



# THE ARMY LAWYER

*Headquarters, Department of the Army*

May 2013

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*Major Jacqueline J. DeGaine*

### Make the Most of It:

How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources

*Major Dan Dalrymple*

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## Lore of the Corps

### Civilian Lawyers Join the Department: The Story of the First Civilian Attorneys Given Direct Commissions in the Corps

Fred L. Borch  
Regimental Historian & Archivist

Today, it is not unusual to find judge advocates (JAs) who entered the Corps from civilian life, as directly commissioned officers. Nearly one hundred years ago, however, it was a radical idea to invite civilian attorneys, who had no military experience, to don uniforms and join the Judge Advocate General's Department (JAGD). This is the story of the first selection from civil life of twenty JAs in World War I—lawyers who were at the top of the American legal profession in the early 20th century and some of whom remain larger than life personalities in American law.

On 17 June 1917, just two months after Congress declared war and the Army prepared to draft 600,000 young Americans to fight in what would become the American Expeditionary Force (AEF), the War Department announced that it was also commissioning twenty civilian attorneys to be JAs. These attorneys were to “be assigned to a division of the Army and . . . all of them would be Majors (MAJ) on the staff of the Judge Advocate General in the field.”<sup>1</sup> Just a year earlier, the authorized strength of the JAGD had been thirteen JAs. Consequently, adding twenty majors more than doubled the size of the Department—bringing the total number of men wearing the crossed pen-and-sword on their collars to thirty-two.<sup>2</sup>

The Army of this period did not have a formal education program for officers or enlisted personnel in any branch or field. Everything was “on the job” training, which meant that Brigadier General Enoch Crowder,<sup>3</sup> who had been serving as the Judge Advocate General (JAG) since 1911, wanted to select the best possible lawyers for these new positions. After America's entry into World War I, there was no shortage of applicants; patriotism, and with it a desire to serve, swept the country.

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<sup>1</sup> James Brown Scott, *Judge Advocates in the Army*, AM. J. INT'L L. 650 (1917).

<sup>2</sup> Congress authorized the twenty additional majors when it enacted legislation reorganizing the Judge Advocate General Department on 3 June 1916. That legislation provided that the Judge Advocate General was to be a brigadier general, and that his Department also would have four colonels and seven lieutenant colonels. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 107 (1975).

<sup>3</sup> Crowder was promoted to major general in October, when Congress increased the top Army lawyer's rank and pay. For a biography of Crowder, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955). See also Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, ARMY LAW., May 2012, at 1–3.

According to the War Department, “a great many distinguished lawyers and legal professors, men of national standing,” applied to be Army lawyers. There were so many “highly qualified” applicants, said the Army, that it was “hard . . . to select a few from so much good material.”<sup>4</sup> That said, the Army's Committee on Public Information announced that the following had been selected to be directly commissioned as majors:

Henry L. Stimson, former Secretary of War;  
Professor Eugene Wambaugh, Harvard Law School;  
Professor Felix Frankfurter, Harvard Law School;  
Dr. James Brown Scott, leading authority on international law;  
Professor John H. Wigmore, Dean of Northwestern University;  
Gaspar G. Bacon, son of Robert Bacon, former U.S. Ambassador to France;  
Frederick Gilbert Bauer of Boston, Massachusetts;  
George S. Wallace of Huntington, West Virginia;  
Nathan W. MacChesney of Chicago, Illinois;  
Lewis W. Call of Garrett, Maryland;  
Burnett M. Chiperfield, former congressman from Chicago, Illinois;  
Joseph Wheless of St. Louis, Missouri;  
George P. Whitsett of Kansas City, Kansas;  
Victor Eugene Ruehl of New York, New York;  
Thomas R. Hamer of St. Anthony, Idaho;  
Joshua Reuben Clark, Jr., of Washington, D.C.;  
Charles B. Warren of Detroit, Michigan;  
Edwin G. Davis of Boise, Idaho; and  
Hugh Bayne of New York, New York.<sup>5</sup>

The Army insisted—and well may have intended—that these twenty new judge advocates would see action in France. As the Committee on Public Information explained:

It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a “snap” or for a “silk stocking” position far in the rear of the actual fighting. The officers acting on the staff of the Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought

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<sup>4</sup> Scott, *supra* note 1, at 651.

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

into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.<sup>6</sup>

Of the twenty attorneys identified in the War Department's press release, all but one—Gaspar G. Bacon<sup>7</sup>—ultimately accepted direct commissions as majors in the JAGD Reserve. Additionally, while the Army had insisted that these new lawyers in uniform would be part of the actual fighting force, only about half of the men chosen by the Department joined the AEF and deployed to Europe; the remainder did not leave U.S. soil. But their service in the JAGD was exemplary, and many went on to make even greater contributions in their lives after the Army.

*Henry L. Stimson.* After accepting a commission on 22 May 1917 in the Judge Advocate General's Reserve Corps, MAJ Stimson was assigned to the Army War College (then located at Fort McNair), where he served in the Intelligence Section. Three months later, however, Stimson transferred to the Field Artillery with the rank of lieutenant colonel (LTC). He deployed to France in December and remained in the AEF until August 1918. He left active duty as a colonel (COL). Stimson had previously served as Secretary of War (1911 to 1913) under President William H. Taft. He would later join President Herbert Hoover's cabinet as Secretary of State (1929 to 1933) and serve yet again as Secretary of War (1940 to 1945) in the Roosevelt and Truman administrations in World War II. Stimson was a remarkable lawyer and public servant; he is the only individual to have served in four presidents' cabinets.<sup>8</sup>

*Eugene Wambaugh.* Major Wambaugh, who accepted his commission on 8 November 1916, had been a Harvard professor since 1892. He had a national reputation as a constitutional law expert, which explains why tJAG Crowder appointed him to be the Chief of the Constitutional and International Law Division, Office of the Judge Advocate General. Wambaugh had previous government experience, having "worked on war problems while serving

as the special counsel to the State Department in 1914," and having been "the American member of the Permanent International Commission under the treaty with Peru in 1915."<sup>9</sup> Major Wambaugh was promoted to LTC in February 1918 and pinned silver eagles on his uniform in July of that same year. Wambaugh was 62 years old when he was honorably discharged from active duty and returned to teaching law at Harvard's law school.

*Felix Frankfurter.* Major Frankfurter, who accepted his Reserve commission on 6 January 1917, spent his entire tour of duty in Washington, D.C., where he was assigned to Office of the Secretary of War. He worked a variety of issues, including the legal status of conscientious objectors, and wartime relations with labor and industry. He refused to wear a uniform while on active duty but, as Frankfurter was close friends with tJAG Crowder, he apparently was allowed to wear only civilian clothes. In his memoirs, Frankfurter explained why:

The reason I didn't want to go into uniform was because I knew enough about doings in the War Department to know that every pipsqueak Colonel would feel he was more important than a Major . . . . As a civilian I would get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, 'You wait. He's got a Colonel in there.'<sup>10</sup>

After leaving active duty, Frankfurter continued a stellar career. He declined to be Solicitor General in 1933 but accepted President Roosevelt's nomination to the U.S. Supreme Court in 1939. Frankfurter served as an associate justice until retiring in 1962.

*James B. Scott.* Canadian-born James Brown Scott was fifty years old when he accepted a commission as a Reserve Corps major on 8 November 1916. A graduate of Harvard University, he had been a law professor at Columbia University from 1903 to 1906 and lecturer in international law at Johns Hopkins University from 1909 to 1916. Despite the War Department's insistence that these directly commissioned officers would be in the field, Scott too remained in Washington after being called to active duty on 15 May 1917. His expertise, however, was critical after the fighting in Europe ended; MAJ Scott was the technical advisor to the American Commission to Negotiate Peace and technical delegate of the United States to the Paris Peace Conference from 1918 to 1919.

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

<sup>7</sup> While he could have served in the JAGD, Gaspar Griswold Bacon (1886–1947) decided instead to serve as a Field Artillery officer during World War I. He was a member of the 81st Division and left active duty as a major. During World War II, Bacon obtained a commission as a major in the Army Air Forces and took part in the D-Day landings in Normandy on 6 June 1944. He was honorably discharged as a colonel in 1945. Parkman Dexter Howe, *Gaspar Griswold Bacon*, PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY (OCT. 1947–MAY 1950), 426–28 (1950).

<sup>8</sup> For more on Stimson, see HENRY L. STIMSON, ON ACTIVE SERVICE IN PEACE AND WAR (1947); RICHARD H. CURRENT, SECRETARY STIMSON (1954); ELTING E. MORRISON, TURMOIL AND TRADITION: A STUDY OF THE LIFE AND TIMES OF HENRY L. STIMSON (2003).

<sup>9</sup> THE ARMY LAWYER, *supra* note 2, at 118.

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

*John Henry Wigmore.* When MAJ John Henry Wigmore was called to active duty in 1917, he “was at the peak of his career.”<sup>11</sup> His widely acclaimed and authoritative text, *A Treatise on the System of Evidence in Trials at Common Law*, was in print, and he was the dean of Northwestern University Law School. He also was the president of the Association of American University Professors. When Wigmore arrived in Washington, tJAG Crowder, who was also serving as the Provost Marshal General, decided that Wigmore’s skills could best be used in administering the Selective Service Act of 1917. Crowder, who had overall responsibility implementing the war-time draft that ultimately would induct three million men in to the armed forces, appointed MAJ Wigmore as the “Chief, Statistical Division, Office of The Provost Marshal General.” In this position, Wigmore “originated and placed into execution the general plan of statistical tables” used to screen and classify over ten million men.<sup>12</sup> Major Wigmore also “did liaison work with nearly every government agency in Washington” and authored a chapter on evidence for the 1917 *Manual for Courts-Martial*. In recognition of his work, he was promoted to LTC in early 1918. He was later promoted to full COL that same year. Although COL Wigmore left active duty on 8 May 1918, he retained his status as a Reserve officer. He signed his last oath of office in 1940, when he was 77 years old.

*Frederick Gilbert Bauer.* Major Bauer, who was commissioned as a major in the Reserve Corps on 3 June 1916, received his A.B. in 1900 from Harvard *summa cum laude*, and his LL.B. in 1903 from Harvard *cum laude*. He had been in private practice in Boston prior to World War I and had been an officer in the Massachusetts National Guard since 1910. After being ordered to active duty in July 1917, Bauer served stateside as the Division Judge Advocate, 6th Division, until deploying to France. When he joined the AEF—only three weeks before the fighting in Europe ended—Bauer was put in charge of the General Law Section. He left active duty as a LTC.

*George S. Wallace.* A native of Albemarle County, Virginia, George Selden Wallace received his law degree from the University of West Virginia in 1897. He started his own law firm in Charleston, West Virginia, the same year and, after the outbreak of the Spanish American War in 1898, served as Divisional Quartermaster, 2d West Virginia Volunteer Infantry. At the time he accepted a commission as a Reserve major in November 1916, Wallace was the Judge Advocate General of the State of West Virginia and had achieved considerable fame in prosecuting labor radical Mary Harris “Mother” Jones after the Cabin Creek riots of 1912.<sup>13</sup> After a brief period of service in Washington, D.C.,

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<sup>11</sup> *Id.* at 119.

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

<sup>13</sup> See Fred L. Borch, *The Trial by Military Commission of “Mother Jones,”* ARMY LAW., Feb. 2012, at 1–4.

Wallace was promoted to LTC in June 1918 and sent to France as senior assistant of the Judge Advocate General for the AEF. Wallace left active duty in June 1919 and resumed an active legal, business, and political career in West Virginia.

*Nathan William MacChesney.* Nathan William MacChesney accepted his direct commission in November 1916. Prior to being ordered to active duty in June 1917, MacChesney had practiced law in Chicago, served as Illinois’s special assistant attorney general from 1913 to 1918, and was the president of the Illinois State Bar Association. With prior service in the National Guard of California, Arizona, and Illinois, MAJ MacChesney had considerable military experience. He remained in the United States during the war, however, and did not deploy to France until after the fighting had ended. Ultimately, he served briefly in the Office of the Acting Judge Advocate General, AEF, where he “served as chief of the section which reviewed dishonorable discharge cases in France.”<sup>14</sup> After the Armistice, MacChesney represented the Army before the Supreme Court in the case of *Stearns v. Wood*, which held that the Secretary of War had the power to control the military forces of a state by executive order. In 1932, President Herbert Hoover appointed MacChesney as Envoy Extraordinary and Minister Plenipotentiary (the chief of U.S. diplomatic mission) to Canada and, when MacChesney presented his credentials, he wore the full dress uniform of a COL, JAGD Reserve; however, the Senate never confirmed him.<sup>15</sup> MacChesney later also served as Counsel General to Thailand. He retired as a Reserve brigadier general in 1951.<sup>16</sup>

*Lewis W. Call.* Born in Ohio in 1858, Lewis W. Call was fifty-eight years old when he was ordered to active duty as a Reserve major in August 1917. An 1889 graduate of Columbian (now George Washington) University’s law school, Call had extensive service as a civilian employee in the JAGD. He had been a law clerk, chief clerk, and solicitor in the Department from 1889 to 1914 and, at the time he accepted a commission, was serving as a law officer for Bureau of Insular Affairs. This extensive legal experience in tJAG’s office probably explains not only why Call was offered a commission but also why he remained in Washington, D.C., for the entire war. His performance of duty must have been exemplary; Call was promoted to LTC in February 1918 and COL in July 1918.

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<sup>14</sup> THE ARMY LAWYER, *supra* note 2, at 122.

<sup>15</sup> NATHAN WILLIAM MACCHESNEY (1878-1954), U.S. DEP’T OF STATE OFFICE OF THE HISTORIAN, <http://history.state.gov/departmenthistory.state.gov/departmenthistory/people/macchesney-nathan-william> (last visited July 15, 2013).

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

*Burnett M. Chipierfield.* Major Burnett M. Chipierfield was an Illinois attorney and only just retired as an Illinois National Guard COL before he applied for a Reserve commission as a judge advocate. Having been elected to the House of Representatives in March 1915, Chipierfield also was a member of Congress at the time he pinned JAGD insignia on his uniform collar in November 1916; his term in the House ended in March 1917. Called to active duty on 2 May 1917, MAJ Chipierfield assisted tJAG Crowder in implementing the Selective Service Act in the Office of the Provost Marshal General. He returned to Illinois to coordinate the work of various draft boards in the greater Chicago area before assuming duties as Judge Advocate, 33d (Illinois) Division, in August 1917. He accompanied the division to France and was subsequently cited by MG George Bell, Jr., the commanding general, for performing duty “of great responsibility beyond that required by his office.” According to Bell, when Chipierfield was serving as a liaison officer with the 80th and 29th Divisions north of Verdun in October 1918, Chipierfield was “constantly under hostile artillery fire” and “voluntarily and frequently [went] to the front line for information.” He was in the thick of the action since, “on several occasions,” Chipierfield opened “serious and extensive traffic blocks under shell fire.”<sup>17</sup> In March 1919, then-LTC Chipierfield was still on active duty in Europe, where he was with the Army of Occupation in Koblenz, and was serving as the Judge Advocate, III Army Corps, AEF. In this position, Chipierfield was in charge of all civil affairs for that part of Germany occupied by the Corps: which meant that not only did he operate a “Provost Court” to prosecute German civilian offenders, but he also supervised “all the cities, Burgermeistereis, and political units located within the Corps area.”<sup>18</sup>

*Joseph Wheless.* Commissioned on 25 November 1916, Joseph Wheless was living in Chicago at the time he was called to active duty, and this probably explains why he was assigned as Assistant Judge Advocate, Central Department, Chicago, Illinois. Wheless was an international law expert and a specialist in South American law. He spoke Portuguese and Spanish and, while practicing law in Mexico City, wrote an officially authorized two-volume *Compendium of the Laws of Mexico*.<sup>19</sup> He also was the author of several legal texts on Tennessee law. Wheless never left American soil during his time as an Army lawyer and was honorably discharged on 15 December 1917—only a month after the fighting in France ended. In later life, Wheless’s views on religion made him a controversial figure. A self-professed atheist, he insisted that the Bible was a fraud, no man named Jesus ever lived, and that

Christianity as a religion “was based on and maintained by systematic persecution and murder.”<sup>20</sup>

*George P. Whitsett.* Born in Missouri in 1871, George P. Whitsett received his law degree from the University of Michigan in 1892 and then practiced law until the outbreak of the Spanish-American War in 1898. He then joined the 5th Missouri Volunteer Infantry and deployed to the Philippines, where his legal skills resulted in his being first assigned as a Judge of the Inferior Provost Court and later as a Judge of the Superior Provost Court of Manila.<sup>21</sup> It seems likely that this prior lawyering in the Philippines made him an attractive applicant for a Reserve commission. Major Whitsett accepted his appointment in May 1917 and then sailed to France, where he served as the Judge Advocate for the AEF’s 5th Army Corps. Whitsett was wounded in action during the Argonne offensive in October 1918. After the Armistice, then LTC Whitsett remained in Europe with the Army of Occupation. He returned to the United States in June 1919.

*Victor Eugene Ruehl.* Major Victor Eugene Ruehl, a graduate of the University of Indiana’s law school, had both service as a Soldier and considerable experience as an attorney when he accepted his direct commission as a Reserve officer on 3 January 1917. Ruehl had served as a Soldier in the Army’s Hospital Corps in the Philippine Islands from May 1899 to May 1904. After being honorably discharged, he completed law school and, after practicing for several years in Indiana, moved to New Jersey. From 1907 to 1917, Ruehl was the law editor of *Corpus Juris*, a legal encyclopedia,<sup>22</sup> and the editor-in-chief of *The New York Annotated Digest*, Volumes 5-18. After being called to active duty, Ruehl served in the Office of the Provost Marshal General, where he assisted with the implementation of the Selective Service Act. On New Year’s Day 1918, MAJ Ruehl joined the 35th Division and deployed with it to France in May 1918.

*Thomas Ray Hamer.* Thomas Ray Hamer of St. Anthony, Idaho, also had a remarkable pedigree as a lawyer. Born in Vermont, Illinois, in May 1864, Hamer had moved to Idaho in 1893 and then served as county attorney and as a member of the Idaho legislature. When the Spanish-American War began, Hamer was a captain (CPT) in the 1st Idaho Volunteer Infantry and deployed to the Philippines with his regiment in June 1898. He subsequently served as a judge on the first Provost Court organized in the Philippines under military occupation. In February 1899, Hamer was

<sup>17</sup> Letter from Lieutenant Colonel Burnett M. Chipierfield, to Colonel William S. Weeks, Exec. Officer, JAGD (March 30, 1919) (on file with the National Archives and Records Administration, Record Group, 153, Records of the Office of the Judge Advocate General, Entry 45).

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

<sup>19</sup> JOSEPH WHELESS, *COMPENDIUM OF THE LAWS OF MEXICO* (1910).

<sup>20</sup> JOSEPH WHELESS, *FORGERY IN CHRISTIANITY* 238 (1930).

<sup>21</sup> GEORGE B. DAVIS, *HEADQUARTERS, DIVISION OF THE PHILIPPINES, REPORT ON THE MILITARY GOVERNMENT OF THE CITY OF MANILA, P.I., 1898 TO 1901*, at 256 (1901).

<sup>22</sup> *Law Library of Congress*, LIBRARY OF CONGRESS, <http://memory.loc.gov/ammem/awhhtml/awlaw3/legal.html> (last visited July 16, 2013).

wounded at the Battle of Caloochan but the injury must have been slight since he was mustered out of his state regiment and commissioned as a LTC in the 37th U.S. Volunteer Infantry. Lieutenant Colonel Hamer then assumed duties as Military Governor and Commander, District of Cebu until the reorganization of the Supreme Court of the Philippine Islands, when he was appointed as one of the two Military Justices on that court. Honorably discharged in 1901, Hamer returned to Idaho and resumed his law practice. He served as Receiver of Public Monies, U.S. Land Office, Blackfoot, Idaho, and was elected to the U.S. House of Representatives in 1908. On active duty, MAJ Hamer served in the Office of the Judge Advocate, Western Department, before being reassigned to the Office of the Judge Advocate General in Washington, D.C. Hamer also served briefly as the Judge Advocate, Camp Gordon, Georgia, and Judge Advocate, Camp Sheridan, Alabama. He left active duty as a LTC and moved from Idaho to Portland, Oregon, where he practiced law until retiring in 1943.

*J. Reuben Clark, Jr.* Major Joshua Reuben Clark, Jr. already had a distinguished legal career before accepting a commission in February 1917. After graduating from the University of Utah (where he was valedictorian and student body president) and Columbia University, Clark served in a variety of important government positions, including: Assistant Solicitor and Solicitor, U.S. Department of State; Chairman, American Preparatory Committee for the Third Hague Conference; General Counsel of the United States, American-British Claims Arbitration; and Counsel for the Cuban government. After being called to active duty in June 1917, Clark was detailed as a special assistant to the U.S. Attorney General. He later assisted tJAG Crowder with the implementation of the Selective Service Act. His “zeal, great industry, and eminent legal attainments” in both assignments were rewarded with the Distinguished Service Medal. Clark’s citation reads, in part:

[F]rom June 1917 until September 1918 . . . he rendered conspicuous services in the compilation and publication of an extremely valuable and comprehensive edition of the laws and analogous legislation pertaining to the war powers of our Government since its beginning. From September 1918 to December 1918, as executive officer of the Provost Marshal General’s Office, he again rendered services of an inestimable value in connection with the preparation and execution of complete regulations governing the classification and later the demobilization of several million registrants.<sup>23</sup>

<sup>23</sup> U.S. War Dep’t, Gen. Orders No. 49 (25 Nov. 1922).

