposium (Non-CLE)	10 – 14 May 10
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10
512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	13th Redictation Course	29 Mar – 9 Apr 10

ADMINISTRATIVE AND CIVIL LAW		
5F-F24	34th Administrative Law for Military Installations and Operations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
CONTRACT AND FISCAL LAW		
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
CRIMINAL LAW		
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10
INTERNATIONAL AND OPERATIONAL LAW		
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009–2010 Course Schedule

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

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020) Lawyer Course (030)	25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	8 – 12 Mar 10 (Newport) 12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (020) Legalman Accession Course (030)	15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10
056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (010) Trial Refresher Enhancement Training (020)	1 – 5 Feb 10 2 – 6 Aug 10
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	1 – 12 Feb 10 (San Diego) 19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (010) Mid Level Legalman Course (020)	22 Feb – 5 Mar 10 (San Diego) 14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120)	16 – 20 Nov 10 (Norfolk) 11 – 15 Jan 10 (Jacksonville) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 16 – 20 Feb 10 (Norfolk) 16 – 18 Mar 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego)

	Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010)	13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010)	2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (020) Continuing Legal Education (030)	25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)
961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (020)	12 – 16 Apr 10 (San Diego)
NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	25 Jan – 12 Feb 10 22 Feb – 12 Mar 10 29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050)	1 – 12 Feb 10 1 – 12 Mar 10 5 – 16 Apr 10

	Legal Clerk Course (060) Legal Clerk Course (070)	19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 1 7 Sep 10
Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	22 Feb – 12 Mar 10 3 – 21 May 10 7 – 25 Jun 10 19 Jul –6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) Senior Officer Course (090)	25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 8 – 12 Feb 10 (San Diego) 29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

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

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 10-02	5 Jan – 19 Feb 10
Judge Advocate Mid-Level Officer Course, Class 10-A	11 – 29 Jan 10
Air National Guard Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Air Force Reserve Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Homeland Defense/Homeland Security Course, Class 10-A	1 – 5 Feb 10
CONUS Trial Advocacy Course, Class 10-A (off-site, Charleston, SC)	1 – 5 Feb 10
Legal & Administrative Investigations Course, Class 10-A	8 – 12 Feb 10
European Trial Advocacy Course, Class 10-A (off-site, Kapaun AS Germany)	16 – 19 Feb 10

Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10
Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

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

AAJE:	American Academy of Judicial Education P.O. Box 728 University, MS 38677-0728 (662) 915-1225
ABA:	American Bar Association 750 North Lake Shore Drive Chicago, IL 60611 (312) 988-6200
AGACL:	Association of Government Attorneys in Capital Litigation Arizona Attorney General's Office ATTN: Jan Dyer 1275 West Washington Phoenix, AZ 85007 (602) 542-8552
ALIABA:	American Law Institute-American Bar Association Committee on Continuing Professional Education 4025 Chestnut Street Philadelphia, PA 19104-3099 (800) CLE-NEWS or (215) 243-1600
APRI:	American Prosecutors Research Institute 99 Canal Center Plaza, Suite 510 Alexandria, VA 22313 (703) 549-9222
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 National Law Center 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

NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762

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

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

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

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

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of 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 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

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

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

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

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the

ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

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

Current Materials of Interest

1. The Judge Advocate General's Fiscal Year 2010 On-Site Continuing Legal Education Training.

Date	Region	Location	Units	ATRRS Number	POCs
22 – 24 Jan 2010	Southeast On-Site	DOJ National Advocacy Center, Columbia, SC	12th LSO 174th LSO 213th LSO	001	Mrs. Kelly Anderson 803.751.1221 Kelly.y.anderson@usar.army.mil MSG Willie Watkins 803.751.1304 Willie.watkins@usar.army.mil
19 – 21 Feb 2010	National Capital Region On-Site	Fort Myer, VA	151st LSO 10th LSO 153rd LSO	002	MAJ Gary Bilski – Onsite OIC MAJ Matthew Caspari – S-3 SSG Michael Waskewich – NCOIC 703.960.7395 ext. 7420 Michael.Waskewich@usar.army.mil
19 – 21 Mar 2010	Northeast On-Site	Boston, MA	3rd LSO 4th LSO 7th LSO	003	MAJ Don Corsaro Don.corsaro@us.army.mil Mr. Aaron Stein 617.753.4565 Mr. Aaron.Stein1@usar.army.mil
23 – 30 Apr 2010	Western On-Site & FX	San Francisco, CA (followed by FX at Fort Hunter Liggett 25 – 30 Apr)	87th LSO 6th LSO 75th LSO 78th LSO	004	LTC Tomson T. Ong Tomson.Ong@us.army.mil Tong@LASuperiorCourt.org 562.491.6294 Mr. Khahn Do Khahn.K.Do@usar.army.mil 650.603.8652
6 – 12 Jun 2010	Midwest On-Site & FX	Fort McCoy, WI (includes an FX – exact dates TBD)	91st LSO 9th LSO 139th LSO	006	SFC Treva Mazique 708.209.2600 Treva.Mazique@usar.army.mil
16 – 18 Jul 2010	Heartland On-Site	San Antonio, TX	1st LSO 2nd LSO 8th LSO 214th LSO	007	LTC Chris Ryan Christopher.w.ryan1@dhs.gov Christopher.w.ryan@us.army.mil 915.526.9385 MAJ Rob Yale Roburt.yale@navy.mil Rob.yale@us.army.mil 703.463.4045
24 – 25 Jul 2010	Make-up On-Site	TJAGLCS, Charlottesville, VA			COL Vivian Shafer Vivian.Shafer@us.army.mil 301.944.3723

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

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-

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

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

4. The Army Law Library Service

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

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

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Your Government Failed You: Breaking the Cycle of National Security Disasters, Sept. 2009, at 53.

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Ronald T.P. Alcala, Editor, The Army Lawyer	1 October 2009

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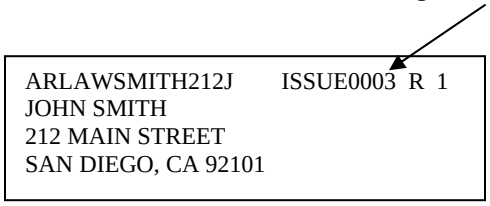

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