



# THE ARMY LAWYER

*Headquarters, Department of the Army*

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Jury Dynamics, Juror Confusion, and Juror Responsibility**

*Lieutenant Colonel Eric R. Carpenter*

**Annual Review of Developments in Instructions**

*Lieutenant Colonel Christopher T. Fredrikson, Lieutenant Colonel Wendy P. Daknis,  
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**Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course**

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## Lore of the Corps

### Colonel Walter T. Tsukamoto: No Judge Advocate Loved America or the Army More

Fred L. Borch III  
Regimental Historian & Archivist

[Editor's Note: As May is "Asian-Pacific American Heritage Month," this Lore of the Corps about the first Asian-American judge advocate is both timely and appropriate.]

Shortly after the December 1941 attack on Pearl Harbor, Walter T. Tsukamoto, a civilian lawyer and judge advocate (JA) captain (CPT) in the Army Reserve, requested that the War Department order him to active duty. His request was denied. Tsukamoto made another request for active duty. It also was denied. He then applied a third and fourth time for active duty: denied again each time. Finally, when Tsukamoto applied a fifth time in early 1943, the Army relented and, on 10 March 1943, CPT Tsukamoto—a native-born U.S. citizen of Japanese ancestry—became the first Asian-American to serve on active duty in the Judge Advocate General's Department (JAGD). What follows is a remarkable story of an Army lawyer whose love for America and the Army never wavered despite the fact that this affection was not always reciprocated.

Born in Molokai, Hawaii, on 15 September 1904, Walter "Walt" Takeo Tsukamoto moved with his parents from Hawaii to Nevada when he was only a few months old. When Walt was seven years old, his parents moved from Nevada to California and settled in Sacramento. Young Tsukamoto soon proved to be an excellent student and, after graduating from high school in 1923, entered the University of California at Berkeley.

Tsukamoto graduated with a law degree (LL.B.) in 1929, passed the California bar examination, and began practicing law in Sacramento. He had a general practice that included probate, civil, and criminal law. Tsukamoto's specialty, however, was alien property law. This area of law was of great importance to Japanese immigrants living in California in the 1930s because the state had enacted legislation in 1913 prohibiting non-citizens from owning land in California.<sup>1</sup> Since U.S. law during this time did not permit Asian immigrants to become naturalized citizens,<sup>2</sup> a native-born American (known as a "Nisei" in Japanese) like

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<sup>1</sup> California's Alien Land Law, enacted in 1913, prohibited persons ineligible to become U.S. citizens from owning land in the state or from leasing land for more than three years. The law was intended to prevent Japanese immigrants from purchasing farmland. Asian and other non-white immigrants were prohibited from owning land in the state until the California Supreme Court ruled in 1952 that the restriction was unconstitutional.

<sup>2</sup> President Calvin Coolidge signed the Immigration Act of 1924, 43 Stat. 153, which continued the ban on further Japanese immigration. In fact, U.S. law continued to curtail Japanese immigration until 1952, although the Japanese brides of U.S. servicemen were permitted entry onto U.S. soil after World War II.

Tsukamoto could own real estate in California while his parents, who were born in Japan, could not. Men and women in the same predicament as Tsukamoto's parents visited Tsukamoto for advice on how to lawfully acquire real estate, especially farmland, which many Japanese immigrants in California were interested in purchasing.

Walt Tsukamoto also was politically active in his local community and routinely lobbied the largely antagonistic California legislature on behalf of Japanese-Americans. Particularly noteworthy was his success, achieved almost singlehandedly in the mid-1930s, in defeating legislation that would have prohibited Americans of Japanese ancestry from engaging in the fishing industry.<sup>3</sup> Tsukamoto also was a force in national politics. He had joined the Japanese American Citizens League (JACL) as a young Sacramento attorney and was elected to serve a two-year term as national president in 1938.<sup>4</sup>

In addition to his law practice, Walter Tsukamoto also pursued a career as a Soldier. Having participated in the Reserve Officer Training Corps program at Berkeley, where he had attained the rank of cadet major, Tsukamoto was commissioned as an Army Reserve infantry officer on 10 May 1927. Assigned to the 361st Infantry, 91st Division, then-Second Lieutenant Tsukamoto took Army correspondence courses in map and aerial photography reading, customs and courtesies, and scouting and patrolling. After transferring to the Reserve JAGD on 29 July 1937, now-CPT Tsukamoto also took correspondence courses in administrative law, military justice, and the rules of land warfare. He was the first Nisei to wear the crossed-sword-and-pen insignia on his collar and was almost certainly the first Asian-American JA.

When the Japanese surprise attack on Pearl Harbor occurred, Tsukamoto was shocked and angry. As a patriot and Reservist, he immediately volunteered for active duty.

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<sup>3</sup> For more on the attempts to exclude Japanese Americans from California's fishing industry and Walt Tsukamoto's involvement, see Donald H. Estes, "Offensive Stupidity," *And the Struggle of Abe Tokunoske*, J. SAN DIEGO HISTORY, available at <http://www.sandiegohistory.org/journal/82fall/offensive.htm>.

<sup>4</sup> Founded in 1929, the Japanese American Citizens League was established as a pro-American organization working for civil rights on behalf of Japanese-Americans. Today, it is the largest and oldest Asian-American civil rights organization in the United States. See JAPANESE AMERICAN CITIZENS LEAGUE (May 20, 2011), [www.jacl.org](http://www.jacl.org).

The Army, however, refused to act on his December 1941 application; apparently the War Department was uncertain about whether a thirty-seven-year-old Nisei Reserve officer should be activated.

On 19 February 1942, as Tsukamoto waited to hear from the Army—he did not know that the War Department had refused to take action on his request for active duty—President Franklin D. Roosevelt signed Executive Order 9066. This order authorized the Army to designate military areas from which “any or all persons may be excluded”<sup>5</sup> and to provide transportation, food, and shelter for persons so excluded. Shortly thereafter, Lieutenant General (LTG) John L. DeWitt, commander of the Western Defense Command, issued proclamations dividing Arizona, California, Oregon, and Washington into military areas and ordering the re-location of Japanese-Americans into camps.

On 24 March 1942, recognizing that he was subject to LTG DeWitt’s order and believing that he would soon be called to active duty, Walt Tsukamoto requested that he be exempted from any forced re-location and that he be permitted to remain in his home in Sacramento. Not only did the Army deny Tsukamoto’s request, but Tsukamoto, his wife, their five children, his father, and his mother, were sent to a camp near Tule Lake on the California-Oregon border.<sup>6</sup> Ultimately, 120,000 men, women, and children of Japanese ancestry, two-thirds of whom were U.S. citizens, were involuntarily settled in ten camps located in desolate areas west of the Mississippi.

Despite his internment at Tule Lake, Tsukamoto’s desire to serve his country as a Soldier did not diminish. On 8 April 1942, he wrote to the Army a second time and requested active duty. In this letter, Tsukamoto stressed that he had “special qualifications in the knowledge of the Japanese language” and could “serve the Army in its evacuation and resettlement program of the Japanese.”<sup>7</sup>

On 15 April 1942, Tsukamoto received this reply from Headquarters, First Military Area, Presidio of San Francisco: “[O]fficers of the JAG Department are ordered to active duty . . . to fill vacancies when and where needed. . . . [Y]our tender of service is appreciated and same has been made a matter of record.”<sup>8</sup> The message was clear: There would be no active duty for CPT Tsukamoto.

<sup>5</sup> Exec. Order No 9066, C.F.R. 1092–1093 (1942).

<sup>6</sup> The Tule Lake camp was the largest of the relocation camps. Opened on 26 May 1942, it eventually held some 18,700 Japanese-Americans. The camp operated under martial law for a time (4 November 1943 to 15 January 1944) and was the last to close, on 28 March 1946.

<sup>7</sup> Letter from Walter T. Tsukamoto, to Headquarters, 1st Military Area, Presidio of San Francisco, subject: Extended Active Duty (Apr. 8, 1942) (Historian’s files, The Judge Advocate General’s Legal Center and School (TJAGLCS)).

<sup>8</sup> Letter from Captain Jeff J. Smith, Adjutant, Headquarters, 1st Military Area, Presidio of San Francisco, to CPT Walter T. Tsukamoto, subject: Active Duty (Apr. 15, 1942) (Historian’s files, TJAGLCS).

On 15 October 1942, Tsukamoto asked to be called to active duty a third time. In his request, he wrote that he was “most anxious to serve in the defense and prosecution of the present war against the Axis nations, particularly Japan.” The Army rejected this request a month later, on 10 November 1942; Walt Tsukamoto was informed that there was “no appropriate assignment . . . to which you might be assigned.”

Deciding that perhaps he should look outside the JAGD, Tsukamoto applied for active duty with the Military Intelligence Service (MIS) Language School located in Minnesota; this application also was rejected.

Then, on 28 January 1943, Secretary of War Henry L. Stimson announced that American citizens of Japanese extraction would be allowed to volunteer for service in the Army. This was the opportunity that Tsukamoto had been waiting for and the next day, on 29 January 1943, he requested active duty a fifth time. As he put it:

I have been a reserve officer continuously for the past 16 years and have at all times prepared myself to serve my country in time of need. I desire above all else to be permitted to serve in the present crisis and therefore respectfully and urgently request active duty assignment, either in my present branch or in any other branch in which I may be most useful to the United States.<sup>9</sup>

As a follow-up to this request, Tsukamoto sent a telegram a week later to the War Department in Washington D.C. The telegram was addressed to Secretary of War Stimson and read as follows:

I HAVE REQUESTED IMMEDIATE ACTIVE DUTY ASSIGNMENT TO MY COMMANDING GENERAL FIVE TIMES SINCE THE WAR BUT WAS ADVISED THAT MY JAPANESE ANCESTRY PRECLUDED SUCH ASSIGNMENT. I HAVE BEEN A RESERVE OFFICER CONTINUOUSLY SINCE 1927 AND MY SOLE REASON FOR BECOMING AN OFFICER WAS OF COURSE TO SERVE MY COUNTRY IN TIME OF NEED. MAY I BEG OF YOU TO BRING ABOUT MY IMMEDIATE ASSIGNMENT. MY WIFE AND 5 CHILDREN, ALL LOYAL

<sup>9</sup> Letter from Walter T. Tsukamoto, to Headquarters, Ninth Service Command, subject: Request of Immediate Active Duty (Jan. 29, 1943) (Historian’s files, TJAGLCS).

AMERICANS, JOIN WITH ME IN THIS  
REQUEST.<sup>10</sup>

Apparently it was this telegram that finally made a difference, as on 10 February 1943, Walt Tsukamoto received a letter from the War Department acknowledging receipt of his telegram and informing him that his request was being considered.<sup>11</sup>

While Tsukamoto was waiting to hear from the Army, other Japanese-Americans living alongside Tsukamoto and his family in the relocation camp, who despised him for his pro-American attitude, began making threats against him and his family.<sup>12</sup> Believing that both he and his family were in danger, the re-location camp authorities allowed Tsukamoto to re-locate to Cincinnati, Ohio, on 27 February 1943. His family followed shortly thereafter.

On 3 March 1943, having only just arrived in Cincinnati, Tsukamoto received the message he had been hoping for: a telegram from the War Department ordering him to report for a physical exam. Two days later, he was on active duty in the JAGD and reported for duty to the University of Michigan, where he joined the 10th Judge Advocate Officer Course as a student. Tsukamoto was the only Asian-American student in his class and, as a relatively senior CPT, outranked many of his classmates.

When he graduated in June 1943, Tsukamoto was assigned as the Legal Officer at the MIS Language School, Fort Snelling, Minnesota. He reported for duty on 10 June 1943. Because the personnel at the MIS Language School were principally Nisei who were being trained for interrogation, interpretation, and translation duty in the Pacific, and because Walter Tsukamoto spoke fluent Japanese, it made perfect sense for the JAGD to assign him there. For the next two years, Tsukamoto performed a wide variety of legal duties, including preparing and reviewing court-martial cases and serving as a claims officer. Tsukamoto's expertise in alien property rights was especially valuable "in the preparation of wills, powers of attorneys, real property and other legal matters for military

personnel prior to the departure for overseas assignment."<sup>13</sup> As his military records indicate, providing legal advice was "complex . . . since dependents of the enlisted men of Japanese descent have been evacuated from the Pacific Coast States."<sup>14</sup>

Tsukamoto excelled as a JA at Fort Snelling. His 31 December 1944 efficiency report described him as "a quiet, well-mannered officer who carries out his tasks well and faithfully. He has a pleasant personality and combines ability with tact and courtesy . . . [and] can always be depended upon to do his job well and without supervision."<sup>15</sup> His efficiency report for the following year likewise lauded his "tact and charm" and noted that Tsukamoto took "a whole-hearted personal interest in the welfare of the enlisted men of the command."<sup>16</sup>

Having been promoted to major (MAJ) in 1944, and with glowing efficiency reports, Tsukamoto was able to remain on active duty after World War II when many other JAs were discharged and returned to civilian life. After a brief assignment at the Presidio of Monterey, MAJ Tsukamoto deployed to the General Headquarters, Far East Command, in Tokyo, where he was assigned to the Military Affairs Division. For the next several years, he handled administrative and civil law matters and drafted legal opinions for his JA superiors. However, Tsukamoto also served as the law member (the forerunner of today's military judge) on general courts-martial and reviewed records of trial by military commissions in which death sentences had been imposed.<sup>17</sup>

His efficiency report for the period June 1947 to June 1948 reveals that, despite his sterling performance as an Army lawyer, his loyalty as an American citizen was still questioned by some of his fellow Soldiers. Brigadier General (BG) Franklin Shaw, the Staff Judge Advocate (SJA) of the Far East Command, and the "endorsing officer" (today's Senior Rater) wrote the following:

A neat, clean cut officer, of good  
appearance and address, professionally

<sup>10</sup> Telegram from Captain Walter T. Tsukamoto, to Sec'y of War Henry Stimson (Feb. 8, 1943) (Historian's files, TJAGLCS).

<sup>11</sup> Letter from Adjutant Gen., War Dep't, to Commanding General, Ninth Service Command, subject: Active Duty (Walter Takeo Tsukamoto) (10 Feb. 1942) (Historian's files, TJAGLCS).

<sup>12</sup> Many of these antagonistic Japanese Americans, known as Kibeis, were native born Americans who had been sent to Japan by their parents as children. Consequently, when they returned to the United States as young men and women, their sympathies were Japanese rather than American. However, some Nisei were also antagonistic toward Walt Tsukamoto and his pro-American outlook because they were angry about having been involuntarily removed from their homes and transported to re-location camps.

<sup>13</sup> Memorandum for The Adjutant Gen., from Major General Clayton Bissell, subject: Recommendation for Promotion to Major of Captain Walter T. Tsukamoto tab A (12 Dec. 1944)

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

<sup>15</sup> War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, 1 July 1944 to 31 December 1944 (31 Dec. 1944) (Historian's files, TJAGLCS).

<sup>16</sup> War Dep't Adjutant Gen. Office Form 67, Efficiency Report, Walter T. Tsukamoto, 1 July 1945 to 31 December 1945 (31 Dec. 1945) (Historian's files, TJAGLCS).

<sup>17</sup> Between February 1946 and October 1949, the U.S. Army tried 996 accused at military commissions in Yokohama, Japan; 854 were convicted. Major Tsukamoto reviewed some of the records of trial in which these accused were sentenced to be hanged. PHILIP R. PICCAGALLO, *THE JAPANESE ON TRIAL* 90 (1979).

able. His standards of conduct and citizenship, his legal ability, thoroughness, tact and sound judgment make him an exceptionally valuable judge advocate. *A Nisei who is a credit to his kind and the service. Long separation from his civil professional contacts, plus special problems confronting the American of Japanese antecedents in Japan, especially dependents, have had some discouraging effect, but he has met them manfully and I consider him outstanding as a citizen and soldier nevertheless.*<sup>18</sup>

While BG Shaw's words might seem patronizing to today's reader, their meaning is clear: Despite his proven loyalty as an American and outstanding performance in uniform as a JA, Walter Tsukamoto continued to suffer from racism and prejudice.

When MAJ Tsukamoto finished his tour in Tokyo in September 1950, his rater lauded him as "a mature officer . . . of good moral character. Friendly, intelligent, industrious, and exercises good judgment."<sup>19</sup> Colonel (COL) George W. Hickman, who would later serve as The Judge Advocate General (TJAG), wrote the following endorsement: "I agree with all remarks [of the rater] but also note that this Nisei officer is *intensely loyal* and ambitious."<sup>20</sup>

While Tsukamoto was in Tokyo, the North Koreans had into South Korea and war was raging on the Korean peninsula. He then deployed to Korea and joined X Corps in early October and, within a month of arriving, earned his first combat decoration: the Bronze Star Medal. The citation for this award covers the period of 2 October to 2 November 1950, and notes Tsukamoto's superb performance "as executive officer to the Corps Judge Advocate"<sup>21</sup> and "his invaluable assistance in forming and operating a War Crimes Division."<sup>22</sup> While it was not unusual for a line officer to be awarded the Bronze Star Medal for merit for a short time period during the Korean War, Tsukamoto's Bronze Star Medal for a thirty-day period of work as a staff officer is unusual.

Promoted to lieutenant colonel (LTC) on 12 December 1950, Walter Tsukamoto once again made history as the first Asian-American to reach this rank in the JAG Corps

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<sup>18</sup> U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, 23 June 1947 to 30 April 1948 (23 Apr. 1948) (Historian's files, TJAGLCS) (emphasis added).

<sup>19</sup> U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-1, Officer Efficiency Report, Walter T. Tsukamoto, 1 May 1950 to 30 September 1950 (30 Sept. 1950) (Historian's files, TJAGLCS).

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> Headquarters, X Corps, Gen. Order No. 26 (11 Feb. 1951).

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

(JAGC). He remained in Korea until 16 October 1951. As a senior ranking JA at X Corps, he "performed all duties of the Staff Judge Advocate and act[ed] in his place in his absence."<sup>23</sup> Lieutenant Colonel Tsukamoto also served as a law member at general courts-martial. While Tsukamoto did not participate in any fighting, he was close to the front lines and, consequently, was exposed to danger. In any event, when he returned to the United States, Tsukamoto left with a second Bronze Star Medal for meritorious service and another outstanding Officer Efficiency Report (OER).

Assigned to Sixth Army at the Presidio of San Francisco, Tsukamoto assumed duties as the Chief, Military Affairs Division. For the next four years, he prepared or supervised the preparation of opinions on such varied subjects as taxation, public utilities matters affecting the Army, and other similar civil and administrative law matters. But LTC Tsukamoto also spent considerable time as a law officer, as the new Uniform Code of Military Justice (UCMJ) was now in effect. His raters lauded his "versatile, logical mind" and his "sound knowledge of the rules of evidence, judicial temperament free of bias," and his "clear and logical thinking." His endorsers praised Tsukamoto as "loyal" and "likeable" and noted that his work was "uniformly of high caliber."<sup>24</sup>

In June 1955, LTC Tsukamoto travelled to Heidelberg, Germany, where he joined the JAGD, Headquarters, U.S. Army, Europe (USAREUR). He served as Executive Officer, worked in the Military Affairs and International Law Branch, and also served as a law officer at general courts-martial.

In February 1957, the Army notified now fifty-two-year old Tsukamoto that when he reached the mandatory retirement age of fifty-five, he would be released from active duty. This was a great blow to him because he had fewer than fifteen years of active duty and could not reach twenty years of active duty by the time he was fifty-five years old. Tsukamoto's superiors in the Corps, however, did not want to lose an officer of his talents. Consequently, they encouraged him to apply for an exception to the retirement age rule. He did and was informed by the Pentagon that he could remain on active duty until he had the twenty years necessary for retirement.

By this time, LTC Tsukamoto was widely known for his judicial bearing, temperament, and legal talents in court as a law officer. Consequently, in January 1958, when the JAGC

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<sup>23</sup> U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 1 October 1950 to 15 May 1951 (Historian's files, TJAGLCS).

<sup>24</sup> U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 18 November 1951 to 31 May 1952; U.S. Dep't of Army, Adjutant Gen.'s Office, AGO Form 67-2, Officer Efficiency Report, Walter T. Tsukamoto, 1 June 1954 to 28 July 1954 (Historian's files, TJAGLCS).

established a pilot “law officer program” to see if a more formal judicial organization should be created, Tsukamoto was one of fourteen senior JAs selected for the program. When this program was formalized as the “Field Judiciary Division” in January 1959, LTC Tsukamoto remained with it.

It was an extremely busy time for military justice practitioners in USAREUR—and for law officers like LTC Tsukamoto. From 25 May 1959 to 17 July 1959, for example, he served as the law officer on nineteen general courts-martial tried in Western Germany, France, and Italy.<sup>25</sup> Despite the long hours of travel and many extra hours in court, Tsukamoto performed his duties in an exemplary manner. Not surprisingly, when he received his first OER as a member of the Field Judiciary, his rater, COL Edward T. Johnson, wrote:

I consider Lt Col Tsukamoto to be the most outstanding officer of the entire group. He has a wonderful grasp of the technical aspects of his duty and his personality is such that he is able to carry out his judicial role without arousing the resentment of the prosecution, defense or command, but nevertheless insure a fair and impartial trial.<sup>26</sup>

Major General (MG) Stanley W. Jones, The Assistant Judge Advocate General, endorsed Tsukamoto’s OER. He wrote: “I concur in everything the rating officer has said. [Tsukamoto] is a man of rare intelligence and splendid character. He is highly respected by all who know him for his extremely highly professional skill as a law officer.”<sup>27</sup>

On 25 October 1960, Tsukamoto was promoted to full colonel, the first Asian-American to reach that rank in the Corps. His many years of loyal service had been rewarded and Tsukamoto no doubt looked forward to more years of service as an Army lawyer.

But it was not to be. His last OER had noted that LTC Tsukamoto “has a heart condition that somewhat limits his

physical capability,”<sup>28</sup> although the OER went on explain that this health issue “has not interfered in any manner with his performance”<sup>29</sup> as a judicial official. Unfortunately, his ailment was more serious than anyone imagined because, on 20 January 1961, COL Tsukamoto died of a heart attack in Germany. He was fifty-six-years old and his death was a shock to all who knew him, especially his wife and five children, who had remained in the United States while Tsukamoto was serving overseas.

In COL Tsukamoto’s final OER, the Chief of the Field Judiciary wrote that Tsukamoto “was, in every respect, the most outstanding . . . officer in the judicial field.” The Assistant Judge Advocate General, MG Robert H. McCaw, who endorsed the OER, wrote but a single sentence: “With Colonel Tsukamoto’s death, the Army has lost one of its finest officers.” In appreciation of his service to the Corps, MG McCaw recommended that Tsukamoto be posthumously awarded the Legion of Merit. This decoration was approved by the Army’s Deputy Chief of Staff for Personnel and was presented to his widow, Mrs. Tomoye Tsukamoto, in a ceremony at the Presidio of San Francisco in June 1961. A Soldier to the end, COL Tsukamoto was buried with full military honors at the military cemetery at the Presidio of San Francisco.

Looking back at COL Walt Tsukamoto’s sterling career in the Corps, it is clear that no JA loved America or the Army more. Today, when we celebrate the diversity of the United States, it is important to remember that Japanese-Americans like Tsukamoto suffered from prejudice, yet Tsukamoto apparently bore no ill will and was unwavering in his devotion to the United States and its promise of equality for all.

The author thanks Air Force judge advocate Col. Derek Hirohata for alerting him to the story of COL Walter Tsukamoto, and his help in preparing this Lore of the Corps article. A special thanks also to Mrs. Doris Tsukamoto Kobayashi for ensuring the accuracy of the personal details about her father.<sup>30</sup>

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<sup>25</sup> Letter of Commendation from Colonel Laurence W. Lougee, Area VII Judicial Officer, through Chief, Field Judiciary Division, to Lieutenant Colonel Walter T. Tsukamoto (17 Aug. 1959) (Historian’s files, TJAGLCS).

<sup>26</sup> U.S. Dep’t of Army, DA Form 67-4, Officer Efficiency Report, LTC Walter T. Tsukamoto, 1 May 1959 to 30 April 1960 (Historian’s files, TJAGLCS).

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

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

<sup>29</sup> *Id.*

<sup>30</sup> See also *Colonel Walter Takeo Tsukamoto*, JAPANESE AM. VETERANS ASS’N, <http://www.javadc.org/tsukamoto.htm> (last visited May 24, 2011).

# An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility

Lieutenant Colonel Eric R. Carpenter\*

## Introduction

What exactly happens in the deliberation room of a capital trial? What are the jurors thinking and how are they acting as they make their decisions? Do they act rationally and bravely like the holdout juror played by Henry Fonda in *12 Angry Men*,<sup>1</sup> or do they succumb to group pressure and change their votes without actually changing their minds? Do they understand and follow the military judge's directions or are they confused about the fundamental rules that govern capital cases? Do they accept responsibility for their votes or shift responsibility to the other actors in the system? In a capital system that requires a unanimous vote at several stages<sup>2</sup>—and where a holdout juror can stop the death penalty process—it is critically important for capital attorneys to know the answers to these questions.

Because juror deliberations are closed and secret, however, trial advocates have not had much insight into juror dynamics.<sup>3</sup> Fortunately, the Capital Jury Project (CJP), a major research effort, has come up with some answers to those questions, and many of these answers are startling. Civilian capital defense counsel have recognized the value of the CJP findings by adopting new strategies based on those findings, particularly in theme development and *voir dire*. Unfortunately, most military counsel are not familiar with the CJP's findings or these new strategies and we, as a community, risk falling well below the standard of practice currently found in state and federal death penalty cases.

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<sup>1</sup> 12 ANGRY MEN (Orion-Nova Productions 1957). The movie was based on the teleplay and play by Reginald Rose, and was remade as a television show in 1997.

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2008) [hereinafter MCM].

<sup>3</sup> At least two projects have filmed actual jury deliberations. *Frontline* filmed a jury as it deliberated a case involving jury nullification, *Frontline: Inside the Jury Room* (PBS television broadcast Apr. 8, 1986) [hereinafter *Frontline* project], and *ABC News* filmed five juries as they deliberated five separate cases, including one capital case, *In the Jury Room* (ABC television broadcast Aug. 10, 2004). The deliberations captured in these videos reflect many of the Capital Jury Project findings. See also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) (the first in-depth study of juror dynamics).