After leaving active duty in December 1918, Clark resumed an active legal and political career. A prominent and active leader in the Church of Jesus Christ of Latter Day Saints, Clark nonetheless found time to serve as an Under Secretary of State in the Coolidge administration and as U.S. Ambassador to Mexico. The J. Reuben Clark Law School at Brigham Young University is named after him.<sup>24</sup>

*Charles B. Warren.* When Charles Beecher Warren accepted a commission as a Reserve major in July 1917, he already was well-known in government legal circles: he had represented the United States as an associate counsel in hearings before the Joint High Commission to adjudicate claims of British subjects arising out of the Bering Sea controversy of 1896–97 and had served as counsel for the United States before the Permanent Court in The Hague in the Canadian Fisheries Arbitration between the United States and Great Britain in 1910. After being called to active duty, Warren was assigned to the Provost Marshal General’s Office, where he served as tJAG Crowder’s chief of staff and “formulated and directed regulations administering the Selective Service Act.”<sup>25</sup> In July 1918, then COL Warren (he had been promoted to LTC in February and COL in July) deployed to Europe, where he oversaw the classification (and exemption) of Americans living in France and England. For his “administration of the selective service law during the war . . . [and his] unselfish devotion, tireless energy, and extraordinary executive ability,” Warren was decorated with the Distinguished Service Medal in 1920.<sup>26</sup> After World War I, Warren was active in the Republican Party and, during the administration of President Calvin Coolidge, served as U.S. Ambassador to Japan (1921-1922) and U.S. Ambassador to Mexico (1924). Warren made the cover of *Time* magazine in January 1925<sup>27</sup> and shortly thereafter, President Coolidge nominated him to be U.S. Attorney General. Warren, however, “was never confirmed due to political controversy between the Senate and President Coolidge.”<sup>28</sup>

*Edwin G. Davis.* Edwin Griffith Davis accepted his appointment as a Reserve officer on 14 May 1917, at the age of forty-three. Born in Idaho, Davis graduated from the U.S. Military Academy in 1900 then served in the Philippines with the 5th Infantry. In 1903, he returned to West Point and was assigned as an instructor in Law and History. During

<sup>24</sup> As an aside, Clark’s son-in-law, U.S. Navy Captain Mervyn S. Bennion, was killed in action while commanding the U.S.S. *West Virginia* on 7 December 1941; Bennion was posthumously awarded the Medal of Honor. *World War II (Recipients A-F)*, US ARMY CENTER OF MILITARY HIST., <http://www.history.army.mil/html/moh/wwII-a-f.html> (last visited July 16, 2013).

<sup>25</sup> THE ARMY LAWYER, *supra* note 2, at 122.

<sup>26</sup> U.S. War Dep’t, Gen. Orders No. 10 (2 Apr. 1920).

<sup>27</sup> *Charles B. Warren | Jan. 26, 1925*, TIME, <http://www.time.com/time/covers/0,16641,19250126,00.html> (last visited July 16, 1925).

<sup>28</sup> THE ARMY LAWYER, *supra* note 2, at 122.

that time, Davis studied law and, two years later, was admitted to the bar in the District of Columbia. In 1907, then-CPT Davis was reassigned to Fort Baker, California, where he served as District Adjutant, Artillery District of San Francisco. In 1910, “he retired due to a physical disability contracted in the line of duty.”<sup>29</sup> Davis then practiced law in Boise, Idaho, and, after becoming involved in politics, served in the Idaho state legislature and as Assistant Attorney General of Idaho from 1913 to 1915. Called to active duty in May 1917, then MAJ Davis was the Chief of the Military Justice Division in Washington, D.C., and, upon promotion to LTC, was reassigned to be the JAGD representative on the War Department General Staff. Davis’s greatest contribution during World War I, however, was his work with Professor John Henry Wigmore, one of the other Reserve direct commissionees. Together, the two officers wrote the Soldiers’ and Sailors’ Civil Relief Act of 1918, which provided significant legal protections for Americans serving in the Army, Navy, and Marine Corps during the war.<sup>30</sup> For his “exceptionally meritorious and distinguished service,” COL Davis (he was promoted in July 1918) was awarded the Distinguished Service Medal. His citation lauds his work as “chief of the disciplinary division . . . [where] he contributed a most helpful means of avoiding serious errors in the administration of military justice during the war.”<sup>31</sup> In October 1919, Davis returned to civilian life. From 1922 to 1925, he served as the U.S. Attorney for Idaho, but he resigned from this position to become a special assistant to the U.S. Attorney General to handle war fraud cases. He “settled and adjusted many questions growing out of war contracts” and, at the close of a month-long trial in New York City in 1926, “won the only conviction secured by the Department of Justice in a criminal case growing out of war frauds.”<sup>32</sup> In 1929, Davis joined the legal department of the National Surety Company and, in 1934, was in U.S. District Court in Atlanta, Georgia, and “had just finished arguing a case” on behalf of the company “when he collapsed in the court room, and died before medical attention could be secured.”<sup>33</sup> He was only sixty years old.

*Hugh A. Bayne.* The last of the twenty lawyers offered a Reserve commission in the JAGD was Hugh Aiken Bayne of New York. Born in New Orleans in 1870, Bayne graduated from Yale University in 1892 and then returned to Louisiana and obtained a law degree from Tulane University. He

<sup>29</sup> *Edwin G. Davis*, REGISTER OF GRADUATES AND FORMER CADETS 1–36 (2000).

<sup>30</sup> Today, this legislation is familiar to judge advocates as the Servicemembers Civil Relief Act, 50 U.S.C. §§501-597b (2011). The original legislation authored by Davis and Wigmore expired after World War I but was renewed in 1940 and has been in effect since that time.

<sup>31</sup> U.S. War Dep’t, Gen. Orders No. 111 (2 Sept. 1919).

<sup>32</sup> *Edwin Griffith Davis*, ASS’N OF GRADUATES ANNUAL REPORT 216 (1936).

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

practiced law in New Orleans from 1894 to 1898 and in New York City from 1898 to 1917. After being commissioned as a Reserve officer in May 1917, MAJ Bayne joined General John J. Pershing’s staff and sailed with him to Europe just nine days later. Bayne then served as the Judge Advocate, Services of Supply, Counsel for the U.S. Prisoners of War Commission, and as Judge Advocate, 80th Division. During the Meuse-Argonne Offensive from 1–11 November 1918, now-LTC Bayne was a liaison officer with attacking units of the division. At the end of World War I, LTC Bayne was honorably discharged. Some years later, he was awarded the Distinguished Service Medal for displaying “untiring zeal, rare professional ability, and intellectual qualities of a high order.” According to the citation for this decoration, Bayne’s “special knowledge of the French language and the laws of France enabled him to render . . . services of immeasurable value and contributed markedly to the successes of the American Expeditionary Force.”<sup>34</sup> Bayne did not return to the United States after leaving active duty. Rather, he remained in Paris, France, where he served as a member of the Franco-American Liquidation Commission. In the 1920s, he also was an arbitrator on the Inter-Allied Reparations Commission established by the Paris Peace Conference. This commission determined the amount of reparations to be extracted from the Central Powers and paid to the Allies. Bayne participated in a number of significant cases, including a 1926 decision involving the commission’s appropriation of twenty-one oil tankers owned by a German subsidiary of Standard Oil to pay for German reparations. Standard Oil fought the decision, but lost.<sup>35</sup>

It is hard to imagine a more impressive group of attorneys offered direct commissions. From law school professors and practicing attorneys to politicians and a future Supreme Court justice, these judge advocates provided great service to the JAGD and the Army during a time of war. They continued to serve the legal profession and their communities with great distinction long after taking off their uniforms—and are yet another example of our Regiment’s rich and varied history.

*More historical information can be found at*

The Judge Advocate General’s Corps  
Regimental History Website

*Dedicated to the brave men and women who have served our  
Corps with honor, dedication, and distinction.*

<https://www.jagcnet.army.mil/History>

<sup>34</sup> U.S. War Dep’t, Gen. Orders No. 15 (5 Apr. 1923).

<sup>35</sup> For the decision of the Reparations Commission, see *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (U.S. v. Reparations Comm’n)*, 2 R.I.A.A. 777 (1926), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_II/777-795.pdf](http://untreaty.un.org/cod/riaa/cases/vol_II/777-795.pdf).

## Digital Evidence

Major Jacqueline J. DeGaine\*

*It's impossible to move, to live, to operate at any level without leaving traces, bits, seemingly meaningless fragments of personal information.*<sup>1</sup>

### I. Introduction

At 2000 on Tuesday night, Captain (CPT) Jones uses her iPhone to send CPT Smith a text message in an attempt to confirm the meeting place for Wednesday's Physical Training (PT) session. Receiving the text message, CPT Smith replies, confirming that Wednesday's PT session will start at 0615 with group stretching at the bottom of Birch Hill. To ensure that she knows her way to Birch Hill, CPT Smith conducts a quick search on her tablet's google maps app, and also uses her vehicle's Global Positioning System (GPS) the next morning. After a grueling run up and down Birch Hill, CPT Jones logs on to her Facebook account and posts a picture of the spectacular view of the snowcapped mountains from the top of the hill, with the caption, "[t]he weather is beautiful, wish you were here."

A short time later CPT Jones arrives at her office. While drinking her coffee she checks her work e-mail account and her electronic calendar to prepare for the day ahead. After reading her e-mail messages, CPT Jones listens to her voicemail messages from Charlie Company Commander, CPT Harper, and U.S. Army Criminal Investigation Command (CID), Special Agent (SA) Zimmerman. She immediately returns their phone calls and learns that CID has initiated an investigation into a Soldier named Specialist (SPC) John Doe, for suspected possession of child pornography. Specialist Doe's roommate, SPC Green, reported seeing digital images of suspected child pornography when he borrowed SPC Doe's laptop computer. When CID searched SPC Doe's barracks room, agents seized the laptop, a cell phone, and several thumbdrives. While interviewing witnesses later that day, CID agents learned that, in addition to possession of child pornography, SPC Doe is also suspected of communicating with underage minors via an AOL chat room. One of the witnesses told the agents that SPC Doe also has a stack of compact discs (CDs) and thumbdrives in a gym bag in the trunk of his vehicle.<sup>2</sup>

As shown through a typical day in the life of a trial counsel, CPT Jones, technology and digital evidence have become part of everyday life.<sup>3</sup> Text messages, cell phone calls, social media postings, voicemails, digital photos, electronic calendars, and other forms of digital media are used to assist with a myriad of daily activities, both personal and professional in nature. "Unfortunately, those who commit crimes have not missed the information revolution. Criminals use mobile phones, laptop computers, and network servers in the course of committing their crimes."<sup>4</sup> Several months after CPT Jones's initial notification of SPC Doe's case, she will represent the United States in the court-martial against SPC Doe. At trial, CPT Jones will use digital evidence and a digital evidence expert to further the government's case-in-chief against SPC Doe.

This article serves as a blueprint for military justice practitioners to use while advising personnel collecting digital evidence; in analyzing and evaluating collection procedures in preparation for trial; and in presenting digital evidence at trial. Part II discusses the background and definition of digital evidence before transitioning into a brief discussion of the Fourth Amendment and statutes applicable to digital evidence collection. Next, Part III outlines collection procedures with and without a search authorization, as well as collection procedures involving third party service providers by means of compelled and voluntary disclosure. The final part focuses on evidentiary issues leading up to and during trial.

### II. Background and Definition

#### A. Background

"Although computers have existed for more than 60 years, it has been only since the late 1980s, as computers have proliferated in businesses, homes, and government agencies, that digital evidence has been used to solve crimes and prosecute offenders."<sup>5</sup> The earliest crimes involving

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<sup>1</sup> *William Gibson Quotes*, BRAINYQUOTE, [http://www.brainyquote.com/quotes/authors/w/william\\_gibson.html](http://www.brainyquote.com/quotes/authors/w/william_gibson.html) (last visited July 16, 2013). William Ford Gibson is an "American-Canadian writer of science fiction who was the leader of the genre's cyberpunk movement." (emphasis removed). *William Gibson*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/233297/William-Gibson> (last visited Mar. 12, 2013).

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<sup>2</sup> EOGHAN CASEY, *DIGITAL EVIDENCE AND COMPUTER CRIME: FORENSIC SCIENCE, COMPUTERS, AND THE INTERNET* 76-77 (3d ed. 2011) (providing a loosely adapted scenario).

<sup>3</sup> OFFICE OF LEGAL EDUC., EXEC. OFFICE FOR U.S. ATTORNEYS *COMPUTER CRIME & INTELLECTUAL PROPERTY. SEC. CRIM. DIV., U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS*, at ix (3d ed. 2009) [hereinafter *SEARCHING AND SEIZING COMPUTERS*].

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

computers involved computer theft, computer destruction, and unauthorized computer access.<sup>6</sup> Later, computer-related crime developed into the use of computers to commit fraud; and in the 1990s, the accessibility of computers led to additional types of crime including child pornography.<sup>7</sup> Today computer crimes continue to grow exponentially and are considered “among the fastest growing crimes in our society.”<sup>8</sup>

Because digital devices and computer crime have evolved and infiltrated society, they have increasingly become a part of daily litigation.<sup>9</sup> “Electronic records such as computer network logs, email [sic], word processing files, and image files increasingly provide the government with important (and sometimes essential) evidence in criminal cases.”<sup>10</sup> Military justice practitioners, like CPT Jones, frequently rely on digital evidence in a variety of types of trials.<sup>11</sup> In addition to child pornography cases, practitioners may find digital evidence useful in cases of child abuse, homicide, domestic violence, assault, fraud, larceny, harassment, stalking, or drug-related crimes.<sup>12</sup> “Indeed,

virtually every class of crime can involve some form of digital evidence.”<sup>13</sup>

## B. Digital Evidence Defined

Due to its increased importance in investigations and increased use at trial, litigators on both sides of the bar should first have a basic understanding of the definition of digital evidence and potential sources of digital evidence.<sup>14</sup> “Digital evidence is information and data of value to an investigation that is stored on, received, or transmitted by an electronic device. This evidence is acquired when data or electronic devices are seized and secured for examination.”<sup>15</sup> Digital evidence can be found on a number of electronic devices including hard drives, laptop computers, desktop computers, servers, telephone systems, wireless communication systems, the Internet, and mobile devices.<sup>16</sup>

## C. Fourth Amendment and Applicable Statutes

One of the main sources of law that governs the area of digital evidence is the Fourth Amendment.<sup>17</sup> To properly handle these digital evidence cases, litigators should re-familiarize themselves with the basics of the Fourth Amendment during the investigation and while preparing for trial. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,<sup>18</sup> supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>19</sup>

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<sup>5</sup> NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, DIGITAL EVIDENCE IN THE COURTROOM: A GUIDE FOR LAW ENFORCEMENT AND PROSECUTORS, at xi (2007) [hereinafter PROSECUTORS], available at <https://www.ncjrs.gov/pdffiles1/nij/211314.pdf>.

<sup>6</sup> CASEY, *supra* note 2, at 65.

<sup>7</sup> *Id.* at 65–66.

<sup>8</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS para. 11 (10 Jan. 2005) [hereinafter FM 3-19.13].

<sup>9</sup> See CASEY, *supra* note 2, at 38–39.

By now it is well known that attorneys and police are encountering progressively more digital evidence in their work. Less obviously, computer security professionals and military decision makers are concerned with digital evidence. An increasing number of organizations are faced with the necessity of collecting evidence on their networks in response to incidents such as computer intrusions, fraud, intellectual property theft, sexual harassment, and even violent crimes.

*Id.*

<sup>10</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3; see also MARIE-HELEN MARAS, COMPUTER FORENSICS: CYBERCRIMINALS LAWS AND EVIDENCE 5 (Megan R. Turner et al. eds., 2012).

<sup>11</sup> Survey of Former and Current Chiefs of Military Justice (Nov. 2012) [hereinafter Survey] (received responses from four former and current chiefs of military justice recounting their experiences at various Army installations) (unpublished responses) (on file with author).

<sup>12</sup> See U.S. SECRET SERV., U.S. DEP’T OF HOMELAND SECURITY, BEST PRACTICES FOR SEIZING ELECTRONIC EVIDENCE v.3: A POCKET GUIDE FOR FIRST RESPONDERS 13–15 (2007) [hereinafter SECRET SERV. BEST PRACTICES], available at <https://www.ncjrs.gov/APP/publications/Abstract.aspx?id=239359>; see also PROSECUTORS, *supra* note 5, at xi (“Once the province of ‘computer crime’ cases such as hacking, digital evidence is now found in every crime category.”); see also CASEY, *supra* note 2, at 35–36.

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<sup>13</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at ix.

<sup>14</sup> “[N]o attorney can avoid the . . . task of understanding the law applicable to litigating with ESI [(electronically stored information)], as that law is developing, evolving, and maturing.” MARIAN K. RIEDY ET AL., LITIGATING WITH ELECTRONICALLY STORED INFORMATION 3 (2007).

<sup>15</sup> NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, ELECTRONIC CRIME SCENE INVESTIGATION: A GUIDE FOR FIRST RESPONDERS, at ix (2008) [hereinafter FIRST RESPONDERS], available at <http://www.nij.gov/pubs-sum/219941.htm>. There are several other definitions of “digital evidence.” See CASEY, *supra* note 2, at 36–37.

<sup>16</sup> See CASEY, *supra* note 2, at 36–38. see also SECRET SERV. BEST PRACTICES, *supra* note 12, at 13–15.

<sup>17</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at ix.

<sup>18</sup> Probable cause is determined by examining the “totality of the circumstances.” *Illinois v. Gates*, 462 U.S. 213 (1982).

<sup>19</sup> U.S. CONST. amend. XIV.

In addition to the limits established by the Fourth Amendment, the legislative branch has established additional limits on digital evidence collection through the development of various statutes.<sup>20</sup> These statutes include the Wiretap Act,<sup>21</sup> the Pen/Trap Statute,<sup>22</sup> and the Electronic Communications Privacy Act (ECPA)/Stored Communications Act (SCA).<sup>23</sup> “[These statutes] are in large part a reaction to Supreme Court decisions interpreting the Fourth Amendment and are, broadly speaking, designed to provide more protections to individuals.”<sup>24</sup> The Wiretap Act governs interception and disclosure of electronic communications, including interception and disclosure by persons involved with investigations;<sup>25</sup> the Pen/Trap Statute<sup>26</sup> governs devices used to identify phone numbers;<sup>27</sup> and the ECPA/SCA governs access to stored electronic communications.<sup>28</sup> The ECPA/SCA will be discussed in further detail in Part III.B of this primer.

### III. Digital Evidence Collection Procedures<sup>29</sup>

In consideration of the Fourth Amendment and the statutes listed above, there are a variety of ways for military investigators to lawfully obtain digital evidence.<sup>30</sup> Digital evidence is unique because it consists of virtual information and thus may exist in more than one location: in the possession of the accused and in the possession of a third party, namely the service providers. This part will cover collection procedures for both.

#### A. Digital Evidence from the Accused

The most obvious and common way to obtain evidence directly from the accused is through the use of a search warrant,<sup>31</sup> or what is referred to in the Uniform Code of Military Justice (UCMJ) as a “search authorization.”<sup>32</sup> A commander can authorize the search of an area or person over which he has control.<sup>33</sup> For example, using the hypothetical fact pattern above, SPC Doe’s company commander can authorize a probable cause search of SPC Doe’s room and SPC Doe’s vehicle assuming, as in this case, he has reason to believe that the vehicle and room contain evidence of the crimes of which SPC Doe is suspected.<sup>34</sup> Higher level commanders have a broader range of authority regarding searches because they have control over larger areas and more Soldiers than do lower level commanders.<sup>35</sup>

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<sup>20</sup> THOMAS K. CLANCY, CYBER CRIME AND DIGITAL EVIDENCE: MATERIALS AND CASES 12–13 (2011); PROSECUTORS, *supra* note 5, at 1.

<sup>21</sup> 18 U.S.C. §§ 2510–2522 (2011) (also known as the “Wiretap Act”); CLANCY, *supra* note 20, at 12–13.

<sup>22</sup> 18 U.S.C. §§ 3121–3127 (also known as the “Pen/Trap Statute”); CLANCY, *supra* note 20, at 12–13.

<sup>23</sup> 18 U.S.C. §§ 2701–2711 (also known as the “Stored Communications Act” (SCA) and more recently as the “Electronic Communications Privacy Act” (ECPA)); CLANCY, *supra* note 20, at 12–13.

