Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 3 • 2019

McPherson's *Army Lawyer* Interview 60

From Legal Clerks to Paralegal Specialists 10

Securing Soldiers from State Prisoners 49

The Army's Trial Judiciary at Fifty 76

AROUND THE CORPS

Students take a break in the atrium of The Judge Advocate General's Legal Center and School. (Credit: Chris Tyree)

Army Lawyer

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Issue 3 • 2019

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On the cover: James E. McPherson, recently named acting Under Secretary of the Army, in his office at the Pentagon. (Credit: Aaron C. Sweet, United States Government Publishing Office)

Table of Contents

Departments

Court is Assembled

2 **Lawyers of Record**
By Lieutenant General Charles N. Pede

Career Notes

3 **Taking AIM2**
New Interactive Assignment Module Makes Officer Management Process More Efficient
By Lieutenant Colonel Katherine K. Stich

4 **Why They Stay**
By Colonel Fansu Ku

8 **News & Notes**

Lore of the Corps

10 **From Legal Clerks to Paralegal Specialists**
A Short History of Enlisted Soldiers in the Corps
By Mr. Fred L. Borch

20 **The Beast of Lichfield**
Colonel James A. Kilian and the Infamous 10th Reinforcement Depot
By First Lieutenant Antonino C. Monea

Life Hack

23 **College for Under $10K**
A Guide to Using the Post-9/11 GI Bill for Your Kids' Tuition
By Major Kyle V. Burgamy

Practice Notes

27 **Recent Changes to the Anti-Deficiency Act**
What Do They Mean?
By Major Matthew B. Firing

32 **An Overview of the Judgment Fund and How Its Availability Can Impact Claim Settlements**
By Lieutenant Colonel (Retired) Timothy A. Furin

36 **An Intelligence Law Primer for the Second Machine Age**
By Major John C. Tramazzo

45 **Government Communication with Industry**
More Necessary Now Than Ever
By Lieutenant Colonel Alan M. Apple

49 **A Writ of Habeas Corpus *Ad Prosequendum***
Federal Authority to Secure Soldiers Who Are State Prisoners at Court-Martial
Captain Patrick S. Wood

54 **We Didn't Start the Fire**
A Primer on Mutual Aid Agreements for Fire Suppression Services
By Lieutenant Colonel William (Bill) M. Stephens and Major Faith R. Coutier

Features

No. 1

60 **From MP to Under Secretary**
An Interview with James E. McPherson, the Newly Named Under Secretary of the Army
By Sean P. Lyons

No. 2

66 **Welcome to the Wild West**
A Guide to Arming in Stand-Alone Facilities
By Major Julie A. Worthington

No. 3

76 **Independent but Invested**
The Army's Trial Judiciary Turns Fifty
By Colonel Timothy P. Hayes Jr. and Lieutenant Colonel Christopher E. Martin

No. 4

80 **Leading an OSJA Team**
By Colonel William R. Martin

Closing Argument

87 **Officers Should Vote Early and Often**
By Lieutenant Colonel Jess R. Rankin

Court is Assembled

Lawyers of Record

By Lieutenant General Charles N. Pede

Every day you may make progress. Every step may be fruitful. Yet there will stretch out before you an ever-lengthening, ever-ascending, ever-improving path. You know you will never get to the end of the journey. But this, so far from discouraging, only adds to the joy and glory of the climb.
- Winston Churchill

And a glorious climb for *The Army Lawyer* it has been.
A little over a year ago, I sat in my office in the Pentagon, looking at my computer screen, reading an article in The Army Lawyer. The article was great—well written, informative—everything you would expect from the written work of a member of our Corps. However, something was missing—a certain intangible in the publication. I couldn't quite put my finger on it, though. Then, as often happens, I was called to collaborate on a pressing issue, closed the publication, and moved on with the business of the day.

A few weeks later, we published that year's *Quill & Sword. The Quill & Sword* included the usual information on assignments with the addition of some articles written by judge advocates in the field. When Major General (MG) Risch and I received a hard copy, we immediately read it; excited to see what other members of our Regiment were up to outside of the walls of the Pentagon. We heard other people talking about it in the hallway—it seemed people were excited for the *Quill & Sword* in a way that we hoped they would be excited for *The Army Lawyer*. The Strategic Initiatives team, then Lieutenant Colonel Jeri Hanes and Major Laura Grace, had transformed the *Quill & Sword* into an exceptional hardcopy publication. We realized we needed to make a change. Indeed, the reaction to the *Quill & Sword* confirmed long standing discussions between MG Risch and me about bringing *The Army Lawyer* back into print.