Military capital attorneys are drawn from a pool of general criminal trial advocates. Most in this pool have no experience in capital litigation<sup>4</sup> because very few courts-martial are referred with a capital instruction and military attorneys frequently rotate through both locations and legal disciplines.<sup>5</sup> While serving as general criminal litigators, these counsel have no pressing need to keep up with this capital litigation developments. Therefore, military counsel who find themselves detailed to a capital case will likely be operating in the world of the Unknown Unknowns, as Donald Rumsfeld would say. Review his famous quote, cleverly adapted by Hart Seely (without changing the order of any words) to a poem titled *Unknown*:

As we know,  
There are known knowns.  
There are things we know we know.  
We also know  
There are known unknowns.  
That is to say  
We know there are some things  
We do not know.  
But there are also unknown unknowns,  
The ones we don't know  
We don't know.<sup>6</sup>

When an attorney can spot the issue and know the answer right away, she is operating in the world of the Known Knowns. When she can spot the issue but still needs to look up the answer, she is operating in the world of Known Unknowns. When she has no idea what the issues are, she is in the world of Unknown Unknowns: she does not even know that she should be looking something up.<sup>7</sup> With no previous exposure to capital litigation—and not having peers or supervisors with that experience—a military defense counsel assigned to a capital case may not know that she does not know about admission defenses, the Colorado method of *voir dire*, or the Federal Death Penalty Resource Counsel.

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<sup>4</sup> The Court of Appeals for the Armed Forces (CAAF) has noted that “there is no professional death penalty bar in the military services.” *United States v. Kreutzer*, 61 M.J. 293, 299 n.7 (C.A.A.F. 2006).

<sup>5</sup> See REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 10–11 (2001), available at [http://www.wcl.american.edu/nimj/documents/cox\\_comm\\_report2.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1).

<sup>6</sup> Hart Seely, *The Poetry of D.H. Rumsfeld: Recent Works of the Secretary of Defense*, SLATE (Apr. 2, 2003), <http://www.slate.com/id/2081042/>.

<sup>7</sup> Recognizing that a defendant or accused, or an attorney, or a panel member or juror are represented by both sexes in capital cases, throughout this article, I will use “he” as the pronoun for the defendant or accused; “she” as the pronoun for the attorney; and “he” as the pronoun for a juror or panel member.

The main purpose of this article is to shrink somewhat, for the prospective military capital attorney, the world of the capital Unknown Unknowns by providing an overview of certain areas covered by the CJP—capital jury dynamics, juror confusion, and juror responsibility—and by providing an overview of a major litigation technique that has been developed based on those CJP findings, the Colorado method of *voir dire*. Having moved these topics to the category of Known Unknowns, prospective military capital attorneys can then work to learn these topics.

Yet military attorneys may not find value in the CJP findings if they think that these findings are unique to civilian jurors and would not shed light on how court-martial panel members think and act. That leads to the other purpose of this article: to show that some evidence exists that capital court-martial panels behave consistently with the CJP findings. Military panel members are human beings and have shown that they follow the same patterns of reasoning and behavior that civilian jurors follow. Not all jurors or panel members will follow all of the patterns revealed by the CJP, but many will think and act in ways described by the CJP findings and some will cast votes based on those thoughts—and in a system where a single vote can decide life or death, those votes are critical.

This article will first cover the CJP findings on jury dynamics; will look at how the military's rules that govern capital cases could impact panel dynamics; and will demonstrate that military panels in three capital courts-martial have behaved consistently with the CJP findings. This article will next cover the CJP findings related to juror confusion and will demonstrate that military panels or military judges in three capital courts-martial have behaved consistently with those findings. Next, this article will discuss the concept of juror responsibility and how this concept may apply in a military context. Finally, this article will discuss a method of *voir dire* that defense counsel can use in capital cases to address the issues raised by the CJP.

### What is the Capital Jury Project?

Started in 1991, the CJP is a research project supported by the National Science Foundation and headquartered at the University of Albany's School of Criminal Justice.<sup>8</sup> The people doing the work are “a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—utilizing common data-gathering instruments and procedures.”<sup>9</sup>

<sup>8</sup> *What is the Capital Jury Project?*, STATE UNIV. OF NEW YORK AT ALBANY SCH. OF CRIMINAL JUSTICE, <http://www.albany.edu/scj/CJPwhat.htm> (last visited June 7, 2011) [hereinafter *What is the CJP?*].

<sup>9</sup> William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1068 (1995).

The CJP investigators conducted in-depth interviews with people who have served on juries in capital cases, “randomly selected from a random sample of cases, half of which resulted in a final verdict of death, and half of which resulted in a final verdict of life imprisonment.”<sup>10</sup> Trained interviewers administered a fifty-one page survey and then conducted a three to four hour interview.<sup>11</sup> The interviews “chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.”<sup>12</sup> When coming to their findings, the researchers draw upon the statistical data created by the surveys and interviews as well as the narrative accounts given by the jurors.<sup>13</sup> To date, the CJP has conducted interviews with 1198 jurors from 353 capital trials in 14 states.<sup>14</sup> Academics have published the results of these interviews in many journals and books.<sup>15</sup>

### Findings on Juror Dynamics

In the 1950s, Solomon Asch ran a series of experiments sponsored by the U.S. Navy that revealed the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting.<sup>16</sup> The examiner would bring a subject into a classroom along with seven to nine other people, all of whom were in on the experiment (only the subject was not).<sup>17</sup> As an example, the examiner would give a card to the subject with a line on it,

<sup>10</sup> John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 144, 173 (Stephen P. Garvey ed. 2003).

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

<sup>12</sup> *What is the CJP?*, *supra* note 8.

<sup>13</sup> *Id.* See also Bowers, *supra* note 9, at 1077–84 (in-depth discussion of the sample design and data collection methods); Blume et al., *supra* note 10, at 145–48.

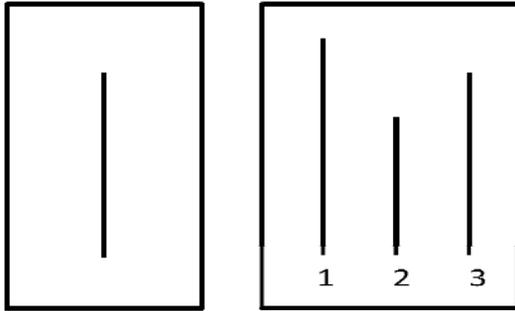
<sup>14</sup> *What is the CJP?*, *supra* note 8.

<sup>15</sup> SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY (2005) (providing an excellent introduction to and survey of the CJP findings). Sundby introduces the broad themes of the CJP within the study of a single jury. For lists of publications related to the CJP, see *Publications*, STATE UNIV. OF N.Y. AT ALBANY SCH. OF CRIM. JUST., <http://www.albany.edu/scj/CJPpubs.htm> (last visited June 7, 2011); *Articles*, CORNELL UNIV. L. SCH., <http://www.lawschool.cornell.edu/research/death-penalty-project/Articles.cfm> (last visited June 7, 2011); SUNDBY, *supra*, app., at 213–15.

<sup>16</sup> S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951) [hereinafter Asch, *Effects of Group Pressure*]; SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952) [hereinafter ASCH]; Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956) [hereinafter Asch, *A Minority of One*]. See also GREGORY BURNS, ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY 88–92 (2008) (providing simple explanations of these experiments); SUNDBY, *supra* note 15, at 81–84.

<sup>17</sup> Asch, *Effects of Group Pressure*, *supra* note 16, at 178.

along with another card that had three lines on it, as shown below:<sup>18</sup>



The subject's task was to match the line on the left to either line 1, 2, or 3 on the right. The examiner would then ask one of the other people who was helping with the experiment for the answer and the person would deliberately give an *incorrect* answer, say, 1. The examiner would ask another person and that person would also give that same incorrect answer, and on down the line until the examiner reached the subject. The examiner would then ask the subject for the answer, which the subject would have to state in front of everyone else.<sup>19</sup>

The results of the experiment are startling: for each individual question, the subjects would go along with the group and give the wrong answer to this simple question *nearly one-third of the time*. During the series of multiple questions, *one-fourth* of the subjects would miss at least one question.<sup>20</sup> Compare that to when the subjects were alone when they did the task: the subjects would get the right answer on all of the questions 95% of the time.<sup>21</sup>

The experiments revealed that this force of social conformity primarily arose when three or more people gave the wrong answer first; had some influence when two people gave the wrong answer first; and had little influence when only one gave the wrong answer first.<sup>22</sup> Further, if just one other person went against the majority, the power of the group pressure was greatly reduced. If that "partner" later changed his answer to the incorrect answer, the power of social conformity returned with full force.<sup>23</sup> When the subjects did not have to announce their findings in public, the majority effect diminished markedly.<sup>24</sup>

But can one look to Asch's research to draw conclusions about how jurors and panel members act? The situations are quite different. First, other than public embarrassment, not much was on the line during the Asch experiments. Much more is at stake in a capital trial—someone's life. Next, in Asch's experiments, the subjects were dealing with facts (the length of lines). Capital jurors deal with facts but they also deal with norms and values such as whether someone should live or die. Finally, in the Asch experiments, no requirement existed for the group to return a unanimous group answer—the experiment dealt with a series of individual answers. Capital juries must return a unanimous verdict.

The CJP research shows that the answer to this question is, "Yes." Capital jurors, dealing in norms or values, faced with the requirement to produce a unanimous answer, are affected by group pressure—even when someone's life is on the line. But unlike the Asch findings, adding one partner (having a minority of two) is not enough to overcome that pressure. The minority needs to be at least 25% and probably as high as 33% in order for those jurors to preserve in their votes. For example, during the first vote on sentence, if 25% or fewer of the jurors vote for life, those jurors will *almost always* change their votes and the verdict will be death. If 33% or more vote for life, those jurors will *almost always* maintain their vote and the verdict will be life. If the vote falls between 25% and 33%, the verdict can go either way.<sup>25</sup>

Importantly, the research indicates that the minority voters do not actually change their *beliefs* about whether the defendant should live or die: they just change their *votes*.<sup>26</sup> Asch stated that, "A theory of social influences must take into account the pressures upon persons to act contrary to their beliefs and values."<sup>27</sup> What social pressures and dynamics occur in a deliberation room that can cause someone to vote against his belief when so much is at stake?

One of the first interesting findings is that jurors do not remain open-minded for very long. Even if jurors were not that committed to their position before they cast their first vote, they quickly harden them: "Psychologists have discovered that when groups deliberate and an initial disagreement exists, group members tend *not* to move toward a 'middle' position, but actually become even more

<sup>18</sup> ASCH, *supra* note 16, at 452.

<sup>19</sup> ASCH, *Effects of Group Pressure*, *supra* note 16, at 178–79.

<sup>20</sup> *Id.* at 181–82; ASCH, *A Minority of One*, *supra* note 16, at 9.

<sup>21</sup> ASCH, *Effects of Group Pressure*, *supra* note 16, at 181; ASCH, *supra* note 16, at 457; ASCH, *A Minority of One*, *supra* note 16, at 9–10.

<sup>22</sup> ASCH, *Effects of Group Pressure*, *supra* note 16, at 188.

<sup>23</sup> *Id.* at 186.

<sup>24</sup> ASCH, *A Minority of One*, *supra* note 16, at 65.

<sup>25</sup> Blume et al., *supra* note 10, at 173. See also Scott Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 110 (2010). Sundby notes that there is a first vote threshold that forecasts the result of the trial in eighty-nine percent of the studies he sampled. With a jury of twelve members, if the first vote has five or more votes for life, the sentence will almost always be life. If the first vote on sentence has nine or more votes for death, the sentence will almost always be death.

<sup>26</sup> SUNDBY, *supra* note 15, at 96–97; Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1195–220 (1995).

<sup>27</sup> ASCH, *supra* note 16, at 450–51.

extreme or polarized in the direction of their original leanings.”<sup>28</sup> As members of the majority argue their points to the minority, the members of the majority become cemented in their attitudes<sup>29</sup> and approach the minority as teachers “trying to lead students to the right answer.”<sup>30</sup> The middle ground quickly disappears. Scott Sundby also notes that some juries learned from the guilt-phase voting that once people make a public announcement of their position, it is difficult to move them off that position.<sup>31</sup> Based on those guilt-phase experiences, some juries decided to avoid that problem by not taking an initial vote during the penalty phase, thereby trying to preserve some middle ground.<sup>32</sup>

With jurors now polarized, the majority begins to work on the minority by applying social pressure. Sundby notes that in many of the juries studied, some jurors adopted recurring roles. One of these roles is the victim’s advocate. The victim’s advocate believes that “it is up to them personally to act as the victim’s voice in the jury room”<sup>33</sup> and “that ‘they didn’t want to run into the victim’s parents and feel like they didn’t do the right thing by the victim and parents.’”<sup>34</sup> Another of these roles is the bully. The bully may resort to sarcasm, belligerence, name calling, and demeaning comments.<sup>35</sup> The bully may believe that his role is to serve as the “bad cop”: “He sensed that the others expected him to be brusque, to raise the arguments that they were too polite to make or were not worldly enough to fully comprehend.”<sup>36</sup> Sometimes these roles are played by the same juror. Often, in civilian trials, the deliberations will become contentious, loud, and angry,<sup>37</sup> and jurors are often reduced to tears.<sup>38</sup>

As the minority is whittled down to a single holdout,<sup>39</sup> the pressure increases. Frustration and anger arise because the majority feels that the holdout can essentially hold the entire group’s decision hostage to his views.<sup>40</sup> Members of the majority will challenge the holdout with whether he had been honest in *voir dire* when asked if he could vote for death (or life, if holding out the other way).<sup>41</sup> Jurors will use subtle pressure to get the holdout to change his position like cutting off his questions, talking to him in a patronizing tone, or sighing.<sup>42</sup> According to Asch, this withdrawal of social support is a powerful component of group pressure.<sup>43</sup>

Further, the holdout is under constant pressure from all angles and cannot take any mental breaks:

The worst part was that [the holdout] could not easily opt out of the active deliberations as some other jurors had done. [The holdout] had become the focus of the deliberations, and in some sense every question and every comment was directed at her, asking her to justify how she could still be voting life now that eleven were for the death penalty.<sup>44</sup>

The members of the majority can take turns. They can daydream or go to the bathroom while someone else takes the lead. The holdout has no relief.

Eventually the holdout changes his vote, not because he now believes in the rightness of the other side’s position or is persuaded by the aggravating evidence, but because he has reached emotional exhaustion and simply acquiesces. Sundby remarks,

[T]he powerful pull of conformity can be observed readily, whether on the playground or in the workplace. And, of course, such pressures come into play in the jury room. For those of us who have whispered to ourselves that we would play Henry Fonda’s role in the jury room, the sobering reality is that many of us would not live up to our hopes and expectations.<sup>45</sup>

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<sup>28</sup> SUNDBY, *supra* note 15, at 51. Asch describes something similar, where the subject adopts the majority position and the act of adopting the majority position “increases the person’s confidence in his response.” Asch, *Effects of Group Pressure*, *supra* note 16, at 182. Further, “[G]roup decisions are generally more extreme than are individual decisions.” Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241, 1246 (1995). Sherman continues, “[D]ifferent individuals may have different reasons for their individual decision. When each person is then exposed to other supporting arguments by the other group members who share their decision outcome, they become even more polarized. Research clearly demonstrates that jury deliberations produce this polarization effect.” *Id.*

<sup>29</sup> SUNDBY, *supra* note 15, at 51–52.

<sup>30</sup> *Id.* at 21.

<sup>31</sup> Sundby, *supra* note 25, at 112.

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

<sup>33</sup> SUNDBY, *supra* note 15, at 128.

<sup>34</sup> *Id.* at 129.

<sup>35</sup> *Id.* at 122.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 123.

<sup>38</sup> *Id.* at 56.

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<sup>39</sup> See also *id.* at 81–84 (including an interesting discussion of Asch’s experiments related to this process).

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.* at 23.

<sup>42</sup> *Id.* at 66–68.

<sup>43</sup> Asch, *Effects of Group Pressure*, *supra* note 16, at 188.

<sup>44</sup> SUNDBY, *supra* note 15, at 85.

<sup>45</sup> *Id.* at 84.

Likewise, the jurors who cross-over from a death vote to a life vote often do so to avoid becoming a hung jury and not because they were influenced by mitigating factors.<sup>46</sup> As Asch would predict, the *social* factors in the courtroom—and not the aggravating or mitigating circumstances—drive the juror to change his vote.<sup>47</sup>

### Jury Dynamics and the Military Justice System—in Theory

This section will discuss in theory how panel member dynamics in a capital case might be affected by the force of social conformity. The next section will discuss whether there is any evidence that the dynamics discovered by the CJP actually exist in capital courts-martial. Looking first at voting procedures, like civilian capital trials, capital courts-martial require unanimous votes: before a death sentence may be imposed, a panel must have a unanimous finding of guilt on a capital offense,<sup>48</sup> a unanimous vote on the existence of an aggravating factor,<sup>49</sup> a unanimous vote that extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances,<sup>50</sup> and a unanimous vote that death is the appropriate sentence.<sup>51</sup> The basic framework is the same as that found in civilian systems, so maybe members faced with resolving the difficult issue placed before them will follow the same patterns as civilian jurors.

However, the Rules for Courts-Martial (RCM) include provisions not found in civilian systems that should prevent the force of social conformity from coming into play at three of the four voting junctures – all but the final vote on life or death. One of most important of these rules deals with how

the panel votes and re-votes on the question of guilt as to the capital offense. For death to be an available punishment in the presentencing proceeding, a panel of at least twelve members must vote unanimously that the accused is guilty of the capital offense.<sup>52</sup> After the members deliberate on the capital offense, the members vote by secret written ballot.<sup>53</sup> The junior member collects and counts the ballots, the president announces the result, and that result is the finding.<sup>54</sup>

If the vote on the capital offense is two-thirds or greater for guilt,<sup>55</sup> the finding on that offense is guilty; however, if the vote on the capital offense is not unanimous, then the accused cannot face the death penalty. He is still guilty of the offense, he is just not eligible for the death penalty. Importantly, *the rules prohibit the panel from re-voting on that finding of guilt* for the purpose of increasing the votes to a unanimous vote, thereby making the accused death-eligible. The finding can only be reconsidered under the procedure outlined in Article 52 of the Uniform Code of Military Justice (UCMJ) and RCM 924,<sup>56</sup> and those rules do not allow for a non-unanimous vote for guilt to be reconsidered.<sup>57</sup>

This means an 11-1 vote for guilt is a finding and cannot be revisited in an effort to get a unanimous vote on a capital offense. The rules themselves preserve the minority: the majority *never gets a chance* to apply pressure on the minority members to change their votes to guilty. A single panel member can anonymously remove the death penalty as an available sentence by voting for a lesser-included offense of the capital offense without subsequently having to explain himself to the group.

Turning to the capital presentencing proceeding, some of the rules also protect the minority. There are three potential votes in the capital sentencing deliberations: a vote on whether an aggravating factor exists,<sup>58</sup> if all panel members agree that at least one does, then a vote on whether the extenuating and mitigating factors are substantially outweighed by the aggravating circumstances (the balancing test),<sup>59</sup> if all panel members vote yes, then they vote on the ultimate sentence, which could include death.<sup>60</sup> As with the

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<sup>46</sup> Sandys, *supra* note 26, at 1207. Sundby describes how the process of converting death votes to life votes is very similar. Sundby, *supra* note 25, at 140–44. The jury filmed for the project displays many of these dynamics. *Frontline* project, *supra* note 3. Interestingly, the holdout is arguing for a conviction where the law clearly requires a conviction (the case is about jury nullification). The force of social conformity works against him and he eventually joins the vote for acquittal – not because he believed the defendant was not guilty, but because he did not want to prevent the others from reaching *their* decision.

<sup>47</sup> After reviewing CJP data, Sundby concluded that capital juries followed remarkably similar patterns as they reached a decision on the sentence. Sundby, *supra* note 25, at 105–06. Juries would follow a five-step process: first, the majority would unite with a strong viewpoint; second, the majority would isolate and focus on the holdouts to get them to change their votes; third, the majority would convert the holdouts to the majority position; fourth, the majority would reconcile with and support the former holdouts until the verdict was announced; and fifth, the jurors would wait in suspense as the jurors were individually polled during the announcement of the sentence, wondering if a holdout would change positions at the last minute. *Id.* at 105–06, 146–48.

<sup>48</sup> MCM, *supra* note 2, R.C.M. 1004(a)(2).

<sup>49</sup> *Id.* R.C.M. 1004(b)(4)(B).

<sup>50</sup> *Id.* R.C.M. 1004(b)(4)(C).

<sup>51</sup> *Id.* R.C.M. 1006(d)(4)(A).

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<sup>52</sup> *Id.* R.C.M. 1004(a)(2).

<sup>53</sup> *Id.* R.C.M. 921(c)(1).

<sup>54</sup> *Id.* R.C.M. 921(c)(6).

<sup>55</sup> UCMJ art. 52(a)(2) (2008).

<sup>56</sup> MCM, *supra* note 2, R.C.M. 924(b) & discussion.

<sup>57</sup> UCMJ art. 52(c); MCM, *supra* note 2, R.C.M. 924(b); R.C.M. 922(b)(2); R.C.M. 922 analysis, at A21-70.

<sup>58</sup> MCM, *supra* note 2, R.C.M. 1004(b)(7).

<sup>59</sup> *Id.* R.C.M. 1004(b)(4)(C).

<sup>60</sup> *Id.* R.C.M. 1004(b)(7).

merits voting, the votes are also by secret, written ballot,<sup>61</sup> and the junior member collects and counts the ballots while the president announces the result.<sup>62</sup>

For the first two votes (the vote on the aggravating factor and the vote on the balancing test) the first vote is the *finding*,<sup>63</sup> just like the vote on guilt after the merits deliberations is a *finding*. The votes on these first two gates may not be reconsidered *because there are no reconsideration procedures for these votes*.<sup>64</sup> Like the vote on guilt for the capital offense, if a single member anonymously votes that no aggravating factor exists or that the extenuating and mitigating factors are not substantially outweighed by the aggravating circumstances, then the deliberations on those gates are over and those votes cannot be revisited.

For these three findings votes (the guilt finding on the capital offense, the aggravating factors finding, and the balancing test finding), defense counsel should be wary of “straw votes.” Straw votes are informal votes taken by members to see where they stand on the issues. They are not authorized by the RCMs or the UCMJ but are not specifically prohibited by these sources.<sup>65</sup> However, the Court of Military Review has said that “we do not believe that this practice merits encouragement,”<sup>66</sup> primarily because straw polls circumvent the voting reconsideration rules, remove anonymity, and allow superiority of rank considerations to enter the deliberation room.<sup>67</sup> Having seen that the established voting rules prevent the force of social conformity from affecting these first three findings votes, defense counsel should recognize the danger posed by straw votes, should object to any request that straw votes be allowed, should ask the military judge to instruct that no straw votes may be taken, and should educate panel members during *voir dire* to prevent straw votes.

Turning to the final vote on the sentence, the rules no longer protect the minority to the same degree. Members propose sentences in writing and submit them to the junior member who in turn provides them to the president who announces them in the deliberation room.<sup>68</sup> The members then vote and revote on the sentences, starting with the least severe sentence, and continuing with the next least severe until enough votes exist for a sentence.<sup>69</sup> The vote requirements are a three-fourths majority for life<sup>70</sup> (which is the mandatory minimum for premeditated murder and felony murder),<sup>71</sup> three-fourths for life without parole (LWOP),<sup>72</sup> and unanimous for death.<sup>73</sup>

The panel continues to vote and revote until one of two things happens. If enough panel members have voted for a particular sentence, then the sentence has been *adopted*.<sup>74</sup> (Unlike the merits vote and the first two votes during the sentencing deliberations, this decision is not a “finding.”) Or, the panel can hang. In the court-martial system, panels cannot hang on the merits—if there are not enough votes for a guilty finding when the ballot count is announced, then the accused is acquitted. However, panels can hang on the sentencing decision.<sup>75</sup> If the panel cannot agree on a sentence, the military judge will declare a mistrial on the sentence only (the merits findings still stand), and the case is returned to the convening authority to either order a rehearing on the sentence only or order that no punishment be imposed.<sup>76</sup>

Unlike the first three votes, where the rules prohibit re-voting and so shield against the force of social conformity, here the rules allow that force to enter the deliberation room because re-voting is explicitly allowed. One should expect the force of social conformity to play a major role in deliberations—the majority will get the chance to work on the minority as the panel struggles to reach either a three-fourths vote for life or LWOP, or a unanimous vote for death. Even though the votes are still by secret, written ballot,<sup>77</sup> everyone will be able to recognize who the holdout

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<sup>61</sup> *Id.* R.C.M. 1004(b)(7), 1006(d)(2). The rules expressly call for a secret, written vote on the aggravating factors gate but do not expressly call for a secret, written vote on the balancing gate. However, the CAAF advises military judges to require that this vote be reduced to writing. *United States v. Curtis*, 44 M.J. 106, 159 (C.A.A.F. 1996). Complying with that advisory, Army judges provide an instruction that calls for a secret, written vote on the balancing decision. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 8-3-40 (1 Jan. 2010) [hereinafter MILITARY JUDGES’ BENCHBOOK].

<sup>62</sup> MCM, *supra* note 2, R.C.M. 1006(d)(3).

<sup>63</sup> *Id.* R.C.M. 1004(b)(4).

<sup>64</sup> *Id.* R.C.M. 1004(b)(4)(C) & (b)(7); R.C.M. 1006.

<sup>65</sup> *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* In *Lawson*, the panel asked the military judge whether they could conduct straw votes on the findings (not on the sentence, where the rules allow for revoting without using reconsideration rules), and the military judge said they could. *Id.* at 40. Importantly, the defense counsel did not object. *Id.* The Court of Military Review indicated that this procedure would not be allowed over defense objection. *Id.* at 41.

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<sup>68</sup> MCM, *supra* note 2, R.C.M. 1006(c).