<sup>24</sup> CLANCY, *supra* note 20, at 257.

<sup>25</sup> *See id.* at 12.

<sup>26</sup> A “pen register” is (“[a] device that decodes or records electronic impulses, allowing outgoing numbers from a telephone to be identified.”) (emphasis removed) *Pen Register Definition*, FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Pen+Register> (last visited Mar. 9, 2013). A “trap and trace device” is “a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing and signaling information . . . provided . . . such information shall not include the contents of any communication.” *Trap and Trace Device Definition*, FREE DICTIONARY BY FARLEX, <http://encyclopedia.thefreedictionary.com/trap+and+trace> (last visited May 20, 2013) (quoting 18 U.S.C. § 3127(4)) (emphasis removed).

<sup>27</sup> *See* CLANCY, *supra* note 20, at 12.

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

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<sup>29</sup> The Computer Crime Investigation Unit (CCIU) and the U.S. Army Criminal Investigation Laboratory (USACIL) located at Fort Gillem, Georgia, are integral to the Army’s mission in combating computer crimes. Both offer training and support to the U.S. Army Criminal Investigation Command (CID) field offices and can be useful in helping attorneys address technical questions with respect to computer investigations. FM 3-19.13, *supra* note 8, para. 11; *see also* U.S. Army Criminal Investigation Laboratory, U.S. ARMY CRIMINAL INVESTIGATION COMMAND, <http://www.cid.army.mil/usacil.html> (last visited May 20, 2013).

<sup>30</sup> Presentation by Keith Lyon, Cal. Deputy Attorney Gen., E-Evidence: Getting it and Using it (Sept. 19, 2012) [hereinafter Lyon Presentation] (on file with author).

<sup>31</sup> *Id.*; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315 (2012) [hereinafter MCM]. *See also* MARAS, *supra* note 10, at 81.

<sup>32</sup> MCM, *supra* note 31, MIL. R. EVID. 315.

<sup>33</sup> *Id.* MIL. R. EVID. 315(d).

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

<sup>35</sup> 2 CRIMINAL LAW DEP’T., THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, at N-15 (2012) [hereinafter DESKBOOK], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Crim-Law-Deskbook-8-3-12\\_Vol-2.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Crim-Law-Deskbook-8-3-12_Vol-2.pdf).

In addition to commanders, military magistrates<sup>36</sup> can authorize on-post searches,<sup>37</sup> while United States magistrate judges<sup>38</sup> and civilian judges can authorize off-post searches.<sup>39</sup> As a practice tip, military practitioners must remember that in spite of their on-post search authority, neither commanders nor military magistrates may authorize off-post searches of a Soldier's quarters.<sup>40</sup> Before seeking a commander's search authorization, trial counsel must understand the following prerequisites for a commander to authorize a search.

### 1. Search Authorization

A request for search authorization<sup>41</sup> should include information provided under oath<sup>42</sup> describing the offense being investigated, the items being searched for, the location where the search is being conducted, and an explanation as to why the items are believed to be at the stated location at the stated time.<sup>43</sup> In other words, the request for search authorization must articulate a basis for probable cause and must articulate with "particularity" the items to be seized and the places to be searched.<sup>44</sup>

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<sup>36</sup> U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-1 (3 Oct. 2011) [hereinafter AR 27-10] (noting the establishment of the Army Military Magistrate Program) ("A military magistrate is a JA[ judge advocate] empowered . . . to issue search, seizure, and apprehension authorizations on probable cause.").

<sup>37</sup> U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES FOR MILITARY MAGISTRATES 8 (Mar. 2012) [hereinafter SOP FOR MAGISTRATES] (citing *United States v. Rogers*, 388 F.Supp. 298 (E.D. Va. 1975) and *United States v. Reppert*, 76 F. Supp. 2d 185 (D. Conn 1999) (explaining in *Reppert* that, "property leased by the Government in the civilian community to house sailors and their families [is] under 'military control'")); see also MCM, *supra* note 31, MIL. R. EVID. 315(d).

<sup>38</sup> See generally 28 U.S.C. §§ 631–639 (2011) (Terms of appointment and powers of U.S. magistrate judges).

<sup>39</sup> MCM, *supra* note 31, MIL. R. EVID. 315(d); SOP FOR MAGISTRATES, *supra* note 37, at 8.

<sup>40</sup> MCM, *supra* note 31, MIL. R. EVID. 315(d); SOP FOR MAGISTRATES, *supra* note 37, at 8.

<sup>41</sup> U.S. Dep't of Army, DA Form 3744, Affidavit Supporting Request for Authorization to Search and Seize or Apprehend (Sept. 2002) [hereinafter DA Form 3744].

<sup>42</sup> AR 27-10, *supra* note 36, para. 8-8(a) ("Information provided in support of the request for authorization may be sworn or unsworn. The fact that sworn information is generally more credible and often entitled to greater weight than information not given under oath should be considered."); see also SOP FOR MAGISTRATES, *supra* note 37, at 5.

<sup>43</sup> SOP FOR MAGISTRATES, *supra* note 37, at 5 (explaining that while there are rare instances in which the sworn statements can be oral, written sworn statements are a better practice).

<sup>44</sup> MARAS, *supra* note 10, at 81.

There are additional issues to consider when establishing particularity, including "whether the seizable property is the computer *hardware* or merely the *information* that the hardware contains."<sup>45</sup> If authorities plan to seize the computer equipment based upon its physical nature, the "courts have often found fairly generic descriptions of the items . . . sufficient."<sup>46</sup> "Of course, if computer equipment has been stolen and that specific equipment is the object of the search, it [must] be described with sufficient particularity to identify it."<sup>47</sup>

When investigators want to search or seize computer items because of the information that may be stored on those items, a different technique may be necessary.<sup>48</sup> Instead of the *hardware* being described with particularity, the *content* should be described with particularity.<sup>49</sup>

With regard to the accusations against SPC Doe, investigators want to search SPC Doe's computer and digital devices because of the potential information that may be stored on them. Therefore, a proper authorization may grant permission for law enforcement personnel to search "for all information, in whatever form found, to include records, documents, and materials, whether electronic or physical, related to the offenses previously described."<sup>50</sup> In this case, the authorization should also include language authorizing a search of the seized digital media for "evidence of ownership and control" of the information relevant to the crime.<sup>51</sup>

While CID and the military police (MP) oftentimes independently determine what evidence they are looking for during an investigation, trial counsel should proactively examine the investigative file to see if there is any additional evidence relevant to the investigation. The sooner that the trial counsel can examine the file, the sooner she will discover any missing pieces of evidence in the case and work to secure pieces of evidence before they disappear or are compromised. If a trial counsel examines the file and

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<sup>45</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 70; CLANCY, *supra* note 20, at 109–10.

<sup>46</sup> CLANCY, *supra* note 20, at 110 (citing *State v. Lehman*, 736 A.2d 256, 260–61 (Me. 1999)).

<sup>47</sup> *Id.* at 110–11; SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 71 ("Courts have . . . held that descriptions of hardware can satisfy the particularity requirement so long as the subsequent searches of the seized computer hardware appear reasonably likely to yield evidence of a crime . . .").

<sup>48</sup> See generally CLANCY, *supra* note 20, at 113 (explaining the "container approach" and the "special approach" for evidence collection).

<sup>49</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 72. See generally *infra* Appendix A.

<sup>50</sup> SOP FOR MAGISTRATES, *supra* note 37, at 10.

<sup>51</sup> PROSECUTORS, *supra* note 5, at 10.

wants additional evidence, she should notify CID and request that the agent obtain the evidence pursuant to the original authorization or pursuant to an additional authorization if necessary.<sup>52</sup>

If there is no authorization to search, there are specific exceptions that allow law enforcement personnel to search for evidence under certain conditions; the most common exceptions include consent, plain view, and exigent circumstances.<sup>53</sup>

## 2. Consent

When an individual consents to a search, he permits law enforcement officials to search his person or his property.<sup>54</sup> If law enforcement personnel arrive on scene without authorization, they may seek permission to search the property from the person who owns, controls, or shares the property.<sup>55</sup> To be valid, consent must be deemed “voluntary”<sup>56</sup> when viewing the totality of circumstances.<sup>57</sup> The government’s burden of proof to show that consent existed is “clear and convincing evidence.”<sup>58</sup> While working with CID agents, trial counsel should encourage agents to obtain written consent during investigations because the language of the consent can help establish the voluntariness and scope of the consent.<sup>59</sup> “It is a good practice for agents to use written consent forms that state explicitly that the scope of consent includes consent to search computers and other electronic storage devices.”<sup>60</sup>

If, however, the computer or particular files are password-protected with a password that the third party has not been given access to, the third party cannot consent to the search of the protected computer or its protected files.<sup>61</sup> For instance, assuming that SPC Green had permission to use SPC Doe’s computer and assuming that SPC Doe’s computer and its files are not password-protected, SPC Green can consent to the search of his roommate’s computer.<sup>62</sup> If, however, some of the files are password-protected, SPC Green can only give Special Agent (SA) Zimmerman limited consent to search those files that are not protected.<sup>63</sup> A better option is for SA Zimmerman to receive SPC Doe’s full consent to search the computer and all of its files.<sup>64</sup>

## 3. Plain View

The plain view doctrine<sup>65</sup> provides that “[law enforcement officials] are acting within the scope of their authority, and . . . they have probable cause to believe the item is contraband or evidence of a crime.”<sup>66</sup> With respect to computer cases, plain view scenarios arise in one of two ways.<sup>67</sup> The first is when an officer lawfully searches an area and sees evidence of a crime left on an open computer screen, and the second is when investigators lawfully search a computer for evidence of one crime and find evidence regarding a different crime.<sup>68</sup>

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<sup>52</sup> A new authorization is advised if there is a lapse in time from the original search because “the authorization should be executed within 10 days after the date of issue.” AR 27-10, *supra* note 36, para. 8-10.

<sup>53</sup> CASEY, *supra* note 2, at 87–88; *see also* Lyon Presentation, *supra* note 30.

<sup>54</sup> MCM, *supra* note 31, MIL. R. EVID. 314 (e).

<sup>55</sup> DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 257 (Ethan Shaw & Heidi Litman eds., 7th ed. 2008) (citing various cases). Military courts defer to an agent relying on a third party’s “apparent authority to provide consent.” *Id.* *See also* MARAS, *supra* note 10, at 85; *see also* CLANCY, *supra* note 20, at 152.

<sup>56</sup> DESKBOOK, *supra* note 35, at N-23 (referencing a number of cases, e.g., Ohio v. Robinette, 519 U.S. 33, 40 (1996)); *see also* Schneckloth v. Bustamonte 412 U.S. 218, 248 (1973).

<sup>57</sup> MCM, *supra* note 31, MIL. R. EVID. 314(e)(1) analysis, at A22-27 (“The basic rule for consent searches is taken from *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).”; *see also* MARAS, *supra* note 10, at 84.

<sup>58</sup> MCM, *supra* note 31, MIL. R. EVID. 314(e)(5).

<sup>59</sup> MARAS, *supra* note 10, at 86.

<sup>60</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 19. *See infra* Appendix B.

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<sup>61</sup> SCHLUETER, *supra* note 55, at 256–58; *see also* MARAS, *supra* note 10, at 86.

<sup>62</sup> SCHLUETER, *supra* note 55, at 256–58; *see* United States v. Rader, 65 M.J. 30 (C.A.A.F. 2007); *see also* MARAS, *supra* note 10, at 86.

<sup>63</sup> MARAS, *supra* note 10, at 86.

<sup>64</sup> Sometimes obtaining consent is impractical because consent may alert an accused of a pending investigation and result in obstruction of evidence. FM 3-19.13, *supra* note 8, para. 11-13.

<sup>65</sup>

[P]lain view doctrine n. the rule that a law enforcement officer may make a search and seizure without obtaining a search warrant if evidence of criminal activity or the product of a crime can be seen without entry or search. Example: a policeman stops a motorist for a minor traffic violation and can see in the car a pistol or a marijuana plant on the back seat, giving him ‘reasonable cause’ to enter the vehicle to make a search.

*Plain View Doctrine Definition*, FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/Plain+View+Doctrine> (last visited Feb. 28, 2013) (emphasis removed).

<sup>66</sup> United States v. Washington, No. 20100961 2011 WL 498325 (A. Ct. Crim. App. Feb. 8, 2011) (unpublished) (quoting United States v. Fogg, 52 M.J. 144 (C.A.A.F. 1999)).

<sup>67</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 34.

<sup>68</sup> *Id.* at 34.

While some courts differ in their application of the plain view doctrine to computer searches,<sup>69</sup> military courts have a fairly mainstream view regarding seizure of electronic evidence pursuant to the plain view doctrine. For instance in *United States v. Washington*, while searching for photos and videos of a specific rape victim, the agent found unrelated images of child pornography. The Army Court of Criminal Appeals (ACCA) found that the agent had proper authorization to open images during his search and that his discovery of evidence related to a different crime constituted plain view.<sup>70</sup>

In the hypothetical case referenced in the introduction, SPC Green was not an “officer” or agent of the government, so his discovery did not constitute “plain view” of the suspected illegal content.<sup>71</sup> Had the facts been different, the search and seizure may have been permissible pursuant to the plain view doctrine. If, for instance, a military police officer was called to the Soldiers’ barracks room to break up a fight between SPC Green and SPC Doe, and while breaking up the fight the officer saw SPC Doe’s computer screen displaying images of child pornography, he would not need a search authorization to further examine the image.<sup>72</sup> However, it is advised that any further search of the computer files be pursuant to a search authorization based on the image in plain view.<sup>73</sup>

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<sup>69</sup> MARAS, *supra* note 10, at 87–88. In the past the 10th Circuit’s more restrictive application of the plain view doctrine has since been further clarified by developing case law. In subsequent cases, the 10th Circuit has noted that the more narrow caselaw was very fact specific. SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 36; *see also* DESKBOOK, *supra* note 35, at N-8. *See infra* Appendices C and D.

<sup>70</sup> *Washington*, 2011 WL 498325. In *Washington* the Court explains that the Supreme Court established three prongs that comprise the “plain view” test: (1) the officer must lawfully be on the premises, (2) the criminality of the evidence must be “immediately apparent,” and (3) “the officer must also have a lawful right of access to the object itself.” (citing *Horton v. California*, 496 U.S. 128, 136–37 (1990)); *see also* DESKBOOK, *supra* note 35, at N-8.

<sup>71</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 34; *see also* MARAS, *supra* note 10, at 87.

<sup>72</sup> An example of military case involving plain view is *United States v. Tanksley*, in which the accused was suspected of sexual offenses against minors. 54 M.J. 169 (C.A.A.F. 2000). The accused left an office document open on his computer and left the computer on. Later a judge advocate (JA) went to the accused’s office and found the open document that referenced the allegations against the accused. The JA printed the document and seized the disk that was inside the computer. In spite of the accused’s objection, the court allowed such seizure under the plain view doctrine, noting, “appellant forfeited any expectation of privacy he might have enjoyed by leaving the document in plain view on a computer screen in an unsecured room.” *Id.* at 172. The analysis by the court stresses that the seized document in this case was “exculpatory.” *Id.* Therefore there may be a different outcome with similar facts involving an “inculpatory” document. *Id.* *See also* SCHLUETER, *supra* note 55, at 254.

<sup>73</sup> The CID trains its agents that, “[i]f during the conduct of a search for one offense, evidence of an unrelated or different type of offense is identified, the scope of the search authorization must be expanded accordingly.” FM 3-19.13, *supra* note 8, para. 11-13.

#### 4. Exigent Circumstances

A third commonly used exception to the search authorization is when law enforcement personnel are faced with “exigent circumstances.”<sup>74</sup> Searches under exigent circumstances still require probable cause,<sup>75</sup> but a warrant or search authorization is not required because obtaining the warrant under these circumstances could lead to imminent destruction of evidence<sup>76</sup> through physical damage to the computer or deletion of computer files.<sup>77</sup>

For instance, adding some facts to the introductory fact pattern, authorities searched the room pursuant to a search authorization, but at the time that they had the authorization, had no reason to believe that there was evidence of a crime in the accused’s vehicle, and thus did not seek authorization to search the vehicle. While searching the room, authorities learned from a reliable witness<sup>78</sup> that the accused kept several digital video discs (DVDs) and CDs locked in the trunk of his car.

Now presume that nothing of evidentiary value was found during the course of the search of SPC Doe’s room. Special Agent Zimmerman asked SPC Doe if he could search his vehicle, and received written consent to search. During the search, SA Zimmerman asked if he could seize the CDs and DVDs that he found in a duffel bag in the trunk of SPC Doe’s vehicle, but SPC Doe refused. Special Agent Zimmerman believed that he did not have time to seek authorization to search the accused’s vehicle because he feared that if he left the scene to obtain authorization, the accused may destroy or alter the digital storage devices. Seizure in this case is most likely going to be found permissible due to exigent circumstances.<sup>79</sup> Practitioners should be aware that after a seizure of these digital storage devices, a best practice is for law enforcement personnel to obtain authorization to search the contents of the seized storage media.<sup>80</sup>

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<sup>74</sup> *See* CASEY, *supra* note 2, at 87–88.

<sup>75</sup> MCM, *supra* note 31, MIL. R. EVID. 315(g).

<sup>76</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 28. While there are other circumstances that may result in exigencies, a circumstance in which “the evidence is in imminent danger of destruction—is generally the most relevant in the context of computer searches.” *Id.*

<sup>77</sup> MARAS, *supra* note 10, at 84.

<sup>78</sup> MCM, *supra* note 31, MIL. R. EVID. 315(f)(3)(D).

<sup>79</sup> *See* MARAS, *supra* note 10, at 84.

<sup>80</sup> *Id.*; SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 30.

## B. Digital Evidence from Third Parties—Service Providers

### 1. Introduction

Another factor that trial counsel must consider during an investigation is that sometimes the evidence or potential evidence is controlled not by the accused, but by service providers, including e-mail companies, phone companies, and financial institutions.<sup>81</sup> As previously mentioned, “[w]hen investigators seek stored email [sic], account records, or subscriber information from . . . service providers, they must comply with the SCA/ECPA.”<sup>82</sup> These stored e-mails may be retained by either electronic communication service providers or by remote computing service providers.<sup>83</sup> “An electronic communication service (‘ECS’) is ‘any service which provides to users . . . the ability to send or receive wire or electronic communications,’”<sup>84</sup> while “a remote computing service is provided by an off-site computer that stores or processes data for a customer.”<sup>85</sup>

### 2. Compelled and Voluntary Disclosure

The government can seek information from public and non-public service providers<sup>86</sup> through two different means: compelled disclosure, regulated by 18 U.S.C. § 2703, and voluntary disclosure, regulated by 18 U.S.C. § 2702.<sup>87</sup> The government can compel disclosure of information in five ways: (1) through use of a subpoena; (2) through use of a subpoena with notice; (3) with a § 2703 (d) court order; (4) with a § 2703 court order with notice; and (5) through use of search warrant.<sup>88</sup>

These five options for compelled disclosure provide access to different types of content and non-content information.<sup>89</sup> A subpoena without notice to the subscriber may compel service providers to release a limited amount of information regarding a customer’s identity and basic connection records.<sup>90</sup> A § 2703(d) court order may compel more detailed information than a subpoena would, including account activity logs with Internet Protocol (IP) addresses; contact lists; and cell-site location information.<sup>91</sup> This mechanism will not usually compel disclosure of content information which is subject to additional protections.<sup>92</sup> A subpoena or § 2703(d) court order with prior notice will usually compel “retrieved communications, unretrieved communications older than 180 days, and other files stored with a public provider.”<sup>93</sup> If prior notice is given to a subscriber, a § 2703 court order can also be used to compel “unretrieved communications older than 180 days.”<sup>94</sup>

A search warrant will yield both content and non-content information associated with an account, without putting the subscriber of the account on notice of the content’s release, and consequently on notice of the investigation.<sup>95</sup> Reasons for proceeding with the first two options to obtain information from the internet service providers as opposed to the broader reaching warrant include the practical benefit that, “the legal threshold for issuing a subpoena is low,”<sup>96</sup> and the § 2703(d) standard is also lower than that required by a warrant.<sup>97</sup> It may be wisest to proceed in an investigation with a subpoena at the preliminary stages, followed by a search authorization when content-information is sought.

<sup>81</sup> See Lyon Presentation, *supra* note 30.

<sup>82</sup> CLANCY, *supra* note 20, at 269. One of the first steps of ensuring compliance with the ECPA/SCA is to determine whether the holder of the records qualifies as either an Electronic Communication Service (ECS) or a Remote Computing Service (RCS). SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 116; see generally Orin S. Kerr, *A User’s Guide to the Stored Communications Act—And a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004).

<sup>83</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 117.

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

<sup>85</sup> *Id.* at 119.

<sup>86</sup> *Id.* at 115–50.