Major General Risch and I talked it over, and we engaged members of our Strategic Initiatives Office and the talented team of editors and professors at The Judge Advocate General's Legal Center and School, and we asked them to take *The Army Lawyer* and transform it. We wanted to publish a product that showcased the best of our Corps by exploring what judge advocates, our Civilian lawyers, legal administrators, and paralegals do during the duty day—from providing first-class legal assistance services to trying courts-martial to advising commanders on the battlefield—while also featuring who we are as a Corps.

Change can be daunting, and it can also be incredibly rewarding. As I write this, our Army is in the midst of a Renaissance—changes to warfighting doctrine, formations, weapons, and systems, collectively—from which will emerge a vastly different Army. Just as our client changes, we must also change, and with that change comes endless opportunity. It has not been without great effort, however, to make this particular change happen, and on behalf of all of the Senior Leaders in our Corps, I want to thank the editorial board and all of those who have helped make the "new" *Army Lawyer* a success.

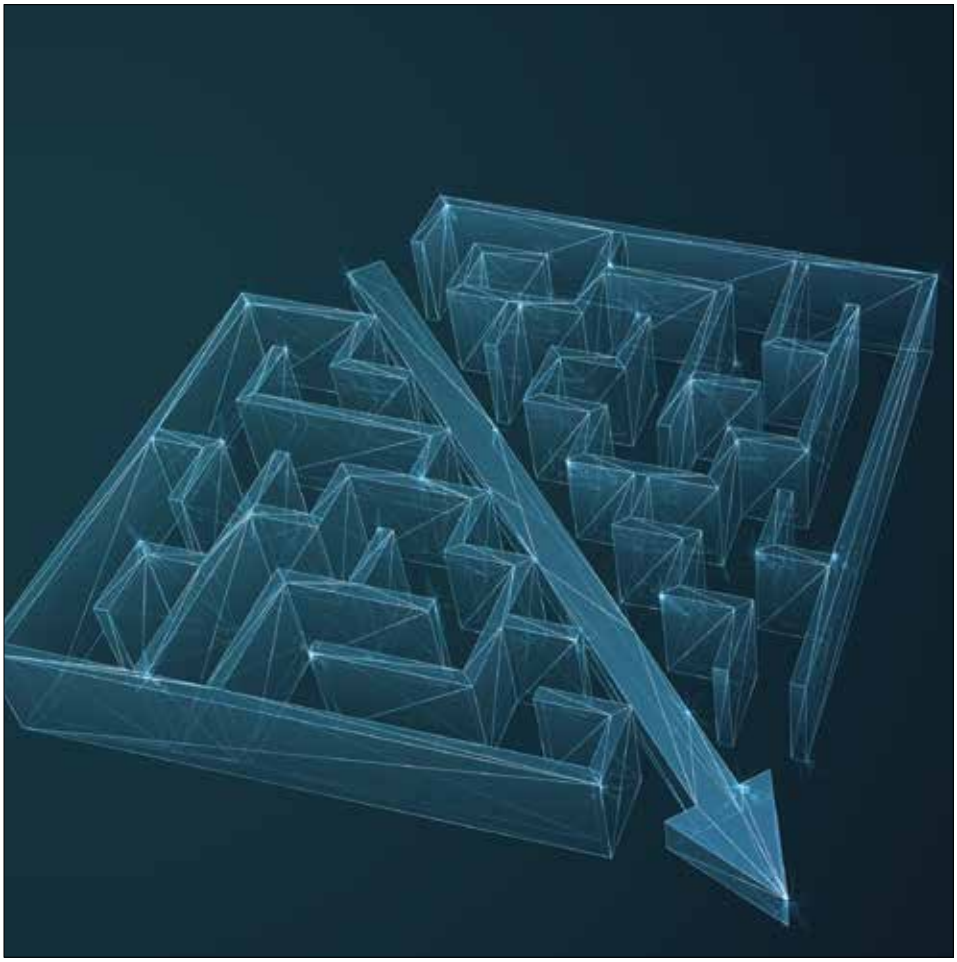
Don't forget, though—you have made all of that possible. By giving us constant feedback and, more importantly, by providing us with excellent content, you have kept the lights on, so to speak, by telling your stories and sharing your knowledge. As a new team takes the reins of the *The Army Lawyer* editorial board, and we say farewell to those who step off to new challenges, we will continue to improve *The Army Lawyer* and ensure it is a publication befitting the oldest and best law firm in the Nation.