<sup>69</sup> *Id.*, R.C.M. 1006(d)(3)(A). In a note to the hung jury instruction, the Military Judges’ Benchbook states that, “In capital cases, only one vote on the death penalty may be taken.” MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 2-7-18. However, that note is not supported by the rules or case law.

<sup>70</sup> UCMJ art. 52(b)(2) (2008).

<sup>71</sup> *Id.* art. 118(4).

<sup>72</sup> *Id.* art. 52(b)(2).

<sup>73</sup> *Id.* art. 52(b)(1).

<sup>74</sup> MCM, *supra* note 2, R.C.M. 1006(d)(6).

<sup>75</sup> *Id.* R.C.M. 1006(e); MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 2-7-18.

<sup>76</sup> MCM, *supra* note 2, R.C.M. 1006(e).

<sup>77</sup> *Id.* R.C.M. 1006(d)(2).

is because he is the one making the arguments for life.<sup>78</sup> Further, the president of the panel can keep the deliberations open until he or she feels that the debate is done,<sup>79</sup> which could mean keeping the deliberations open until the holdout comes around.

While the primary rules for voting on a sentence allow the force of social conformity to enter the deliberation room, two ancillary rules could be used to counter that force. The first rule is the hung jury instruction from the U.S. Army's Military Judges' Benchbook, which explains to the panel members that they do not have to agree:

[Y]ou each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others.

[Y]ou are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.<sup>80</sup>

This language explains to the holdout in a public setting that he does not have to move from a conscientious decision (that is, a moral decision based on an inner sense of right and wrong) simply because he is outnumbered. His only obligation is to deliberate for a reasonable period of time.

The problem for the defense counsel is getting the military judge to read this instruction to the panel. The

<sup>78</sup> In *Lawson*, the court recognized that, "Typically there will be some discussion among court members as to the facts of a case, and it is hard to imagine how, in speaking about the facts, a member could completely conceal his views." *United States v. Lawson*, 16 M.J. 38, 40 (C.M.A. 1983).

<sup>79</sup> MCM, *supra* note 2, R.C.M. 502(b)(1), 1006; *United States v. Accordino*, 20 M.J. 102, 105 (C.M.A. 1985).

<sup>80</sup> MILITARY JUDGES' BENCHBOOK, *supra* note 61, para. 2-7-18.

directions in the instruction state that it should be read "[w]henver any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory"<sup>81</sup> or if the panel "has been deliberating for an inordinate length of time."<sup>82</sup> If, after deliberating, the panel asks the military judge a question about the effect of a non-unanimous vote on the death penalty, or if the panel has been deliberating for a long time, the defense counsel should ask the military judge to read this instruction. And, the defense counsel should work this instruction into her *voir dire* of the panel.

If the panel adopts a sentence, another rule exists which could work to counter the force of social conformity—the reconsideration provisions for adopted sentences outlined in RCM 1009.<sup>83</sup> To reconsider an adopted sentence of death with an eye toward lowering the sentence to life, only one member needs to vote to reconsider.<sup>84</sup> While this procedure only applies to sentences that have been adopted (which means that the holdout member has already given up, at least temporarily) and not to the votes taken as the panel tries to reach an adopted sentence, it does serve as a final opportunity for a holdout member to return to his original vote. The rules require that the panel go to the judge for additional instructions before they can reconsider the sentence.<sup>85</sup> This provides the opportunity for the military judge to read the hung jury instruction, which then might work against the force of social conformity and enable the holdout member to preserve his vote. After asking for reconsideration, the panel member would be instructed that the law does not expect him to change a firmly held moral belief—he only needs to negotiate with an open mind for a reasonable amount of time.

This discussion of the voting rules suggests that defense counsel should focus on those decision points that have rules that protect against the force of social conformity. Defense counsel should refine their merits arguments to focus the panel on lesser-included offenses. Defense counsel can use "admission defenses"<sup>86</sup> to present a credible argument that

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> MCM, *supra* note 2, R.C.M. 1009.

<sup>84</sup> *Id.* R.C.M. 1009(e)(3)(B). To reconsider the sentence with a view toward increasing the sentence from life to death requires a majority vote. *Id.* R.C.M. 1009(e)(3)(A). That would require a significant number of life voters to change to death voters and is unlikely to happen. *See Sundby, supra* note 25, at 108–09.

<sup>85</sup> MCM, *supra* note 2, R.C.M. 1009(e)(1).

<sup>86</sup> Scott E. Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 88 CORNELL L. REV. 1557, 1568–69, 1584 (1998). Admission defenses "admit that the defendant committed the acts charged, but also assert that she lacked the requisite intent to be held criminally liable for the offense charged. Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). *See also* Carpenter, *An Overview of the Capital Jury Project for Military Justice*

the accused is not guilty of the greater capital offense. In their sentencing arguments, defense counsel should specifically address the aggravating factors and the balancing test. Defense counsel will often have to find novel approaches to the aggravating factors since the aggravating factors are often not in controversy, especially when there are two or more murder victims.<sup>87</sup> However, the balancing test vote (that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances)<sup>88</sup> is always in controversy. If the defense counsel properly educates the members in *voir dire* and the military judge clearly instructs the members on the voting rules for the balancing test vote, a potential holdout juror will recognize that he can anonymously end the debate on life versus death by voting against death at the balancing test vote.

Turning now to bullies in the deliberation room, we should not expect to find overt bullies in a court-martial deliberation room, but a dynamic that resembles that pressure exists: the dynamic of rank in the deliberation room. Overt use of rank within the deliberation room is a form of unlawful command influence and is impermissible.<sup>89</sup> Panel members understand that. Senior-ranking members do not look at the junior-ranking members and tell them, “You will vote this way.” The real problem is subtle or even unintended influence. During deliberations, members will learn where other members stand on the issues; therefore, even though the voting is secret, the junior member will generally know where the senior member stands and vice versa. The Court of Military Review said as much in *United States v. Lawson*.<sup>90</sup>

[W]e cannot deny that considerations of rank may have, at least, an unconscious effect upon the deliberations of a court-martial. Typically there will be some discussion among court members as to the facts of the case, and it is hard to imagine how, in speaking about the facts, a member could completely conceal his views.

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Obviously, if [verbal “straw polls” were taken], the danger would be enhanced, because each member’s position—albeit, a tentative position—is clearly revealed to

the others; and junior members might be influenced to conform to the expressed positions of their seniors.<sup>91</sup>

If the panel follows the correct voting procedures and does not cast any straw votes, this dynamic should not be much of an issue during the first three votes. The junior member can anonymously cast a vote and end the discussion.

However, this dynamic may play a significant role in the final vote for life or death. While one should not expect that anyone on a panel will resort to name-calling or other bully tactics, the respect given to rank might achieve the same result. A junior panel member who is holding out for life may change his vote when eleven other senior members in the military, including a president who is most likely a colonel, are telling him, albeit politely or through stares, that a life vote is inappropriate. And, the president of the panel can exercise his discretion to keep the deliberations open until he feels that the debate is done,<sup>92</sup> which a president could do until he feels that the holdout vote has come around.

A look at the RCMs, then, shows that the potential for the force of social conformity exists in a military panel’s deliberation room. On the final vote for life or death, the panel must continue to re-vote until they reach a sentence or hang. One of the dynamics that causes a minority voter to change his vote in a civilian jury—a bully in the deliberation room—probably does not exist in that form in a military panel room but may have a close counterpart: the influence of rank in the deliberation room. The next step is to see if any evidence exists that these dynamics have surfaced in a capital court-martial.

### Evidence of These Dynamics in Capital Courts-Martial

At least three capital courts-martial appear to reflect some of the CJP findings. A review of the appellate opinions of the modern capital courts-martial that have resulted in approved death sentences<sup>93</sup> reveals two cases in which, at some point in deliberations, at least one panel member voted for life. In addition, news reports of a recent capital court-martial indicate that at least one panel member voted for life before changing his or her vote to death. Two of these cases may have also been impacted by the influence of rank in the deliberation room.

One of the important CJP findings is that most juries start deliberations with at least some jurors who support a

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*Practitioners: Aggravation, Mitigation, and Admission Defenses*, ARMY LAW. (forthcoming July 2011).

<sup>87</sup> MCM, *supra* note 2, R.C.M. 1004(c)(7)(J).

<sup>88</sup> *Id.* R.C.M. 1004(b)(4)(C).

<sup>89</sup> *United States v. Accordino*, 20 M.J. 102, 104 (C.M.A. 1985).

<sup>90</sup> 16 M.J. 38 (C.M.A. 1983).

<sup>91</sup> *Id.* at 40–41.

<sup>92</sup> MCM, *supra* note 2, R.C.M. 502(b)(1); R.C.M. 1006; *Accordino*, 20 M.J. at 105.

<sup>93</sup> See Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 17–19 (2006).

life sentence.<sup>94</sup> As discussed earlier, though, if the minority vote is 25% or fewer, those jurors will almost always change their minds.<sup>95</sup> In *United States v. Loving*,<sup>96</sup> possibly the most recognized capital case in the military, the initial vote on a proposed sentence was seven votes for death and one for life.<sup>97</sup> The panel re-voted the sentence after further deliberations and, as the CJP findings would predict, that one voter (12%) changed his vote to death.

The influence of rank in the panel room may have also played a role in *Loving*. The *Loving* opinion contains three affidavits from panel members,<sup>98</sup> allowing a rare (though short) glimpse into the deliberation room of a capital court-martial. Again, the initial vote on the sentence in *Loving* was seven votes for death and one for life.<sup>99</sup> In this case, under the president's guidance, the panel did not vote on aggravating factors,<sup>100</sup> did not vote on the balancing gate,<sup>101</sup> did not nominate sentences (the president, a colonel, told them that they needed to vote between two options, life and death),<sup>102</sup> the junior member did not count the votes, but passed them to the president to count instead;<sup>103</sup> and the panel did not vote on the lightest sentence first.<sup>104</sup>

After discussing that these rules exist to prevent rank from entering the deliberation room, in the dissenting opinion, Judge Wiss stated:

Regrettably, the specter [of unlawful command influence] has been raised that this carefully designed structure of procedures broke down in this case—and critically, that it did so entirely because the superior-ranking member of the court unilaterally imposed his own short-cut

toward a sentence rather than follow the clear path carefully mapped out [by the rules].<sup>105</sup>

Judge Wiss concluded:

It is not within [the president's] authority or discretion . . . to divine his own personally preferred procedural path toward a death sentence, . . .

Unlawful command influence? I think so. . . . [These affidavits] portray a scenario in which the senior-ranking member, solely by the virtue of his rank, successfully imposed a procedure that was unlawful.<sup>106</sup>

In the context of the earlier discussion on juror dynamics, the panel president's explanation of what happened takes on new meaning. Here is what he said:

The judge had explained before we adjourned that the death penalty required a unanimous vote. . . . After another 1 1/2 hours of review, I asked if everyone was prepared to vote again. They said they were. . . . The second vote resulted in the following: 8 votes [for death].<sup>107</sup>

The language the president used is important, particularly when viewed from the perspective of whoever was Panel Member #8 in this case. Panel Member #8 knows that he voted for life and is the only life vote, so the president of the panel—the colonel who just made that statement—necessarily voted for death. The colonel has just said that in order to impose the death penalty, everybody needs to vote for death. He did not say, “Or three-fourths of us can vote for life, or we can be a hung jury, all three of which are acceptable options.” The implied message to the holdout is,

<sup>94</sup> William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1491–96 (1998); Sandys, *supra* note 26.

<sup>95</sup> Blume et al., *supra* note 10, at 173.

<sup>96</sup> 41 M.J. 213 (C.A.A.F. 1994).

<sup>97</sup> *Id.* at 234–35. Prior to the passage of Article 52a, UCMJ, in 2001, which requires twelve members in a capital court martial, capital courts-martial only require the same number of panel members that are required in any general court-martial—five. UCMJ arts. 16(a)(A), 52a (2008).

<sup>98</sup> The dissenting opinion in *Loving* contains all three affidavits in their entirety. *Loving*, 41 M.J. at 331–33 (Wiss, J., dissenting).

<sup>99</sup> *Id.* at 234–35.

<sup>100</sup> *Id.* at 313 (Wiss, J., dissenting).

<sup>101</sup> *Id.* at 233–35.

<sup>102</sup> *Id.* at 313 (Wiss, J., dissenting). In theory, a case could be capital-eligible going into the sentencing deliberations but then no panel member would nominate death as a sentence. All of the panel members might nominate life or life without parole (LWOP). In that case, the panel would not be able to deliberate on death.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 313–14 (Wiss, J., dissenting).

<sup>105</sup> *Id.* at 313 (Wiss, J., dissenting).

<sup>106</sup> *Id.* at 314 (Wiss, J., dissenting). Judge Wiss contrasts the president's ability and power to modify the procedures with the inability of a second lieutenant on a panel to do the same thing. *Id.* at 314–15 n.1 (Wiss, J., dissenting):

Can it be more than rhetorical to ask whether anyone except the most senior ranking person on the court could have unilaterally imposed on all of the other, presumably intelligent, officer members a procedure of his own handiwork that was in marked deviation from that which clearly and in detail was prescribed by the military judge? I am not so naïve as to believe that a second lieutenant . . . could have been so possessed of nature leadership that he so effectively could have led astray a whole panel of his colleagues.

<sup>107</sup> *Id.* at 331–33 (Wiss, J., dissenting). His account was confirmed by two junior members on the panel who also provided affidavits. *Id.* Sundby documents very similar language which was used against a holdout. SUNDBY, *supra* note 15, at 90.

“You need to change your vote.” Panel Member #8 is the one during deliberations who mentioned that life might be appropriate, so everyone on that panel, including Panel Member #8, must have know, that the colonel was speaking to Panel Member #8.

In *Loving*, Panel Member #8 changed his vote—possibly because of the social conformity dynamic and because of the subtle pressure of rank in the deliberation room.<sup>108</sup> Even if the panel member genuinely changed his mind (and not just his vote) based on the deliberations, the key is to recognize that there is real potential for these dynamics to exist.

The capital case of *United States v. Thomas (Thomas J)*<sup>109</sup> also contains portions of post-trial depositions given by panel members. These depositions indicate that multiple votes were taken on the finding of guilt with at least some votes for acquittal on the capital offense.<sup>110</sup> This was contrary to the RCMs, which, as discussed above, do not allow for re-voting on the findings for the purpose of seeking a unanimous vote on the capital offense. After receiving instructions on the findings from the military judge, the panel president asked how many times the panel could vote on the verdict before they announced their finding.<sup>111</sup> The military judge essentially told him that if that issue came up, to come back to the military judge.<sup>112</sup> Based on that question, the defense counsel asked the military judge to ask the panel how many times they voted on the finding but the military judge denied that request.<sup>113</sup>

After the trial, the appellate defense counsel called the junior member of the panel who told him (and another appellate defense counsel) that the panel voted multiple times on the finding of guilt.<sup>114</sup> The appellate defense counsel provided affidavits to the Navy-Marine Court of Military Review, which then ordered depositions of the panel members.<sup>115</sup> Of these nine panel members, three said that the initial vote on guilt included votes for not guilty with probably two panel members voting for not guilty. Five said

that only one vote was taken on the guilty finding (including the president, and, interestingly, the junior panel member that the appellate defense counsel had interviewed earlier). One had retired and refused to answer questions.<sup>116</sup>

The difference in the way the panel members remember the voting process is interesting. Very likely, the two panel members who voted not guilty are among the three that remember the multiple votes. They would have been the ones that the group dynamics worked against and would have felt a high degree of stress, resulting in a memorable event. By this reasoning, the president of the panel was very likely in the majority block that was voting for guilt. He remembered only one vote.<sup>117</sup> This president, like the president in *Loving*, did not follow the rules and may have unintentionally invited the subtle pressure of rank into the deliberation room. Had the president followed the rules, no further deliberations would have been allowed on the merits. The accused would not have received a death sentence. Instead, the minority voters changed their positions (at only 22%, this result conforms to the CJP findings), possibly because of the force of social conformity and the subtle pressure of rank in the deliberation room.

Last, in the recent capital court-martial of Master Sergeant Timothy Hennis, the panel asked a question that indicated that at least one panel member voted for life during the sentencing deliberations.<sup>118</sup> After more than seven hours of debate, the fourteen-member panel asked the military judge, “If one person votes against imposing a death sentence, are subsequent ballots automatically for a life sentence?”<sup>119</sup> The reasonable inference from this is that at least one person in the panel room voted for life, and to his credit, the president of the panel returned to the judge for guidance. The military judge told the panel to follow the rules for voting on a sentence: to keep deliberating and voting until the panel reached sufficient votes to adopt a sentence (three-fourths for life or unanimous for death).<sup>120</sup> The military judge did not, however, read them the hung jury instruction.<sup>121</sup> After another six hours of deliberation, consistent with the CJP findings (the minority was 7%), that voter changed his vote and the panel adopted a sentence of death.<sup>122</sup> Had the military judge read the hung jury instruction, the minority voter may have found assurances in the language and hung on to his vote.

<sup>108</sup> The court in *Loving* resolved the unlawful command influence issue by ruling that the affidavits provided by the panel members were not admissible under the 1984 *Manual for Courts-Martial (MCM)*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (1984) [hereinafter 1984 MCM]. *Loving*, 41 M.J. at 239. The majority declined to hold that the information included in the affidavits rose to the level of unlawful command influence necessary to satisfy one of the exceptions in Military Rule of Evidence (MRE) 606(b). 1984 MCM, *supra*, MIL R. EVID. 606(b); *Loving*, 41 M.J. at 237–38.

<sup>109</sup> 39 M.J. 626 (N.M.C.M.R. 1993).

<sup>110</sup> *Id.* at 637.

<sup>111</sup> *Id.* at 628.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 629.

<sup>116</sup> *Id.* at 628, 637.

<sup>117</sup> *Id.* at 637.

<sup>118</sup> Paul Woolverton, *Hennis Jurors Extend Debate*, FAYETTEVILLE OBSERVER, Apr. 15, 2010, <http://www.fayobserver.com/Articles/2010/04/14991074>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Paul Woolverton, *Hennis Sentenced to Death for 1985 Eastburn Murders*, FAYETTEVILLE OBSERVER, Apr. 16, 2010, <http://www.fayobserver.com/Articles/2010/04/15/991361>.

These three cases indicate that panel members in capital cases face similar dynamics when deliberating cases that civilian jurors face. In each of these cases, at least one panel member changed a vote that could have prevented the imposition of the death penalty but changed that vote, consistent with the research on jury dynamics. And in two of these cases, the subtle influence of rank in the deliberation room may have substituted for the bullying behavior that is sometimes found in civilian juries.

### Juror Confusion

Another of the major findings of the CJP is the striking degree to which jurors do not understand the law because the instructions were incomplete, poorly drafted, or otherwise confusing. For example, even after hearing the instructions and sitting through a capital trial, 63% of jurors in one study thought that the law *required* them to impose the death sentence if they found that the crime was heinous, atrocious, or cruel;<sup>123</sup> 43% thought the same if they found the defendant would pose a future danger;<sup>124</sup> 41% thought the standard of proof on mitigating factors was beyond a reasonable doubt;<sup>125</sup> 42% thought unanimity was required on mitigating factors;<sup>126</sup> only one-third understood that life was the required sentence if the mitigating factors outweighed the aggravating factors;<sup>127</sup> and when given six basic questions about the process to answer, fewer than 50% were able to answer more than half of the questions correctly.<sup>128</sup>

One of the main reasons for this is that instructions are written by trial lawyers for appellate lawyers and not for jurors. Even when provided with the written instructions, jurors find them long, boring, and confusing, “like the undecipherable user’s manual that comes with a new computer, written by one technician for another.”<sup>129</sup> The instructions may have gaps or confusing portions and the process for seeking clarification from the judge is overwhelming, intimidating, and time consuming. If a juror has a question, the court has to get the lawyers, get the defendant from a holding cell, and formally march everyone into the courtroom.<sup>130</sup> The response from the judge is often

to simply re-read the same instruction that the jurors found was confusing.<sup>131</sup> After doing that once, jurors figure out that the process is not worth it and try to solve the problems on their own—often incorrectly.<sup>132</sup>

For those who think that a military panel filled with college-educated professionals will have no problem following the instructions or the law, or that military judges will provide complete, accurate instructions, a review of three military capital cases may challenge that assumption. Look again at *Loving*.<sup>133</sup> The panel failed to follow many of the military judge’s instructions. According to affidavits provided by three panel members, including the president (a colonel), the panel did not vote on the aggravating factors,<sup>134</sup> violating RCM 1004(b)(7).<sup>135</sup> The panel did not vote on whether the aggravating factors substantially outweighed the extenuating and mitigating factors,<sup>136</sup> violating RCM 1004(b)(4)(B).<sup>137</sup> The panel did not vote in order of least severe sentence to most severe sentence,<sup>138</sup> violating RCM 1006(d)(3)(A).<sup>139</sup> The junior member did not count the votes (the president did),<sup>140</sup> violating RCM 1006(d)(3)(B).<sup>141</sup> While this could be the result of the president deliberately ignoring the rules, the panel may have just been confused.

The military judge also gave incomplete instructions. He did not instruct that only one vote could be taken on say again which gates and that those votes could not be revisited.<sup>142</sup> While at least one of the aggravating factors (multiple murders)<sup>143</sup> was not an issue, the holdout panel member might have voted against the balancing gate had a vote actually been taken specifically on that gate. If the panel had been thoroughly instructed on the rules, and if the panel had followed those rules, the minority voter may well have voted against death at the balancing gate.

Similarly, in *United States v. Thomas (Thomas I)*,<sup>144</sup> both the panel members and the military judge appeared confused about the rules. After the military judge read the instructions at the conclusion of the merits, the president of

<sup>123</sup> James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1174 (1995). See also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000).

<sup>124</sup> Luginbuhl & Howe, *supra* note 123, at 1174.

<sup>125</sup> *Id.* at 1167.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1173.

<sup>128</sup> *Id.* at 1168.

<sup>129</sup> SUNDBY, *supra* note 15, at 49. See also Luginbuhl & Howe, *supra* note 123, at 1169.

<sup>130</sup> SUNDBY, *supra* note 15, at 49–50.

<sup>131</sup> Garvey et al., *supra* note 123.

<sup>132</sup> SUNDBY, *supra* note 15, at 50.

<sup>133</sup> 41 M.J. 213 (C.A.A.F. 1994).

<sup>134</sup> *Id.* at 234.

<sup>135</sup> 1984 MCM, *supra* note 108, R.C.M. 1004(b)(7).

<sup>136</sup> *Loving*, 41 M.J. at 313 (Wiss, J., dissenting).

<sup>137</sup> 1984 MCM, *supra* note 108, R.C.M. 1004(b)(4)(B).

<sup>138</sup> *Loving*, 41 M.J. at 234–35.

<sup>139</sup> 1984 MCM, *supra* note 108, R.C.M. 1006(d)(3)(A).

<sup>140</sup> *Loving*, 41 M.J. at 313 (Wiss, J., dissenting).

<sup>141</sup> 1984 MCM, *supra* note 108, R.C.M. 1006(d)(3)(B).

<sup>142</sup> *Loving*, 41 M.J. at 233.

<sup>143</sup> *Id.* at 267.

<sup>144</sup> 39 M.J. 626, 628 (N.M.C.M.R. 1993).

the panel asked: “I want to say, your instructions on reconsideration, if I understood correctly, we can have several ballots on the issue? We can reconsider at anytime up until the findings has been announced; and then, additionally, before the sentence has been announced?”<sup>145</sup> The correct response from the military judge should have been:

Do not worry about sentencing right now.

Once you have finished deliberating, you will vote by secret, written ballot. The junior member will collect and count those votes. You will then check that count and announce the results.

If the president informs the panel that the finding is not guilty, then if a majority of you would like to reconsider the finding to seek a guilty verdict, let me know and I will give you further instructions.

If the president informs the panel that the finding is guilty, then if more than one-third of you would like to reconsider to seek a not guilty verdict, then let me know and I will give you further instructions.

However, if the president informs the panel that the finding on the capital offense is guilty, but one of you has voted for not guilty on the capital offense, you may not reconsider that vote for the purpose of seeking a unanimous vote in order to authorize a capital sentencing rehearing. You may only reconsider that vote to seek a not-guilty finding.

Compare that to the military judge’s actual response: “If it comes up—if anybody wants to raise the issue that, ‘Hey, I want to talk about this, reconsider it,’ let me know and I’ll give you the instructions on it.”<sup>146</sup> Provided with this incomplete response, the panel then re-voted the finding of guilt on the capital offense in order to raise a seven-two vote to a unanimous vote, which ultimately led to an adopted sentence of death.

In both *Loving* and *Thomas I*, the military judges provided incomplete but not incorrect instructions on the specified issues. In *United States v. Simoy*,<sup>147</sup> the military judge issued a patently incorrect instruction: he told the

panel to vote on death before voting on life.<sup>148</sup> The Court of Appeals for the Armed Forces (CAAF) reversed, stating:

The instructions to the members should make [clear that] . . . they may not vote on the death penalty first if there is a proposal by any member for a lesser punishment, *i.e.*, life in prison. Some of those members who voted for the death penalty in this case might have agreed with life in prison. Thus, unless they held out on their vote for the lesser punishment of life, three-fourths might very well have agreed on life in prison rather than death. Thus, it was important for the members to understand that, because of requirements for unanimous votes, any one member at any stage of the proceeding could have prevented the death penalty from being imposed.<sup>149</sup>

The court’s reasoning is in concert with the CJP’s findings: a properly educated and instructed panel member might decide to hold on to his or her vote for life.<sup>150</sup> In *United States v. Thomas (Thomas II)*,<sup>151</sup> the CAAF dealt with an error in the military judge’s instructions that had not been raised in *Thomas I* and found that the military judge’s instructions that the panel should vote on death first was reversible error.<sup>152</sup> One should not be surprised that panel members are confused by the rules when these rules confuse military judges, too.

Juror confusion also has the effect of causing a hung jury. One of the primary concerns of jurors is to avoid

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<sup>148</sup> *Id.* at 613–14.