<sup>87</sup> 18 U.S.C. §§ 2702, 2703 (2011); CLANCY, *supra* note 20, at 288–91. Anyone who “obtains, alters, or prevents authorized access” to protected communications can suffer criminal penalties. SEARCHING AND SEIZING COMPUTERS, *supra* note 3 at 115. See also Kerr, *supra* note 82, at 1218.

<sup>88</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 127; see also Kerr, *supra* 82, at 1218–19; see also Lyon Presentation, *supra* note 30.

<sup>89</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 127. “Content data are the spoken words in a conversation or the words written in a message (through either texting or e-mail).” MARAS, *supra* note 10, at 52 (emphasis omitted). “Non-content data include, but are not limited to, telephone numbers dialed, customer information (name and address), and e-mail addresses of the message sender and recipient.” *Id.*

<sup>90</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 128.

<sup>91</sup> PROSECUTORS, *supra* note 5, at 4–5.

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

<sup>93</sup> *Id.* at 3, 5–6. SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 128–33. “NOTE: Because providers may use different terms to describe the types of data they hold, it is advisable to consult with each provider on its preferred language . . . .” PROSECUTORS, *supra* note 5, at 3.

<sup>94</sup> PROSECUTORS, *supra* note 5, at 5.

<sup>95</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 133.

<sup>96</sup> *Id.* at 128 (referencing *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950)).

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

As a practical matter trial counsel may conserve time and resources by becoming familiar with the major internet service providers' basic requirements to see what each company requires for release of information because § 2702 voluntary disclosure may yield positive results without compelling the companies to disclose the requested information.<sup>98</sup>

### 3. Additional Considerations

In cases where notice will likely adversely affect an investigation, and in cases where notice will endanger an individual's life or safety, notice of disclosure may be delayed.<sup>99</sup> In instances involving subpoenas, a supervisor must certify in writing that notice will result in an "adverse result,"<sup>100</sup> while in instances involving a § 2703(d) court order, delayed notice requires permission from the court.<sup>101</sup> When permitted, notice will be delayed for ninety days.<sup>102</sup>

Trial counsel and investigators should consider options to preserve evidence while gathering records from service providers, so that it is not lost or manipulated during the course of the investigation. One way to preserve evidence is through the use of an order to service providers to "freeze" existing records and information.<sup>103</sup> The "SCA permits the government to direct providers to 'freeze' stored records and communications that contain content and non-content information, pursuant to 18 U.S.C. § 2703(f)."<sup>104</sup> Another way to preserve evidence is through a court order prohibiting the service provider from disclosing "existence of a warrant, subpoena, or court order," in accordance with 18 U.S.C. § 2705(b).<sup>105</sup> This tool can be used when notification will endanger someone's life or safety; cause the suspect to flee; compromise the evidence; result in witness intimidation; or seriously jeopardize an investigation.<sup>106</sup>

Because SPC Doe is aware of the investigation against him, investigators should consider that he might take steps to

<sup>98</sup> See *id.* at 135, 139.

<sup>99</sup> 18 U.S.C. § 2705(a) (2011); PROSECUTORS, *supra* note 5, at 6.

<sup>100</sup> 18 U.S.C. § 2705(a)(1)(B); PROSECUTORS, *supra* note 5, at 6.

<sup>101</sup> 18 U.S.C. § 2705(a)(1)(A); PROSECUTORS, *supra* note 5, at 6.

<sup>102</sup> 18 U.S.C. § 2705(a)(1); PROSECUTORS, *supra* note 5, at 6.

<sup>103</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 139. CLANCY, *supra* note 20, at 304.

<sup>104</sup> 18 U.S.C. § 2703(f); SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 139; see also Lyon Presentation, *supra* note 30.

<sup>105</sup> 18 U.S.C. § 2705(b); SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 140–41. See also CLANCY, *supra* note 20, at 304.

<sup>106</sup> 18 U.S.C. § 2705(b); SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 141.

prevent the government from accessing information from his service providers. Therefore, the government should immediately contact his service providers and order them to freeze his records.<sup>107</sup> Then the government should also communicate with the service providers to learn about their requirements for release of the desired information.<sup>108</sup> Doing so may result in release of evidence that will assist as the investigation continues to develop. Finally, because the government will have additional time once the records are frozen, the government should issue a detailed search authorization to serve upon the service provider to gain any additional evidence desired.<sup>109</sup>

## IV. Using Digital Evidence in Court

In addition to being familiar with definitions, and the rules and practice of obtaining digital evidence, military practitioners must be familiar with rules surrounding the use of digital evidence in the courtroom. Authentication, hearsay, and expert issues oftentimes arise in digital evidence cases.

### A. Authentication

As in using any form of evidence in court, counsel introducing evidence must first show that the evidence is relevant<sup>110</sup> and must then authenticate the evidence in accordance with Military Rule of Evidence (MRE) 901<sup>111</sup> to show that the evidence is reliable.<sup>112</sup> To authenticate an

<sup>107</sup> 18 U.S.C. § 2703(f); SEARCHING AND SEIZING COMPUTERS, *supra* note 3, at 139; Lyon Presentation, *supra* note 30.

<sup>108</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3.

<sup>109</sup> See Lyon Presentation, *supra* note 30.

<sup>110</sup> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MCM, *supra* note 31, MIL. R. EVID. 401.

<sup>111</sup> "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* MIL. R. EVID. 901.

<sup>112</sup> RIEDY ET AL., *supra* note 14, at 188.

Authentication means satisfying the court that (a) the contents of the record have remained unchanged, (b) that the information in the record does in fact originate from its purported source, whether human or machine, and (c) that extraneous information such as the apparent date of the record is accurate. As with paper records, the necessary degree of authentication may be proved through oral and circumstantial evidence, if available, or via technological features in the system or the record.

exhibit, a witness must convey “personal knowledge”<sup>113</sup> of the exhibit. Keep in mind that authentication does not proffer the content of the document to be true, but instead confirms that the document is what the offering party claims it to be.<sup>114</sup>

### 1. Digital Storage Devices

With respect to SPC Doe’s case, to authenticate thumbdrive #3 taken from SPC Doe’s barracks room, SA Zimmerman testifies that he recognizes thumbdrive #3 as the thumbdrive he collected from SPC Doe’s room. He testifies that on X date he collected an orange, 16-gigabyte Memorex thumbdrive from barracks room #214 and placed it into a brown paper bag that he labeled “Thumbdrive #3, RAZ” in black marker before securing it in the evidence locker. He testifies that he recognizes the paper bag and the handwriting on the bag as his own, that he wrote the words on the bag, and that “RAZ” are his initials. He also testifies that the orange thumbdrive and the paper bag appear the same as they did on the day that he collected the evidence, save for the fact that the tape used to secure the bag on which he wrote his initials was ripped.

While SA Zimmerman is a skilled CID agent, he lacks knowledge in the area of digital forensic examinations. Therefore a digital forensic examiner, SA Gonzalez, is called to authenticate the photographs and videos that SA Gonzalez found on the thumbdrive during his forensic examination. Special Agent Gonzalez testifies that on X date he met with SA Zimmerman and retrieved a paper bag marked with the initials “RAZ,” both agents properly documenting the exchange of evidence on the chain of custody document. Special Agent Gonzales testifies that he took the bag to the digital examination room where he carefully opened the bag, breaking the tape marked “RAZ.” He testifies that he used Acmenats software to conduct his forensic examination and that in the midst of the examination he discovered images containing what he believes is child pornography. He verifies the images that the prosecutor displays on the projection screen as those images that he found during his examination of the thumbdrive and confirms that they are in the same condition as the images that he saw on the date of the forensic examination.<sup>115</sup>

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CASEY, *supra* note 2, at 50–51 (quoting Chris Reed, *The Admissibility and Authentication of Computer Evidence—A Confusion of Issues*, 6 COMPUTER L. & SECURITY REV., no. 2, July–Aug. 1990, at 13–16).

<sup>113</sup> PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 336 (David Sluis, 2d ed. 2008).

<sup>114</sup> Lyon Presentation, *supra* note 30 (citing *City of Vista v. Sutro & Co.*, 52 Cal. App. 4th 401, 411–12 (1997)).

<sup>115</sup> See DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS 153 (Ethan Shaw et al. eds., 4th ed. 2010).

### 2. E-mails and Text Messages

Authentication of e-mails and text messages may be established through “personal knowledge and circumstantial indicia of authenticity” by a witness testifying as to sending or receiving the communication.<sup>116</sup> Other avenues that may establish authenticity of text messages or e-mail include a witness’s familiarity with the following: a particular e-mail address from where the communication was sent; little-known information contained in the e-mail; or a “communication’s storage and retrieval systems.”<sup>117</sup> For instance, if neither the sender nor recipient of an e-mail is willing or able to testify about sending or receiving the e-mail, an employee of the service provider may be able to establish authenticity by testifying that an e-mail or text message was sent from one specific address to another specific address at a certain date and time.<sup>118</sup>

While an expert witness is not required to authenticate the digital storage devices, or even the digital evidence,<sup>119</sup> one is oftentimes used to authenticate the digital evidence (contents on computer hard drives and electronic storage devices) because of his specialized knowledge and ability to convey that knowledge to a layperson<sup>120</sup> and because he can testify that a computer was in proper working condition.<sup>121</sup>

### 3. Digital Files

Digital files found on removable storage devices and computer hard drives must also be authenticated in court.<sup>122</sup> This can be done through a “two-step process.”<sup>123</sup> First, a chain of custody must be established and then a “forensic identifier” or “hash value” is used to show that the evidence is what it is purported to be.<sup>124</sup> If using an expert in the authentication process, trial counsel must remember that “[t]he computer forensics investigator needs to be viewed as a credible witness to ensure that the validity and reliability of the electronic evidence and its handling are upheld in court.”<sup>125</sup> These expert witnesses generally are the experts

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<sup>116</sup> RIEDY ET AL., *supra* note 14, at 188.

<sup>117</sup> *Id.* at 188–89. Lyon Presentation, *supra* note 30. See also PROSECUTORS, *supra* note 5, at 31.

<sup>118</sup> RIEDY ET AL., *supra* note 14, at 189.

<sup>119</sup> MARAS, *supra* note 10, at 330.

<sup>120</sup> See *id.* at 331.

<sup>121</sup> See *id.*

<sup>122</sup> RICE, *supra* note 113, at xx (“Litigation involving electronic evidence will involve the same evidentiary issues as litigation in other contexts.”).

<sup>123</sup> SEARCHING AND SEIZING COMPUTERS *supra* note 3, at 199.

<sup>124</sup> *Id.*

<sup>125</sup> MARAS, *supra* note 10, at 331.

who conduct the forensic examination of the computer and can testify about their involvement in the collection, analysis, and evaluation of the evidence.<sup>126</sup>

One of the most common types of digital files used in military courts involves digital images of child pornography that the accused downloaded.<sup>127</sup> To authenticate these images, the trial counsel must introduce the witnesses involved in collecting the evidence to establish a chain of custody.<sup>128</sup> To demonstrate reliability, “[e]ach person in the chain of custody should testify that he or she did not access or change the images.”<sup>129</sup>

#### 4. Chat Logs

With respect to internet relay chats (IRCs), trial counsel can authenticate the chat logs by presenting evidence about how the logs were created, that the logs are an accurate representation of the chat room conversations, and by further linking the parties involved to the screen names used during the conversation.<sup>130</sup> In *United States v. Tank*, the 9th Circuit found the chat logs were admissible because (1) a witness testified explaining the process he used to create chat logs with his computer and confirmed that the proposed chat log printouts were an accurate representation of the chat room conversations, (2) the accused admitted to using the screen name, and (3) others corroborated that the accused used the screen name.<sup>131</sup> In SPC Doe’s case, the victim can confirm the details about the chats and can confirm the accuracy of the chat conversation while other means will likely need to be used to confirm SPC Doe’s link to the user name. For instance the service provider can testify that John Doe had an account registered with their company with user name X. Otherwise, an expert digital computer examiner may testify about the username being linked to SPC Doe’s computer.<sup>132</sup>

<sup>126</sup> *Id.* at 325.

<sup>127</sup> Survey, *supra* note 11.

<sup>128</sup> RICE, *supra* note 113, at 361.

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

<sup>130</sup> Lyon Presentation, *supra* note 30 (citing *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000)).

<sup>131</sup> *Tank*, 200 F.3d 627.

<sup>132</sup> In military cases the CID agent responsible for collecting the evidence will usually first testify about collecting the computer and or other digital storage devices, before the expert digital forensic examiner. The digital forensic examiner is oftentimes a CID agent with specialized training in this area.

The computer forensics investigator has one of two roles in a . . . proceeding—as a technical witness or as an expert witness. As a technical witness, an individual can testify only as to the facts of the case, evidence, and procedures used. . . . as an expert witness, the individual can provide an opinion based

#### B. Hearsay

Another concern with proffering digital evidence in the courtroom is hearsay. “Digital evidence might not be admitted if it contains hearsay because the speaker or author of the evidence is not present in court to verify its truthfulness.”<sup>133</sup> An important practice tip is that computer-generated<sup>134</sup> evidence, such as “the login record of an ISP [(internet service provider)], automated telephone call records, and automatic teller receipts” are not hearsay “because they are not the statement of a person.”<sup>135</sup> In SPC Doe’s case, the chat logs, even after proper authentication, cannot be used to prove the truth of the contents in the chat logs. If the chat logs note, “it was wonderful meeting with you, Minor T, on 12 August 2012,” that content cannot be used to show that there was a meeting between Minor T and SPC Doe, but can be used to establish that SPC Doe had computer contact with Minor T.

When evaluating evidence for trial, a prosecutor should attempt to anticipate evidentiary problems and anticipate solutions. There are a number of exceptions that can be considered with respect to hearsay,<sup>136</sup> but the business records exception is the most common exception with

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on the investigation conducted and the observations he or she made.

MARAS, *supra* note 10, at 335.

<sup>133</sup> CASEY, *supra* note 2, at 95. “Hearsay” is an out-of-court statement offered for the truth of the matter asserted. MCM, *supra* note 31, MIL. R. EVID. 801.

[I]n a prosecution for credit fraud, computer printouts related to the defendant’s account, kept by the collections department of the credit card company, would meet the core definition of hearsay because they would be offered to prove the truth of their contents. On the other hand, in a prosecution for online solicitation of a minor, the reply e-mails from the victim, if introduced simply to show contact between the defendant and victim rather than for the truth of their contents, would not meet the core definition of hearsay. They would be relevant for the fact that the defendant received them, not for what they say.

PROSECUTORS, *supra* note 5, at 29.

<sup>134</sup> “Computer-generated evidence consists of the direct output of computer programs.” PROSECUTORS, *supra* note 5, at 30.

<sup>135</sup> *Id.* at 30. If a computer-generated document is considered hearsay, some exceptions that should be considered include present-sense impression, Military Rule of Evidence (MRE) 803(1); public records, MRE 803(8); and residual exception, MRE 807. *Id.* at 36–37 (referencing federal rules of evidence as opposed to the military rules of evidence). See also CASEY, *supra* note 2, at 96–97. See also RIEDY ET AL., *supra* note 14, at 206 (noting the argument that there is “human activity . . . behind . . . the computer-generated data”).

<sup>136</sup> MCM, *supra* note 31, MIL. R. EVID. 803, 804; see also PROSECUTORS, *supra* note 5, at 29.

respect to “computer-stored”<sup>137</sup> records.<sup>138</sup> This exception requires that the proponent lay a foundation, establishing the trustworthiness of the records<sup>139</sup> by showing that they were kept in the ordinary course of business and that the regular practice of the business was to generate the evidence in question.<sup>140</sup>

## V. Conclusion

The world of digital evidence will continue to evolve and develop along with the evolution and development of new electronic devices, storage options, and storage capabilities.<sup>141</sup> Practitioners must arm themselves with information necessary to litigate their current cases, and must continue to stay informed as new technology emerges.<sup>142</sup> With the advent of new technology, law will change to reflect emerging issues that will affect evidence collection phase, pre-trial preparation, and trial.<sup>143</sup>

After properly researching the Fourth Amendment, exceptions to the Fourth Amendment, statutes applicable to digital evidence, and rules for courts-martial, CPT Jones confidently represented the United States in its case against SPC John Doe. Her knowledge and preparation were evident when the court found SPC Doe guilty of all charges and specifications. Following the close of court, CPT Jones left the courtroom and listened to her voicemail messages. She had two messages; one from a company commander who suspects his Soldier of misconduct and one from a CID agent who is planning to interview the suspect.

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<sup>137</sup> “Computer-stored” records are human-generated documents that are electronically stored. PROSECUTORS, *supra* note 5, at 30.

<sup>138</sup> *Id.* at 31.

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

<sup>140</sup> MCM, *supra* note 31, MIL. R. EVID. 803(6).

<sup>141</sup> See RIEDY ET AL., *supra* note 14, at 3–4.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* See also RICE, *supra* note 113, at 492–94.

# Appendix F

## Sample Premises Computer Search Warrant Affidavit

This form may be used when a warrant is sought to allow agents to enter a premises and remove computers or electronic media from the premises. In this document, “[[” marks indicate places that must be customized for each affidavit. Fill out your district’s AO 93 Search Warrant form without any reference to computers; your agents are simply searching a premises for items particularly described in the affidavit’s attachment. Consider incorporating the affidavit by reference. See Chapter 2 for a detailed discussion of issues involved in drafting computer search warrants.

UNITED STATES DISTRICT COURT  
FOR THE [DISTRICT]

\_\_\_\_\_)  
In the Matter of the Search of ) Case No.  
[[Premises Address]] )  
\_\_\_\_\_)

AFFIDAVIT IN SUPPORT OF AN APPLICATION  
UNDER RULE 41 FOR A WARRANT TO SEARCH AND SEIZE

I, [[AGENT NAME]], being first duly sworn, hereby depose and state as follows:

INTRODUCTION AND AGENT BACKGROUND

1. I make this affidavit in support of an application under Rule 41 of the Federal Rules of Criminal Procedure for a warrant to search the premises known as [[PREMISES ADDRESS]], hereinafter “PREMISES,” for certain things particularly described in Attachment A.

<sup>143</sup> SEARCHING AND SEIZING COMPUTERS, *supra* note 3, app. F.

2. I am a [[TITLE]] with the [[AGENCY]], and have been since [[DATE]]. [[DESCRIBE TRAINING AND EXPERIENCE INCLUDING EXPERTISE WITH COMPUTERS]].

3. This affidavit is intended to show only that there is sufficient probable cause for the requested warrant and does not set forth all of my knowledge about this matter.

#### PROBABLE CAUSE

4. [[Give facts that establish probable cause to believe that evidence, fruits, or contraband can be found on each computer that will be searched and/or seized, or to believe that the computers may be seized as contraband or instrumentalities.]]

#### TECHNICAL TERMS

5. [[THIS SECTION MIGHT BE UNNECESSARY; DEFINE ONLY TECHNICAL TERMS AS NECESSARY TO SUPPORT PROBABLE CAUSE.]] Based on my training and experience, I use the following technical terms to convey the following meanings:

a. IP Address: The Internet Protocol address (or simply “IP address”) is a unique numeric address used by computers on the Internet. An IP address looks like a series of four numbers, each in the range 0-255, separated by periods (e.g., 121.56.97.178). Every computer attached to the Internet computer must be assigned an IP address so that Internet traffic sent from and directed to that computer may be directed properly from its source to its destination. Most Internet service providers control a range of IP addresses. Some computers have static—that is, long-term—IP addresses, while other computers have dynamic—that is, frequently changed—IP addresses.

b. Internet: The Internet is a global network of computers and other electronic devices that communicate with each other. Due to the structure of the Internet, connections between devices on the Internet often cross state and international borders, even when the devices communicating with each other are in the same state.

#### COMPUTERS AND ELECTRONIC STORAGE

6. As described above and in Attachment A, this application seeks permission to search and seize records that might be found on the PREMISES, in whatever form they are found. I submit that if a computer or electronic

medium is found on the premises, there is probable cause to believe those records will be stored in that computer or electronic medium, for at least the following reasons:

a. Based on my knowledge, training, and experience, I know that computer files or remnants of such files can be recovered months or even years after they have been downloaded onto a hard drive, deleted or viewed via the Internet. Electronic files downloaded to a hard drive can be stored for years at little or no cost. Even when files have been deleted, they can be recovered months or years later using readily available forensics tools. This is so because when a person “deletes” a file on a home computer, the data contained in the file does not actually disappear; rather, that data remains on the hard drive until it is overwritten by new data.

b. Therefore, deleted files, or remnants of deleted files, may reside in free space or slack space—that is, in space on the hard drive that is not currently being used by an active file—for long periods of time before they are overwritten. In addition, a computer’s operating system may also keep a record of deleted data in a “swap” or “recovery” file.

c. Similarly, files that have been viewed via the Internet are typically automatically downloaded into a temporary Internet directory or “cache.” The browser often maintains a fixed amount of hard drive space devoted to these files, and the files are only overwritten as they are replaced with more recently viewed Internet pages or if a user takes steps to delete them.

d. [[FOR CHILD PORNOGRAPHY CASES]] I know from training and experience that child pornographers generally prefer to store images of child pornography in electronic form as computer files. The computer’s ability to store images in digital form makes a computer an ideal repository for pornography. A small portable disk or computer hard drive can contain many child pornography images. The images can be easily sent to or received from other computer users over the Internet. Further, both individual files of child pornography and the disks that contain the files can be mislabeled or hidden to evade detection. In my training and experience, individuals who view child pornography typically maintain their collections for many years and keep and collect items containing child pornography over long periods of time; in fact, they rarely, if ever, dispose of their sexually explicit materials.

e. [[FOR BUSINESS SEARCH CASES]] Based on actual inspection of [[spreadsheets, financial records, invoices]], I am aware that computer

equipment was used to generate, store, and print documents used in the [[tax evasion, money laundering, drug trafficking, etc.]] scheme. There is reason to believe that there is a computer system currently located on the PREMISES.