Major General Risch and I look forward to year two of *The Army Lawyer* and can't wait to see *your* article grace its pages. We want you to be Lawyers of Record. Whether you publish in the *Military Law Review*, *The Army Lawyer*, *Parameters*, or any number of possible venues, put your pen to paper and change the way someone thinks. Share your views on an important best practice at a warfighter exercise, or give your studied view of our military justice practice. The opportunities are endless. And with each opportunity you seize, you shape our practice, you make another practitioner better than before, and you become a Lawyer of Record, all while refining yet another critical skill in your lawyer's tool box.

Our hope for each of you in this extraordinary Corps is that you develop into the best Lawyer you can be—and every good lawyer worth their salt has something to offer the lawyer to their left and "write."

No doubt Churchill above served as inspiration for our storied 10th Mountain Division—with whose motto I close—Climb to Glory!

Be Ready . . . and Keep Writing! **TAL**



(Credit: istockphoto.com/KvitaJan)

Career Note

Taking AIM2

New Assignment Interactive Module Makes Officer Management Process More Efficient

By Lieutenant Colonel Katherine K. Stich

There's a lot of buzz about the Assignment Interactive Module 2.0 (AIM2) among officers throughout the Army. You may have heard the term thrown around by your S1, your fellow brothers- and sisters-in-arms from other branches, your commander, or even your staff judge advocate. Your curiosity may have brought you to the AIM2 website, https://aim.hrc.army.mil/portal/officer/portal.aspx. If you haven't visited yet, please take the time to do so.

Why all the excitement over AIM2? The Assignment Interactive Module 2.0 is a web based system designed to enhance the effectiveness and efficiency of the officer management process. It allows interaction directly with your career manager through the portal, and challenges individual officers to inform the Army of knowledge, skills, and behaviors (KSBs) that are not captured on their Officer Record Brief (ORB). This is a large part of the Army's effort in developing a new talent management system to acquire, develop, employ, and retain the right talent.

The Judge Advocate General's Corps (JAG Corps) intends to begin using AIM2 as part of our 2020 assignment process. In other words, those in the assignment cycle that begins this summer will be the first in our Corps to benefit from the new system. We anticipate it will be a tremendous talent management tool, as AIM2 encourages even more officer input into the assignments process. The more knowledge we have about an officer's KSBs and preferences, the better fit career managers are able to make for the members of our Corps. However, the system is only as good as the input provided by leaders and individual officers. Leaders were recently asked to provide duty descriptions for every judge advocate position in their footprint. These descriptions will allow career managers to better understand each position and find an officer with complementary KSBs.

We are now asking individual officers to do their part by providing their resume. Officers will head to the website and click on "My Resume." They will find a place to review and verify data the Army already knows about them and as well as areas where they may provide additional self-professed KSBs and experiences. The information they provide will appear on the back side of their ORB, and will serve as a complement to the front side. This information is similar to what was requested on last year's assignment preference sheet, but allows for much more detail. It may highlight an expertise not readily apparent from the front side of an officer's ORB, demonstrate an officer's versatility, or bring to light a KSB not otherwise captured by constraints of the traditional ORB format. Regardless of the officer's background,

completing the resume on AIM2 will almost certainly help career managers better understand the talents of our teammates to best deliver the right officer to the right assignment at the right time. The information an officer provides through AIM2 will be available to career managers in real time, so officers can feel free to update it as often as they see fit.

While AIM2 offers a "marketplace" option for most Army branches, some specialty branches—including the Chaplains and the JAG Corps—are not currently using the marketplace option. The marketplace mechanism is intended to have both officer and units indicate preferences for assignments. For now, however, judge advocates will continue to make their assignment requests to career managers and will continue to receive assignments in accordance with policy and statute as opposed to participating in the marketplace.