<sup>149</sup> *United States v. Simoy*, 50 M.J. 1, 2–3 (C.A.A.F. 1998). The statement, “any one member at any stage of the proceeding could have prevented the death penalty from being imposed” should be read to mean that at the first three gates, one vote can prevent death from being considered as a sentence, and on the sentencing vote, one vote can prevent death from ultimately being imposed by hanging the jury.

<sup>150</sup> Note this interesting contrast between *Loving* and *Thomas*. If the panel members vote improperly (they vote out of order or do not vote on certain gates at all) because they are either confused or purposefully choose not to follow the rules, but they do so after having been properly instructed by the military judge, then the appellate courts will not intervene. The appellate courts will let those known, faulty votes stand by finding that the evidence of that improper voting does not satisfy MRE 606b. MCM, *supra* note 2, MIL. R. EVID. 606(b). The courts will not consider the evidence, or essentially, “hear no evil, see no evil.” See *United States v. Loving*, 41 M.J. 213, 237–38 (C.A.A.F. 1994); *Thomas*, 39 M.J. at 636. If, however, the military judge issues an incorrect instruction, and even without evidence that the panel did in fact vote improperly, the courts will find those verdicts untrustworthy. *Simoy*, 50 M.J. at 2–3; *United States v. Thomas (Thomas II)*, 46 M.J. 311, 312 (C.A.A.F. 1997). That seems to be a paradox within due process but one sanctioned by the Supreme Court. See *Tanner v. United States*, 483 U.S. 107 (1987).

<sup>151</sup> 46 M.J. 311.

<sup>152</sup> *Id.* at 315–16.

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<sup>145</sup> *Id.* at 628.

<sup>146</sup> *Id.*

<sup>147</sup> 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

becoming a hung jury.<sup>153</sup> In his case study, Sundby describes what happened when the holdout juror suggested that the jury deadlock on the sentencing decision.<sup>154</sup> One of the jurors read the instructions and thought that if the jurors deadlocked, then the defendant would automatically get LWOP.<sup>155</sup> The instruction actually said that all that would happen is that a new jury would reconsider the sentence. After incorrectly decoding the instructions, the rest of the jurors became increasingly upset with the idea that this one juror “would now dictate the result.”<sup>156</sup> This holdout juror eventually changed his vote.

Something similar happened in *Thomas I*. Asked why the panel took multiple votes during the guilt deliberations, a panel member “said that they voted more than once to avoid being a ‘hung jury.’ He had understood that a hung jury was ‘a jury that has not reached a unanimous conclusion.’”<sup>157</sup> The military judge did not instruct the members that they were not required to come to a unanimous conclusion and that they could not reconsider a non-unanimous finding of guilt.<sup>158</sup> Had the panel members returned to the instructions to find the answer, they would not have found it. Instead, they would have found that standard instructions are themselves confusing enough that sometimes military judges cannot get them right.<sup>159</sup> The panel continued to deliberate and re-vote, eventually convicting the accused of a capital offense by a unanimous vote.

In addition to confusion about the rules themselves, another area of significant confusion is the meaning of a life sentence and the meaning of a death sentence. Jurors generally do not believe that a life sentence, either with or without parole, means that the defendant will actually spend his life in prison.<sup>160</sup> Rather, jurors tend to believe that if the defendant does not get the death penalty, he will be back on the street in fifteen years—even in jurisdictions that have LWOP.<sup>161</sup>

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<sup>153</sup> Sundby, *supra* note 25, at 117-19. See generally Sandys, *supra* note 26, at 1195-96, 1199, 1203, 1205-08.

<sup>154</sup> SUNDBY, *supra* note 15, at 90.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 91.

<sup>157</sup> *Thomas I*, 39 M.J. 626, 638 (N.M.C.M.R. 1993).

<sup>158</sup> *Id.* at 646 (Jones, S.J., dissenting).

<sup>159</sup> See *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *Thomas II*, 46 M.J. 311 (C.A.A.F. 1997).

<sup>160</sup> William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); Benjamin D. Steiner, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 340 (1996) [hereinafter, Eisenberg et al. *Jury Responsibility*]; Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001) [hereinafter, Eisenberg et al., *The Deadly Paradox*].

<sup>161</sup> Bowers & Steiner, *supra* note 159, 645-48.

Considering that future dangerousness is one of the determining factors in a juror's decision to vote for death,<sup>162</sup> this issue is no small matter. Jurors are more likely to vote for death when they believe that the alternative to death will result in the defendant's release from prison.<sup>163</sup> Those who underestimate the parole date are more likely to vote for death, more so as the trial progresses.<sup>164</sup>

[J]urors who underestimate the alternative are more likely to vote for death, whether the alternative does or does not permit parole. In fact, it is when jurors think the defendant will return to society in less than twenty years, regardless of how much longer he will actually serve, that they are substantially more likely to vote for death.<sup>165</sup>

If the panel members use their “folk knowledge” about when murderers are paroled, then they may be making uninformed or misinformed decisions about whether someone should live or die.

Understandably, this is a critical issue to jurors. Sundby notes that this is often the area when the jury deadlocks:

[J]urors favoring life would have acknowledged that they would of course vote for death if they thought the defendant would ever get out of jail, and the jurors favoring death would have agreed that arguments existed for a life sentence but maintained that a life sentence could not guarantee the defendant would not be back on the streets.<sup>166</sup>

Jurors often ask the trial judge, “If we sentence the defendant to life, will he ever be paroled?” The trial judge usually says that “life means life” or simply rereads the instructions.

This is the rule in the military. In *United States v. Simoy*,<sup>167</sup> the only options for the panel were life with parole and death.<sup>168</sup> As Sundby would predict, the panel asked the military judge whether the accused could be paroled if sentenced to life and the judge gave the “life means life”

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<sup>162</sup> Blume et al., *supra* note 10, at 165-67.

<sup>163</sup> Bowers & Steiner, *supra* note 159, at 655.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 671. See also Eisenberg & Wells, *supra* note 123.

<sup>166</sup> Sundby, *supra* note 25, at 117.

<sup>167</sup> 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

<sup>168</sup> *Id.* at 614. The offense occurred before 1997, which was the year that Congress authorized life without parole as a punishment for premeditated murder. UCMJ art. 56a(a) (2008).

response, telling them that whether or not the accused could be paroled was collateral to the sentencing decision and not something that they should consider.<sup>169</sup> In the recent capital court-martial of Master Sergeant Timothy Hennis, the panel was faced with the same issue.<sup>170</sup> The panel asked the military judge if the accused could be paroled if given a life sentence and the military judge replied with the “life means life” instruction.<sup>171</sup>

However, jurors would likely take that response to mean the judge is hiding the fact that the defendant *can* be paroled.<sup>172</sup> And when jurors remain confused about the meaning of life, they revert to using their folk knowledge about when murderers are released from prison.<sup>173</sup> The result of this confusion is that jurors or panel members may choose death not because it is the *appropriate* punishment but because it is the *least inappropriate* of the alternatives that they believe exist—particularly when LWOP is not an option. Commentators call this a “forced choice.”<sup>174</sup>

Some jurors who voted for death say that the defendant did not deserve to die, but deserved a true life sentence. They say that they did not believe death was the appropriate punishment, that they wanted LWOP, but that death was their only option in view of what they knew about parole. They say the defendant deserved life; the jury wanted life; but that was not an option.<sup>175</sup>

They may even solve the problem by deciding that, because of endless appeals and the rarity of executions, “death” does not mean “death” – it means life spent on death row until the defendant dies of a heart attack.<sup>176</sup> If the jurors believe that the defendant might one day be paroled if given a life or LWOP sentence,<sup>177</sup> but will not be paroled if given a death sentence and will not actually be executed, then jurors may vote for death to punish the defendant with a form of super-LWOP.<sup>178</sup>

Some jurors who voted for death did so in the belief that this was the way to come closest to an LWOP sentence, that it was the only way to keep the defendant in prison for the rest of his life. They became convinced that sentencing the defendant to death would not really mean his execution, but would ensure that he stays in prison for life.<sup>179</sup>

The military has a long appellate process and a high rate of overturning death sentences, and has not executed anyone since 1961.<sup>180</sup> One can reasonably believe that some military panel members believe death does not equal death and so will follow this reasoning.<sup>181</sup>

How a military counsel deals with this question will depend on whether LWOP is available in that particular case. Military defense counsel defending capital cases in which LWOP is not an option should seek to fully inform the panel about the parole process because the rules make it very unlikely that this type of offender will ever be paroled. For example, under Army regulations, an Army service member convicted of murder can only be paroled if the Secretary of the Army or his designee approves the parole board’s recommendation.<sup>182</sup> Panel members who are considering voting for life can be reasonably confident that no Secretary of the Army is going to take the political risk of signing the parole paperwork for someone who has committed the kind of a crime that many people feel warrants a death sentence.

For cases without LWOP as an option, fully informing the panel should lead to more reliable sentences—the panel members will only choose death if death is the appropriate

<sup>169</sup> *Id.* 46.

<sup>170</sup> The offense occurred before 1997. Woolverton, *supra* note 118.

<sup>171</sup> *Id.*

<sup>172</sup> Bowers & Steiner, *supra* note 159, at 673–77.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* Bowers and Steiner argue that this “forced choice” may be unconstitutional.

<sup>175</sup> *Id.* at 677.

<sup>176</sup> SUNDBY, *supra* note 15, at 38–39.

<sup>177</sup> Jurors remain skeptical that life without parole actually means that the defendant will never be paroled. Sundby, *supra* note 25, at 117.

<sup>178</sup> *Id.* at 39.

<sup>179</sup> Bowers & Steiner, *supra* note 159, at 678.

<sup>180</sup> Sullivan, *supra* note 93.

<sup>181</sup> In the recent capital court-martial of Master Sergeant Timothy Hennis, the husband and father of the three murder victims expressed that reasoning: the death penalty will “keep him there until that sentenced is carried out or until he dies a natural death, which I think is a just punishment,” [the widower] said, and it doesn’t matter to him whether Hennis is executed.” Woolverton, *supra* note 122.

<sup>182</sup> U.S. DEP’T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD para. 4-2b (23 Nov. 1998). While an Army service member sentenced to life with parole cannot be paroled from a military prison without approval of the Secretary of the Army or his designee, the service member could be transferred to a federal prison where he would fall under federal parole regulations rather than Army parole regulations. *Id.* para. 3-1e(9). If that happened, the Secretary of the Army would lose his veto authority over any subsequent parole recommendation. However, the decision to transfer an Army prisoner to a federal prison is wholly the Army’s to make. U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 3-3 (15 June 2006). If the Secretary of the Army wants to prevent someone who has committed a heinous crime but who has been sentenced to life in prison with parole from ever leaving prison, the Secretary of the Army can do that by preventing the service member from being transferred to a federal prison and then vetoing any recommendation for parole that comes before him.

punishment, not the least inappropriate of the sentencing alternatives. If defense counsel simply seek the “life means life” instruction, the CJP findings suggests that the panel will assume that the judge is hiding the fact that the accused can be paroled and will then follow the reasoning outlined above—that he will be paroled, and the best way to prevent his parole is to put him on death row.

In the military, the degree of this “forced choice” problem should be reduced for those cases with offenses committed after the 1997 change to Article 50(a) that authorized LWOP. The CJP findings indicate that many jurors find LWOP to be an appropriate alternative to the death penalty.<sup>183</sup> However, the problem still exists, even in LWOP cases:

[E]ven when the law does in fact provide for LWOP or LWOP+, jurors and members of the general public are unaware of it, or, if they are aware of it, they do not believe it. Instead, they wrongly think the alternative to death is some term of imprisonment short of LWOP. Reality is one thing; perception is another.<sup>184</sup>

To complicate this problem, in the military, LWOP does not mean LWOP. The convening authority can reduce the sentence at action,<sup>185</sup> the President can pardon the accused,<sup>186</sup> or after the accused serves 20 years in prison, the Service Secretary can remit the sentence to life with parole.<sup>187</sup> If the panel asks the military judge whether an accused can ever get out of confinement if given LWOP, what should the military judge say? Here, fully informing the panel might lead to an unreliable sentence: the panel members might choose death not because it is the appropriate sentence but because they believe it is less inappropriate than an LWOP sentence where the accused can technically be paroled.<sup>188</sup>

All military attorneys in the court room—trial counsel, defense counsel, and the military judge—should be committed to ensuring that the panel understands the law and the rules of the deliberative process. All should be committed to reducing panel member confusion. The laws and rules are designed to ensure a reliable sentence, the very lynchpin of death penalty jurisprudence.<sup>189</sup> So far, in at least

three of the fourteen modern military capital convictions, panels have not followed the rules or the military judge has issued improper deliberation instructions. This problem can be solved by drafting clear instructions and providing helpful responses to panel member questions. The tougher problem is whether to inform panel members when that information might actually lead to an unreliable sentence, such as when the panel asks about the meaning of LWOP.

### Juror Responsibility

An earlier discussion touched upon an issue related to juror responsibility: the belief held by some jurors that if they vote for death, the defendant will never be executed. The reasoning is that if a juror believes that the defendant will never be executed, then the juror will not really feel that he is responsible for his decision because it will never be carried out. The broader theory of juror responsibility is that:

[T]he decisions of people who feel personally responsible for an outcome differ from the decisions where the individual assumes no such responsibility . . . particularly when the decision involves consequences to the welfare of another person . . . Given that a life or death decision during the sentencing phase of a capital trial is as important a consequence to another person as there can be, it follows that the degree of responsibility experienced by a jury would impact on capital decisions.<sup>190</sup>

Theodore Eisenberg and colleagues further refine juror responsibility into role responsibility and causal responsibility.<sup>191</sup> Role responsibility is “the obligations one has flowing from a role one has assumed . . . [I]n the capital sentencing context, role responsibility focuses on whether jurors understand and accept the primary responsibility they have for the defendant’s sentence in the role they have assumed as sentencer.”<sup>192</sup> A juror might believe that someone other than himself has the primary role in making the sentencing decision, or that he is carrying out the decision on behalf of someone else. Jurors might shift responsibility for their decision to any number of places, to include the law, if, as discussed earlier, the jurors incorrectly believe that the law requires a death sentence,<sup>193</sup> to the judge,<sup>194</sup> to the community,<sup>195</sup> or to the other jurors, through

<sup>183</sup> Eisenberg et al., *The Deadly Paradox*, *supra* note 159, at 391.

<sup>184</sup> *Id.* at 395–96.

<sup>185</sup> UCMJ art. 56a(b)(1)(A) (2008).

<sup>186</sup> *Id.* art. 56a(b)(3).

<sup>187</sup> MCM, *supra* note 2, R.C.M. 1108(b).

<sup>188</sup> In the *Military Judges’ Benchbook*, the only guidance is for the military judge to say that LWOP means “confinement for life without eligibility for parole.” MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 8-3-40.

<sup>189</sup> *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

<sup>190</sup> Sherman, *supra* note 28, at 1242.

<sup>191</sup> Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 340.

<sup>192</sup> *Id.*

<sup>193</sup> Sherman, *supra* note 28, at 1244.

<sup>194</sup> *Id.*

de-individualization and group dynamics, as discussed earlier.<sup>196</sup> The CJP provides evidence that some jurors do shift role responsibility.<sup>197</sup> “Most jurors accept role responsibility though a disquietingly large minority do not.”<sup>198</sup> And the degree to which jurors feel responsible for the sentencing decision appears to be modestly correlated to the final vote: “[W]e find limited evidence that jurors who impose life sentences accept more responsibility than do jurors who impose death sentences.”<sup>199</sup>

The other type of juror responsibility is causal responsibility. Causal responsibility is “whether or not, and how strongly, someone or something figures in the causal chain leading to some outcome . . . [including] all of the factors that might be responsible for the defendant’s sentence, including, most importantly, the conduct of the defendant himself.”<sup>200</sup> If a juror (understandably) believes that the defendant is primarily responsible for his own sentence, that lessens the juror’s feeling of personal responsibility for the sentence—and the CJP findings indicate that jurors do shift causal responsibility to the defendant.<sup>201</sup> Another significant factor in causal responsibility is the belief held by some jurors that the defendant will never be executed—the “death does not mean death” belief.<sup>202</sup> “A clear majority say that ‘very few’ death-sentenced defendants will ever be executed, and about 70 percent of jurors believe that ‘less than half’ or ‘very few’ will be executed.”<sup>203</sup>

Of the ways that jurors can shift responsibility, some may not apply to any degree in courts-martial. Toward role responsibility, judges do not play a role in the military’s capital sentencing scheme. But some may apply as well to courts-martial as they do to civilian trials. Panel members may shift role responsibility to other jurors through group dynamics or to the law by mistakenly believing that the law sometimes requires the death penalty, and may shift causal responsibility to the accused. Some may apply with even greater force. Toward causal responsibility, one can reasonably assume that a court-martial panel member will have more confidence that the accused will not be executed than a juror on a Texas jury.

One type of role responsibility may have special significance in the military: the shift of responsibility to the community. Steven Sherman describes the shift to the community in the civilian context as follows:

Jurors are informed that they have been chosen as representatives of the community, and that they must represent the moral values of that community. In a capital case, there is often outrage and anger in the community-at-large about the murder. Cries for retribution and a death sentence are common. Believing that they are simply conduits for the expression of community values can greatly diminish the jurors’ personal sense of responsibility.<sup>204</sup>

In the military context, add to this the special role of the convening authority in the administration of military justice, both before and after the court-martial.

Capital cases are unique in that these are the only courts-martial in which the convening authority, by the very act of referral, has communicated to the panel what he thinks is the appropriate sentence in that case. The panel members can reasonably assume that the convening authority believes that death is the appropriate sentence; otherwise, the convening authority would not have referred the case with a capital instruction. Military attorneys tend to analyze problems like this using the framework for unlawful command influence<sup>205</sup> (and maybe this is a form of unintended but *per se* unlawful command influence), but for a capital defense counsel, this referral process presents additional problems. If the panel member believes, or even just thinks, that he is simply a conduit for the expression of the convening authority’s values, then he may shift role responsibility for his decision to the convening authority. Another problem exists: the panel members may shift role responsibility to the convening authority in the way that civilian jurors might shift responsibility to the judiciary. Panel members who are aware that a convening authority can reduce a sentence (and one should assume that panel members know this) may opt for a higher sentence believing that if they miss the convening authority’s target, the convening authority will reduce the sentence later.

This is not a fanciful problem. In *United States v. Dugan*,<sup>206</sup> the convening authority had held meetings where he discussed military justice issues in an inappropriate way, essentially saying that there was no room in the military for

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<sup>195</sup> *Id.* at 1245.

<sup>196</sup> *Id.* at 1246.

<sup>197</sup> Joseph L. Hoffman, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 *IND. L.J.* 1137, 1138 (1995).

<sup>198</sup> Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 349.

<sup>199</sup> *Id.* at 341, 376–77.

<sup>200</sup> *Id.* at 340–41. See also Sherman, *supra* note 28, at 1244.

<sup>201</sup> Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 341.

<sup>202</sup> *Id.* at 340. See also Sherman, *supra* note 28, at 1245.

<sup>203</sup> Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 363.

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<sup>204</sup> Sherman, *supra* note 28, at 1245.

<sup>205</sup> Convening authorities cannot tell panel members what the appropriate punishment is for an accused. *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001).

<sup>206</sup> 58 M.J. 253 (C.A.A.F. 2003).

drug users.<sup>207</sup> The military judge allowed *voir dire* on this issue but that remedy was not good enough—apparently, the remaining panel members were still concerned about what the convening authority would think of their sentence because they talked about that in the deliberation room. According to a letter filed by the junior member of the panel, “a couple of the panel members expressed the notion that a Bad Conduct Discharge was a ‘given’ for a person with these charges”<sup>208</sup> and “a panel member reminded us that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message.”<sup>209</sup> This was a not a capital case but still shows that panel members think—and even talk—about how the convening authority will think about their sentence. This process shifts role responsibility away from the panel member and onto the convening authority.

To ensure panel members retain responsibility for their decisions, in capital cases the defense counsel should ask the judge to “instruct jurors that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final.”<sup>210</sup> Counsel should explore in *voir dire* what the panel members think about the fact that the convening authority referred the case with a capital instruction. And counsel should explore with the panel members in *voir dire* whether they would shift role responsibility for their individual decisions onto the panel as a whole—as in, whether they would concede their personal, conscientious decision to the majority because of group pressure.

### Colorado Voir Dire

The CJP has influenced one of the major revolutions in capital trial work—the development of the Colorado *voir dire* method. One of the CJP findings is that most juries start deliberations with at least some jurors who support a life sentence.<sup>211</sup> David Wymore recognized that the key for defense counsel is to find a way to preserve those potential votes.<sup>212</sup> Essentially, he set out to find a way around the force of social conformity that Asch documented.

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<sup>207</sup> *Id.* at 254.

<sup>208</sup> *Id.* at 255.

<sup>209</sup> *Id.* The court took the unintended unlawful command influence issue seriously and returned the case for a fact finding hearing: “It is exactly this type of command presence in the deliberation room—whether intended by the command or not—that chills the members’ independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial.” *Id.* at 259.

<sup>210</sup> Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 379.

<sup>211</sup> Bowers et al., at 1491–96; Sandys, *supra* note 26.

<sup>212</sup> Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Productions 2004), available at <http://www.thelifepenalty.com/>.

Asch described the subject’s quandary in his experiment as this, which, as it turns out, is much the same as the quandary that many capital jurors believe they are in:

The subject knows (1) that the issue is one of fact; (2) that a correct result is possible; (3) that only one result is correct; (4) that the others and he are oriented to and reporting about the same objectively given relations; (5) that the group is in unanimous opposition at certain points with him.<sup>213</sup>

However, if the juror knows that his decision is a moral,<sup>214</sup> not necessarily factual, decision; that more than one resolution of this complex problem is possible; that he must decide for himself what the resolution should be,<sup>215</sup> and that it is acceptable to be in opposition to the majority, then the force of social conformity might be significantly defused. If Asch had told his subjects that more than one result was possible and that the majority might have it wrong, the results of his experiment would likely have been much different.

David Wymore pioneered a new method of *voir dire* for use in capital cases that, among other things, seeks to reduce the force of social conformity and get the life votes out of the deliberation room. Called the Colorado *voir dire* method (Wymore was practicing in Colorado when he developed this method), the method has two basic parts.<sup>216</sup> The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges and to build grounds for challenges for cause.<sup>217</sup> The second part is designed to address the Asch findings on group dynamics. This part focuses on teaching the juror the rules

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<sup>213</sup> ASCH, *supra* note 16, at 461.

<sup>214</sup> *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

<sup>215</sup> *Allen v. United States*, 164 U.S. 492 (1896).

<sup>216</sup> This is a very simplified description of the method. The method is generally taught over a three or four day hands-on seminar. The National Association of Criminal Defense Lawyers generally offers one training seminar on the Colorado method every year. See *CLE & Events*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/meetings> (last visited Oct. 7, 2010). One of these seminars has been captured on video and is available for training. Videotape: Selecting a Colorado Jury—One Vote for Life, *supra* note 211. See generally Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, CHAMPION, Jan. 2001, at 35.

<sup>217</sup> Under the Colorado method, defense counsel exercise their peremptory challenges based only on the juror’s death views. The method uses a ranking system based on juror responses. This portion of the method (the wise use of the peremptory challenge) plays a small role when Colorado *voir dire* is used in a court-martial. In the federal system, the defense gets twenty peremptory challenges in a capital case. FED. R. CRIM. P. 24(b). However, in the military, the accused in a capital case only gets one. MCM, *supra* note 2, R.C.M. 912(f)(4). In the military, defense counsel should focus on building grounds for challenge for cause.

for deliberation; that he is making an individual moral decision;<sup>218</sup> that he needs to respect the decisions of others; and that he is entitled to have his individual decision respected by the group. The goal is not to teach the juror to change everyone else's mind—the goal is to teach the juror how not to fold and to teach the other jurors to respect everyone else's opinions.

The method is grounded in constitutional law<sup>219</sup> and fits within the framework of the military's liberal grant mandate. The liberal grant mandate is a response to the unique nature of the military justice system, "because in courts-martial peremptory challenges are much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere."<sup>220</sup> The reasoning is that since the convening authority can hand-pick the panel members, in fairness, the defense counsel should be able to conduct *voir dire* of the panel members and then the military judge should give the Defense the benefit of the doubt on challenges when an issue arises.

Defense counsel should anticipate possible objections to the use of this method of *voir dire* and litigate any issues that might implicate panel dynamics, panel confusion, and panel member responsibility to establish a foundation for using the method. The defense counsel will probably not receive the direct remedy requested in the motion but likely will receive a different, valuable remedy: the ability to *voir dire* the panel members on that issue. For example, the defense counsel should file motions to have the junior member appointed as the president; require random panel member selection; find *per se* unlawful command influence in the referral process; change the place of trial based on pretrial publicity; trifurcate the trial into a merits, aggravating factor, and sentencing phase to reduce panel member confusion;<sup>221</sup> allow an opening statement in the presenting proceeding because of potential panel member confusion; request certain instructions; request additional peremptory challenges and limit government peremptory challenges and challenges for cause; allow parole rules and statistics as mitigation; etc.

For the military defense counsel who is detailed to a capital case, training in the Colorado method is the most important capital-specific training to receive.<sup>222</sup> If the

<sup>218</sup> See generally *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

<sup>219</sup> See John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1229 (2001).

<sup>220</sup> *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005). See also *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987).

<sup>221</sup> Donald M. Houser, Note, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH & LEE L. REV. 349 (2007).

<sup>222</sup> Prior to the passage of Article 52a in 2001, which requires twelve members in a capital court martial, capital courts-martial only required the

counsel in *Thomas I* had known of and used the Colorado method, the outcome at trial may well have been different. Had the panel members been educated on the rules and then followed them, they very likely would not have re-voted the initial guilt finding and the case would not have reached the presentencing proceeding with death as an authorized punishment.<sup>223</sup> Similarly, in *Loving*, the outcome at trial may have been different had the holdout panel member been educated on the rules. He may have voted against death at the balancing gate.<sup>224</sup>

In these two cases, teaching the members techniques to withstand group pressure may have helped to preserve the holdout votes: in both cases, the minority voters fell in the range where the minority block will fold (in *Loving*, one of eight voters, or 12%; in *Thomas I*, two of nine voters, or 22%). Getting the president of the panel to commit to following the rules may have helped to preserve the votes. This would have prevented the possibility of the subtle influence of rank in the panel room, as might have occurred in *Loving* and *Thomas I*.