7. [[FOR CHILD PORNOGRAPHY OR OTHER CONTRABAND CASES]] In this case, the warrant application requests permission to search and seize [[images of child pornography, including those that may be stored on a computer]]. These things constitute both evidence of crime and contraband. This affidavit also requests permission to seize the computer hardware and electronic media that may contain those things if it becomes necessary for reasons of practicality to remove the hardware and conduct a search off-site. [[In this case, computer hardware that was used to store child pornography is a container for evidence, a container for contraband, and also itself an instrumentality of the crime under investigation.]]

8. [[FOR CHILD PORNOGRAPHY PRODUCTION CASES]] I know from training and experience that it is common for child pornographers to use personal computers to produce both still and moving images. For example, a computer can have a camera built in, or can be connected to a camera and turn the video output into a form that is usable by computer programs. Alternatively, the pornographer can use a digital camera to take photographs or videos and load them directly onto the computer. The output of the camera can be stored, transferred or printed out directly from the computer. The producers of child pornography can also use a scanner to transfer photographs into a computer-readable format. All of these devices, as well as the computer, constitute instrumentalities of the crime.

9. [[FOR HACKING OR OTHER INSTRUMENTALITY CASES]] I know that when an individual uses a computer to [[obtain unauthorized access to a victim computer over the Internet]], the individual's computer will generally serve both as an instrumentality for committing the crime, and also as a storage device for evidence of the crime. The computer is an instrumentality of the crime because it is used as a means of committing the criminal offense. The computer is also likely to be a storage device for evidence of crime. From my training and experience, I believe that a computer used to commit a crime of this type may contain: data that is evidence of how the computer was used; data that was sent or received; notes as to how the criminal conduct was achieved; records of Internet discussions about the crime; and other records that indicate the nature of the offense.

10. [[FOR CASES WHERE A RESIDENCE SHARED WITH OTHERS IS SEARCHED]] Because several people share the PREMISES as a residence, it is possible that the PREMISES will contain computers that are predominantly used, and perhaps owned, by persons who are not suspected of a crime. If agents conducting the search nonetheless determine that it is possible that the things described in this warrant could be found on those computers, this application seeks permission to search and if necessary to seize those computers as well. It may be impossible to determine, on scene, which computers contain the things described in this warrant.

11. Based upon my knowledge, training and experience, I know that searching for information stored in computers often requires agents to seize most or all electronic storage devices to be searched later by a qualified computer expert in a laboratory or other controlled environment. This is often necessary to ensure the accuracy and completeness of such data, and to prevent the loss of the data either from accidental or intentional destruction. Additionally, to properly examine those storage devices in a laboratory setting, it is often necessary that some computer equipment, peripherals, instructions, and software be seized and examined in the laboratory setting. This is true because of the following:

a. The volume of evidence. Computer storage devices (like hard disks or CD-ROMs) can store the equivalent of millions of pages of information. Additionally, a suspect may try to conceal criminal evidence; he or she might store it in random order with deceptive file names. This may require searching authorities to peruse all the stored data to determine which particular files are evidence or instrumentalities of crime. This sorting process can take weeks or months, depending on the volume of data stored, and it would be impractical and invasive to attempt this kind of data search on-site.

b. Technical requirements. Searching computer systems for criminal evidence sometimes requires highly technical processes requiring expert skill and properly controlled environment. The vast array of computer hardware and software available requires even computer experts to specialize in some systems and applications, so it is difficult to know before a search which expert is qualified to analyze the system and its data. In any event, however, data search processes are exacting scientific procedures designed to protect the integrity of the evidence and to recover even "hidden," erased, compressed, password-protected, or encrypted files. Because computer evidence is vulnerable to inadvertent or intentional modification or destruction (both from external

sources or from destructive code imbedded in the system as a “booby trap”), a controlled environment may be necessary to complete an accurate analysis.

12. In light of these concerns, I hereby request the Court’s permission to seize the computer hardware (and associated peripherals) that are believed to contain some or all of the evidence described in the warrant, and to conduct an off-site search of the hardware for the evidence described, if, upon arriving at the scene, the agents executing the search conclude that it would be impractical to search the computer hardware on-site for this evidence.

13. Searching computer systems for the evidence described in Attachment A may require a range of data analysis techniques. In some cases, it is possible for agents and analysts to conduct carefully targeted searches that can locate evidence without requiring a time-consuming manual search through unrelated materials that may be commingled with criminal evidence. In other cases, however, such techniques may not yield the evidence described in the warrant. Criminals can mislabel or hide files and directories, encode communications to avoid using key words, attempt to delete files to evade detection, or take other steps designed to frustrate law enforcement searches for information. These steps may require agents and law enforcement or other analysts with appropriate expertise to conduct more extensive searches, such as scanning areas of the disk not allocated to listed files, or peruse every file briefly to determine whether it falls within the scope of the warrant. In light of these difficulties, the [[AGENCY]] intends to use whatever data analysis techniques appear necessary to locate and retrieve the evidence described in Attachment A.

14. [[INCLUDE THE FOLLOWING IF THERE IS A CONCERN ABOUT THE SEARCH UNREASONABLY IMPAIRING AN OPERATIONAL, OTHERWISE LEGAL BUSINESS]] I recognize that the Company is a functioning company with many employees, and that a seizure of the Company’s computers may have the unintended effect of limiting the Company’s ability to provide service to its legitimate customers. In response to these concerns, the agents who execute the search anticipate taking an incremental approach to minimize the inconvenience to the Company’s legitimate customers and to minimize the need to seize equipment and data. It is anticipated that, barring unexpected circumstances, this incremental approach will proceed as follows:

a. Upon arriving at the PREMISES, the agents will attempt to identify a system administrator of the network (or other knowledgeable employee) who will be willing to assist law enforcement by identifying, copying, and printing out paper and electronic copies of the things described in the warrant. The assistance of such an employee might allow agents to place less of a burden on the Company than would otherwise be necessary.

b. If the employees choose not to assist the agents, the agents decide that none are trustworthy, or for some other reason the agents cannot execute the warrant successfully without themselves examining the Company's computers, the agents will attempt to locate the things described in the warrant, and will attempt to make electronic copies of those things. This analysis will focus on things that may contain the evidence and information of the violations under investigation. In doing this, the agents might be able to copy only those things that are evidence of the offenses described herein, and provide only those things to the case agent. Circumstances might also require the agents to attempt to create an electronic "image" of those parts of the computer that are likely to store the things described in the warrant. Generally speaking, imaging is the taking of a complete electronic picture of the computer's data, including all hidden sectors and deleted files. Imaging a computer permits the agents to obtain an exact copy of the computer's stored data without actually seizing the computer hardware. The agents or qualified computer experts will then conduct an off-site search for the things described in the warrant from the "mirror image" copy at a later date. If the agents successfully image the Company's computers, the agents will not conduct any additional search or seizure of the Company's computers.

c. If imaging proves impractical, or even impossible for technical reasons, then the agents will seize those components of the Company's computer system that the agents believe must be seized to permit the agents to locate the things described in the warrant at an off-site location. The seized components will be removed from the PREMISES. If employees of the Company so request, the agents will, to the extent practicable, attempt to provide the employees with copies of data that may be necessary or important to the continuing function of the Company's legitimate business. If, after inspecting the computers, the analyst determines that some or all of this equipment is no longer necessary to retrieve and preserve the evidence, the government will return it within a reasonable time.

## CONCLUSION

15. I submit that this affidavit supports probable cause for a warrant to search the PREMISES and seize the items described in Attachment A.

## REQUEST FOR SEALING

[[IF APPROPRIATE: It is respectfully requested that this Court issue an order sealing, until further order of the Court, all papers submitted in support of this application, including the application and search warrant. I believe that sealing this document is necessary because the items and information to be seized are relevant to an ongoing investigation into the criminal organizations as not all of the targets of this investigation will be searched at this time. Based upon my training and experience, I have learned that, online criminals actively search for criminal affidavits and search warrants via the Internet and disseminate them to other online criminals as they deem appropriate, i.e., post them publicly online through the carding forums. Premature disclosure of the contents of this affidavit and related documents may have a significant and negative impact on the continuing investigation and may severely jeopardize its effectiveness.]]

Respectfully submitted,

[[AGENT NAME]]

Special Agent

[[AGENCY]]

Subscribed and sworn to before me on \_\_\_\_\_:

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UNITED STATES MAGISTRATE JUDGE

## ATTACHMENT A

1. All records relating to violations of the statutes listed on the warrant and involving [[SUSPECT]] since [[DATE]], including:

- a. [[IDENTIFY RECORDS SOUGHT WITH PARTICULARITY; EXAMPLES FOR A DRUG CASE FOLLOW]];
- b. lists of customers and related identifying information; types, amounts, and prices of drugs trafficked as well as dates, places, and amounts of specific transactions;
- c. any information related to sources of narcotic drugs (including names, addresses, phone numbers, or any other identifying information);
- d. any information recording [[SUSPECT]]'s schedule or travel from 2008 to the present;
- e. all bank records, checks, credit card bills, account information, and other financial records.

2. [[IF OFFENSE INVOLVED A COMPUTER AS AN INSTRUMENTALITY OR CONTAINER FOR CONTRABAND]] Any computers or electronic media that were or may have been used as a means to commit the offenses described on the warrant, including [[receiving images of child pornography over the Internet in violation of 18 U.S.C. § 2252A.]]

3. For any computer hard drive or other electronic media (hereinafter, "MEDIA") that is called for by this warrant, or that might contain things otherwise called for by this warrant:

- a. evidence of user attribution showing who used or owned the MEDIA at the time the things described in this warrant were created, edited, or deleted, such as logs, registry entries, saved usernames and passwords, documents, and browsing history;
- b. passwords, encryption keys, and other access devices that may be necessary to access the MEDIA;
- c. documentation and manuals that may be necessary to access the MEDIA or to conduct a forensic examination of the MEDIA.

4. [[IF CASE INVOLVED THE INTERNET]] Records and things evidencing the use of the Internet Protocol address [[e.g. 10.19.74.69]]

to communicate with [[e.g. Yahoo! mail servers or university mathematics department computers]], including:

- a. routers, modems, and network equipment used to connect computers to the Internet;
- b. records of Internet Protocol addresses used;
- c. records of Internet activity, including firewall logs, caches, browser history and cookies, “bookmarked” or “favorite” web pages, search terms that the user entered into any Internet search engine, and records of user-typed web addresses.

As used above, the terms “records” and “information” include all of the foregoing items of evidence in whatever form and by whatever means they may have been created or stored, including any form of computer or electronic storage (such as hard disks or other media that can store data); any handmade form (such as writing, drawing, painting); any mechanical form (such as printing or typing); and any photographic form (such as microfilm, microfiche, prints, slides, negatives, videotapes, motion pictures, photocopies).

Appendix B

Samples (1–4) of Consent to Search<sup>144</sup>



SPECIAL REPORT / JAN. 07

Sample 1: Consent to Search

(Adapted from Maine Computer Crimes Task Force Consent-to-Search Form)

I hereby give my consent and permission for the items described below to be searched by law enforcement officer \_\_\_\_\_, and by any law enforcement officer of the \_\_\_\_\_ [insert name of task force or agency].

I hereby state that I myself have the authority and the ability to gain access to, possess, inspect, examine, and search the items described below.

I understand that I have the right to refuse to give my consent to search the items described below. I give my consent to this search voluntarily and as an act of my own free will, and not because of any threats, compulsion, promises, or inducements. I further state that no threats or promises have been made to compel or induce me to sign this consent form.

I understand that any items, images, documents, or other evidence discovered pursuant to a search of the items described below may be used as evidence in a court of law.

Items to be searched (description, serial numbers, etc.):

\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_
\_\_\_\_\_

By signing this form, I hereby declare that I have read and understood its contents entirely.

Signature

Date

Witnessed by:

Witness/Law Enforcement Officer

Date

144 PROSECUTORS, supra note 5, at 66–69.

## Sample 2: Consent to Search

I, \_\_\_\_\_, hereby consent to search of the following locations, vehicles, and articles by Agents of \_\_\_\_\_ *(insert name of task force or agency)* or other local, State, or Federal law enforcement personnel.

Home/Business Address(s)

1.) \_\_\_\_\_ 2.) \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

This consent extends to any and all yards, garages, carports, outbuildings, storage areas, sheds, trash containers, or mailboxes assigned to the above listed premises.

\_\_\_\_\_  
**Initials**

### Vehicle(s)

Make/Model \_\_\_\_\_

Year/License \_\_\_\_\_

Make/Model \_\_\_\_\_

Year/License \_\_\_\_\_

I understand that this consent includes authorization to remove all computers, hard drives, and other electronic storage media (CDs, DVDs, floppy discs, Zip® discs, Jaz® cartridges, Smart Media Cards, Compact Flash, Memory Sticks, etc.) for examination offsite at a secure facility using appropriate tools and techniques.

\_\_\_\_\_  
**Initials**

This consent is freely and voluntarily given. I have not been coerced or threatened, nor have any promises been made regarding my cooperation in this investigation.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Witness/Law Enforcement Officer

\_\_\_\_\_  
 Date

**Sample 3: Supplemental Consent to Search**

To assist agents of the \_\_\_\_\_ *[insert name of task force or agency]*, or other local, State, or Federal law enforcement personnel with their search of computers, hard drives, and other electronic storage media seized with my consent, I am providing the following information:

**Screen Saver/BIOS Password**


**Other Passwords/Usernames**

Program/Service	Username	Password

**Encryption Keys**

Public Key	Private Key

\_\_\_\_\_  
**Initials**

**Sample 4: Supplemental Consent to Search  
(Internet Service Provider/Web-Based E-Mail)**

I, \_\_\_\_\_, hereby consent to agents of \_\_\_\_\_  
[insert name of task force or agency], or other local, State, or Federal law enforcement personnel who are accessing, viewing, downloading, printing, and/or copying the contents of any electronic mail in all folders (sent, received, trash, etc.) stored offsite by my Internet service provider or Web based e-mail provider. In cooperation with this search, I am freely and voluntarily providing the following account names, user names, and passwords:

Internet Service Provider (e.g., AOL, Yahoo, Hotmail, etc.)	Username	Password

**This consent is limited to a one-time only access for purposes of viewing, downloading, copying, and/or printing and expires 48 hours after the listed date and time.**

_____ Signature	_____ Date	_____ Time
_____ Witness/Law Enforcement Officer	_____ Date	_____ Time

## Appendix C

### Plain View in the Digital Context<sup>145</sup>

## PLAIN VIEW IN THE DIGITAL CONTEXT

### “PURE” PLAIN VIEW [Majority View]

An agent can look at EVERY file on a computer when searching for evidence. This is “pure” plain view – any file on a computer is plainly viewable and can be opened.

*United States v. Upham*, 168 F.3d 532 (1st Cir. 1999)

*United States v. Highbarger*, 380 Fed. Appx. 127 (3rd Cir. 2010)(unpublished)

*United States v. Williams*, 592 F.3d 511 (4th Cir. 2010)

\*\*Warning: officers must conduct these searches with “care and respect for privacy.”\*\*

*United States v. Mann*, 592 F.3d 779 (7th Cir. 2010)

*United States v. Miranda*, 325 Fed. Appx. 858 (11th Cir. 2009)(unpublished)(per curiam)

*United States v. Whaley*, 415 Fed. Appx. 129 (11th Cir. 2011)(unpublished)(per curiam)

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### “PROCEED WITH CAUTION”

#### Subjective Intent Approach

Plain View does NOT apply when evidence indicates that the **subjective intent** of the agent was to uncover unauthorized evidence. Therefore, agents must have a purpose for opening each file. If the agent finds a file containing another criminal act, the agent must abide by the rules for **Stop & Ask**.

*United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999)

*United States v. Osorio*, 66 M.J. 632 (A.F.C.C.A. 2008)

“[T]here must be specificity in the scope of the warrant which, in turn, mandates specificity in the process of conducting the search. Practitioners must generate specific warrants and search processes necessary to comply with that specificity and then, if they come across evidence of a different crime, stop their search and seek a new authorization.” *Id.* at 637.

#### “Stop & Ask” Approach

An agent can open any file **BUT** when he discovers something criminal which is outside of the scope of the warrant, he must **stop** and **ask** for a new warrant.

*United States v. Lucas*, 640 F.3d 168 (6th Cir. 2011)

*United States v. Koch*, 625 F.3d 470 (8th Cir. 2010)

*United States v. Walsler*, 275 F.3d 981 (10th Cir. 2001)

#### Search Protocols Approach

Agents need to have limitations on their search. Agents should follow protocols and tailor searches to the objective of the warrant.

In *Burgess*, the court set forth some protocols:

- (1) analyze the file structures first;
- (2) look at suspicious file folders;
- (3) use keyword searches to look for folders/files that would most likely contain objects of the search;
- (4) might be able to look into some or all folders/files in order to find objects.

*United States v. Otero*, 563 F.3d 1127 (10th Cir. 2009) (warrants must affirmatively limit searches)

*United States v. Burgess*, 576 F.3d 1078 (10th Cir. 2009) (the search must be tailored to meet allowed ends)

*United States v. Washington*, ARMY MISC 20100961 (A.C.C.A. 2011) (unpublished) (adopts *Burgess*-like factors: (1) the agent performing the search was clear as to what he was searching for; (2) the agent conducted his search in a way to avoid types of files not identified by the warrant by segregating only image files.)

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<sup>145</sup> In-class Handout, Criminal Law Dep’t., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Plain View in the Digital Context (2012–2013).

**“PLAIN VIEW DOES NOT APPLY”**

**Prophylactic Approach**

- (1) Reliance on PV is **waived**;
- (2) An independent 3rd party must review, segregate, and redact files first;
- (3) Warrants must disclose the risks of destruction of information and prior efforts to seize that information;
- (4) The government must disclose its search protocol and it must be designed to uncover **only** information for which it has probable cause;
- (5) The government must destroy or return evidence outside the scope of the warrant.

*U.S. v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009) (en banc)

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**ALTERNATE ROUTES AROUND PLAIN VIEW**

Some courts have used **Inevitable Discovery** or **Alternate Source** in order to support a search and avoid PV.

*United States v. Crespo-Ríos*, 645 F.3d 37, 42 (1st Cir. 2011) (**Inevitable Discovery**)

*United States v. Stabile*, 633 F.3d 219 (3rd Cir. 2011) (**Inevitable Discovery**) (routine police procedures would have inevitably led to discovery of CP files)

*United States v. Wallace*, 66 M.J. 5, 10 (C.A.A.F. 2008) (**Inevitable Discovery**)

## Appendix D

### Plain View Doctrine—Digital Context<sup>146</sup>

#### PLAIN VIEW DOCTRINE – DIGITAL CONTEXT

##### 1ST CIRCUIT:

- *United States v. Upham*, 168 F.3d 532 (1st Cir. 1999)
  - o A search warrant for image files on a computer gave authorization to police to search every file on the computer as well as deleted info.
  - o “[A] search of a computer and co-located disks is not inherently more intrusive than the physical search of an entire house for a weapon or drugs.” *Id.* at 535.
  - o The PC showing in the warrant must demonstrate a “sufficient chance of finding some needles in the computer haystack.” *Id.* at 535.
  - o Followed by *United States v. Burdulis*, 2011 U.S. Dist. LEXIS 53612
    - Search warrant of computer for a single image gave authorization to open every image file on the computer and all is admissible under PV.

##### 2ND CIRCUIT:

##### 3RD CIRCUIT:

- *United States v. Stabile*, 633 F.3d 219 (3rd Cir. 2011)
  - o Seized hard drives and have search warrant for evidence of financial crimes, discovered CP when opened video files on hard drive.
  - o Refuse to address if PV applies (*Id.* at 242)
  - o The court upholds the search on grounds of (1) independent source and (2) inevitable discovery – routine police procedures would have inevitably led to police discovering the CP files.
- *United States v. Highbarger*, 380 Fed. Appx. 127 (3rd Cir. 2010) (unpublished)
  - o Search warrant for all documents and records relating to drug offense.
  - o During search, police opened graphic files and discovered CP.
  - o Court upheld search under PV – authorization to search is not limited by the names/type of file – police had to open files to verify contents.