Officers should feel free to start populating their "My Resume" tab now. The career managers at the Office of the Judge Advocate General's Personnel, Plans, and Training Office (PPTO) look forward to reading about all of the talented members of our Corps. As always, officers are welcome to reach out to their PPTO career managers with questions or concerns about AIM or the assignment process in general. **TAL**

LTC Stich is a Career Manager with OTJAG's Personnel, Plans, and Training Office.

Why They Stay

By Colonel Fansu Ku

I stayed because I realized that leadership . . . is about his heart and his commitment to his fellow man. It's about developing the hand that you are dealt. It's about giving back to society a better citizen than society gave to you when that soldier enlisted in the military. It doesn't matter if a soldier stays for three years or thirty. If he leaves the military feeling a little bit better about his fellow man; if he begins to question some of the prejudices that he grew up with; if he feels moved when he hears the national anthem being played and stands a little straighter, then staying in the military is worth all of the pain and sweat and hardship.

- MG (Ret.) Lloyd Miles

In a paper entitled "Why I Stayed," then-Colonel Lloyd Miles—who retired in 2012 after more than thirty-two years of service—attempted to answer a question that was posed to him by friends and families on many occasions. This same question was posed to many of us in the Corps over the last couple of years. Recently, I interviewed three senior leaders with diverse backgrounds, asking them their reasons for joining the Judge Advocate General's Corps (JAG Corps), but more importantly, why they stayed. Three main themes run through each of their reasons.

First, good leaders make a remarkable difference in whether someone stays or leaves. As aptly pointed out by a professor while I was pursuing my Masters in Law (LL.M), we all have three basic questions in our minds about our leaders, whether we say it out loud or not: Can I trust you? Do you have my back? Are you committed to be your best every day? If the answer to all three is yes, the chance that the leader will inspire someone to stay increases, perhaps for no other reason than an opportunity to continue working for that leader.

Second, diverse work opportunities, even in far flung places, and institutional relevance inspire people to stay. People relish the opportunity to do interesting things that matter, and they want to contribute their share to the greater good. You have to know yourself and how you are "wired."

Third, the people. Perhaps it is cliché because you hear it at every single promotion and retirement ceremony, but it is true: people make the difference. I personally look forward to, but also dread, moving and changing assignments every couple of years. Building a new life for yourself in a new environment never gets any easier. I got through it because of the people who showed up to greet me each time. Throughout the years, these people inspired and pushed me to be better. I have learned, just as each of the three leaders I spoke with has learned, that each assignment may not be what I had imagined for myself, but it was a journey worth taking. As I have progressed in the Corps, I have developed lifelong friendships—a community of people who have become my family. You have a JAG family too—a family that will pause and reflect with you about who you want to be and the impact you want to have. I encourage you to pause and reflect on why you stay.

Below is what I learned from three leaders on their reasons for remaining in the JAG Corps.

Colonel Stephanie Sanderson

There are moments in our lives and careers when we should pause and reflect, not only about who we want to be and what kind of impact we want to have, but what this will take. It is through this process that you can become the leader that you'd choose to follow.

- Mike Hochleutner, Director, Stanford MSx Program

I have known Colonel (COL) Stephanie Sanderson for over seventeen years, ever since we were both assigned to Defense

Colonel Stephanie Sanderson

Appellate Division as second-term captains, two months before 9/11 forever changed how we viewed the world.

Colonel Sanderson initially joined the Corps because growing up in rural Alabama she always felt there was a world to see beyond Alabama. Her father, who retired from the Army in 1974 as a First Sergeant, did not want his daughter—who had received full scholarships through college and law school—to join the Army. In his mind, the Army was for people who did not have other opportunities, and he felt she could have done anything with her education. Within a week, however, he was the proud father of a daughter who was an officer in the JAG Corps.

She stayed because of role models and mentors such as Major General (MG) (Ret.) Ken Gray, MG (Ret.) Butch Tate, COL (Ret.) Richard Cairns, COL (Ret.) Jerry Linn, and COL (Ret.) Stephanie Stephens, just to name a few.

She stayed because of the positive professional experiences during her internship and initial assignment at Fort Benning, and all of her assignments since.

She stayed because the JAG Corps was, and continues to be, her opportunity to practice law and do something bigger than herself.