With proper instructions and thorough *voir dire*, the defense counsel can address all of these dynamics—the force of social conformity, the subtle pressure of rank in the deliberation, juror confusion, voting rules, the parole problem, and juror responsibility. Using the Colorado method will not ensure a life sentence—some crimes may warrant the death penalty from a qualified panel—but using this method should help ensure a reliable sentence in which every member votes his or her conscience rather than the group's opinion.

## Conclusion

Hopefully, this overview of the CJP has reduced the space occupied by the capital Unknown Unknowns. In your capital case, you should realize that your panel members will behave in ways consistent with the CJP findings on juror dynamics. You should realize that your panel members might be confused about the law and the rules. You should

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same number of panel members that are required in any general court-martial—five. UCMJ arts. 16(a)(A), 52a (2008). Some cases that originated before this change suggested to defense counsel that they should not strike members from panels in order to raise the total number of panel members from five to something much larger, which would therefore increase the odds that one panel member might be seated who would eventually vote for life. See *United States v. Simoy*, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring). Now that the minimum number of panel members is twelve, that advice is inapplicable and should not be followed. We also now know from the CJP findings that that advice may have been to no avail anyway: even if the panel grew to a size where one potential life vote were seated, if he were the only life vote, he would change his vote anyway.

<sup>223</sup> *Thomas*' death sentence was set aside. *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997).

<sup>224</sup> *Loving* still faces the death penalty. *United States v. Loving*, 68 M.J. 1 (C.A.A.F. 2009).

realize that your panel members might shift responsibility to other actors in the case. And you should realize that you must learn the Colorado method of *voir dire* so that you can address all of those dynamics.

Still, the CJP covers much more than jury dynamics, juror confusion, and juror responsibility. Depending on your case, it may offer additional insight into areas like race, religion, the effect of the accused not testifying, jurors' views on experts,<sup>225</sup> victim impact testimony, and more. But the CJP is not everything. The void of Unknown Unknowns is great. Should defense counsel approach the victims and survivors?<sup>226</sup> How do you present or rebut the case for future dangerousness? What is impaired executive functioning? I am sure that there are many more – I just do not know what they are. They are, after all, Unknown Unknowns.

Although this article has examined three capital courts-martial in which the panels appeared to act and think consistently with the CJP findings and three capital courts-martial in which panel members and judges appeared confused, some may still question whether the CJP findings can apply to court-martial practice. The only way to truly resolve that question is to conduct research on military panels, capital and non-capital. One might quickly respond that the rules do not allow anyone to talk to panel members, thereby preventing research. But do the rules say that? Almost all of the rules that one can point to deal with whether *evidence* of what happened in the deliberation room can be admitted *in court*.<sup>227</sup> Those rules do not prohibit a panel member from talking to a researcher. The apparent prohibition comes from an unlikely source—the oath given to panel members. The text of the oath is not mandated by

the Uniform Code of Military Justice; rather, Article 42(a) simply states that the service secretaries shall prescribe the form of oaths.<sup>228</sup> The Secretary of the Army did so in Army Regulation 27-10, directing that this oath be used: “[T]hat you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law.”<sup>229</sup> The primary purpose behind the rules, and presumably, this oath, is to protect freedom of deliberation, protect the stability and finality of verdicts, protect panel members from harassment and embarrassment, and prevent unlawful command influence.<sup>230</sup>

Researchers could ask questions that prevent a panel member from violating this oath (say, by not identifying any particular member's vote or opinion) while still respecting the values underlying the MREs and RCMs—and these rules would then govern any statements made by a panel member to a researcher if someone wanted to introduce them in the particular court-martial of which one of these panel members was a member. A well-crafted, properly-conducted sociological research project could call into question many of our assumptions about whether rank plays a role in the deliberation room or whether panel members follow instructions. Research could cause us to reexamine the legal fictions that are found throughout the common law. Research could shed light on how our panels approach sexual assault cases. And, most importantly, properly conducted research can help military attorneys fully understand their audience so that they can present cases to them in ways that will allow them to solve the difficult problems they are given. Military justice can certainly benefit from that.

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<sup>225</sup> See Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (providing an interesting article on how to effectively use expert witnesses, in capital cases or otherwise).

<sup>226</sup> Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should be Concerned About Victims and Survivors*, CHAMPION, Dec. 2006, at 12; Russell Stetler, *Capital Cases: Working with the Victim's Survivors in Death Penalty Cases*, CHAMPION, June 1999, at 42.

<sup>227</sup> See MCM, *supra* note 2, MIL. R. EVID. 509 & 606; R.C.M. 923 discussion; R.C.M. 1007(c).

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<sup>228</sup> UCMJ art. 42(a) (2008).

<sup>229</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 11-8c (16 Nov. 2005) [hereinafter AR 27-10]. This is the same as the suggested oath found in MCM, *supra* note 2, R.C.M. 807(b)(2) discussion. As a practical matter, the oath given in all Army courts-martial is that found in the MILITARY JUDGES' BENCHBOOK, *supra* note 612, para. 2-5, which is the same as that in AR 27-10 and the RCM 807(b)(2) discussion except that the parentheses were dropped. However, at the end of the members' service, the trial judge is supposed to give this instruction: “If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from *discussing your deliberations with anyone*, to include stating any member's opinion or vote, unless ordered to do so by a court.” *Id.* para. 2-5-25 (emphasis added). That is an incorrect statement—the oath required by the MCM and Army regulations is much narrower.

<sup>230</sup> See *United States v. Loving*, 41 M.J. 213, 235-37 (C.A.A.F. 1994).

## Annual Review of Developments in Instructions

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### Introduction

This annual installment of developments on instructions covers cases decided by the Court of Appeals for the Armed Forces (CAAF) during its September 2009 term<sup>1</sup> and is written for military trial practitioners. The *Military Judges' Benchbook (Benchbook)*<sup>2</sup> remains the primary resource for drafting instructions. During this term, the CAAF decided cases involving evidence of consent in aggravated sexual contact cases;<sup>3</sup> the defenses of obedience to orders and mistake of law; instructions on propensity under Military Rule of Evidence (MRE) 414; inadmissible testimony of expert witnesses; and lesser included offenses.

### Defenses

#### *Obedience to Orders*

It is well-established that military judges are required to give instructions on affirmative defenses to the panel members when raised by the evidence in a case.<sup>4</sup> In 2000, the question of when an affirmative defense has been raised was resolved by the CAAF in *United States v. Davis*, when it reiterated that the standard is “whether the record contains some evidence to which the court members may attach credit if they so desire.”<sup>5</sup> This standard applies to all affirmative

defenses, to include the defense of obedience to orders.<sup>6</sup> In *United States v. Smith*,<sup>7</sup> the CAAF considered whether the military judge was required to give an instruction on the affirmative defense of obedience to lawful orders in a maltreatment case involving the abuse of detainees at the Baghdad Central Confinement Facility at Abu Ghraib, Iraq (hereinafter Abu Ghraib).

Army Sergeant (SGT) Smith was a military working dog (MWD) handler working at Abu Ghraib.<sup>8</sup> While serving in this role, SGT Smith participated in an interrogation of a detainee during which he allowed his unmuzzled dog to bark in the detainee's face and also permitted his dog to pull a hood off the detainee's head with its teeth.<sup>9</sup>

Staff Sergeant (SSG) Frederick, the noncommissioned officer in charge told SGT Smith to use his dog during this particular interrogation.<sup>10</sup> Staff Sergeant Frederick was told, in turn, by a civilian contractor/interrogator at Abu Ghraib that the use of dogs during the interrogation was authorized.<sup>11</sup> The civilian contractor/interrogator's notes indicated that the use of dogs was approved by Colonel (COL) Thomas Pappas<sup>12</sup> for all interrogations, although COL Pappas testified that he did not authorize the general use of MWD for all interrogations, nor did he authorize the use of MWD for this particular interrogation.<sup>13</sup> Further

<sup>1</sup> The September 2009 term began on 1 September 2009 and ended on 31 August 2010.

<sup>2</sup> U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK].

<sup>3</sup> *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010). A separate article will be published discussing how military judges should instruct regarding consent and mistake of fact as to consent in light of *United States v. Neal* and two Court of Appeals for the Armed Forces (CAAF) cases published in the 2010 term—*United States v. Prather* and *United States v. Medina*.

<sup>4</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 902(e)(3) (2008) [hereinafter MCM]. *Id.* R.C.M. 916(a) and discussion.

<sup>5</sup> 53 M.J. 202, 205 (C.A.A.F. 2000).

<sup>6</sup> See MCM, *supra* note 4, R.C.M. 902(e)(3); R.C.M. 916(a).

<sup>7</sup> 68 M.J. 316 (C.A.A.F. 2010).

<sup>8</sup> *Id.* at 318.

<sup>9</sup> *Id.* at 318, 320.

<sup>10</sup> *Id.* at 320.

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

<sup>12</sup> Commander, 205th Military Intelligence Brigade in Iraq. *Colonel Loses Command for Abuses*, WASH. TIMES (Wash., D.C.), May 12, 2005, at <http://www.washingtontimes.com/news/2005/may/12/20050512-11180126-79r/?page=1>.

<sup>13</sup> *Smith*, 68 M.J. at 320.

evidence showed that the only person competent to authorize the use of MWD during interrogations was Lieutenant General (LTG) Ricardo Sanchez, the Combined Joint Task Force-7 Commander.<sup>14</sup>

With respect to the defense of obedience to orders, Rule for Court-Martial (RCM) 916(d) states that “[i]t is a defense to any offense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful.”<sup>15</sup> The *Benchbook* instructions on this defense are subdivided into two separate paragraphs—one dealing with unlawful orders and the other dealing with lawful orders.<sup>16</sup> Whether the order was lawful or unlawful is an interlocutory question for the military judge.<sup>17</sup>

When instructing the panel members on findings as it related to SGT Smith permitting his dog to bark in the detainee’s face and pull the hood off the detainee’s head, the military judge gave the instruction on obedience to unlawful orders,<sup>18</sup> stating that “[a]n order to use military working dogs to aid in military interrogations, if you find such an order was given, would be an unlawful order.”<sup>19</sup> The military judge did not give the instruction on obedience to lawful orders.<sup>20</sup>

The question before the CAAF with respect to the obedience to orders instruction was “whether the military judge erred by failing to instruct on obedience to lawful orders as it pertained to maltreatment by having a MWD bark at a detainee when there was no evidence before the military judge that such an order was illegal.”<sup>21</sup> Applying the standards enunciated in *United States v. Davis*, Judge Baker highlighted that before the military judge is required to give an instruction on the defense of obedience to lawful orders, there must be some evidence that the accused was given a lawful order,<sup>22</sup> and that the order must be to engage in the charged conduct.<sup>23</sup> Judge Baker determined that the military judge had not erred in not giving the instruction because neither of the two prongs were met.<sup>24</sup> First, there

was no evidence that SSG Fredrick, or any other person, had ordered SGT Smith specifically to allow his dog to bark in the detainee’s face or pull the hood off the detainee’s head with its teeth.<sup>25</sup> Second, any order regarding the use of MWD during interrogations that did not originate from LTG Sanchez would necessarily be an unlawful order since LTG Sanchez was the only competent authority to give that particular order.<sup>26</sup> Chief Judge Effron, in his concurring opinion, emphasized his agreement that a military judge is not required to give the obedience to lawful orders instruction when the order is unlawful.<sup>27</sup>

In *Smith*, the CAAF reiterates the standards for giving instructions on affirmative defenses, and specifically on the defense of obedience to orders. Additionally, the CAAF reminds practitioners that before the obedience to orders instruction is given, there must be some evidence that ties the order to the specific acts committed by the accused. In this case, the CAAF found that although there was some evidence that SGT Smith may have been given an order to use his MWD during an interrogation, there was no evidence that he was ordered to use the dog in the manner he did by unmuzzling it and allowing it to approach the detainee in violation of the standards and policies in place concerning the use of MWD.<sup>28</sup> Finally, the CAAF confirms that the military judge is not required to give the obedience to lawful orders instruction when he determines that the order is unlawful.<sup>29</sup>

#### *Mistake of Law*

In *United States v. Maynulet*,<sup>30</sup> the CAAF addressed the issue of what evidence raises the affirmative defense of mistake of law.

Army Captain (CPT) Maynulet commanded an armor company in Iraq with the mission of capturing or killing a high-value target (HVT).<sup>31</sup> When a vehicle containing the HVT sped past a traffic control point manned by members of CPT Maynulet’s company, the unit initiated a high-speed pursuit which resulted in the vehicle carrying the HVT colliding with a wall and a house.<sup>32</sup> Captain Maynulet and several of his Soldiers approached the vehicle and

<sup>14</sup> *Id.* at 321. Per Combined Joint Task Force-7 (CJTF-7) policy, Lieutenant General (LTG) Sanchez expressly withheld approval authority to use “the presence of” military working dogs (MWDs) for interrogations. *Id.* at 320.

<sup>15</sup> MCM, *supra* note 4, R.C.M. 916(d).

<sup>16</sup> BENCHBOOK, *supra* note 2, ¶¶ 5-8-1, 5-8-2.

<sup>17</sup> MCM, *supra* note 4, R.C.M. 916(d) discussion.

<sup>18</sup> See BENCHBOOK, *supra* note 2, ¶ 5-8-1.

<sup>19</sup> *Smith*, 68 M.J. at 319.

<sup>20</sup> *Id.* at 320.

<sup>21</sup> *Id.* at 318.

<sup>22</sup> *Id.* at 320.

<sup>23</sup> *Id.*

<sup>24</sup> See *id.* at 321.

<sup>25</sup> *Id.* at 320. Even in the instances in which LTG Sanchez expressly approved the presence of working dogs, CJTF-7 policy still “required that MWDs be muzzled and under control of a MWD handler at all times.” *Id.* at 321.

<sup>26</sup> *Id.* at 321.

<sup>27</sup> *Id.* at 324.

<sup>28</sup> *Id.* at 320.

<sup>29</sup> *Id.* at 321.

<sup>30</sup> 68 M.J. 374 (2010).

<sup>31</sup> *Id.* at 375.

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

discovered that the driver of the vehicle had a serious head wound and, according to the unit's medic, appeared to have been mortally wounded.<sup>33</sup> As CPT Maynulet watched, the driver made gurgling sounds and flapped his arm.<sup>34</sup> Without attempting to assist the driver, CPT Maynulet fired two shots at the driver's head, ultimately killing him.<sup>35</sup>

Captain Maynulet testified that he shot the driver to "put him out of his misery."<sup>36</sup> Additionally, the defense presented evidence that CPT Maynulet had received training on rules of engagement and the law of war which indicated that Soldiers should avoid causing unnecessary suffering.<sup>37</sup> Based on this evidence, the defense counsel requested the mistake of law instruction, arguing that CPT Maynulet mistakenly believed that the unnecessary suffering provision of the law of war allowed him to commit this mercy killing.<sup>38</sup>

Rule for Court-Martial 916(l)(1) makes it clear that mistake of law is not ordinarily a special defense.<sup>39</sup> An exception to this general rule is carved out in the discussion to the rule: "mistake of law may be a defense when the mistake results from reliance on the decision or pronouncement of an authorized public official or agency."<sup>40</sup> The discussion further clarifies that reliance on advice of counsel is not equivalent to reliance on a pronouncement of an authorized public official or agency, and as such, does not raise a defense.<sup>41</sup>

Relying on the standard from *United States v. Davis*,<sup>42</sup> the CAAF determined that no evidence had been raised that would require the military judge to instruct on the defense of mistake of law.<sup>43</sup> Specifically, the court found that CPT Maynulet had been instructed on all aspects of the law of war, such that it should have been clear to him that he had a duty to collect and care for the wounded, rather than to kill them.<sup>44</sup> Further, the CAAF found that CPT Maynulet's subjective belief of the law was irrelevant, as the defense would only apply if there were evidence that (1) an authorized public official or agency had disseminated erroneous information about the law of war (which evidence

did not exist in this case) and (2) CPT Maynulet had relied on this erroneous information.<sup>45</sup>

In evaluating the defense of mistake of law, the CAAF observed that while the exception to the general rule against the defense is well-grounded in law, it has never heard a case in which the exception applied.<sup>46</sup> Given the rarity of the exception, practitioners should ensure that they carefully evaluate the facts of a case before instructing on mistake of law as an affirmative defense.

## Evidence

### *Propensity Evidence under MRE 414*

Military Rule of Evidence 414 provides that "[i]n a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant."<sup>47</sup> The CAAF provided guidance governing the admission of evidence under MRE 414 in numerous cases over the past ten years,<sup>48</sup> to include *United States v. Wright*<sup>49</sup> and *United States v. Bare*.<sup>50</sup> In *United States v. Ediger*,<sup>51</sup> the CAAF not only applied the standards from *Wright* and *Bare* to determine whether evidence of prior child molestation was properly admitted under MRE 414, but also specifically reviewed and commented on the adequacy of the military judge's instruction to the panel members concerning the use of this propensity evidence.<sup>52</sup>

Among other charges, Army Private First Class (PFC) Ediger was charged with raping his stepdaughter (MA),

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 377.

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

<sup>39</sup> MCM, *supra* note 4, R.C.M. 916(l)(1).

<sup>40</sup> *Id.* R.C.M. 916(1)(1) discussion.

<sup>41</sup> *Id.*

<sup>42</sup> 53 M.J. 202, 205 (C.A.A.F. 2000).

<sup>43</sup> *Maynulet*, 68 M.J. at 376.

<sup>44</sup> *Id.* at 377.

<sup>45</sup> *Id.* at 376, 377.

<sup>46</sup> *Id.* at 376.

<sup>47</sup> MCM, *supra* note 4, MIL. R. EVID. 414(a).

<sup>48</sup> See OPINION DIGEST BEGINNING WITH 1999 TERM OF COURT, OCT 2, 1998—CURRENT TERM ¶¶ III.C.4 and III.C.34 (last updated Oct. 4, 2010), available at <http://www.armfor.uscourts.gov/ConsolidatedDigestOutline.htm>.

<sup>49</sup> 53 M.J. 476 (C.A.A.F. 2000). This case provides a list of non-exclusive factors that a military judge may use to conduct a balancing test under both MRE 414 and MRE 413. *Id.*

<sup>50</sup> 65 M.J. 35 (C.A.A.F. 2007). This case lays out a two-step analysis for admission of evidence under Military Rule of Evidence (MRE) 414. The first step requires the military judge to determine: "(1) whether the accused is charged with an act of child molestation as defined by M.R.E. 414(a); (2) whether the proffered evidence is evidence of his commission of another offense of child molestation as defined by the rule; and (3) whether the evidence is relevant under M.R.E. 401 and M.R.E. 402." The second step requires the military judge to then apply a balancing test under MRE 403. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *Bare*, 65 M.J. at 36).

<sup>51</sup> 68 M.J. 243 (C.A.A.F. 2010).

<sup>52</sup> *Id.*

taking indecent liberties with MA by masturbating while MA posed on the bed on her hands and knees with her naked lower torso exposed to PFC Ediger, and making false official statements that he never raped MA and that he did not masturbate in MA's presence.<sup>53</sup> Prior to trial, the military judge ruled that evidence that PFC Ediger sexually assaulted another young girl (TG) when she was between the ages of nine and eleven was admissible under MRE 414.<sup>54</sup> After the military judge's ruling on the MRE 414 evidence, but before trial, the Government dismissed the indecent liberties charge.<sup>55</sup> At that point, the defense requested a new military judge detailed to the case to reconsider the prior ruling by the previous judge concerning the admissibility of TG's testimony.<sup>56</sup> The new military judge affirmed the prior ruling and permitted the testimony under MRE 414.<sup>57</sup> At trial, TG testified that when PFC Ediger was dating her mother, he licked and fondled her genital area while forcing her to pose on the bed on her hands and knees with her naked lower torso exposed to PFC Ediger, he frequently spanked and fondled her, and forced her to perform oral sex on him.<sup>58</sup>

After TG's testimony, the military judge gave the following limiting instruction:

You've heard evidence through the testimony of [TG] that the accused may have previously committed other offenses of child molestation. You may consider the evidence of such other acts of child molestation for their tendency, if any, to show the accused's propensity to engage in child molestation, as well as their tendency, if any, to identify the accused as the person that committed offenses alleged in [Charge] I<sup>59</sup> . . . to prove a plan or design of the accused to molest [MA] and to determine whether the accused had a motive to commit those offenses.

You may not, however, convict the accused merely because you believe he committed these other offenses or merely because you believe he has a propensity to engage in child molestation. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable

doubt remains as to each and every element of each offense charged.<sup>60</sup>

The military judge repeated the instruction prior to deliberations.<sup>61</sup>

On appeal, PFC Ediger argued that the military judge should have expressly instructed the members that they could only consider TG's testimony for the rape charge (Charge I), but not for any other offense.<sup>62</sup> The CAAF disagreed, noting that "once evidence is admitted under MRE 414, that evidence 'may be considered for any matter to which it is relevant.'"<sup>63</sup> The CAAF determined that the members could have considered TG's testimony in their evaluation of any of the charged offenses, as long as it was relevant.<sup>64</sup> For example, TG's testimony may have been relevant to the panel in determining whether PFC Ediger made a false official statement when he denied masturbating in MA's presence.

Further, the CAAF reiterated the requirements for proper instructions on the use of propensity evidence as originally stated in *United States v. Schroder*<sup>65</sup>:

[I]t is essential that . . . the members are instructed that M.R.E. 414 evidence may be considered for its bearing on an accused's propensity to commit the charged crime, the members must also be instructed that the introduction of such propensity evidence does not relieve the government of its burden of proving every element of every offense charged. Moreover, the factfinder may not convict on the basis of propensity evidence alone.<sup>66</sup>

In the instant case, the court found that the military judge's limiting instruction on TG's testimony had complied with the requirements of *Schroder*.<sup>67</sup>

The *Benchbook* instruction for the proper use of propensity evidence under MRE 414 is found at paragraph 7-13-1, note 3.<sup>68</sup> The instruction is similar to that given by

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<sup>53</sup> *Id.* at 245.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 246.

<sup>56</sup> *Id.* at 247.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> It is apparent from the CAAF opinion that Charge I concerned the rape of MA. *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 249 (citing MCM, *supra* note 4, MIL. R. EVID. 414(a)).

<sup>64</sup> *Id.*

<sup>65</sup> 65 M.J. 49 (C.A.A.F. 2007).

<sup>66</sup> *Id.* at 56.

<sup>67</sup> *Ediger*, 68 M.J. at 249.

<sup>68</sup> MCM, *supra* note 4, ¶ 7-13-1 n.3. This instruction is based on the U.S. Army Court of Criminal Appeals' decision in *United States v. Dacosta*. 63 M.J. 575 (A. Ct. Crim. App. 2006).

the military judge in *Ediger*; however it is more detailed in that it reminds the members of their requirement to first determine by a preponderance of the evidence whether the other act of child molestation occurred before considering it for any purpose.<sup>69</sup> Additionally, the *Benchbook* instruction places extra emphasis on the prosecution's burden to prove each element beyond a reasonable doubt.<sup>70</sup> Given the CAAF's ruling in *Ediger*, it is clear that the *Benchbook* instruction is a proper instruction that complies with *Schroder*. As such, *Ediger* serves as a reminder that practitioners would be wise to follow the *Benchbook* instruction when admitting propensity evidence under MRE 414.

*Ediger* also emphasizes that military judges are not required to instruct members that propensity evidence is limited to certain specifications, as it may be considered for "any of the charges . . . for which it [is] relevant."<sup>71</sup> With respect to this ruling, it would appear that the *Benchbook* instruction may limit the member's consideration of propensity evidence under MRE 414 in a way which is not required by the CAAF. Specifically, the instruction states, "If you determine by a preponderance of the evidence (this)(these) other uncharged offenses(s) occurred, you may then consider the evidence of (that)(those) offenses(s) for its bearing on any matter to which it is relevant *only in relation to (list the specifications(s) for which the members may consider the evidence)*."<sup>72</sup> Applying the CAAF's ruling in *Ediger*, it would appear that the last portion of this instruction is unnecessary, as the propensity evidence may be considered for all charges for which it is relevant. Regardless, in cases in which the charged offenses are clearly separated between those involving child molestation and those that do not, an instruction that restricts the panel's consideration of propensity evidence to certain specifications helps ensure that members are not using the evidence for the improper purpose of convicting the accused of an unrelated offense solely because they find that the accused has a propensity to engage in child molestation. Practitioners should consider the charges and evidence carefully when determining whether to instruct the members that their consideration of propensity evidence is limited to certain specifications.

#### *Experts as Human Lie Detectors—A Cautionary Tale*

In *United States v. Mullins*,<sup>73</sup> the CAAF addressed the perennial issue of experts overstepping their testimonial boundaries and providing human lie detector testimony.

<sup>69</sup> BENCHBOOK, *supra* note 2, ¶ 7-13-1n.42.

<sup>70</sup> *Id.*

<sup>71</sup> *Ediger*, 68 M.J. at 249 (citing MCM, *supra* note 4, MIL. R. EVID. 414).

<sup>72</sup> BENCHBOOK, *supra* note 2, ¶ 7-13-1 n.3 (emphasis added).

<sup>73</sup> 69 M.J. 113 (C.A.A.F. 2010).