##### 4TH CIRCUIT:

- *United States v. Williams*, 592 F.3d 511 (4th Cir. 2010)
  - o PV doctrine applies fully so long as there is a warrant to look for files on digital media relating to an offense (here it was harassing or threatening behavior) – the warrant implies that officers can open each file to determine what the file contains and then PV rules apply.
  - o “[T]he warrant impliedly authorized officers to open each file on the computer and view its contents, at least cursorily, to determine whether the file fell within the scope of the warrant’s authorization-i.e., whether it related to the designated Virginia crimes of making threats or computer harassment.” *Id.* at 522.
  - o “Once it is accepted that a computer search must, by implication, authorize at least a cursory review of each file on the computer, then the criteria for applying the plain-view exception are readily satisfied.” *Id.*
  - o Warning: officers must conduct these searches with “care and respect for privacy.” *Id.* at 523-24.

<sup>146</sup> In-class Handout, Criminal Law Dep’t., The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Plain View Doctrine—The Digital Context (2012).

# Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources

Major Dan Dalrymple\*

## I. Introduction

In courts-martial, when seeking the assistance of an expert witness or consultant, defense counsel are typically met with a Hobson's choice, a decision allowing only one option. While free to request government funding regardless of financial means, a military accused is not entitled to the expert of his choice. If the defense is able to meet the judicial test to establish that it needs an expert, the Government itself decides which expert will meet the needs of the defense. The defense must then disprove the adequacy of this alternative if unsatisfied.

This primer provides insights into acquiring expert witnesses and consultants at government expense. First, it reviews the legal basis for obtaining experts. Second, it discusses how to capitalize on the checks afforded by military trial courts where an expert is not provided and how to prepare for appellate issues. Third, it explores ways of obtaining the preferred expert at government expense. Fourth, it provides an overview of the rules applicable to government contracting, as they apply to contracting for experts. Finally, methods of obtaining experts at government expense from other areas of the Government are also discussed, including ways to use existing funding mechanisms to cast a wider net for qualified federal employees.

## II. The Foundations of the Right to Funding for an Expert

### A. Uniform Code of Military Justice Article 46 and Rule for Court-Martial 703(d)

Article 46 provides the statutory authority for a service member to obtain the services of an expert during courts-martial.<sup>1</sup> Its language has remained unchanged for over half a century since introduced.<sup>2</sup> The record of Senate floor

debate yields little more than that it "seeks to afford the accused an equal opportunity to obtain witnesses and other evidence."<sup>3</sup> By its terms Article 46 provides for simply that, and makes no mention of expert witnesses.<sup>4</sup> The President has provided more specific guidance in Rule for Court-Martial (RCM) 703(d), which discusses the retention of expert witnesses.

This rule allows either party to lobby the convening authority for an expert, but with notice to its opposition required.<sup>5</sup> Military judges may make determinations at any time the case is before them and can enforce their decisions by abating proceedings if the Government does not comply with their orders.<sup>6</sup>

<sup>3</sup> 81 CONG. REC. S6, 162-70 (daily ed. May 13, 1949) (Letter from Sen. Patrick McCarran, to Sen. Millard E. Tydings (Apr. 30, 1949) (commenting on Articles in Senate bill).

<sup>4</sup> The Uniform Code of Military Justice (UCMJ) Article 46 states in relevant part, that "[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (2012).

<sup>5</sup> *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d) (2012) [hereinafter MCM] (emphasis in original).

<sup>6</sup> See *infra* Part III (discussing abatement). Before the promulgation of Rule 703(d), the convening authority was *supposed* to approve funding for experts if the military judge ordered it, but if he failed to do so, then the experts could not be paid and there was no other remedy. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XXIII, ¶ 116 (1969) [hereinafter 1969 MCM] (providing different rules for employment of experts during and in advance of court-martial; but in each case leaving the final decision to the convening authority, with no remedy if the military judge or the court-martial president thought the expert was necessary but the convening authority did not agree); see also Dr. Martin Blinder, et al., Comp. Gen., B-210831, Aug. 2, 1983 (under the pre-RCM 703 regime, the military judge

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<sup>1</sup> In *Ake v. Oklahoma*, 470 U.S. 53 (1985), the Supreme Court held that the Constitution guarantees the right to the assistance of an expert at Government expense. That holding, however, has been largely limited to assistance focused on the issue of sanity. The source of this right under the Constitution, the various areas in which it has been explored, and how the courts have employed the holding of *Ake* is beyond the scope of this primer. However, several articles, particularly, Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004), can provide further insights.

<sup>2</sup> Act of May 5, 1950, Pub. L. No. 81-506, ch. 169, 64 Stat. 107, 122-23.

## B. Clarifying the Kind of Expert Assistance Sought

In military practice, and even in this article, the terms “expert assistance,” “expert consultants,” and “expert witnesses” are sometimes used interchangeably. “Expert assistance” is a generic term for expert witnesses and expert consultants. Either side can call for the production of an expert *witness* to provide testimony at trial and the opposing party can interview the witness prior to the proceedings.<sup>7</sup> An expert *consultant* (including an investigator) may be retained by the *defense* as a member of the trial team. The consultant may participate in the development of case theory and strategy, and may receive confidential communications. She is not subject to pretrial interviews or examination on the record, unless she changes roles by testifying.<sup>8</sup>

Separate, but closely related, tests govern the requests for funding of assistance from experts as members of the defense team and as testifying expert witnesses. For the assistance of an expert consultant, an accused must demonstrate: first, why the expert assistance is needed; second, what the expert assistance would accomplish for the accused; and third, why defense counsel is unable to gather and present the evidence that the expert assistant would be able to develop.<sup>9</sup> To obtain the testimony of a testifying expert at government expense, the defense must supply either the convening authority or the military judge with a “statement of reasons why the employment of the expert is necessary” pursuant to RCM 703(d), along with the estimated cost of employment. This latter showing of necessity, concerning a testifying expert, is subject to essentially the same considerations as that of an expert consultant.<sup>10</sup> In the context of either type of request, the military judge determines whether the Government has provided, or will provide, an adequate substitute. If the Government refuses to do so, the military judge can order abatement.

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“directed” that several psychiatric witnesses be called in the case of *United States v. King*, 24 M.J. 774 (C.M.A. 1987). The convening authority did not approve the experts; the trial counsel may even have failed to request funding from the convening authority. The experts could not be paid.)

<sup>7</sup> *United States v. Langston*, 32 M.J. 894, 896 (C.M.A. 1991).

<sup>8</sup> *Id.* (holding that consultants are “provided to the defense as a matter of due process, in order to prepare properly for trial and otherwise assist with the defense of a case).

<sup>9</sup> *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994) (citing *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986)).

<sup>10</sup> Major David Edward Coombs, *Pass Go, Collect \$200, and Hire Yourself an Expert: Article 46 of the Uniform Code of Military Justice and the Defense's Right to a Government-Funded Expert*, ARMY LAW., June 2008, at 28, 36 n.35.

## III. Abatement and Appellate Readiness

### A. Abatement: When Success Arises from a Lost Pursuit for an Expert

If a dispute over experts proves intractable, abatement can effectively end the case. In *United States v. True*, the military judge granted the defense request for the assistance of a civilian expert, finding that the four alternatives proposed by the Government were not similarly qualified.<sup>11</sup> After the convening authority refused to pay for the expert, the military judge directed the convening authority to provide the defense requested expert. After receiving notice that the convening authority had refused, the military judge granted a defense request to abate the proceedings. The Court of Military Appeals equated the effect of abatement with dismissal.<sup>12</sup>

Abatement has been held to be the functional equivalent of a “ruling of the military judge which terminates the proceedings” under Article 62, enabling appeal by the Government.<sup>13</sup> Thus, the defense should solidify its position for appeal by bolstering the record of trial when abatement seems imminent.<sup>14</sup> Exactly when that is may not be clear.<sup>15</sup> Having already convinced a military judge who imposes abatement of the necessity of an expert, the defense should seek to ensure that the military judge’s findings of fact and conclusions of law related to that necessity be explicit.

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<sup>11</sup> *United States v. True*, 28 M.J. 1, 2 (C.M.A. 1989).

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 2. See also UCMJ art. 62(a)(1)(A) (2012) (providing that the United States may appeal “[a]n order or ruling of the military judge which terminates the proceedings with respect to a charge or specification”).

<sup>14</sup> A few practical points to consider are the appropriate point at which abatement should take effect and how to leverage that abatement to dispose of the case. A military judge cannot impose an abatement unilaterally; abatement under Rule for Court-Martial (RCM) 703(d) is triggered by a Government failure to comply with a military judge’s ruling that an expert is necessary and must be provided at Government expense.

<sup>15</sup> The time to impose abatement may range from waiting weeks for compliance to being appropriate for immediate discussion about whether the Government will comply. Compare *United States v. Reinecke*, 31 M.J. 507, 512 (A.F.C.M.R. 1990) (observing that where military judge ruled an expert should be hired within two weeks, abatement would have been proper if the Government were not in compliance after the weeks passed), with a later opinion in the same case, *United States v. Lamer*, 32 M.J. 63, 64 (C.M.A. 1990) (contemplating that an objection by the defense to an “immediate failure” by the Government to comply may have allowed for both sides to argue about the timing of funding). This latter decision is somewhat puzzling. The Court of Military Appeals held that the military judge was premature in abating the proceedings at the same time he directed the defense expert be provided. *Id.* The court also held the defense’s failure to object interfered with the Government’s rights, including its ability to explain its failure to obey the military judge’s directive to employ the defense expert. *Id.* This despite the explanation provided to the military judge by trial counsel that the expert had not been provided due to Government indecisiveness. *Reinecke*, 31 M.J. at 509. In other words, having already obtained the remedy of abatement, the defense was held to have waived its right to contest the very Government conduct that brought about the abatement.

Rulings concerning the appointment of government funded experts are reviewed under an abuse of discretion standard, and may be overturned if the military judge's findings of fact are clearly erroneous or his decision has been shaped by an erroneous view of the law.<sup>16</sup> The stronger the support for those findings, the more likely the decision is to survive appeal by the Government.

## B. Abatement to Dismissal: A Test of Wills on Speedy Trial Grounds

Defense counsel can help to make abatement fatal to the Government's case by asserting the accused's right to a speedy trial.<sup>17</sup> Abatement coupled with speedy trial rights is a powerful tool unique to the military amongst American justice systems.<sup>18</sup> One service court has noted that abatement under RCM 703(d) can carry the case to dismissal and "prevail over" or outshine any defense delay, if RCM 707(a)'s 120 day speedy trial clock has been exceeded.<sup>19</sup> As

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<sup>16</sup> *E.g.*, *United States v. Anderson*, 68 M.J. 378, 383 (C.A.A.F. 2010) (citing *United States v. Lee*, 64 M.J. 213, 217 (C.A.A.F. 2006) and *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001)).

<sup>17</sup> Asserting the client's right to a speedy trial, by objecting to delay or by explicitly requesting that the Government proceed as fast as possible, strengthens the defense case for an eventual dismissal on Sixth Amendment or Article 10 speedy trial grounds. *See* Captain Joseph D. Wilkinson II, *Speedy Trial Demands*, ARMY LAW., Dec. 2011, at 24, 25–26. Apart from RCM 707(a)'s 120 day speedy trial clock, under the provisions of UCMJ Article 10, an accused in pre-trial confinement may have an even stronger argument for a violation of his speedy trial rights where an expert's assistance has been denied. *See* *United States v. Cossio*, 64 M.J. 254, 257 (C.A.A.F. 2007) (noting that the most serious indicia of a speedy trial violation is present where a defendant's case is impaired by delay (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)). Where a convening authority withholds the basic tools for mounting a defense, such as an expert, basic fairness can be called into question, not just the delay. *See id.* at 532 (explaining that "the inability of a defendant adequately to prepare his case skews the fairness of the entire system"). If the delay itself impairs the defense, and it appears to be a "tactical" move by the Government, it may violate the Fifth Amendment as well. *United States v. Vogan*, 35 M.J. 32, 33–34 (C.M.A. 1992); *Wilkinson*, *supra*, at 26.

<sup>18</sup> Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission of the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 252 (2002) ("[A]lthough a recalcitrant convening authority might cause a delay, the UCMJ . . . has safeguards against a delay becoming burdensome. The government is held to strict accountability regarding the accused's right to a speedy trial. If a convening authority unnecessarily causes delay, he risks having the charges forever barred by the expiration of the 120-day speedy trial clock."). An assertion of delay based on abatement must be weighed against other speedy trial issues, for instance any delay in the matter already attributable to the defense. Demanding a speedy trial and setting the pace of litigation are strategic decisions, but waiving delay arising from a request for an expert removes the teeth of RCM 703(d)'s abatement remedy. It is thus vital to ensure other delay issues are resolved or no longer attributable to the defense once abatement appears a ripening prospect.

<sup>19</sup> *Reinecke*, 31 M.J. at 512. The U.S. Air Force Court of Military Review has stated that for abatement of proceedings under RCM 703(d) to prevail over other speedy trial delays several conditions must be met. First, the military judge must find the requested expert assistance is relevant and necessary. Second, the military judge must either grant the defense

suggested above, the defense should request immediate Government compliance, and object to Government delay in providing the necessary expert, so that the resulting delay will be attributed to the Government in the event of RCM 707 speedy trial litigation.<sup>20</sup> Also, explicit written objections to government delay can serve as the accused's "assertion of his right," and support a later dismissal with prejudice on Sixth Amendment or Article 10 speedy trial grounds even if RCM 707 does not apply.<sup>21</sup> It is in the defense's interest that the military judge explicitly attribute delays to each side when and if he grants speedy trial relief, as well as any competing or overlapping reasons for delay.

## C. Measures to Consider in Preserving Appellate Issues

Just as defense counsel must be mindful of the steps available to "defend a win" in the event of abatement, they should also take the right steps in requesting the expert in the first place. Rule for Court-Martial 703(d) does not specify when a request for an expert should be made, but RCM 905(b)(4) requires that motions for the production of

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requested expert or make a finding that the Government must provide a substitute. Third, a ruling must be issued granting the defense request for the expert and directing the Government to employ and fund that expert for the defense. Fourth, the Government must fail to comply with the military judge's ruling. It is a good practice for defense counsel to request of the military judge that the ruling set a date certain for the funding to issue. *See also* discussion *supra* notes 14 and 15.

<sup>20</sup> *Reinecke*, 31 M.J. at 513 (Rives, J., concurring) ("Throughout the 95 day delay in appointing the expert, the defense never raised the speedy trial issue, nor did they demand the expert be appointed immediately.").

<sup>21</sup> *Barker*, 407 U.S. at 528–29 ("objections" by the defense are analyzed as the defendant's "assertion of his right" under the four-part test for Sixth Amendment speedy trial violations); *see also* *Wilkinson*, *supra* note 17, at 25–26 & n.14 (discussing Sixth Amendment speedy trial dismissal in the military context, and the importance of explicit objections or requests for speedy trial in securing it). The Government can object the RCM 707 speedy trial clock from running by dismissing and re-preferring charges, MCM, *supra* note 5, RCM 707(b)(3), but it cannot so easily stop its accountability under the Sixth Amendment (and nothing prevents the defense from raising both grounds in the same motion, a highly desirable move, as a constitutional violation requires dismissal with prejudice, whereas a "pure" 707 violation does not). If the accused remains flagged, restricted, reassigned, etc. while awaiting eventual disposition of his case, if in short he is being treated like someone under suspicion even before re-preferral, then the entire period from first referral to trial should be considered for Sixth Amendment purposes. *See* *United States v. Grom*, 21 M.J. 53, 55–56 & n.3 (C.M.A. 1985) (Sixth Amendment accountability can be measured from first referral, even if the accused is ultimately brought to trial on other charges); *United States MacDonald*, 456 U.S. 1, 10 (1982) (a civilian accused against whom charges are dismissed "is able to go about his affairs, to practice his profession, and to continue with his life" so that his Sixth Amendment speedy trial rights are not implicated until charges are brought again; contrast this with a flagged military accused, who cannot be promoted or attend military schools to advance his career). The defense may also argue that a dismissal and re-preferral is "ineffective" for RCM 707 purposes because the accused remained flagged, not allowed to work in his Military Occupation Specialty, and so forth, especially if it appears to be a ploy for the Government to avoid its RCM 707 accountability. *See* *United States v. Robinson*, 57 M.J. 506, 510 (N-M. Ct. Crim. App. 1997).

witnesses be brought before arraignment or else the issue is deemed waived by the defense. Rule for Court-Martial 703(c)(2)(C) requires the defense to notify the Government of its witnesses with sufficient notice to guarantee their production and lets the military judge set deadlines in his scheduling order, and RCM 905(e) treats issues not timely raised as waived. Military appellate courts can decide many issues on waiver grounds<sup>22</sup> and have done so on the issue of the production of an expert witness.<sup>23</sup> An untimely motion can seal a loss and foreclose any later consideration of the issue. Thus, defense counsel should develop their plan for experts as part of the trial strategy and file related motions before entering a plea.

Objections also present an opportunity to lose a fight on expert funding. The opportunities are many, but several key junctures are typical in the progression of requests for expert funding: the initial denial of a request by the convening authority, the affirmation of that denial by the military judge, and the Government's appointment of a purported adequate substitute. Each presents a possible ground for arguing an abuse of discretion has occurred,<sup>24</sup> but the defense must make the record by presenting arguments and evidence at *each* of these stages. This may persuade the court and convening authority that a defense expert is appropriate, beyond what may have been submitted in support of the initial request.<sup>25</sup> If the defense has the expert testimony ready, but the military judge excludes it, then the defense can use an offer of proof under MRE 103(a)(2) to get the substance of the evidence into the record.<sup>26</sup>

<sup>22</sup> See generally Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—The Why and How*, ARMY LAW., Mar. 2003, at 10.

<sup>23</sup> E.g., *United States v. Bell*, 34 M.J. 937, 950 (A.F.C.M.R. 1992) (“[T]here was no complaint before pleas that the defense had requested but been denied [an expert] witness. Accordingly, any such complaint was waived.”). However, see *United States v. Robinson*, 24 M.J. 649, 650–51 (N.M.C.M.R. 1987) (military judge erred in denying request to order production of expert witness even though the request was made two days before trial was scheduled; defense counsel showed adequate “good cause” for relief from timeliness requirements of RCM 703(c)(2)(C)).

<sup>24</sup> See, e.g., *United States v. Anderson*, 68 M.J. 378, 383 (2010).

<sup>25</sup> See, e.g., *Robinson*, 24 M.J. 649, 653 (finding error in the denial of a defense expert, based in part on defense counsel's offer of proof as to how that expert's conclusions—relayed to defense counsel the day he made the offer of proof—differed from that of the Government supplied expert). Even where a trial court is not inclined to entertain discussion or hear an oral offer of proof, one can still be prepared and made part of the appellate record. See also Ham, *supra* note 22, at 22.

<sup>26</sup> See, e.g., *United States v. Myles*, 29 M.J. 589, 592 (A.F.C.M.R. 1989) *aff'd*, 31 M.J. 7 (C.M.A. 1990) (finding military judge erred in excluding expert testimony based on defense offer of proof, but concluding exclusion was not prejudicial). *But cf. id.* at 593 (Kastl, J., dissenting) (“There is no way to measure how much credibility the Government expert would have retained had the defense's . . . expert countered him and proved him fallible.”).

#### IV. Demonstrating the Need for Expert Assistance Without First Receiving Expert Assistance

If the outright denial of assistance is problematic, demonstrating that such assistance is needed without the benefit of the specialized knowledge sought is especially difficult. Courts tend to assume that “[i]n the usual case, the investigative, medical, and other expert services available in the military are sufficient to adequately prepare for trial,”<sup>27</sup> and are reluctant to “provide investigative services for a mere ‘fishing expedition.’”<sup>28</sup> How does one prove a need to know something without having already learned it? This has been described as the “classic military defense counsel dilemma.”<sup>29</sup> The key to unlocking the professional insight a defense needs is the very funding sought to pay the expert, and without payment many are reluctant to render assistance.<sup>30</sup>

In seeking such “threshold” information, the defense should first consider whether it may be obtained from military or other federal personnel who have not been appointed to the defense team. In *United States v. Anderson*, the defense sought funding for a psychiatrist to examine the accused. The defense team did not attempt to see whether the same examination could be performed by the military psychiatrists available on base. The convening authority and the military judge denied funding in part for that reason. The Navy-Marine Court of Criminal Appeals affirmed. “The defense never opted to pursue this alternative. As a result, it forfeited its right to such assistance.”<sup>31</sup>

<sup>27</sup> *United States v. Gonzalez*, 39 M.J. 459, 460–61 (C.M.A. 1994).

<sup>28</sup> *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987).

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The best way to articulate and explain the need for an expert is by using just such an expert to describe their evidence analysis and development process. But experts, when not already employed by the Government, charge fees for their services, and detailed defense counsel normally do not have access to money to pay for such initial services, in order to obtain preliminary consultation or evaluation services.

*United States v. Warner*, 62 M.J. 114, 122 (C.A.A.F. 2005) (citing *United States v. Kreutzer*, 59 M.J. 773, 777 (A. Ct. Crim. App. 2004) *aff'd*, 61 M.J. 293 (C.A.A.F. 2005)).

<sup>30</sup> See, e.g., *United States v. Mann*, 30 M.J. 639 (N-M. Ct. Crim. App. 1990) (ruling that there was no error in denying funding of an expert because “no evidence” was presented to the military judge from the expert, despite acknowledging there was “no way to develop this evidence without first paying” the expert) (emphasis in original); see also *United States v. True*, 28 M.J. 1057, 1059 (N-M. Ct. Crim. App. 1989) (observing that a defense request before the military judge spoke in more generalities than specifics, chiefly because the expert sought told the defense he needed to be paid up front “before I give you the real benefit of my expertise”).

<sup>31</sup> *United States v. Anderson*, 50 M.J. 856, 862–63 (N-M. Ct. Crim. App. 1999). A lawyer wishing to consult with a military doctor who has examined or treated his client must obtain the client's permission to obtain confidential medical information on DD Form 2870, Authorization for Disclosure of Medical or Dental Information (Dec. 2003). Block 5 (“Information to be Released”) should include an authorization for the

Free-of-charge assistance from military sources may get the defense enough information to show why it needs a hired expert; and if not, a good faith effort to use these resources can at least help to persuade the military judge that the request is a serious one, and not just a defense ploy to make the case more expensive. Sometimes these resources will not be enough, and then the defense must pursue other means to get over the threshold.

#### A. Seeking Limited Assistance to Demonstrate the Need for More Extensive Assistance

“Due process requires that the accused be given the ‘basic tools’ necessary to present a defense, but defense counsel is responsible for doing his or her homework.”<sup>32</sup> Requests for experts often fail because the defense has not done enough of this homework to demonstrate the need for full expert assistance, but has relied on bare assertions and lawyers’ conjecture.<sup>33</sup> Sometimes the Government or the military judge can be persuaded to provide the defense “help with its homework.”

Thus, in *United States v. Gonzalez*, the accused was charged with murdering his wife in Spain. The defense requested a Spanish-speaking investigator (investigators, remember, are treated as consulting experts) to investigate whether she had been killed by members of “the Spanish criminal drug element.” The military judge did not allow this, but did provide the defense with an interpreter “under an order of confidentiality.” If the defense, using this interpreter, had uncovered any evidence to support its theory that someone else had done the crime, it could have re-petitioned the court for the full-fledged investigation. Apparently, the defense made no use of this interpreter, and for that reason the Court of Military Appeals upheld the denial of an investigator.<sup>34</sup>

Defense counsel who are worried that their foundations for seeking expert assistance are too weak should consider whether some kind of limited assistance—which would be cheaper and more palatable to the Government—can be sought as an alternative to get them over the threshold.

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treating personnel to *talk* to the defense counsel and discuss the case, not merely provide records. See Major Kristy Radio, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, ARMY LAW., Dec. 2011, at 4, 13 for a sample. Personnel at military hospitals, compared to their civilian counterparts, are often far more willing to talk to TDS counsel (provided counsel has the appropriate release).

<sup>32</sup> *United States v. Short*, 50 M.J. 370, 373 (C.A.A.F. 1999).

<sup>33</sup> See *Anderson*, 50 M.J. at 862–63. “To require psychiatric assistance based on mere conjecture ‘would be tantamount to a judicial license for a paid fishing expedition.’” *Id.* (citing *United States v. Thomas*, 33 M.J. 644, 648 (N.M.C.M.R. 1991)).

<sup>34</sup> *United States v. Gonzalez*, 39 M.J. 459, 460–61 (C.M.A. 1994).

#### B. Go It Alone? Another Way to Unlock the Government’s Coffers

The last thing an accused may want is to devote personal funds to hiring an expert. This may especially be so when his attorney could not articulate to the judge’s satisfaction why the expert was needed. Nonetheless, sometimes it is worthwhile to advise an accused to spend his own money.

A small investment by the accused can help to open the Government’s much larger resources. In *United States v. Pomarleau*, the accused’s family was able to assemble \$750 for a pair of accident reconstruction experts. Their initial report involved little more than a critique of the state trooper’s investigation relied upon by the prosecution. No significant independent research, fact finding, or testing was necessary. The experts’ preliminary findings were enough to suggest that someone else had committed the vehicular homicides at issue. Two days after this report was provided, the convening authority approved up to \$4,000 to pay one of these experts to help the defense with trial preparation and testimony.<sup>35</sup>

Where a request for government funding is denied and an expert is privately retained, however, courts may avoid weighing in on the necessity of such an expert. In *United States v. Gunkle*, the military judge declined to grant funding of an expert consultant. The accused hired the consultant at his own expense. The military judge did not rule on the defense request to have this expert produced as a witness. He later stated that he might allow the witness to testify on surrebuttal, but the defense ultimately decided not to call the expert.<sup>36</sup> The teaching point is that by paying for the expert’s services when the Government would not, the accused enabled his counsel to prepare for trial and have at least an opportunity to call this expert as a witness. Even trial counsel who opposed funding may elect not to object to privately funded expert testimony. If the accused hires the expert, the earlier denial is a moot issue for appeal,<sup>37</sup> and the Government may not want to create a new appellate issue by objecting to testimony that is costing them nothing.

While the accused, if he has the funds, may hire expert assistance on his attorney’s advice, his attorney may not do this for him. Army Trial Defense Service (TDS) attorneys cannot contract for the services of experts nor obligate the Army, the command prosecuting the client, or TDS to pay

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<sup>35</sup> *United States v. Pomarleau*, 57 M.J. 351, 354 (C.A.A.F. 2002).

<sup>36</sup> *United States v. Gunkle*, 55 M.J. 26, 32 (C.A.A.F. 2001).

<sup>37</sup> See *id.* (the issue of whether the expert should have been funded was rendered moot by the accused’s hiring of the expert). The CAAF acknowledged that the accused might seek *reimbursement* for the expense, but this was not at issue in the appeal. *Id.* at 32 n.2

for the services of an expert.<sup>38</sup> Furthermore, “[a] lawyer may not provide financial assistance to a client in connection with pending or contemplated litigation,” so TDS counsel may not hire experts at their own expense.<sup>39</sup> However, if the client has means to hire a private expert, the defense should be involved to ensure that privately funding the expert is adding to the defense team and is in harmony with the defense theory of the case. The decision to hire a privately funded expert remains that of the client, and while defense counsel can assist with framing the parameters of the assistance, perhaps even the language of the agreement, the contract is between the expert and the client.<sup>40</sup>

In a few rare circumstances privately retaining an expert *without* first trying to obtain expert assistance from the Government is a good idea. This is so if the accused is claiming innocence and wants to take an exculpatory polygraph to persuade the command to drop the case, or is admitting guilt in a sex offense and wants to take a psychological recidivist test to use in mitigation. If the client pays for the test himself, and the results are not good for the defense, then the Government need never be told the test took place.

### C. Leveraging the Government’s Purported Adequate Substitutes

Often the Government offers a substitute, frequently a government employee, in response to a defense request for a private sector expert. They can do this because even an accused who is entitled to expert assistance is not entitled to the expert of his choice, and because the RCM 703(d) explicitly allows the Government to provide an “adequate substitute” for the requested expert.<sup>41</sup> Several cases show how the defense can demonstrate that the proffered substitute is inadequate. Inadequacies include experts lacking the proper expertise,<sup>42</sup> failing to embrace the defense’s theory of the case,<sup>43</sup> and lacking qualifications

comparable to the experts used by the Government.<sup>44</sup> Sometimes the inadequate substitute’s own testimony can be used to show that he is inadequate, and thus pave the way for a better expert.

Thus, in *United States v. Warner*, the Government retained the foremost Air Force expert while providing the defense an expert with lesser qualifications. In asking the court for a different expert, the defense used an affidavit from the appointed substitute herself, who candidly admitted that she did not have specialized expertise in the subject matter of the case.<sup>45</sup> While the military judge did not grant the defense motion to order the appointment of another expert, the CAAF reversed his decision in part because of this affidavit. The court did not hold that there must be parity between the Government’s chosen expert and that given the defense. Instead, it inquired “whether the expert the Government provided to the defense was an adequate substitute for the defense-requested civilian expert.” Whether the defense expert’s professional qualifications were “reasonably comparable” with the Government expert’s was simply one factor to be considered in deciding whether a substitute was adequate.<sup>46</sup>

As the “standard for determining whether a substitute for a defense-requested expert is adequate . . . is a fact-intensive determination that is committed to the military judge’s sound discretion,”<sup>47</sup> defense counsel must use evidence to demonstrate any inadequacy to the trial court and to cement a record for appeal. The expert offered by the Government can be a key source of evidence. He can be asked to testify or prepare an affidavit outlining his limitations in or lack of experience as an expert witness and making comparisons between his expertise and that of the Government’s expert or that of a proposed defense alternative.<sup>48</sup> Sworn affidavits and testimony, rather than

<sup>38</sup> U.S. ARMY TRIAL DEFENSE SERVICE, STANDARD OPERATING PROCEDURES para. 1-12 (2009).

<sup>39</sup> U.S. DEPT’S OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. B, Rule 1.8(e) (1992). This rule applies to military lawyers. A civilian lawyer representing an indigent client at court-martial “may pay court costs and expenses of litigation on behalf of the client.” *Id.*

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

<sup>41</sup> *United States v. Van Horn*, 26 M.J. 434, 439 (C.M.A. 1988).

<sup>42</sup> *E.g.*, *United States v. Lee*, 64 M.J. 213 (C.A.A.F. 2006) (finding a violation of fundamental fairness where the military judge denied the defense an expert in the emerging field of media analysis—a novel, complex scientific discipline—based on the belief that an interview between the defense counsel and the Government expert prior to trial was a sufficient substitute). *See also* *United States v. McAllister*, 55 M.J. 270 (C.A.A.F. 2001) (returning the case to the court below for a hearing with the benefit of the DNA testing expert assistance denied at trial).

<sup>43</sup> *E.g.*, *United States v. Van Horn*, 26 M.J. 434 (C.M.A. 1988); *United States v. Guitard*, 28 M.J. 952 (N.M.C.M.R. 1989).

<sup>44</sup> *United States v. Warner*, 62 M.J. 114, 122 (C.A.A.F. 2005).

<sup>45</sup> In some ways the dispute over funding can be avoided by winning the foot race to the foremost Government expert. In *Warner*, “the Government had already secured its expert witness before the defense had an opportunity to seek its own.” *Id.* at 118. If the defense is able to request first the preeminent expert available to the convening authority, not only might the defense secure that expertise, but the prosecution would also be denied the benefit of the finite resources of that person. It is unclear though, if the acts of making contact and having an initial consultation with an expert would suffice to create a conflict preventing the Government from retaining that expert. Consultants made subject to orders of confidentiality by the convening authority may be a “viable alternative to requiring the convening authority to fund a private investigator.” *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). But less clear is whether such confidentiality could be imposed post hoc on a Government employee informally consulted for defense use. There may be no professional ethics or other restriction such that a duty of loyalty would preclude that same expert from assisting the Government if not appointed to the defense team.

<sup>46</sup> *Warner*, 62 M.J. at 118, 122.

<sup>47</sup> *Id.* at 120.

<sup>48</sup> *See id.* at 124–25 (Crawford, J., dissenting) (considering affidavit of proposed Government expert stating that though she feels competent she is

lawyers' assertions or unsworn documents, should be used whenever possible.<sup>49</sup> Education, training, published works, clinical and other experience—anything on or related to a curriculum vitae—can be made a subject of comparison.

It may be embarrassing to ask a Government appointed expert to diminish his own qualifications in comparison to another—in a sworn statement for a court, no less—but it may be vital for the defense.<sup>50</sup> Moreover, as cases involving complex questions frequently devolve into a battle of the experts, it may be worth fighting some of that battle before trial. A scrimmage with one's Government appointed expert is useful in any event as the prosecution is not foreclosed from attacking, or at least diminishing, the qualifications of the very expert they offer to the defense.<sup>51</sup> If the Government does so after the defense has unsuccessfully challenged the adequacy of the substitute expert, then they are giving the defense ammunition to renew the request for a better expert.

## V. How Contracting Norms Apply to the Hiring of Experts

### A. Sole Source Acquisition of Experts

As with all government acquisitions, several analytical steps are involved in obtaining civilian expert services at government expense. The contracting process, while complex overall, is relatively straightforward in this area. A full and open competition process is the norm in acquiring goods and services by the Government.<sup>52</sup> Under this system, the Government does not go about making its decision as an attorney would in retaining a subject matter expert, such as through research, contacting contemporaries, informal interviewing and consultation, and personal vetting. Rather,

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not the equivalent of the defense's initially requested expert, and that others are better qualified).

<sup>49</sup> See *id.* at 124–25 (Crawford, J., dissenting) (emphasizing *inter alia* that “averments of counsel during motions practice and oral argument . . . are not evidence” and that an unattested CV is not evidence); see also MCM, *supra* note 5, RCM 905(h) (motions may be supported by affidavits or evidence presented at Article 39(a) sessions); Military Rules of Evidence (MRE) 1101(a) (MRE) apply to 39(a) sessions, including motions hearings).

<sup>50</sup> *Warner*, 62 M.J. at 126 (Crawford, J., dissenting) (contemplating that a Government appointed expert might be used “to assist [the defense] in making a more credible request for the services of” their preferred expert); see also *id.* at 136 n.20 (Crawford, J., dissenting) (noting that one of the capabilities of one rendering expert assistance might be “recommending an expert witness or another consultant”).

<sup>51</sup> See, e.g., *United States v. Anderson*, 68 M.J. 378, 382 (C.A.A.F. 2010); *United States v. Langston*, 32 M.J. 894, 896 (C.M.A. 1991).

<sup>52</sup> 10 U.S.C.A. § 2304(a) (2012) (stating that except where otherwise provided, a competitive procedure or a combination of procedures shall be used in obtaining goods or services).

a formal advertisement is published<sup>53</sup> and interested parties prepare detailed bids, expending time and effort reviewing the minimum requirements, and draft proposals on how they will meet the strictures set forth.

As experts' time is valuable, and time is often limited in the run-up to court-martial, it is fortunate that experts may be hired through sole source acquisition.<sup>54</sup> Because this method of contracting departs from the default rule, the Federal Acquisition Regulation requires that a Justification and Authorities memorandum be prepared by the contracting office.<sup>55</sup> Beyond that, the contracting office may use a series of letters or one of several standard forms to record the details of the employment and the required signatures.<sup>56</sup>

### B. Borrowed Experts: More Available Prospects, Better Suited Alternatives, and Already Paid For

When the Government denies funding for a specific private sector expert, it will frequently offer an “adequate substitute” who works for the Government, and sometimes the defense will request such assistance to start with. This can work to the benefit of all parties, but is not always as simple as it seems, especially if the expert is from a nonmilitary department.

#### 1. Considering Other Military Resources

Beyond the personnel on the local installation, perhaps most likely to occur to trial counsel, other commands may have witnesses who are qualified and able to testify. Rule for Court-Martial 703(e)'s discussion notes the ease with which military personnel near and far can be made to appear.<sup>57</sup>

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<sup>53</sup> See, e.g., FEDBIZOPPS.GOV, <https://www.fbo.gov> (last visited Mar. 15, 2013).

<sup>54</sup> *Id.* Agencies do not need to follow competitive procedures to procure the services of an expert for use, in any litigation or dispute . . . involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or to procure the services of an expert or neutral for use in any part of an alternative dispute resolution or negotiated rulemaking process, whether or not the expert is expected to testify. . . . 10 U.S.C.A. § 2304(c)(3) (2012). See also FAR 6.302-3(a)(iii) (2012) (allowing for the simplified acquisition of “the services of an expert or neutral person for any current or anticipated litigation or dispute”); *id.* 6.302-3 (b)(3)(i) (allowing the use of the authority in sub-section (a)(iii) to obtain the services of experts as described in 10 U.S.C.A. § 2304(c)(3)).

<sup>55</sup> See FAR 6.302-3(c).

<sup>56</sup> See, e.g., U.S. Dep't of Def., DD Form 2292, Request for Appointment or Renewal of Appointment of Expert or Consultant (Sept. 2011); U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment (Mar. 1991).

<sup>57</sup>

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at Government expense, or if informal

Apart from counterparts in other Army installations' medical facilities, criminal investigation offices, or laboratories, sister services may have personnel worthy of consideration. They may have more extensive training, more relevant experience, and may appear more appealing as potential members of the defense team because they owe nothing to the Army. Another service's foremost expert can be sought where the Army's top expert is already retained by the prosecution. Stand-alone facilities, such as Uniformed Services University of Health Sciences, are akin to civilian academic institutions with resident experts.<sup>58</sup> Such personnel may be willing to consult remotely and may relish the opportunity to put their knowledge to practical application, whether testifying or on a more limited basis outside the courtroom as a consultant. As members of the military, or even federally employed Department of Defense civilians, the cost of their involvement amounts to little more than a temporary duty (TDY) assignment.<sup>59</sup>

## 2. Looking to Other Federal Entities for Expert Assistance

The responsibility for funding experts rests on the convening authority. The use of witnesses already employed by the federal government relieves unit funds of this burden (except as discussed below).

### a. Conflict Issues—Who Does the Expert Work for Anyway?

As an initial matter, it is important that a federal employee not act as consultant or witness in a court-martial in a private capacity. Chiefly, this is because the usual method of funding an employee is through a TDY type arrangement, which covers official duties and not personal arrangements. Furthermore, federal employees are generally forbidden by regulation to serve as expert witnesses in federal court unless they (1) are appearing for the Government, or (2) have permission from their agencies.<sup>60</sup>

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coordination is inadequate, the appropriate superior should be requested to issue the necessary order." MCM, *supra* note 5, R.C.M. 703(e)(1) discussion.

<sup>58</sup> Prior to its closure, the Armed Forces Institute of Pathology (AFIP) and its assigned personnel regularly consulted on medical issues in legal matters involving the military in both civil and criminal litigation. Though not identical, some of AFIP's capabilities have been absorbed by the Joint Pathology Center, a newly established entity. See 10 U.S.C.A. § 176 (2012). See also National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 722 (2008) (listing the findings of Congress relating to the closure of AFIP and the establishment of the Joint Pathology Center).

<sup>59</sup> See 5 U.S.C.A. § 5537 (2012) (prohibiting federal employees from receiving fees for service "as a witness on behalf of the United States").

<sup>60</sup> 5 C.F.R. § 2635.805(a) (2012).

It is also conceivable that, however unlikely this may be in practice, an employee of the Government participating in a court-martial proceeding could be subject to prosecution for acting as "an agent or attorney for anyone before any . . . court-martial . . . in connection with any covered matter in which the United States is a party. . . ." <sup>61</sup> While the Department of Justice has opined that serving as an expert witness does not count as "acting as an agent or attorney" and so does not violate this law,<sup>62</sup> and the law contains an exception for persons testifying under subpoena,<sup>63</sup> at least one federal district court has suggested that expert testimony unauthorized by the expert's agency could be a prosecutable offense.<sup>64</sup> Suffice to say that advance coordination with the supervisor of the prospective expert who is a federal employee is indispensable, if only to ensure that TDY will be feasible.

### b. Fiscal Issues—Is This Expert Already Being Paid for This?

Further caution is also advisable in using the employees of one agency to do the work of another. Historically, and in a general sense, federal agencies are branches of a single

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<sup>61</sup> 18 U.S.C.A. § 205(a)(2) (2012) (making it a crime for an officer or employee of the United States to act as an "agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest," *except* "in the proper discharge of his official duties"); *Young v. United States*, 181 F.R.D. 344, 347-48 (W.D. Tex. 1997) ("Testimony contrary to the provisions of 5 C.F.R. § 2635.805 invites prosecution . . ."). See also 5 U.S.C.A. § 5537 (2012) (precluding the receipt of fees by federal employees for service "as a witness on behalf of the United States" but not criminalizing such conduct).

<sup>62</sup> See Expert Witness Agreements Between the Department of Justice and Employees of the Department of Veterans Affairs, 13 Op. O.L.C. 317 (1989). The memorandum opinion of the Department of Justice, Office Of Legal Counsel, expresses doubt that mere testimony as an expert would violate 18 U.S.C.A. § 205. "[A] witness, including an expert witness, would not be thought to act as 'agent or attorney' for another person within the ordinary meaning of those words." *Id.* at 318. Greater involvement in a case, however, such as helping to shape case strategy as a consultant might go too far. In some cases, expert witnesses can be expected to do considerably more than testify—they can be the architects of the case in preparation of specialized studies, development of theories, etc. Such pre-trial involvement, coupled with testimony at trial, might well rise to the level of acting as 'agent or attorney' within the meaning of 18 U.S.C. § 205(2). *Id.* at 319 (citing Letter from Leon Ulman, Acting Assistant Att'y Gen., Office of Legal Counsel, to Arthur Kusinski, Assistant to the General Counsel, Nat'l Sci. Found., at 4 n.3 (May 13, 1976)).