Master-at-Arms First Class Mullins, U.S. Navy, was brought before a general court-martial charged with the rape of a child, forced sodomy of a child, two specifications of indecent acts and two specifications of possession of child pornography.<sup>74</sup> During his court-martial the Government called Ms. Cynthia Conrad, a forensic child interviewer from the local prosecutor's office, to testify about the types of interviews she performed on the alleged victim.<sup>75</sup>

Ms. Conrad testified that a normal child of the alleged victim's age "might understand sexual intercourse but would not understand oral or anal sex, male masturbation, or ejaculation."<sup>76</sup> She also testified that the alleged victim's characteristics during interviews were "consistent . . . with a child who may have been sexually abused."<sup>77</sup> In response to her testimony the military judge provided the following *sua sponte* instruction to the panel on the testimony they had just heard:

[N]o witness is a human lie detector. That is no one—no one who testifies in this courtroom can know if someone else is telling the truth or lying. You are advised that only you, the members of this court, can determine the credibility of the witnesses and what the ultimate facts of this case are. No witness, including an expert witness, can testify that someone else's account of what happened is true or credible, that a person believes the alleged victim or that, in fact, a sexual encounter actually occurred.<sup>78</sup>

After being cross examined by the defense, the Government conducted re-direct examination of Ms. Conrad about the frequency of children lying about sexual abuse.<sup>79</sup> In response to the trial counsel's question, Ms. Conrad testified that children lied about sexual abuse in less than "1 out of 100 or 1 out of 200" cases.<sup>80</sup> Hearing no objection from the defense, the military judge asked Ms. Conrad:

[D]o you have any forensic, that is, scientifically accurate way of proving whether the child is telling the truth or not? In other words . . . the only way that you typically could know that is if the child later comes forth and says 'Yes, I

<sup>74</sup> *Id.* at 114.

<sup>75</sup> *Id.* at 115.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

made it up,' or . . . unless that [defendant] ultimately confesses, you would ultimately never know who was telling the truth and who wasn't, is that correct?<sup>81</sup>

Ms. Conrad replied affirmatively and there was no objection to the judge's question and the defense counsel commented on this last bit of testimony during his closing argument.<sup>82</sup> Prior to allowing the panel to recess for deliberations the military judge reiterated, in generic form, his prior instruction on human lie detectors and the role of the members as the sole authority for determining the facts of a case and the credibility of witnesses.<sup>83</sup>

On appeal the defense argued that, despite the military judge's cautionary instruction on human lie detectors and the follow-up question he asked the expert, allowing the expert's testimony on the improbability of children lying about sexual abuse into evidence amounted to the admission of an expert opinion that there was a 1 in 200 chance that the accused was innocent.<sup>84</sup> Turning first to the law concerning the boundaries of expert opinion in child sexual abuse cases, the CAAF reiterated the well established evidentiary rules that "[a]n expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms"<sup>85</sup> but that "an expert may not testify regarding the credibility or believability of a victim, or 'opine as to the guilt or innocence of the accused.'"<sup>86</sup> The court then noted the similarity of the case at hand with the 2007 CAAF decision in *United States v. Brooks*.<sup>87</sup>

In *Brooks*, another child sexual assault case, the Government's child sexual abuse expert testified on re-direct that only "about 5 percent" of all child sexual abuse claims made by children were false.<sup>88</sup> As in *Mullins*, the expert's testimony drew no objection from the defense and the military judge's only gave the standard instructions on credibility and expert witnesses, as well as the following tailored instruction:

Only you, the members of the court determine the credibility of the witnesses and what the fact[s] of this case are. No expert witness or other witness can testify that the alleged victim's account of what

occurred is true or credible, that the expert believes the alleged victim, or that a sexual encounter occurred. To the extent that you believed that Dr. Acklin testified or implied that he believes the alleged victim, that a crime occurred, or that the alleged victim is credible, you may not consider this as evidence that a crime occurred or that the alleged victim is credible.<sup>89</sup>

Applying the plain error standard in the absence of any defense objection at trial,<sup>90</sup> the court in *Brooks* concluded that allowing the percentage testimony was plain error because the Government expert's "credibility quantification testimony invaded the province of the members"<sup>91</sup> and represented "the functional equivalent of vouching for the credibility or truthfulness of the victim."<sup>92</sup> Looking to whether the plain error had materially prejudiced the substantial rights of the appellant, the court concluded it had and reversed the conviction.

Focusing on the impact of the error, the *Brooks* court noted that the case "hinged on the victim's credibility and medical testimony" as "[t]here were no other direct witnesses, no confession, and no physical evidence to corroborate the victim's sometimes inconsistent testimony."<sup>93</sup> Based upon the error's "particular impact upon the pivotal credibility issue and ultimately the question of guilt" the court concluded that the military judge's error in admitting the testimony cast "substantial doubt about the fairness of the proceeding" and required a reversal of the findings and sentence.<sup>94</sup>

Applying the established law to the facts of *Mullins*, the CAAF ruled that the military judge in *Mullins* committed plain error by allowing the Government's expert to state the "the statistical frequency of children lying about sexual abuse."<sup>95</sup> Reviewing whether the military judge's error materially prejudiced the accused, the CAAF stated that it must review "the erroneous testimony in context to determine if the witness's opinion amounts to prejudicial error."<sup>96</sup> The court then defined "context" to include "such factors as the immediate instruction, the standard instruction, the military judge's question, and the strength of the

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<sup>81</sup> *Id.* at 116.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 117.

<sup>84</sup> *Id.* at 116.

<sup>85</sup> *Id.* (citing *United States v. Birdsall*, 47 M.J. 404, 409 (C.A.A.F. 1998)).

<sup>86</sup> *Id.* (citing *United States v. Cacy*, 43 M.J. 214, 217 (C.A.A.F. 1995)).

<sup>87</sup> 64 M.J. 325 (C.A.A.F. 2007).

<sup>88</sup> *Id.* at 327.

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

<sup>90</sup> To demonstrate that relief is warranted under the plain error doctrine, an appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

<sup>91</sup> *Brooks*, 64 M.J. at 330.

<sup>92</sup> *Id.* at 326–27.

<sup>93</sup> *Id.* at 330.

<sup>94</sup> *Id.*

<sup>95</sup> *United States v. Mullins*, 69 M.J. 113, 117 (C.A.A.F. 2010).

<sup>96</sup> *Id.* (citing *United States v. Eggin*, 51 M.J. 159, 161 (C.A.A.F. 1999)).

government's case to determine whether there was prejudice."<sup>97</sup>

Based on the context of *Mullins*, the court quickly determined there was no prejudicial error.<sup>98</sup> First, the military judge gave an instruction at the end of Ms. Conrad's direct examination, as well as before deliberations. The CAAF noted that the timing of those instructions, that is, right after Ms. Conrad's testimony and only a few minutes later during the final instructions before deliberations, distinguished *Mullins* from *Brooks*.<sup>99</sup> In *Brooks*, the military judge only instructed the panel members once before they deliberated.<sup>100</sup> The CAAF also noted that the military judge in *Mullins* asked a clarifying question which, despite not being the same as a corrective instruction, reduced the weight the panel members would have given the erroneously admitted testimony.<sup>101</sup> Finally, unlike *Brooks*, the panel in *Mullins* had a substantial amount of corroborating evidence supporting the alleged victim's testimony.<sup>102</sup>

Two important lessons can be drawn from the decision in *Mullins*. First, allowing an expert to state his opinion regarding the statistical probability of a false allegation is error, *per se*. Military judges should be constantly vigilant in their efforts to prevent such testimony from being heard by the panel, even in the absence of an objection by the defense. Military judges should pay particular attention to re-direct examinations of experts by trial counsel, who appear prone to overreaching in their questioning of experts in the aftermath of defense cross-examination and impeachment of their expert's direct testimony. Second, when in doubt, a timely recess to discuss the propriety of a limiting instruction followed by such an instruction can save the day even in the presence of error.

### Miscellaneous Matters: Lesser Included Offenses

United States v. Jones: *Lesser Included Offenses Ain't What They Used to Be*

Since the *United States v. Jones*<sup>103</sup> decision was released by the CAAF on 19 April 2010, there has been a great deal of speculation as to what its full impact would be on

charging in the military justice system.<sup>104</sup> Three things are certain in the aftermath of the *Jones* decision. First, the use of Article 134 offenses as "catch-all" lesser included offenses (LIOs) for other enumerated (Articles 80–132) offenses is over. Second, the analytical method for determining which offenses are LIOs has changed and practitioners can rely neither on the LIOs listed in the *Manual for Courts-Martial (MCM)* nor the past sixteen years of case law. Finally, resourceful trial counsel will use alternative charging to allege the same conduct under separate enumerated and Article 134 specifications to adapt to a post-*Jones* charging landscape. This will lead to judges confronting instructional issues and decisions on unreasonable multiplication of charges issues arising during the findings and sentencing portions of courts-martial.

The facts of *United States v. Jones* are easy to understand and have arisen in many courts-martial. The accused, Airman Jones, was charged, *inter alia*, with rape in violation of Article 120, UCMJ.<sup>105</sup> Prior to closing for deliberations, the military judge instructed the panel on rape as well as the uncharged LIO of indecent acts with another in violation of Uniform Code of Military Justice (UCMJ) Article 134, UCMJ.<sup>106</sup> While there was an objection to the instruction by the defense, the objection centered on whether the evidence introduced at trial could constitute an indecent act and not whether the offense of indecent acts was an LIO of rape.<sup>107</sup>

Because the offense alleged occurred prior to the 1 October 2007 effective date of the "new" Article 120,<sup>108</sup> indecent acts was still an offense under Article 134<sup>109</sup> and not, as now, an enumerated offense under Article 120.<sup>110</sup> Airman Jones was found guilty of indecent acts, as instructed as an LIO of rape.<sup>111</sup> On appeal, the CAAF granted the issue of whether indecent acts was available as an LIO of rape.<sup>112</sup>

In a ruling that surprised many in the military justice community, the CAAF determined that not only was the offense of indecent acts not an LIO of rape, but no Article 134 offense was an LIO of any enumerated offense.<sup>113</sup> The

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 118.

<sup>99</sup> *Id.* at 117.

<sup>100</sup> *Brooks*, 64 M.J. 325, 330 (C.A.A.F. 2007).

<sup>101</sup> *Mullins*, 69 M.J. at 117–18.

<sup>102</sup> *Id.* at 118. This "corroborating evidence" included two victims' testimony, other witnesses' observations, and *Mullins*' possession of child pornography and illicit instant messages on his home computer. *Id.*

<sup>103</sup> 68 M.J. 465 (C.A.A.F. 2010).

<sup>104</sup> See, e.g., Major Patrick Pflaum, *Lesser Included Offenses Update: United States v. Jones*, ARMY LAW., July 2010, at 27.

<sup>105</sup> *Jones*, 68 M.J. at 466.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 467.

<sup>108</sup> See generally National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3256. UCMJ art. 120 (2008).

<sup>109</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 90 (2005).

<sup>110</sup> MCM, *supra* note 4, pt. IV, ¶ 45a(k).

<sup>111</sup> *Jones*, 68 M.J. at 468.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 472–73.

CAAF's ruling in *Jones* included an explicit repudiation of the analysis that had been used since 1994 to determine what constituted an LIO. In the 1994 case of *United States v. Foster*,<sup>114</sup> the Court of Military Appeals (CMA) analyzed whether the "elements test" announced in the Supreme Court case of *United States v. Schmuck*,<sup>115</sup> and adopted by the CMA in *United States v. Teters*,<sup>116</sup> permitted a service member to be found guilty of the LIO of indecent acts in violation of Article 134 when the Government failed to prove the elements of forcible sodomy in violation of Article 125.

The elements test announced in *Schmuck*<sup>117</sup> and adopted in *Teters*<sup>118</sup> defined LIOs in the negative, as described in Federal Rule of Criminal Procedure 31(c). That is, "one offense is not necessarily included in another unless the elements of the lesser offense are a subset of the elements of the charged offense."<sup>119</sup> If the proposed lesser offense included "an element not required for the greater offense," it was not an LIO.<sup>120</sup> In affirming *Foster's* indecent acts conviction, the CMA paid lip service to adopting the elements test laid out by *Schmuck* and *Teters*, but actually adopted a far more flexible (and subjective) standard to uphold Technical Sergeant Foster's conviction.

In *Foster*, the CMA announced that rather than simply lining up the elements of the greater and lesser offense to determine if the one was an LIO of the other, military practice required that the existence of a potential LIO could only be determined by "lining up elements *realistically* and determining whether *each* element of the supposed "lesser" offense is *rationally* derivative of one or more elements of the other offense-and *vice versa*."<sup>121</sup> By applying this more flexible "inherent relationship approach" to the facts of *Foster*, the CMA upheld his conviction of indecent acts as an "LIO" of the charged offense of forcible sodomy.

Looking at the elements of forcible sodomy and indecent acts, the court found that the first two elements of indecent acts were "rationally," if not literally, included in the elements of forcibly sodomy.<sup>122</sup> The CMA then analyzed away the fact that Article 134 offenses require proof of the element that they are "contrary to good order and discipline or service discrediting" by summarily announcing that:

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<sup>114</sup> 40 M.J. 140 (C.M.A. 1994).

<sup>115</sup> 489 U.S. 705 (1989).

<sup>116</sup> 37 M.J. 370 (1993).

<sup>117</sup> *Schmuck*, 489 U.S. at 716–17.

<sup>118</sup> *Teters*, 37 M.J. at 376.

<sup>119</sup> FED. R. CIV.P. 31(c).

<sup>120</sup> *Schmuck*, 489 U.S. at 716.

<sup>121</sup> 40 M.J. 140, 146 (C.M.R. 1994).

<sup>122</sup> *Id.*

The enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles. Although the Government is not required to prove these elements in an enumerated-article prosecution, they are certainly present.<sup>123</sup>

Thus, two years after the Supreme Court's decision in *Schmuck* and one year after the CMA's own decision in *Teters*, the *Foster* court essentially re-adopted, under the guise of "realistically" determining whether each element of the lesser offense was "rationally" a sub-set of the greater offense, the same "inherent relationship," ad hoc, case-by-case determination of lesser included offenses that had been rejected in *Schmuck* and *Teters*. This led to sixteen years of mischief and confusion that ended, in part, with the CAAF's 2009 case *United States v. Miller*<sup>124</sup> and then definitively with the CAAF's 2010 decision in *United States v. Jones*.<sup>125</sup>

In *Miller*, the CAAF disemboweled and overruled *Foster* and the cases that followed its rationale "to the extent those cases support the proposition that clauses 1 and 2 of Article 134, UCMJ, are *per se* included in every enumerated offense[.]"<sup>126</sup> The *Jones* court completed the *coup de grace* on *Foster* started in *Miller*. In *Jones*, the CAAF confessed that it had "drifted significantly from the *Teters* application of *Schmuck* with respect to LIOs" and recognized that the inherent relationship test for LIOs originating in-line with the *Foster* decision was "no longer seriously supportable in light of our more recent focus-consonant with the Constitution, precedent of the Supreme Court, and the *Teters* line of cases—on the significance of notice and elements in determining whether an offense is a subset (and thus an LIO) of the greater offense."<sup>127</sup> Going forward, the CAAF summarized the "elements test" for determining an LIO as follows:

Under the elements test, one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called a greater offense because it contains all of the elements of offense X along with the one or more additional elements.<sup>128</sup>

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<sup>123</sup> *Id.* at 143.

<sup>124</sup> 67 M.J. 385 (C.A.A.F. 2009).

<sup>125</sup> 68 M.J. 465 (C.A.A.F. 2010).

<sup>126</sup> *Miller*, 67 M.J. at 389 (overruling in part *United States v. Foster*, 40 M.J. 140 (C.M.A. 1994)).

<sup>127</sup> *Jones*, 68 M.J. at 470.

<sup>128</sup> *Id.*

Because *Miller* overruled the proposition that all enumerated offenses silently contain the element that the alleged conduct was “to the prejudice of good order and discipline” or “of a nature to bring discredit upon the armed forces,” the elements test announced in *Jones* unequivocally rules out Article 134 offenses as LIOs of enumerated offenses. This means that Article 134 LIOs listed in part IV of the *MCM* and affirmed by case law are no longer LIOs of enumerated offenses because they all contain an element that the enumerated offenses do not. As the listed LIOs in the *MCM* and affirmed in case law between 1994 and 2010 cannot be trusted to determine LIOs going forward, military justice practitioners must apply the elements test announced in *Jones* to the charges in their cases to determine what is, and isn’t, an LIO of the charged offense.

In November 2010, the CAAF released *United States v. Alston*,<sup>129</sup> which applied the elements test described in *Jones*. In *Alston*, the question before the court was whether a military judge erred by giving an aggravated sexual assault by causing bodily harm LIO instruction, over defense objection, when the accused was charged with forcible rape under Article 120(a), UCMJ.<sup>130</sup>

Analyzing the trial judge’s decision to instruct on aggravated sexual assault as an LIO of rape by force, the court first referred back to *Schmuck’s* holding that “one offense is not ‘necessarily included’ in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction [regarding a lesser included offense] is to be given.”<sup>131</sup> The court noted, however, that “[t]he elements test does not require that the two offenses at issue employ identical statutory language. Instead, the meaning of the offenses is ascertained by applying the “normal principles of statutory construction.”<sup>132</sup>

Reviewing the charged offense and the instructed LIO, the CAAF noted that the first element of both offenses was identical in that it required that the accused cause another person “to engage in a sexual act.”<sup>133</sup> Turning to the second element of the charged rape, the court noted that the force required was defined in Article 120(t)(5) as “action to compel submission of another or to overcome or prevent another’s resistance by . . . physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.”<sup>134</sup> The second element of aggravated sexual

assault, on the other hand, only requires “caus[ing] another person of any age to engage in a sexual act . . . causing bodily harm.”<sup>135</sup> Bodily harm is defined by Article 120(t)(8) as “any offensive touching, however slight.”<sup>136</sup>

The question of whether the judge’s LIO instruction was correct turned on whether the bodily harm element of “aggravated sexual assault under Article 120(c), as defined in Article 120(t)(8) as including an offensive touching, however slight, was a subset of the force element in the offense of rape under Article 120(a), as defined in Article 120(t)(5)(C).”<sup>137</sup> Using the ordinary rules of statutory construction, the CAAF determined that the force described in Article 120(t)(5)(C) clearly included the offensive touching described in the bodily harm element of Article 120(t)(8). However, the court cautioned that the same result would not apply to the definitions of force described by Article 120a(t)(5)(A)<sup>138</sup> and Article 120a(t)(5)(B),<sup>139</sup> which do not require an offensive touching.<sup>140</sup> In affirming the military judge’s decision to give the LIO instruction, the CAAF emphasized that a careful analysis of the facts of a case and the use of the elements test announced in *Jones* in light of the “common and ordinary understanding of the words” used in the articles mean more than whether a given offense is a listed LIO in the *MCM*.<sup>141</sup>

In many respects the post-*Jones* world of LIO will be simpler for military judges. There is a more objectively clear logic to the elements test required by *Jones* than the subjective test applied under the inherent relationship test that preceded it. On the other hand, the now defunct inherent relationship test had fifteen years of precedent to support what constituted an LIO. The Constitutional basis for the change to determining what is an LIO will also have a potentially case-dispositive impact on cases still pending appeal where the accused was found guilty of what was considered an LIO under the inherent relationship test at trial that is demonstrably not an LIO under the post-*Jones* elements test.<sup>142</sup> Of more immediate interest to judges will

<sup>129</sup> 69 M.J. 214 (C.A.A.F. 2010).

<sup>130</sup> *Id.* at 215.

<sup>131</sup> *Id.* at 216 (quoting *Schmuck v. United States*, 530 U.S. 255, 263 (2000)).

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

<sup>133</sup> *Id.*

<sup>134</sup> *MCM*, *supra* note 4, pt. IV, ¶ 45a(t)(5).

<sup>135</sup> *Id.* pt. IV ¶ 45a(c)(1).

<sup>136</sup> *Id.* pt. IV ¶ 45a(t)(8).

<sup>137</sup> *Alston*, 69 M.J. at 216.

<sup>138</sup> *MCM*, *supra* note 4, pt. IV, ¶ 45a(t)(5)(A) (“The use or display of a dangerous weapon or object”).

<sup>139</sup> *Id.* pt. IV, ¶ 45a(t)(5)(B) (“The suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object”).

<sup>140</sup> *Alston*, 69 M.J. at 216.

<sup>141</sup> *Id.* Given the new post-*Jones* realities of the law of lesser included offenses (LIOs), there is a strong argument to be made that the current listing of LIOs in the manual is probably more misleading than helpful.

<sup>142</sup> See *United States v. Giroud*, 70 M.J. 5 (C.A.A.F. 2011) (holding that negligent homicide is not a LIO of premeditated murder); *United States v. McMurrin*, 70 M.J. 15 (C.A.A.F. 2011) (holding that negligent homicide is not a LIO of involuntary manslaughter); *United States v. Moore*, Army 20080795 (A. Ct. Crim. App. Oct. 27, 2010) (unpublished) (holding that assault with intent to commit rape is not a LIO of rape); *United States v.*

be the impact of the *Jones* opinion on charging decisions in the future.

Going forward, the Government can be expected to charge offenses under several alternative theories. In the aggravated sexual contact example used above, the Government would have at one time been able to charge aggravated sexual contact and reasonably expect to get an instruction on wrongful sexual contact as an LIO. Today, the Government would likely charge both as alternative theories of criminal liability. This will raise the issue of how to instruct on what would have previously been covered under a greater and lesser included offense instruction.

There would appear to be three ways a military judge could deal with this situation. First, the military judge could instruct the panel that the accused could be found guilty of aggravated sexual contact or wrongful sexual contact, but not both. The panel would vote on the more serious offense first, and if there was a finding of guilty to aggravated sexual contact, the panel could be directed to enter a not guilty finding to wrongful sexual contact. The second option would be to allow the panel to vote on both offenses and then, upon a finding of guilty to both, the military judge could dismiss the lesser offense. The third option, if the accused were found guilty of both offenses, would be to merge the two offenses for purposes of sentencing.

The first instructional option would appear to be the most complicated and most susceptible to misinterpretation by the panel. The second option has the benefit of simplicity and the least danger of creating an unreasonable multiplication of charges issue, but has the drawback of removing any safety net for an otherwise successful prosecution in which the greater offense is for some reason found wanting on appeal. In other words, what if the Aggravated Sexual Contact is found to be factually insufficient on appeal? If the military judge dismisses the lesser offense of Wrongful Sexual Contact, the conviction could not be affirmed on that basis and jeopardy would have already attached so the accused could not be re-tried for either offense.

Because of the obvious shortcomings in the first two approaches, the best course of action would appear to be merging the offenses for purposes of sentencing. While this approach risks criticism based upon an argument that it exaggerates the accused's criminality and represents an unreasonable multiplication of charges, the determination of what is "unreasonable" must be interpreted in light of the limited options the Government faces with in the post-*Jones* environment.

## Conclusions

During its 2009 term, the CAAF issued relatively few opinions that impacted military judges' instructions. Nonetheless, these opinions cover a wide range of criminal law topics, including offenses, defenses, and evidence. The majority of these opinions share a common theme: they reiterate the law and serve to remind military judges of the advisability of following the proposed instructions within the *Benchbook*. Two of this term's cases, however, deserve special attention as they change the law with respect to instructions. The first notable opinion, and the one that will likely have the most significant and far-reaching effect on military justice practice is *United States v. Jones*. The changes that the CAAF makes to the methodology of determining LIOs erases a significant amount of precedential case law and essentially creates a blank slate in this area of the law. As trial counsel, defense counsel, and military judges all adapt to the changes in charging decisions that are sure to follow *Jones*, practitioners can anticipate a rocky road ahead with respect to LIOs. The second is *United States v. Neal*,<sup>143</sup> which in combination with the recently published CAAF opinions in *United States v. Prather*<sup>144</sup> and *United States v. Medina*,<sup>145</sup> will be addressed in a separate article. Despite challenges that practitioners may face when drafting instructions, the standard practice of considering the evidence, applying the law, and implementing the intent of the law when there is not clear guidance will continue to produce the best and most accurate results.<sup>146</sup>

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Honeycutt, Army 20080589 (A. Ct. Crim. App. Sept. 1, 2010) (unpublished) (holding that wrongful sexual contact is not an LIO of rape by force).

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<sup>143</sup> 68 M.J. 289 (C.A.A.F. 2010).

<sup>144</sup> 69 M.J. 338 (C.A.A.F. 2011).

<sup>145</sup> 69 M.J. 462 (C.A.A.F. 2011).

<sup>146</sup> See Colonel Timothy Grammel & Lieutenant Colonel Kwasi L. Hawks, *Annual Review of Developments in Instructions*, ARMY LAW., Feb. 2010, at 61.

## Lecture to the U.S. Army 58th Judge Advocate Officer Graduate Course:

### *The Role of the Judge Advocate in Contemporary Operations: Ensuring Moral and Ethical Conduct During War*

*Brigadier General H.R. McMaster\**

The strength of any Army unit and across our military is, as you know, our junior officers and our noncommissioned officers. A great example of junior officer leadership was Dylan Reeves, the brother of your fellow JAG officer Shane Reeves. Dylan was an incredibly courageous and effective combat platoon leader that I served with while commanding 3rd ACR. General Harmon, one of my personal heroes, while commanding the 2nd Armored Division in World War II, stated that his division would succeed only if the platoon succeeded. Dylan showed me that this statement remains true and the importance of resiliency in combat units. Therefore, one of the things I would like to talk with you about today is the importance of building resiliency among your Soldiers and creating cohesive, tough teams that can stand up to the demands of any mission. As judge advocates you play a big part helping

prepare our units for the extreme demands of combat and understanding how to do that holistically is really important.

I was not sure what I was going to talk about today as there are numerous relevant areas in which judge advocates play a significant role in contemporary operations. Judge advocates, as you know, have taken on a broad range of responsibilities, far beyond what anybody would have anticipated prior to the current wars. I believe that our judge advocates, more than anybody else, have adapted extraordinarily well to these increased demands. I personally know the value of a good legal advisor as I benefited tremendously from Lieutenant Colonel Neoma White's efforts and counsel. Major Mike Martinez, our Deputy, who was killed in action in Tal Afar, was an awesome officer as well. There is so much we have taken on in terms of assistance, training host nation security forces, rule of law missions, detention operations, and working within an indigenous law system that relies upon legal expertise. Who would have thought that our military would be at this nexus of war fighting and the law? I believe our judge advocates have done a brilliant job adapting to this reality and have been a primary reason for the successes we have had in Iraq as well as in Afghanistan.

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General McMaster served in numerous command and staff positions in the United States and overseas. His initial duty assignment was to the Second Armored Division at Fort Hood, Texas, where he served as a support platoon leader, tank platoon leader, tank company executive officer, and scout platoon leader in 1st Battalion, 66th Armor Regiment. In 1989, he was assigned to the Second Armored Cavalry Regiment in Nuremberg, Germany where he served as regimental plans officer. In March 1990, he assumed command of Eagle Troop, Second Squadron which he commanded in Bamberg, Germany and Southwest Asia during operations Desert Shield and Desert Storm. After the squadron returned to Germany, he assumed duties as squadron operations officer. In the summer of 1992, General McMaster began graduate study in history at the University of North Carolina, Chapel Hill. In 1994, he reported to the Department of History at the U.S. Military Academy where he served as an assistant professor. He was assigned to the National Training Center in June of 1997 and joined the 11th Armored Cavalry Regiment where he served as executive officer of 1st Squadron and regimental operations officer. In October 1989, Brigadier General McMaster joined the 1st Squadron, 4th Cavalry in Schweinfurt, Germany and commanded the "Quarterhorse" until June of 2002. From May 2003 to May 2004, he served as Director, Commander's Advisory Group at U.S. Central Command. General McMaster assumed command as the 71st colonel of the Third Armored Cavalry Regiment at Fort Carson, Colorado in June 2004. His command tour included a one-year combat mission in Iraq from 2005 to 2006. From July 2006 until June 2008, he was assigned to U.S. Central Command with duty in London as a Senior Research Associate at the International Institute for Strategic Studies and duty in Iraq as Special Assistant to Commander, Multi-National Force-Iraq. From August 2008 until July 2010 Brigadier General McMaster served as the Director, Concept Development and Learning in the Army Capabilities Integration Center, Training and Doctrine Command at Fort Monroe, Virginia.

Before I go on with our discussion, I want to take a moment and really thank you for your service. Thank you for what you are doing in this time of war. I know it has placed great strains on you and your families. I hope you take time during this course to reflect, to share varying perspectives with fellow officers, and to think broadly about our profession and how we can improve the combat effectiveness of our forces. As you all know, we are engaged with enemies that pose a grave threat to all civilized peoples. Just as previous generations defeated Nazi fascism, Japanese imperialism, communism, and totalitarianism, we will defeat these enemies. We all remember the murder of thousands of our fellow Americans on September 11th. Since those attacks, our nation has been at war and it is you who stand between them and those who they would murder—not just in our country, but also in places like Afghanistan, Iraq, Pakistan, Somalia, and Yemen.

As the attempt to commit mass murder on a flight bound for Detroit reminds us, security and the operations we are conducting overseas are naturally connected to our own security. Our enemies seek to enlist masses of ignorant, disenfranchised young people with a sophisticated campaign of propaganda and disinformation. They work within and across borders, posing a new kind of threat due to their ability to communicate and mobilize resources globally. Moreover, the enemy employs mass murder of innocents as their principal tactic within this war. I think all of us

recognize that if these terrorists were to gain access to weapons of mass destruction, attacks such as those on September 11 and those against innocents elsewhere would pale in comparison.

As President Obama observed in Oslo, to say that force is sometimes necessary is not called cynicism, but a recognition of history, imperfections of man and the limits of reason. He observed that a nonviolent movement could not have stopped Hitler's armies. Negotiations cannot convince Al Qaeda's leaders to lay down their arms. The President also observed that the use of military power—for example our humanitarian mission in the Balkans—can be used to help others to live in freedom and prosperity and this, in turn, secures a better future for our children and grandchildren. So I firmly believe the service women and men who are serving in our armed forces today are both warriors and humanitarians, and it falls on you in large measure as judge advocates to help your commanders communicate that message and to inculcate that belief into our institutional culture. So, again thank you for your service.

What I would like to talk about today is the need for us, as an institution, to build cohesive teams and create resilient Soldiers capable of overcoming the enduring psychological and moral challenges of combat. My idea for this discussion came from a book I was reading about a week ago called *Black Hearts*.<sup>1</sup> It is a book about a platoon that essentially disintegrates under the pressures of operations in South Baghdad. In the platoon, discipline and cohesion breaks down for a number of different reasons resulting in the rape and murder of an Iraqi family. This of course raises the question: How could this happen? Today, I want to address this troubling question by picking out a few themes from the book.

More specifically, I would like to focus my remarks on our connected responsibilities of ensuring moral and ethical conduct in war, while also preparing Soldiers psychologically for the extraordinary demands of combat. It is likely you will be called on to advise commanders on these issues, and I want to share some thoughts on how we can prepare our Soldiers and our units for these challenges.

Prior to the wars in Afghanistan and Iraq, the debate over future armed conflicts focused on the importance of emerging technologies. Many believed that technology would completely transform war, calling this the revolution in military affairs. The consensus was that technologically advanced U.S. Forces would be able to overwhelm inferior enemy forces with superior communication capabilities, precision munitions, and perfect surveillance of the

battlefield. Simply put, we were seduced by technology. You remember some of the language, right? No pure competitor until 2020, we are going to achieve full spectrum dominance and so forth. However, this definition of armed conflict divorced war from its political nature. It tried to simplify war into a targeting exercise where all we had to do was target the enemies' conventional forces which conveniently look just like ours. As we now know, this approach did little to prepare us for the challenges we subsequently faced in Iraq and Afghanistan.

As British Lieutenant General, Sir John Kiskey observed, for many military professionals, warfare, the practice of war, war fighting and combat were synonymous. Thus, these military professionals misled themselves into believing that there was no more to the practice of war than combat. Despite many armed forces finding themselves involved in other types of operations, like we did in Somalia and the Balkans, these missions were largely considered by many in the military establishment to be aberrations. Operations other than war, as they came to be known in British and American doctrine, were viewed as distractions from the real thing; more specifically, large-scale, high-tech intrastate conflict. The lack of intellectual preparation for the wars we are in clearly limited our military effectiveness at the beginning of our operations in Afghanistan and in Iraq.

But our military is a learning institution, and we adapted to the demands of the conflicts by undertaking a broad range of adaptations, including improving our military education and training; refining our tactics; and investigating abuses and other failures. These adaptations derived in part from a better appreciation of the political complexity of the wars we were in and the complexity of war in general. Many of these lessons were formalized in the December 2006 publication of the counterinsurgency manual. The manual is meant to provide a doctrinal foundation for education, training, and operations. Our forces have adapted, our leaders have emphasized ethical conduct, and every day our Soldiers take risks and make sacrifices to protect innocents.

However, as I mentioned, there are at times breakdowns within units. It is our responsibility to steel our Soldiers and our units against these breakdowns. The blind faith in technology that I discussed earlier, essentially dehumanized our understanding of war. It ignored critical continuities in war and exaggerated the effect of technology on the nature of armed conflict. As John Keegan observed in *The Face of Battle*, a 1974 classic study of combat across five centuries, the human dimension of war exhibits a very high degree of continuity. He said, "What battles have in common is human, the behavior of men struggling to reconcile their instinct for self-preservation, their sense of honor, and the achievement of some aim over which other men are ready to kill them. The study of battle is, therefore, always the study of fear and usually of courage; always of leadership, usually of obedience; always of compulsion, sometimes of insubordination; always of anxiety, sometimes of elation or

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<sup>1</sup> JIM FREDERICK, *BLACK HEARTS* (Harmony Books 2010).

catharsis; always of uncertainty and doubt misinformation and misapprehension, usually also of faith and sometimes of vision; always of violence, sometimes also of cruelty, self-sacrifice, compassion. Above all, it is always a study of solidarity, and it is usually also the study of disintegration. For it is the disintegration of human groups that battle is directed.”

Keegan was obviously sensitive to the social and psychological dimensions of combat. He argued though against turning the study of war over to sociologists or psychologists. He contended that understanding war and warriors required an interdisciplinary approach and a long perspective. If you take away one thing from our discussion today, I ask you to embrace your duty to study warfare in order to form your own vision of war and to use that vision to help prepare yourself and your fellow Soldiers, Airmen, Marines, and Sailors for the challenges that they are going to face in combat. Additionally, it is imperative that you help your commanders ensure Soldiers are ethical in how they conduct warfare. Commanders must not allow their units to disintegrate. Keegan observes that units disintegrate under the extraordinary physical and psychological demands of combat.

Because our enemies are unscrupulous, some argue for relaxation of ethical and moral standards. I would guess you have talked a lot about this in connection with interrogation techniques or targeting. Some argue that the ends—the ends of defeating this nihilistic, brutal enemy—justify the means employed. But to think this way would be a grave mistake as the war in which we are engaged demands that we retain the moral high ground regardless of the depravity of our enemies. Ensuring ethical conduct goes beyond the law of war and must include a consideration of our values, our ethos.

Prior to the experiences of Iraq and Afghanistan, ethical training in preparation for combat was centered almost exclusively on the law of war. Training covered the Geneva Conventions and the relevant articles of our Uniform Code of Military Justice. However, as Christopher Coker observed in a great book called *The Warrior Ethos*, individual and institutional values are more important than legal constraints on moral behavior. This is because legal contracts are often observed only as long as others honor them or as long as they are enforced. Experience in Iraq and in Afghanistan have inspired our military to emphasize values training as the principle means, along with law of war training, of ensuring moral and ethical conduct in combat. So let’s talk about philosophy for a little bit.

In particular, utilitarianism, associated with the thinking of John Stuart Mill, would have us focus on achieving good consequences from the conflicts we are in. As the counterinsurgency manual points out, the insurgent often tries to provoke excessive or indiscriminate use of force. Therefore, we are fighting these wars really on two battlegrounds: a battleground of intelligence and a

battleground of perception. We have to, both locally in Afghanistan and in Iraq and more broadly in the war on terror, be able to separate insurgents and terrorists from the population. This means treating the local population with respect and building relationships with the people, as trust leads to intelligence. We have to counter what is a very sophisticated enemy propaganda disinformation campaign, and we have to clarify our true intentions, not just with words or messages, but with our deeds and our actions. This is particularly difficult because the enemy seeks to place the onus on us for their indiscriminate type of warfare. They try to deny us positive contact with the population and blame us for their own murderous acts.

Immanuel Kant would say that it is our duty to ensure ethical and moral conduct in this war. Kant would have us treat the people as the ends, not simply the means that we manipulate in order to achieve our own ends. In essence this is the ethics of respect. Where there is a contest for the trust and allegiance of the people, moral and ethical conduct permits us to defeat our enemies, whose primary sources of strength are coercion and intimidation. This might sound a bit theoretical, so I would like to talk to you about specific components of ensuring moral and ethical conduct despite the uncertain and dangerous environments in which our forces are operating. Breakdowns in discipline will result in immoral or unethical conduct in war. These breakdowns can be traced to four factors.

The first factor is ignorance: ignorance concerning the mission, the environment, or failure to understand or internalize the warrior ethos or a professional military ethic. This results in breaking the bond that binds Soldiers to our society, and more importantly, Soldiers to each other. The second factor is uncertainty. Ignorance causes uncertainty, and uncertainty can lead to mistakes—mistakes that can harm civilians unnecessarily. Warfare will always have a component of uncertainty, but leaders must strive to reduce uncertainty for their troopers and for their units.

The third factor is fear. Uncertainty combines with the persistent danger inherent in combat to incite fear in individuals and units. Leaders must strive not only to reduce uncertainty for their troopers, but also must build confident units, because it is confidence that serves as our firewall against fear, and it is fear that has a disintegrating effect on organizations. The final factor is combat trauma. Fear experienced over time, or caused by a traumatic experience, can lead to combat trauma. Combat trauma often manifests itself in actions that compromise the mission and in actions that violate our professional military ethic and our ethos.

The Army and Marine Corps counterinsurgency manual (COIN) recognizes that strong moral conduct during counterinsurgency operations is particularly difficult because in a counterinsurgency, violence, immorality, distrust, and deceit are intentionally used by the insurgent. So the COIN manual directs leaders to work proactively to establish and maintain the proper ethical climate in their organizations and

to ensure violence does not undermine our institutional values. For us to be successful in counterinsurgent operations, servicemembers must remain faithful to the basic American military standards of proper behavior and respect for the sanctity of life. To inculcate Soldiers in units against the four aforementioned causes of moral and ethical breakdowns, leaders should make a concerted effort in four parallel areas.

The first of these areas, and this is an area that I think you will advise commanders on, is applied ethics or values-based instruction. The second area is training: training that replicates as closely as possible the situations that Soldiers, as well as units, are likely to encounter in combat. The third area is education: education about the cultures and the historical experiences of the people for whom these wars are being fought. The fourth area is leadership: leadership that strives to set the example, keep Soldiers informed, and manage combat stress. Let me talk about each of these in more detail.

First, applied ethics and values-based education. Our Army's values aim in part to inform Soldiers about the covenant between them, our institution, and our society. The seven U.S. Army values of loyalty, duty, respect, selfless service, honor, integrity, and personal courage are consistent with philosophy, and, in particular, the Aristotelian virtue as well as the Asian philosophy of Cicero and modern philosophy of Immanuel Kant. It is easy, for example, to identify the similarity between our Army's definition of respect as beginning "with the fundamental understanding that all people possess worth as human beings" and Cicero's exhortation that "we must exercise a respectfulness towards men, both towards the best of them and also towards the rest."<sup>2</sup> The U.S. Army's values have obvious implications for moral conduct in counterinsurgency, especially in connection with the treatment of civilians and captured enemies. Applied ethics indoctrination for new Soldiers is perhaps even more important today than in the past because of the need to differentiate between societal and military professional views on the use of violence. Young Soldiers, Airmen, Marines, and Sailors are exposed to video games, action films, and gangster rap music which make violence appear justifiable as a demonstration of prose or as a way to advance personal interest.

We need to make sure that our servicemen and women understand that the law of war, as well as our Code of Military Justice, justifies violence only against combatants. The way to offset these sources of societal pressures can be found in the collective nature of Army ethics training. It is important to do it in basic training; it is important to do it in officer basic courses; and it is important that Soldiers understand that our Army and their fellow Soldiers expect

them to exhibit a higher sense of honor than that to which they are exposed to in popular culture. As again, Coker observes, in a world of honor, the individual who discovers his or her true identity and his or her role, and then turns away from the role, is turning away from themselves. Particularly important is the Soldiers recognition that he or she is expected to take risks and make sacrifices to accomplish the mission, to protect fellow Soldiers, or to safeguard innocents. Use of force that reduces risk to the Soldier, but threatens the mission or puts innocents at risk, must be seen as inconsistent with the military's code of honor and our professional ethic.

However, values education of this kind can seem hollow unless it is pursued in a way that provides context and demonstrates relevance. While we assume the ethical behavior as an end, we also should stress the utilitarian basis for sustaining the highest moral standards. Showing Soldiers enemy propaganda and saying "Okay your behavior can either support their propaganda, or it can counter their propaganda" is a powerful tool. Respectful treatment, addressing grievances, and building trust with the population ought to be viewed as essential to achieving success in counterinsurgency operations. Historical examples and case studies that point out how excesses or abuse in the pursuit of tactical expediency corrupted the moral character of units and undermines strategic objectives are also powerful tools. You might consider using films such as *The Battle of Algiers* to inspire discussions on topics such as torture, insurgent strategy, terrorist tactics, and propaganda. Applied ethics education by itself, however, cannot steel Soldiers and units against the disintegration that can occur under stressful combat. Training Army troopers and integrating them into cohesive, confident teams must also remain a priority for us as leaders.

Tough realistic training builds confidence and cohesion that serves as psychological protection against fear and psychological stress. As Keegan observed, much of the stress Soldiers experience in combat stems from uncertainty and doubt. Training must endeavor to replicate the conditions of combat as closely as possible and thereby reduce Soldiers' uncertainty and fear about the situations they are likely to encounter. Uncertainty and fear can cause inaction, or in a counterinsurgency environment, may lead to an overreaction that harms innocents and undermines the counterinsurgency mission. For example, how many times have we seen warning shots used against approaching vehicles? But how helpful are these shots when those on the receiving end of a warning shot most likely cannot even hear the shot? The warning shot is simply a way for a Soldier feeling fear to address uncertainty while possibly causing innocents to be harmed unnecessarily.

In Nancy Sherman's great book titled *Stoic Warriors*, she quotes Seneca to emphasize the importance of training as a form of bulletproofing Soldiers against the debilitating effects of fear and combat stress. Seneca said, "A large part of the evil consists in its novelty, but if evil has been

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<sup>2</sup> NANCY SHERMAN, *STOIC WARRIORS, THE ANCIENT PHILOSOPHY BEHIND THE MILITARY MIND* 56 (Oxford Univ. Press 2005).

pondered before that, the blow is gentle when it comes.”<sup>3</sup> We must base training scenarios directly on recent experiences of the units in Afghanistan and Iraq, and conduct training consistent with Aristotle’s observation that virtues are formed by repetition.

Repetitive training under challenging and realistic conditions prepares units to respond immediately and together to any situation that they encounter by using battle drills or rehearsed responses to a predictable set of circumstances. Demonstrating their ability to fight together as a team will build the confidence and cohesion necessary to suppress fear and help Soldiers and units cope with combat stress while preserving their professionalism and preserving their ethos. Further, Soldiers trained exclusively for conventional combat operations may be predisposed to over respond with disproportionate fire power upon contact with the enemy. Such reaction in a counterinsurgency environment might result in the unnecessary loss of innocent life and thus counter the overall aim of the operation. Now I am not saying that in training we should avoid evaluating units on the ability to overwhelm the enemy because it is to our advantage to not have a fair fight! What I am talking about is overwhelming the enemy in tactical situations while simultaneously applying firepower with discipline and discrimination. To help support this difficult balance, our training should include civilian role players, and it should also replicate as closely as possible ethnic religious tribal landscapes in the areas in which units operate. When role players are not available, we should train our own Soldiers to play those roles. Using Soldiers as role players can have a very positive effect by allowing them the opportunity to view our operations through the perspective of the civilian population.

Cultural and historical training and understanding is also extremely important. Unfamiliar cultures can compound the stress associated with physical danger. Ensuring that Soldiers are familiar with the history and culture of the region in which they are operating is critical for sustaining combat effectiveness and promoting respectful treatment of the population. I recommend using professional reading programs as well as lectures and films to educate your Soldiers on their area of operations. For example, there are excellent documentaries that are available on the history of Islam as well as the history of Iraq and Afghanistan. Understanding the ethnic cultural tribal dynamics will allow Soldiers to evaluate sources of information and also allow them to understand the second and third order effects of their actions. Additionally, leaders who have a basic understanding of the history of the culture will recognize and counter the enemy’s misrepresentation of history for propaganda purposes.

But perhaps most importantly, education and training that includes history of culture promotes moral conduct by

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<sup>3</sup> *Id.* at 117.

generating empathy for the population. The COIN manual describes genuine compassion and empathy for the populace as an effective weapon against insurgents. If Soldiers understand the population’s experience, feelings of confusion and frustration might be supplanted by concern and compassion. As Roman Emperor and Stoic philosopher Marcus Aurelius observed, respect becomes concrete through empathy. As Cicero reminds us, a Soldier’s respect must extend to the enemy and civilians as “we must exercise respectfulness towards all men.” As I mentioned before, this respect must be universal as we “ought to revere and to guard and to preserve the common affectionate and fellowship of the whole of humankind.”

Let me digress for a minute. There are some people who say that we cannot really connect with “these people.” They ask, “How can you connect to people in Iraq and Afghanistan?” They believe that our cultures are so different that we can never really connect as human beings. I believe there is a tendency among some people to cloak bigotry with the language of cultural sensitivity. If you think about, in late 2006, when we were deciding whether or not to reinforce the security effort in Iraq in order to stop what was at that time a humanitarian crisis of a colossal scale and a violent sectarian civil war, many who were against the idea justified their position by stating that “those Arabs have been killing each other for many years and there is nothing we can do about it.” This is bigotry cloaked in a language of cultural sensitivity. To combat this mentality, you must truly try to understand the culture, and thus I would recommend a good book on this called *Military Orientalism* which discusses Western military perspective on Eastern militaries over the centuries.

It is also important for us as leaders to study history in order to evaluate ourselves and help us understand others. Examining previous counterinsurgency experiences allows our leaders to ask the right questions, avoid some of the mistakes of the past, recognize opportunities, and identify effective techniques. A critical examination of history also allows Soldiers to understand the fundamentals of counterinsurgency theory and thereby equips them to make better decisions in what are highly decentralized operations. We must continually ask, what are we doing to prepare junior leaders to take on those additional responsibilities?

Soldiers need to recognize that the population must be the focus of the counterinsurgency effort and that the population’s perceptions of their government, of counterinsurgent forces, and of the insurgents, are of paramount importance. This highlights the need for Soldiers to treat the population respectfully and to clarify our intentions with our deeds and with our conduct. While it is important that all Soldier possess basic cultural knowledge, it is also important that leaders and units have access to cultural expertise. Soldiers often tend to share what they learn with other members of their team, so if you send just a few Soldiers to language training or to take college courses in the history of the area, you are going to see that

knowledge spread throughout your organization. Everybody should get a base of education and a base of training but I would recommend trying to develop some depth across your organization as well. Greater cultural expertise helps units to distinguish between reconcilable and irreconcilable groups, which ultimately reduces violence and achieves enduring security by mediating between factions that are willing to resolve differences in politics rather than in violence. Cultural expertise also contributes to the ethical conduct of war by helping Soldiers and units understand their environment. This richer understanding can help them determine how to apply force discriminately and to identify opportunities to resolve conflict short of force.

Finally, I would like to talk about combat stress. Education or indoctrination in professional military ethics and tough realistic training are important; however, they are insufficient in preserving moral character when confronted by the intense emotional and psychological pressures of combat. Soldiers in units must be prepared to cope with the stress of continuous operations in a counterinsurgent environment. An example is a unit like Dylan Reeves's platoon. Dylan's platoon took over fifty percent casualties in the city of Tal Afar, but had the resiliency to continue highly successful combat operations. So how do you get a unit to be able to handle such extreme combat stress without disintegrating into unprofessional or immoral conduct?

The answer is that control of stress is a command responsibility. Leaders must be familiar with grief counseling and grief work. Grieving our losses must be valued, not stigmatized. We have to understand how to communalize grief so we can get through difficult times together. We have to watch Soldier behavior carefully and identify warning signs. These include social disconnection, distractibility, suspiciousness of friends, irrationality, and inconsistency. If units experience losses, get them to stress counseling. Watch for Soldiers who become vindictive, as the pursuit of revenge can break down discipline of the unit and do significant damage to the mission. Commitment to fellow troopers and the mission must be the motivating factors in battle, not rage. Additionally, developing and maintaining unit cohesion is critical in preventing disorders associated with combat stress and combat trauma. As Jonathan Shay notes in a great book called *Achilles in Vietnam*, subtitled *Combat Trauma and the Undoing of Character*, what a returning Soldier needs most when leaving war is not a mental health professional, but a living community to whom his experience matters. Military education is thin on the psychological dynamics of combat. This is something as a judge advocate and an advisor to a commander that you can emphasize. Some of the books you might read and discuss include J. Glenn Gray's *The Warriors: Reflections of Men in Battle*, Jonathan Shay's book that I mentioned, *Achilles in Vietnam*, Dave Grossman's and Loren Christensen's book *On Combat, The Psychology and Physiology of Deadly Conflict in War and in Peace*.

But the factor that cuts across all of these areas is leadership. Common to all of these efforts to preserve the moral character of Soldiers in units is leadership. Lack of effective leadership has often caused combat trauma. Sun Tzu had it right 2500 years ago. Leadership is a matter of intelligence, trustworthiness, humaneness, courage, and sternness. Humaneness in the face of the ambiguous, difficult situations that we are facing today, and will face tomorrow, will permit Soldiers to remain psychologically ready and must be an area that our Soldiers and leaders focus on. Sternness involves ensuring that leaders are in positions of leadership—as well as not hesitating to remove those who do not enjoy the trust or confidence or do not deserve the trust and confidence of their troopers. Effective communication as a leader is important, vitally important. Leaders have to explain to troopers the importance of their mission, mistakes that are involved, and to make sure that they understand the higher commander's intent and concept for defeating the enemy and accomplishing the mission.

A key part to ensuring psychological well being, which is so critical to preserving discipline and moral conduct in combat, depends in large measure on preserving the Soldiers' sense of control. It is vital that troopers understand how the risks they are taking and how the sacrifices they and their comrades are making contribute to a mission worthy of those risks and sacrifices. Senior commanders must establish the right climate, and they have to send a simple and clear message to their troopers: every time you treat a civilian disrespectfully, you are working for the enemy. A command must have some basic standards of conduct, something along the enduring lines of *Standing Orders, Rogers Rangers*, given by Major Robert Rogers to his Rangers in 1759, that lets the unit know that they will overwhelm the enemy in every tactical engagement, but only apply firepower with discipline and discrimination. Other clear and simple messages important to impart to the unit include, treat Iraqis with respect; do not tolerate abusive behavior; and treat detainees humanely. Simple messages are important to set out the command's expectations and to establish the right climate. However, we must recognize that junior officers and noncommissioned officers enforce those standards of moral conduct in what are very highly decentralized operations. Preparing those leaders at the squad, platoon, and company levels for that responsibility is vitally important.

In the book I mentioned at the beginning, *Black Hearts*, the Headquarters and Headquarters Company commander within this battalion commented on the cause of the horrible rape and murders of civilians south of Baghdad. He said the following, "Clearly a lot of what happened can be attributed to a leadership failure, and I'm not talking about just at the platoon level. I'm talking about platoon, company, and battalion. Even I feel in some way indirectly responsible for what happened out there. I mean, we were all part of the team. We just let it go, and we let it go and go and go. We

failed those guys by leaving them out there like that without a plan.”<sup>4</sup>

It is a warrior ethos that permits Soldiers to see themselves as part of an ongoing historical community, a community that sustains itself across our armed forces through bonds of sacred trust, and a covenant that binds up to one another and then binds us to the society that we serve. The warrior ethos forms the basis for this covenant. It is comprised of values such as honor, duty, courage, loyalty

and self-sacrifice. The warrior ethos is important because it makes military units effective and because it makes war less inhumane, as our Commander-in-Chief observed in Oslo. Make no mistake: evil does exist in the world, but it is your advice as a judge advocate and it is your leadership as an officer that helps our forces remain true to our values as we fight these brutal and murderous enemies. I am proud to serve along side of you, and thanks very much for the opportunity to visit here with you today.