<sup>63</sup> 18 U.S.C.A. § 205(g) ("Nothing in this section prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt."); *United States v. Lecco*, 495 F. Supp. 2d 581, 588-89 (S.D. W. Va. 2007) (allowing a Veteran's Administration psychiatrist who had not been given authorization by his agency or its ethics official to testify, and citing this section as authority).

<sup>64</sup> *Young*, 181 F.R.D. at 347-48.

system, and cooperate as a matter of basic comity.<sup>65</sup> Yet, the potential for borrowing agencies to augment their appropriations through the use of other agencies' employees, and for loaning agencies to undertake purposes for which they have not received appropriated funds, has been of concern to Congress.<sup>66</sup> Thus, a convening authority can agree to pay the travel expenses of salaried federal employees called as experts, just as he would for any military witness traveling to participate. However, the salary of that employee on temporary duty may be subject to the same fiscal scrutiny a civilian's expert fee might be. In other words, the loan of personnel from another agency to a court-martial cannot be regarded as a simple interagency accommodation, though this was once the case.<sup>67</sup>

Generally speaking, the Economy Act governs situations in which one agency obtains goods or services from another, including performance of services by the personnel of one agency for another.<sup>68</sup> The loaning of personnel may or may not require reimbursement. When it does, a convening authority may have to use operational funds to cover the salary of a federal employee while serving as an expert. However, a *de minimis* exception allows for the use of federal employee services by another agency without the need to reimburse the loaning agency, so in a typical case where only one expert is provided for a limited time and the expense is minor, the convening authority will not have to do this. While not yet precisely adjudicated, the typical expert role in a case—be it as a consultant or

testifying witness—is likely a *de minimis* transaction.<sup>69</sup> Another exception to the reimbursement requirement allows personnel to be loaned where the transaction will aid the loaning agency in performing a mission for which Congress has made appropriations.<sup>70</sup>

For recurring procurements between the military and other federal agencies, a cross servicing agreement must be established, but for one-time services these might not be required.<sup>71</sup> Close coordination between the lending and borrowing agencies' personnel or human resources offices is essential to address or avoid this issue, as well for coordination of any particulars implicated by the expert assistance sought. Federal agencies may have different definitions of what to call such a relationship, be it a detail, assignment, or otherwise.<sup>72</sup> Each agency may further have policies in favor or against details and may or may not require reimbursement.

## VI. Conclusion

While courts-martial accuseds are not required to show indigence to obtain expert assistance at government expense, numerous barriers—such as the thrift of the convening

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<sup>65</sup> Department of Health and Human Services Detail of Office of Community Services Employees, 64 Comp. Gen. 370, 377–78 (1985) [hereinafter HHS Detail of Employees Decision].

<sup>66</sup> *Id.* at 377.

<sup>67</sup> *Id.* at 378 (referencing Departments and Establishments—Services Between—Loan of Employees, 13 Comp. Gen. 234 (1934) *abrogated* by HHS Detail of Employees Decision, *supra* note 65 (“In the absence of a written order or agreement in advance providing for interdepartmental personal services, or unless the written order or agreement specifically provides for reimbursement, the loan of personnel between departments or offices will be regarded as having been made as an accommodation for which no reimbursement or transfer of appropriation will be made for salaries.”)).

<sup>68</sup> 31 U.S.C.A. § 1535 (2012). Unfortunately, the most relevant portion of the Federal Acquisition Regulation, FAR Subpart 17.5, concerning Interagency acquisitions, states by its own terms that it does not apply to “reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction.” 48 C.F.R. § 17.500(c)(1) (2012). While this portion of the FAR is not applicable, the remainder of the provisions concerning these types of transactions is informative. Generally, under the Economy Act, requests for services by interagency acquisition are supported by a determination and findings memorandum, commonly called a D&F. The D&F (approved by a contracting officer of the requesting agency and furnished to the servicing agency) should state that the supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source and that the use of an interagency acquisition is in the best interest of the Government. *Id.* § 17.502-2(c).

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<sup>69</sup> See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-978SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 12–56 (3d ed. 2008). Though the General Accounting Office itself has not clearly defined the parameters of the *de minimis* exception, it has determined that it “could not, for example, be stretched to cover a detail of 15–20 people.” *Id.* (citing Non-Reimbursable Transfer of Administrative Law Judges, B-221585, 65 Comp. Gen. 635, June 9, 1986). Additionally, the Department of Justice's Office of Legal Counsel has opined on the applicability of the exception in several situations: see Reimbursement for Detail of Judge Advocate General Corps Personnel to a United States Attorney's Office, 13 Op. O.L.C. 188 (1989) (opining that the United States Attorney's Office for the District of Columbia must reimburse Department of Defense for year-long detail of 10 lawyers); see also Reimbursement of the Internal Revenue Service Provided to the Independent Counsel, 12 Op. O.L.C. 233 (1988) (determining the detail of Internal Revenue Service agents to investigate tax fraud for an Independent Counsel could be non-reimbursable under the commonality of functions exception).

<sup>70</sup> HHS Detail of Employees Decision, *supra* note 65, at 380.

<sup>71</sup> Cross servicing agreements can be formalized by memorandum or on a Government form. *E.g.*, U.S. Dep't of Def., DD Form 1144, Support Agreement (Nov. 2001). In instances of a onetime service, an order or requisition may be sufficient without preparing a support agreement. See U.S. DEP'T OF DEF., INSTR. 4000.19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT para. 4.5 (9 Aug. 1995).

<sup>72</sup> Compare U.S. DEP'T OF COMMERCE, AGREEMENTS HANDBOOK (Nov. 2011), available at [www.nist.gov/.../Final-DOC-Agreements-Handbook-Nov-2011.pdf](http://www.nist.gov/.../Final-DOC-Agreements-Handbook-Nov-2011.pdf) (defining “Detail” as “Where an employee performs duties other than those of their current position” and “Assignment” as “Where an employee performs one or more of their regular duties in a different location or undertakes training or developmental assignments”), with U.S. DEP'T OF ARMY, REG. 690–300, FINANCIAL ADMINISTRATION, FINANCE AND ACCOUNTING FOR INSTALLATIONS, TRAVEL AND TRANSPORTATION ALLOWANCES para. 8-1 (12 Aug. 1994) (defining both reimbursable and non-reimbursable details as temporary assignments of an employee outside DoD).

authority bringing the case, and the requirement that the defense demonstrate the necessity of funded assistance—restrict access to such funding. Whether one seeks funding for a consultant or for a testifying witness, the showing of necessity required is virtually identical. If the defense shows necessity and the Government fails to provide assistance, the military judge may abate proceedings, and the defense may take advantage of this abatement using speedy trial doctrine.

Defense practitioners can make a case for funding, either for experts of their choosing or for expert assistance better matched to the defense's needs, rather than accept the first suggestion made by the Government. By engaging with purported adequate substitute experts, the defense may persuade the convening authority to pay for an expert of defense counsel's choosing. Even if not successful at the

trial level, the same material can build a stronger appellate record for later consideration of the issue. The defense may use free government resources, limited initial grants of funding, or the accused's own funds to "jump start" the funding machinery.

The Government can sometimes provide adequate assistance using federal resources, in or out of the military, at little or no additional cost to the Government, provided the experts act in an official capacity. Where such assistance is de minimis, and the arrangement acceptable to the outside federal agency concerned, an accused can enjoy having the resources of the Government at his disposal and have the meaningful equal access to witnesses as intended by Congress.

# 7 Deadly Scenarios: A Military Futurist Explores War in the 21st Century<sup>1</sup>

Reviewed by Major John K. Suehiro\*

## I. Introduction

Missiles swarm toward U.S. warships. A nuclear bomb detonates in the homeland. A deadly virus infects the world. Another nuclear bomb detonates in the homeland. Although these descriptions sound like scenes from summer action movies, they are not. These scenes come from Andrew F. Krepinevich's book, *7 Deadly Scenarios*. Krepinevich advocates for a joint approach in using scenario-based planning to determine how the U.S. military can best respond to future challenges. Although the headquarters of choice, Joint Forces Command, no longer exists,<sup>2</sup> Krepinevich's ideas are still valid and can be helpful for judge advocates seeking to sharpen their operational law skills.

## II. Scenario-Based Planning

The meat of *7 Deadly Scenarios* is in the seven stories that depict possible future events in the world. Helpfully, each has a specific focus. For example, Chapter 6 is about the breakdown of the world economy. Drawing on in-depth research and his vast experience,<sup>3</sup> Krepinevich articulates many believable sequences of events. As one reviewer put it, "I found each scenario extremely captivating, thought provoking, and truly realistic."<sup>4</sup> Aside from the entertainment value of the book, a core lesson is that scenario planning is an important aspect of national security strategy. This concept is not new.

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<sup>1</sup> ANDREW F. KREPINEVICH, *7 DEADLY SCENARIOS: A MILITARY FUTURIST EXPLORES WAR IN THE 21ST CENTURY* (2010).

<sup>2</sup> Jason Ukman, *U.S. Joint Forces Command Formally Dissolved*, WASH. POST, Aug. 4, 2011, [http://www.washingtonpost.com/blogs/checkpoint-washington/post/us-joint-forces-command-formally-dissolved/2011/08/04/gIQAQbzBuI\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/us-joint-forces-command-formally-dissolved/2011/08/04/gIQAQbzBuI_blog.html).

<sup>3</sup> The author is a retired U.S. Army officer and currently serves as the president of the Center for Strategic and Budgetary Assessments. He has also served in the Department of Defense Office of Net Assessment and was a member of the National Defense Panel in 1997, the Defense Science Board Task Force on Joint Experimentation, the Joint Forces Command Advisory Board, and the Defense Policy Board. CENTER FOR STRATEGIC AND BUDGETARY ASSESSMENTS, <http://www.csbaonline.org/about/people/akrepinevich/> (last visited June 6, 2013).

<sup>4</sup> Rick Baillergeon, Book Review, *INFANTRY MAG.*, Apr. 1, 2011, at 51.

## A. Brief History

Scenario planning has been used for military purposes since the end of World War II.<sup>5</sup> Herman Kahn and his colleagues at the RAND Corporation developed scenarios "to provide U.S. policymakers with the conceptual tools to anticipate 'alternate' or 'surprising' military futures by 'thinking the unthinkable'" in the context of the Cold War.<sup>6</sup> In the 1970s, businesses began using scenario planning after the oil crisis of 1973 demonstrated the vulnerability of the world economy to sudden changes in the energy market.<sup>7</sup>

## B. The Concept

Scenarios are not developed to predict the future.<sup>8</sup> Rather, they assist decision makers in exploring the different situations that may be looming on the horizon. In a study on scenario planning, Dana Mietzner and Guido Reger researched the purpose of scenarios.<sup>9</sup> Some key points that shed light on Krepinevich's argument aim to (1) "[r]equire decision makers to question their basic assumptions"; (2) "[p]roduce new decisions by forcing fresh considerations to the surface"; (3) "[i]dentify contingent decisions by exploring what an organization might do if certain circumstances arise"; and (4) "[d]evelop multiple futures based on optimistic and pessimistic projections of past events."<sup>10</sup>

History and present trends will set the stage, but the details must be created as the scenario progresses. As a result, the processes and ideas generated are the important outputs. Furthermore, change is an important variable and all the points mentioned above provide decision makers with mental tools to define that variable. Participants must simply open their minds to all possibilities. It is not surprising that Krepinevich is an advocate of using scenarios to develop responses to change. In *The Army and Vietnam*, he examined how the Army failed to adapt its forces to a counterinsurgency strategy in Vietnam, even though the

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<sup>5</sup> Dana Mietzner & Guido Reger, *Advantages and Disadvantages of Scenario Approaches for Strategic Foresight*, 1(2) INT'L J. TECH. & PLAN. 220, 221 (2005).

<sup>6</sup> Matt Carr, *Slouching Towards Dystopia: The New Military Futurism*, 51(3) RACE & CLASS 13, 14 (2010).

<sup>7</sup> Mietzner & Reger, *supra* note 5, at 222.

<sup>8</sup> KREPINEVICH, *supra* note 1, at 14; Mietzner & Reger, *supra* note 5, at 220.

<sup>9</sup> Mietzner & Reger, *supra* note 5.

<sup>10</sup> *Id.* at 224.

military's experiences in the early 1960s should have dictated otherwise.<sup>11</sup>

### III. Wargaming

A scenario by itself is just a narrative, without any more value than a book or movie.<sup>12</sup> The reader can be stimulated emotionally and intellectually, but there is no lasting effect on decision making.<sup>13</sup> According to Peter Perla and E.D. McGrady,

Strictly intellectual exercises, including simple scenario-based planning, seldom create emotional or psychological stress. Indeed, no planning system or training tool can cover every possible contingency or produce the same stresses experienced in reality. Real people do not die in wargames. Nevertheless, effective high engagement games can equip leaders better to confront whatever contingency they must actually face, regardless of its similarity in detail to the game actually played.<sup>14</sup>

By wargaming a scenario, the players may experience the outcome of their decisions in response to the situation at hand. No longer are they just observers with opinions. Their opinions will have to turn into decisions; and those decisions will have consequences that will further develop the scenario and require additional decisions. The player benefits by receiving immediate feedback.

Turning back to Krepinevich's argument, he maintains that a joint headquarters should wargame futuristic scenarios to make recommendations on strategy, force structure, and acquisitions.<sup>15</sup> By having one organization responsible for this mission, there will be no room for different organizations to compete and draw attention away from the goals at hand. Instead, one neutral organization can make the independent assessments necessary to ensure the U.S. military can meet the challenges it may face.

### IV. Usefulness for the Judge Advocate

*7 Deadly Scenarios* is an intriguing read for anybody interested in world affairs. For the judge advocate (operational law attorney in particular), it can provide the starting point for broadening and sharpening skills in advising commanders.

Most judge advocates should be familiar with wargaming if they have gained any litigation experience. Trial preparation is the key to performing well in the court room. The same concept applies to operational law. Judge advocates participate in this type of training if their unit rotates through a combat training center (CTC) or conducts a field exercise. However, those opportunities come but once or twice a year, at most. What about the rest of the time? There is only so much he can do with a rules of engagement briefing to Soldiers in a unit.

#### A. The Concept Applied to the Operational Law Attorney

Let's say that a CTC rotation or training exercise equates to a trial. They all represent events, in which a judge advocate is called upon to think on his feet in front of others and make decisions that will impact the outcome of the event. Similarly in the practice of criminal law, to prepare for a court-martial, the trial counsel will typically find another trial counsel to act as the defense and anticipate the defense's strategy. What kind of arguments or objections will the defense make? How will they question witnesses?

The more creative the practice adversary counsel can be, the better prepared her colleague will be for trial. The role-playing counsel's job is to expand the preparing trial counsel's thought process. As explained by Krepinevich and Mietzner and Reger, the goal is not to make the preparing trial counsel ready for every possible scenario during a trial.<sup>16</sup> Rather, it is to prepare that trial counsel for what could be possible, and—more importantly—to help that trial counsel understand how to react to a previously unforeseen occurrence.

Just like the trial counsel, the operational law attorney should find another operational law attorney to assist in preparing for a CTC rotation or training exercise. Unlike a trial, this type of situation is not adversarial. The assisting operational law attorney will act more as a game controller; putting the preparing operational law attorney into varying situations based on previous decisions or new developments. Therefore, the assisting operational law attorney has responsibility for building the scenario and should consult with outside resources to make it realistic. He could turn to intelligence personnel in the unit's G2/S2 section, planners in the G3/S3 section and existing literature, etc.

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<sup>11</sup> ANDREW F. KREPINEVICH, *THE ARMY AND VIETNAM* (1986).

<sup>12</sup> Peter P. Perla & E.D. McGrady, *Why Wargaming Works*, 64(3) *NAVAL WAR C. REV.* 111, 113 (2011).

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

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

<sup>15</sup> KREPINEVICH, *supra* note 1, at 343–46.

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<sup>16</sup> KREPINEVICH, *supra* note 1, at 14; Mietzner & Reger, *supra* note 5, at 220.

Books like *7 Deadly Scenarios* can serve as an impetus for building the facts of the scenario. Legal experts' opinions can also be helpful in developing creative issues to present to the preparing operational law attorney. In 2006, the Naval War College hosted a workshop with legal experts to assess "the probable state of the global legal order in 2020."<sup>17</sup> They discussed how states and international organizations may modify their positions on certain issues. For example, growing proliferation of weapons of mass destruction may lead to greater support for the practice of preemptive use of force.<sup>18</sup> Moreover, "any discussion of the global legal order must include not only the obvious treaties, customary international law, and Security Council resolutions but also the transnational application of national laws, decisions or international tribunals (courts and arbitral tribunals), and 'soft law.'"<sup>19</sup>

The foresight of legal scholars will further enhance the assisting operational law attorney's ability to challenge the preparing operational law attorney in areas of uncertainty. Exploring how an operational law attorney can use one of the scenarios from Krepinevich's book is the logical next step in an operational scenario planning exercise.

## B. China's "Assassin's Mace"

Chapter 5 of *7 Deadly Scenarios* presents a situation in which China establishes a blockade around Taiwan to force reunification.<sup>20</sup> Action by the United Nations Security Council is not possible because China can veto it.<sup>21</sup> The United States and Japan attempt to de-escalate the situation through diplomacy, but are ready to impose a counter-blockade.<sup>22</sup>

To further develop the scenario, pretending that a standstill has existed for four months and a humanitarian crisis has emerged is helpful.<sup>23</sup> To the surprise of the western world, the Chinese are allowing a relief force into Taiwan to deliver supplies. A U.S. Army judge advocate is assigned as a legal advisor for the U.S. task force. The task force commander wants advice on whether he should request supplemental rules of engagement. He also wants to know about any agreements the United States has with Taiwan (like a Status of Forces Agreement). Will local Taiwanese

<sup>17</sup> Craig H. Allen, *Moderator's Report: Legal Experts' Workshop on the Future Global Legal Order*, 60(4) NAVAL WAR C. REV. 73, 73 (2007).

<sup>18</sup> *Id.* at 80.

<sup>19</sup> *Id.* at 75.

<sup>20</sup> KREPINEVICH, *supra* note 1, at 169–70.

<sup>21</sup> *Id.* at 206.

<sup>22</sup> *Id.* at 208–09.

<sup>23</sup> The Taiwanese leadership had earlier reported that they only had enough "food, fuel, and other essentials" to last one to two months. *Id.* at 206.

laws apply to U.S. Soldiers? Finally, what will happen if a Soldier gets into a car accident with a local national?

After answering these questions, the operational law judge advocate next finds herself in Taiwan with the U.S. relief force. One day, a U.S. supply convey is stopped by a group of desperate civilians, who attempt to take all the supplies for themselves. A fight breaks out between several civilians and Soldiers, resulting in injuries on both sides. The commander wants to know what he should do in response.

Next, the relief mission is almost over and the U.S. task force is preparing to leave. A convoy commander reports that many local nationals are asking his Soldiers for asylum on a daily basis. What kind of advice should the operational law attorney give those soldiers?

## C. Lessons Learned

The expansion of the "China's 'Assassin's Mace'" scenario is only a brief example of how operational law attorneys can prepare each other for the real thing. In practice, there should be responses to the answers submitted, making the exercise interactive. For example, advice in response to the fight may have been to initiate an investigation. The assisting operational law attorney could then tell you results of the investigation. By way of another example, the investigation concluded that the local nationals started the fight and the Soldiers acted properly in defending themselves. However, the local government also investigated the incident and determined that U.S. Soldiers threw the first punch. What advice should the judge advocate give now?

After going through the questions raised in the previous section, the operational law attorney will be conditioned to know what kind research to conduct before deploying to a foreign country. He might also become more comfortable in responding to incidents as they arise. The specific answers to the questions are not as important as gaining a better feeling for the thought process used in coming to those answers.

## V. Concluding Thoughts

In the 1990 movie, *Back to the Future Part III*, one of the main characters, Dr. Emmett Brown, says "[i]t means your future hasn't been written yet. No one's has. Your future is whatever you make it. So make it a good one. . . ."<sup>24</sup> The world is becoming increasingly complex and new challenges are always arising. Andrew Krepinevich has

<sup>24</sup> BACK TO THE FUTURE PART III (Universal Pictures 1990).

provided valuable insight into what operational judge advocate leaders should be thinking about. It is up to us to make the most of it; to “make it a good one.”

## CLE News

### 1. Resident Course Quotas

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

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

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

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

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

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

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

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

### 2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

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

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

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

### 3. Civilian-Sponsored CLE Institutions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail [Thomas.s.randall2.mil@mail.mil](mailto:Thomas.s.randall2.mil@mail.mil).

#### **5. Mandatory Continuing Legal Education**

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

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

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

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

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

## Current Materials of Interest

### 1. Training Year (TY) 2013 RC On-Site Legal Training Conferences

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

Date	Region, LSO & Focus	Location	POCs
23 – 25 Aug 13	North Western Region 75th LOD  Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org  SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

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

b. Access to the JAGCNet:

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

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely.

Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

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

### **3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet**

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

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](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.

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

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

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

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

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







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