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<sup>4</sup> FREDERICK, *supra* note 1, at 9.

# The Last Stand<sup>1</sup>

Reviewed by Major Bradford D. Bigler\*

## I. Introduction

At the Battle of the Little Bighorn (LBH), a Civil War legend named George Armstrong Custer met death at the hands of Sitting Bull's warriors. The bodies were scarcely cold before the presses went hot. Ever since, participants, poets, and historians alike have been writing, re-writing, analyzing, and romanticizing<sup>2</sup> what became of Custer and his 210<sup>3</sup> U.S. cavalymen.

In *The Last Stand*, the critically acclaimed author Nathaniel Philbrick<sup>4</sup> writes the most recent installment in the overcrowded genre of Custer lore.<sup>5</sup> What distinguishes Philbrick's book from the pack is a unique perspective that combines three independent threads for an intriguing read. First, Philbrick promises to explore both Indian and Soldier perspectives on LBH;<sup>6</sup> second, he applies an analytical model toward unraveling how the participants' "distinctive personalities"<sup>7</sup> influenced key moments in the battle;<sup>8</sup> and third, he uses his analysis of Custer's personality to explain

the controversial eyewitness account of Peter Thompson, a survivor of LBH.

*The Last Stand* offers two thought provoking veins for the military reader. First, Philbrick's focus on developing decisive conclusions about LBH based on the characters' personality traits raises the exciting possibility of new insight into how personality affects military leadership in battle. In the end, though Philbrick's sometimes pessimistic view of human motives strips away some of the impact of his conclusions, *The Last Stand* nevertheless provides much food for thought about the nexus between effective leadership and interpersonal relationships. Second, *The Last Stand* delivers some interesting parallels to the current War on Terror. LBH was a single battle in a protracted counter-insurgency the United States fought against the Plains Indians. As such, the LBH is a timeless tale with application to the current day.

## II. Every Tale has Two Sides: Background on LBH

From the beginning, Philbrick delivers to the reader all the information necessary<sup>9</sup> to understand the big picture. In the first four chapters, Philbrick practically breathes the historical figures of both Custer and Sitting Bull to life. Custer is a tactical genius of Civil War fame<sup>10</sup> who has now inherited the arduous task of pursuing the Grant Administration's military policy toward the plains Indians.<sup>11</sup>

Unfortunately, the year 1876 finds Custer barely hanging onto command of his regiment. Philbrick explains the mutual and hearty "lack of respect"<sup>12</sup> between Custer and Major Reno, his second in command. Captain Frederick Benteen—Custer's senior captain and the one ordered to his relief at LBH—harbored a grudge fueled by Custer's supposed abandonment of several soldiers at a battle nearly ten years before LBH.<sup>13</sup>

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<sup>1</sup> NATHANIEL PHILBRICK, *THE LAST STAND* (2010).

<sup>2</sup> Books have even been written about the proliferation of knowledge and theories in the area. See, e.g., MICHAEL A. ELLIOT, *CUSTEROLGY: THE ENDURING LEGACY OF THE INDIAN WARS AND GEORGE ARMSTRONG CUSTER 2* (2007) (referring to the "arena of historical interpretation and commemoration as 'Custerology'").

<sup>3</sup> PHILBRICK, *supra* note 1, at 311. The actual number of troopers slain is probably as unknowable as what actually happened at the Battle of Little Big Horn (LBH). See BRUCE A. ROSENBERG, *CUSTER AND THE EPIC OF DEFEAT 2* (1974) (setting the number at 212).

<sup>4</sup> Nathaniel Philbrick's book, *Mayflower: A Story of Courage, Community, and War* (2006), was a finalist for the 2007 Pulitzer Prize in History. Nathaniel Philbrick, *About*, NATHANIEL PHILBRICK, <http://www.nathanielphilbrick.com/about> (last visited Sept. 8, 2010). Many of his other books have also won prestigious national honors. *Id.* Most of Philbrick's previous works center around the sea and maritime history, particularly as it relates to New England. Nathaniel Philbrick, *Collected Works*, NATHANIEL PHILBRICK, <http://www.nathanielphilbrick.com/books/collected-works> (last visited Sept. 8, 2010).

<sup>5</sup> Although numerous volumes address LBH, the recently published James Donovan, *A Terrible Glory: Custer and the Little Bighorn—the Last Great Battle of the American West* (2008) competes most directly with *The Last Stand*.

<sup>6</sup> PHILBRICK, *supra* note 1, at xxi. While some books tell both sides, most read more like textbooks. See, e.g., HERMAN J. VIOLA, *LITTLE BIGHORN REMEMBERED* (1999), and COLONEL W.A. GRAHAM, *THE CUSTER MYTH: A SOURCE BOOK OF CUSTERIANA* (1953).

<sup>7</sup> PHILBRICK, *supra* note 1, at xxi.

<sup>8</sup> Philbrick is not the first with this idea. See, e.g., CHARLES K. HOFLING, M.D., *CUSTER AND THE LITTLE BIG HORN: A PSYCHOBIOGRAPHICAL INQUIRY* (1981), for a specific look at how Custer's "personality may have affected his actions at [Little Big Horn]." *Id.* at x.

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<sup>9</sup> A brief word on research values: *The Last Stand* delivers over 130 pages of appendices, notes, and bibliography; however, perhaps to make reading more fluid, Philbrick omitted all end notes. For the casual reader, the approach is welcome; for the reviewer, less so.

<sup>10</sup> General Sheridan gave Custer and his wife the desk upon which the surrender at Appomattox Courthouse was signed, with the note, "[P]ermit me to say . . . that there is scarcely an individual in our service who has contributed more to bring this desirable result than [Custer]." PHILBRICK, *supra* note 1, at 48.

<sup>11</sup> *Id.* at 62–65.

<sup>12</sup> *Id.* at 155.

<sup>13</sup> *Id.* at 12–13.

Perhaps most significant is Custer's congressional testimony against corruption in the Grant Administration, which nearly quashed his participation in the military campaign before it had even begun. Under a compromise brokered by General Sheridan, Custer returned to his unit, but under the command of General Terry,<sup>14</sup> a fact that Custer apparently resented.<sup>15</sup> The first few chapters build a strong case that Custer was out for redemption at LBH.<sup>16</sup>

In the second and fourth chapters, Philbrick then turns to Sitting Bull, the charismatic, brave, and uncompromising spiritual leader of the Lakota.<sup>17</sup> His rise to chiefdom began nearly twenty years earlier in a daring battlefield challenge of a rival Indian chieftain.<sup>18</sup> By the summer of 1876, due to the convergence of an increasingly aggressive Administration policy toward non-agency Indians,<sup>19</sup> an Army attack on a neighboring Indian village,<sup>20</sup> and a healthy buffalo population,<sup>21</sup> Sitting Bull was leading a resurgent yet fragile coalition of his own Lakota and the nearby Cheyenne.<sup>22</sup>

### III. Interplay of Personality and Military Leadership

Philbrick's initial focus on the personalities and motives of the key leaders at LBH promises to raise new and interesting insights into military leadership at LBH. While his emphasis on personality excels in some areas—namely, in using Custer's personality to explain and synthesize Thompson's controversial account of Custer at LBH—in other areas, his bias toward sinister interpersonal motives distracts him from drawing more solid conclusions.

One frustrating moment comes early in the book. In the lead-up to the battle at LBH, Philbrick convincingly argues all the reasons why Terry and Custer were at odds over leadership of the regiment and the plan to attack. Up to this point, his analysis is almost a cautionary warning of what

can happen when a leader allows his own personal ambition to come ahead of the mission.

Philbrick then takes a wrong turn, declaring that Terry, rather than Custer, was “perhaps more than any other single person, responsible”<sup>23</sup> for the rout at LBH. Philbrick argues that Terry's orders were ambiguous, and Custer knew it.<sup>24</sup> Terry “had a talent for crafting documents that appeared to say one thing but were couched in language that could allow for an entirely different meaning,”<sup>25</sup> and wrote the order in an ambiguous fashion to “protect his reputation no matter what the outcome.”<sup>26</sup> Philbrick appears to conclude that Terry, knowing Custer was impatient to fight,<sup>27</sup> set a noose for Custer to hang himself on.

Philbrick's conclusion reads like a conspiracy theory. First, he relies on questionable and potentially unreliable sources<sup>28</sup> to reach his conclusion. More telling, Philbrick acknowledges that the plan Terry developed actually matched the ground truth of where the enemy forces were located.<sup>29</sup> Thus, Philbrick leaves the reader with an unanswered and problematic question: How does creating a tactically sound plan designed to result in a coordinated movement on the exact location of the Indians make Terry “responsible”<sup>30</sup> for Custer's defeat?

Philbrick's ensuing narrative provides little to support his hypothesis that Terry was to blame. Philbrick describes how Custer's reconnaissance of the Rosebud river valley became sidetracked when Custer decided to abandon the “blue line,”<sup>31</sup> a decision which resulted in him being at LBH days before he should have been and effectively foreclosed any reliance on neighboring units during the battle.

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<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 39, 43 (describing Custer's “skylarking” and generally irresponsible behavior during the early parts of the march).

<sup>16</sup> Although many books contain the same underlying facts, see, e.g., Robert M. Utley, *Cavalier in Buckskin: George Armstrong Custer and the Western Military Frontier* 103–05, 161–63 (1988), Philbrick draws them together in a way that illuminates Custer's predicament especially well.

<sup>17</sup> PHILBRICK, *supra* note 1, at 54.

<sup>18</sup> *Id.* at 28–30.

<sup>19</sup> *Id.* at 65.

<sup>20</sup> *Id.* at 66.

<sup>21</sup> *Id.* at 68.

<sup>22</sup> *Id.* at 53–69 (describing the re-gathering of the Indian population under Sitting Bull's command after the attack on Wooden Leg's village during the winter, and Sitting Bull's performance and visions received while performing that year's Sun Dance).

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<sup>23</sup> *Id.* at 103.

<sup>24</sup> *Id.* at 103. Philbrick provides Custer's frustrated and sullen demeanor after the officer call as evidence that Custer knew he was being trapped.

<sup>25</sup> *Id.* at 101.

<sup>26</sup> *Id.* at 102.

<sup>27</sup> See *id.* at 99 (describing the impact a “fresh Indian trail” would have on Custer) (quoting Gibbon's letter to Terry, in CYRUS T. BRADY, *INDIAN FIGHTS AND FIGHTERS* 223 (1971)). See also, *id.* at 98–99 (arguing the actual plan was to “turn[] his wild man loose” to attack at his discretion) (quoting Major Brisbin, in E.A. BRINNSTOOL, *TROOPERS WITH CUSTER: HISTORIC INCIDENTS OF THE BATTLE OF THE LITTLE BIGHORN* 280 (1989)).

<sup>28</sup> Each survivor had a stake in the judgment of history: very different stories came from the Army officer testimony than did from the family and friends of Custer. PHILBRICK, *supra* note 1, at 351–52.

<sup>29</sup> “Terry believed the Indians were somewhere to the southwest between the Rosebud and Bighorn rivers, probably in the vicinity of the Little Bighorn,” *id.* at 97, the exact location Custer found them.

<sup>30</sup> *Id.* at 103. Philbrick recognizes the most pressing tactical problem of the day was to ensure the Indians did not escape. *Id.* at 96. Philbrick baldly states that splitting into two columns was a poor plan, without ever really discussing why. *Id.*

<sup>31</sup> *Id.* at 140–48 (describing the scouting expedition that discovered the Indian village at Little Big Horn, and Custer's subsequent decision to lead the Regiment off the blue line to attack the village).

Philbrick's narrative thus undermines his conclusion that Terry was to blame, and instead reinforces the conclusion that Custer's fateful decision to abandon the original plan led directly to the defeat at LBH.

After this misstep, Philbrick makes up for lost ground when he addresses Custer's apparent inaction at the height of battle. The story begins some hours earlier when Custer divided the regiment into three separate commands, assigning Major Reno to mount a charge from the south. The second detachment, under the command of Captain Benteen, was to reconnoiter the left flank and bring in the pack trains. Meanwhile, Custer would take the main body and maneuver up the eastern side of the Little Big Horn to flank the Indian village. Reno's unit was the first to make contact. However, upon realizing the potential size of the village, Reno aborted the charge and dismounted into a skirmish line.

While Reno's forces waited, Philbrick describes how Sitting Bull sent his adopted son out with a friend to see if "the army [was] coming to make peace."<sup>32</sup> The overture met with disaster when a Soldier shot one of the boys through both legs, and eventually shot Sitting Bull's horse right from under him.<sup>33</sup> The Indians attacked and quickly overwhelmed Reno.<sup>34</sup> Reno ordered a hasty and disorganized retreat, which rapidly degenerated into "a desperate mob . . . [where] the Indians were free to hunt the men as if they were buffalo."<sup>35</sup> Reno's rout comes alive in remarkably vivid and gruesome detail.

After spending much of the book casting Custer as a brilliant and courageous-to-the-point-of-reckless tactician, Philbrick next takes on a vexing contradiction: while the Indians fought Reno's troops in the river valley, Custer and his troops apparently did nothing for "as long as forty-five minutes."<sup>36</sup> Hinting at Custer and Reno's mutual dislike, Philbrick discusses the possibility that Custer may have simply been waiting for the Indians to defeat Reno in an attempt to hog all the glory himself<sup>37</sup> before concluding that the "distressing number of [versions of what happened make it] impossible to verify [that] account."<sup>38</sup>

At this critical juncture in the battle, Philbrick delivers on his promise to synthesize the controversial memoirs of

Peter Thompson through an interesting exposition of Custer's personality.<sup>39</sup> Thompson was a trooper assigned to Custer's unit, whose horse had given out during Custer's march up the eastern riverbank. Before eventually falling in with Reno's battalion, Thompson had traversed much of the battlefield between Reno and Custer, at one point claiming to have stumbled upon Custer alone at the river's edge, far forward of his unit's position, "just one half hour before the fight commenced."<sup>40</sup> Although most historians have dismissed Thompson's account, Philbrick draws on past examples of Custer's daring and risky exploits<sup>41</sup> to suggest that Thompson may have witnessed Custer "perform[ing] much needed reconnaissance."<sup>42</sup> Although impossible to know whether Philbrick is right, he does a solid job of reconciling Custer's absence from the battlefield with his reputation for courage in battle.

Philbrick's conclusion indirectly raises a lesson in military leadership: when in charge take charge. Instead, Custer allowed his own impatience and desire for excitement to get the better of him. If Custer had been where he needed to be—with his troops—instead of where he wanted to be—out conducting reconnaissance—LBH may have turned out much differently.

#### IV. *The Last Stand* in an "Era of Persistent Conflict"

Beyond its commentary on the interplay of military leadership at LBH, *The Last Stand* delivers surprisingly gritty insights that parallel many of the lessons the United States is learning in this new "era of persistent conflict."<sup>43</sup> Three of the more striking lessons loosely fit under the familiar axiom to "know yourself and know your enemy."<sup>44</sup>

First, with regard to knowing one's own human terrain, *The Last Stand* reveals the toll of war to be as real then as it is today. Philbrick's concluding discussion of the physical and psychological effects of battle is both profound and apropos. In 1876, both sides brutalized and misused civilians and those hors de combat—sometimes out of pure frustration, and sometimes out of an effort to gain the upper

<sup>32</sup> *Id.* at 176.

<sup>33</sup> *Id.* at 177.

<sup>34</sup> *Id.* at 166–205 (detailing the battle scene between Reno and the Indian warriors).

<sup>35</sup> *Id.* at 190.

<sup>36</sup> *Id.* at 206.

<sup>37</sup> Philbrick quotes Theodore Roosevelt's words after being addressed with this theory: "The human heart has strange and gruesome depths." *Id.* at 208.

<sup>38</sup> *Id.* at 210.

<sup>39</sup> *Id.* at 210–19.

<sup>40</sup> *Id.* at 218. Although the bibliography includes three of Thompson's writings, he does not cite to which actual work he quoted. *Id.* at 443.

<sup>41</sup> *Id.* at 217 (detailing how Custer was no stranger to "outrageously risking thing[s]").

<sup>42</sup> *Id.* at 216. While others have made the same conclusion as to Custer's purpose, those conclusions were apparently driven primarily by tactical considerations and not a personality analysis. *See id.* at 388.

<sup>43</sup> *See, e.g.,* STRATEGIC STUDIES INSTITUTE, UNITED STATES ARMY RESOURCES, ERA OF PERSISTENT CONFLICT, available at <http://www.strategicstudiesinstitute.army.mil/global-war-on-terrorism> (providing a helpful collection of studies on current warfare lessons learned).

<sup>44</sup> SUN TZU, ON THE ART OF WAR 25 (Lionel Giles, transl. 2007).

hand.<sup>45</sup> Over a hundred years' later, after numerous developments in the laws of war,<sup>46</sup> the principles of humanity sometimes seem as much a mirage today as they were in Custer's day.<sup>47</sup> To the extent that the exigencies of war are often antithetical to the principles of humanity contained in the laws of war, leaders and judges alike should remain vigilant to combat signs of Soldier fatigue or frustration with the law of war.

The second lesson relates to the first. With the current Army emphasis on resiliency,<sup>48</sup> the leadership lessons in *The Last Stand* seem particularly timely. Philbrick details the unhealthy responses some of the leaders had to the horrors of war. Some consumed enormous amounts of alcohol and opium or were court-martialed.<sup>49</sup> Some eventually committed suicide.<sup>50</sup> As leaders, *The Last Stand* highlights in dramatic detail the leader's need to take care of herself before she can take care of her Soldiers.

The third point strikes right to the heart of knowing your enemy. Counterinsurgency doctrine (COIN) has recently rediscovered that with the population as the objective, "some of the best weapons . . . do not shoot."<sup>51</sup> On this point, Philbrick's analysis of a crucial point in the battle—Sitting Bull's last-minute attempts to initiate peace talks with

Custer's regiment—practically shouts the importance of impressing on Soldiers the fundamental differences between COIN and conventional warfare. At LBH, the cavalry troopers responded to the peace talks with firepower. Had the cavalry troopers been listening for the call of peace rather than to the drums of war, LBH might have ended much differently.

Then as now, the United States is in a long war for the hearts and minds of a population. In some ways, the issues and insights in *The Last Stand* hold a mirror up for the modern day. In words popularized by Kenny Chesney, *The Last Stand* tells us that "the more things change, the more things stay the same."<sup>52</sup>

## V. Concluding Thoughts

The military reader should find Philbrick an invigorating and thought provoking read on many different levels. Written more like a novel than a history book, Philbrick's energetic writing style shines, particularly in the battle scenes. Philbrick accurately conveys the fog of battle by "burrowing into the mystery,"<sup>53</sup> skipping around the battlefield in frequent sideways flashes that explore all angles of the battle.

If you are looking to find out what ultimately became of Custer's unit on the eastern riverbank, you will be disappointed. Where the preceding pages of battle have all the dash and fancy of a cavalry charge, Philbrick's treatment of the final engagement feel more like a tactical withdrawal into a "necessarily speculative account of [what] ultimately led to Custer's Last Stand."<sup>54</sup> Although his storytelling ability remains intact, much of the vigor of the tale dissipates under the weight of the assumptions he makes to tell it.

In conclusion, if you are looking for an engaging read that offers surprising insight into the impacts personality and relationships have on leadership in battle, as well quite a few useful lessons and comparisons with modern-day campaigns, then *The Last Stand* is a must-read.

<sup>45</sup> One of Custer's favored tactics to subdue the Indian warriors was to capture the women and children. See PHILBRICK, *supra* note 1 at 259–60. Rape and use as human shields was also common. *Id.* at 137–39, 277. Philbrick describes atrocities committed by both sides: the desecration of Indian graves, *id.* at 84–85; scalping, *id.* at 199, and mutilation, *id.* at 200 (describing troopers severed penis shoved in own mouth), 228 (describing a stick thrust down a soldier's throat), 275 (discovering scorched heads in a fire pit and Tom Custer's skull mashed to the thickness of a hand), and 278–9 (describing Custer's ears pierced and arrow shoved into urethra).

<sup>46</sup> See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members at Sea, Aug. 12, 1949, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

<sup>47</sup> See, e.g., Gregg Zoroya, *U.S. Military Report: Taliban Uses Youths in Afghan Fight*, USA TODAY, September 12, 2010, available at [http://www.usatoday.com/news/world/Afghanistan/2010-09-12-child-soldiers-afghanistan\\_n.htm](http://www.usatoday.com/news/world/Afghanistan/2010-09-12-child-soldiers-afghanistan_n.htm); Thomas E. Ricks, *In Haditha Killings, Details Came Slowly: Officer's Version at Odds with Evidence*, WASH. POST, June 4, 2006, available at <http://washingtonpost.com/wp-dyn/content/article/2006/06/03/AR2006060300710.html>.

<sup>48</sup> See, e.g., UNITED STATES ARMY, HEALTH PROMOTION, RISK REDUCTION, SUICIDE PREVENTION: REPORT 2010, available at [http://usarmy.vo.llnwd.net/e1/HPRRSP/HP-RR-SPReport2010\\_v00.pdf](http://usarmy.vo.llnwd.net/e1/HPRRSP/HP-RR-SPReport2010_v00.pdf); Gregg Zoroya, *Army Reports Record Number of Suicides for June*, USA TODAY, July 15, 2010, available at [http://www.usatoday.com/news/military/2010-07-15-army-suicides\\_N.htm](http://www.usatoday.com/news/military/2010-07-15-army-suicides_N.htm).

<sup>49</sup> PHILBRICK, *supra* note 1, at 301. Reno later went through two courts-martial for sexually related misconduct.

<sup>50</sup> *Id.* at 286.

<sup>51</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-153 (15 Dec. 2006).

<sup>52</sup> CRAIG WISEMAN & STEVE MCEWAN, *Summertime, on THE ROAD AND THE RADIO* (BNA Records 2005).

<sup>53</sup> PHILBRICK, *supra* note 1, at xxii.

<sup>54</sup> *Id.* at 258.

## CLE News

### 1. Resident Course Quotas

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

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

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

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

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

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

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

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

### 2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (<http://www.jagcnet.army.mil/JAGCNETINTER/NET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset> (click on Courses, Course Schedule))

ATRRS. No.	Course Title	Dates
<b>GENERAL</b>		
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug 11 – 25 May 12
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

<b>NCO ACADEMY COURSES</b>		
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

<b>PARALEGAL COURSES</b>		
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11

<b>ADMINISTRATIVE AND CIVIL LAW</b>		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11

<b>CONTRACT AND FISCAL LAW</b>		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

<b>CRIMINAL LAW</b>		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

<b>INTERNATIONAL AND OPERATIONAL LAW</b>		
5F-F47E	2011 USAREUR Operational Law CLE	16 – 19 Aug 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

### 3. Naval Justice School and FY 2010–2011 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.

<b>Naval Justice School Newport, RI</b>		
<b>CDP</b>	<b>Course Title</b>	<b>Dates</b>
0257	Lawyer Course (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (080)	6 – 9 Sep 11 (Newport)

2622 (Fleet)	Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (030)	13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (020) Legalman Paralegal Core (030)	24 May – 9 Aug 11 31 Aug – 20 Dec 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	8 – 10 Aug 11 (Millington) 20 – 22 Sep 11 ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
900B	Reserve Lawyer Course (020)	26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3759	Legal Clerk Course (080)	19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (030)	18 – 29 Jul 11
NA	Iraq Pre-Deployment Training (020)	12 – 14 Jul 11
NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

<b>Naval Justice School Detachment Norfolk, VA</b>		
0376	Legal Officer Course (080) Legal Officer Course (090)	11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (070) Legal Clerk Course (080)	18 – 29 Jul 11 22 Aug – 2 Sep 11
3760	Senior Officer Course (060) Senior Officer Course (070)	8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (070) Legal Officer Course (080)	25 Jul – 12 Aug 11 22 Aug – 9 Sep 11
947J	Legal Clerk Course (080) Legal Clerk Course (090)	1 – 12 Aug 11 22 Aug – 2 Sep 11

#### 4. Air Force Judge Advocate General School Fiscal Year 2010–2011 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 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

#### 5. Civilian-Sponsored CLE Courses

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

- AAJE: American Academy of Judicial Education  
P.O. Box 728  
University, MS 38677-0728  
(662) 915-1225
- ABA: American Bar Association  
750 North Lake Shore Drive  
Chicago, IL 60611  
(312) 988-6200
- AGACL: Association of Government Attorneys in Capital Litigation  
Arizona Attorney General's Office  
ATTN: Jan Dyer  
1275 West Washington  
Phoenix, AZ 85007  
(602) 542-8552

ALIABA: American Law Institute-American Bar Association  
Committee on Continuing Professional Education  
4025 Chestnut Street  
Philadelphia, PA 19104-3099  
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine  
Boston University School of Law  
765 Commonwealth Avenue  
Boston, MA 02215  
(617) 262-4990

CCEB: Continuing Education of the Bar  
University of California Extension  
2300 Shattuck Avenue  
Berkeley, CA 94704  
(510) 642-3973

CLA: Computer Law Association, Inc.  
3028 Javier Road, Suite 500E  
Fairfax, VA 22031  
(703) 560-7747

CLESN: CLE Satellite Network  
920 Spring Street  
Springfield, IL 62704  
(217) 525-0744  
(800) 521-8662

ESI: Educational Services Institute  
5201 Leesburg Pike, Suite 600  
Falls Church, VA 22041-3202  
(703) 379-2900

FBA: Federal Bar Association  
1220 North Fillmore Street, Suite 444  
Arlington, VA 22201  
(571) 481-9100

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

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

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

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (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 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail [donna.pugh@us.army.mil](mailto:donna.pugh@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](http://www.clereg.org) (formerly [www.cleusa.org](http://www.cleusa.org)) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

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

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

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

## Current Materials of Interest

### 1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

### 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](mailto:LAAWSXXI@jagc-smtp.army.mil)

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

### **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](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on “directory” for the listings.

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

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

### **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](mailto:Daniel.C.Lavering@us.army.mil).