She stayed because she loved moot court during law school and early in her career the JAG Corps offered her the opportunity to do appellate work in the National Capital Region (NCR). As a small-town girl, she was excited to do what she loved in the NCR.

She stayed because, as one senior leader astutely pointed out, the Corps drives you forward in twenty-four-month increments with schools, jobs, and opportunities that are difficult to turn down.

She stayed because with each opportunity that the JAG Corps put before her, she thought, "Well, this last job went well, so why not?"

She stayed because the JAG Corps offered her opportunities to go overseas to soldier, lead, and lawyer.

She stayed because places like Korea, Iraq, and Germany offered her unparalleled opportunities to travel and see a world beyond Alabama.

She stayed because up until the graduate course, she looked for assignments that would set her up for a post-JAG Corps life. But every twenty-four months, the JAG Corps offered her opportunities to live and work in places she never would have seen, along with friendships she never would have developed but for the Army.

She stayed after the graduate course because of the leadership and the people—you have a family everywhere you go.

She stayed because as she became more senior, she saw how the Corps operates at the institutional level and her ability to make a difference as a partner in this institution.

In the end, she stayed for over twenty years and continues to stay today because helping others has always been important to her, and is a big part of who she is. She became a lawyer to help others—to help the Boo Radleys in the world; *To Kill A Mockingbird* is one of her favorite books. Staying in the JAG Corps gave her a platform to serve globally, not just locally, and the opportunity to make a difference.

Colonel George Smawley

> *Throughout the varied positions he held during his more than twenty years of military service,* [Brigadier General Wayne E.] *Alley remains upbeat about nearly all of them because the overarching institution itself afforded him so much satisfaction. Certainly, he could have done other things; ability was never an issue. What sustained him was the same thing that brought him back into the Army in the first place: an emphasis on the Army's advantages over its disadvantages. The Army's variety of rich experiences and the company of superior people still won out over average pay, constant moves, and the risks inherent in combat service.*
>
> - Colonel George Smawley, Staff Judge Advocate, U.S. Army, Pacific

Describing the life of one of the U.S. Army JAG Corps' most preeminent jurists, COL George Smawley echoes several themes present in his own twenty-seven-plus year Army career: the ebb and flow of working for great leaders, the opportunity to be part of an institution that is not profit-driven, and the occupational benefit of doing exciting and diverse legal work. Along with Brigadier General (Ret.) Alley, COL Smawley has studied, observed, and often written about the commitment to service of other pioneering JAG Corps leaders. In turn, he encourages those he works with to trust and develop their own narrative in the JAG Corps.

The Army was not COL Smawley's first brush with military service. He grew up with a father who fought in North Africa and was stationed in Korea and Japan. He was twelve years-old before he went to a civilian supermarket. Moreover, with a mother and sister born and raised outside the United States, he grew up in a house with a real appreciation that the world was bigger than his physical presence.

At seventeen, he enlisted in the Air Force National Guard and drilled through college as a C130 radio operator. When he ran out of money in his sophomore year, he

Colonel George Smawley

won an Army ROTC scholarship, branch transferred, and later joined the JAG Corps.

He stayed at first because the Army and the Corps' structure motivated and inspired him in twenty-four-month increments with jobs, schools, and opportunities.

He stayed because as a captain he was introduced to the soldiering aspect of the Army and met thoughtful and intelligent leaders who took an interest in him. They made him comfortable with the idea of the Army as a lifetime career.

When 9/11 happened, he witnessed how the Army, as an institution, responded to real world events. Though he did not join the Army with a great rush of patriotism like many others, after 9/11 he felt he became part of the institutional Army, and recommitted to serving.

He stayed because of the continued opportunities to soldier, lead, and respond to real world problems in diverse places.

He stayed because he always felt the legal work he did mattered.

He stayed because he knew he was not wired to work in a professional environment driven by profit and lacking in diverse work opportunities.

He stayed because he loves to travel and the Army took him to eighteen different countries.

He continues to stay today because the reasons he stayed as a second term captain are no different for him now as a senior colonel—great leaders, exciting legal work, amazing people, and institutional relevance.

Colonel Rick Martin

I had the privilege of working for COL Rick Martin, Chief, Professional Responsibility Branch, when he served as the U.S. Army Pacific Staff Judge Advocate. He shared with me—as he did with many others he worked with—MG (Ret.) Miles' article to encourage us to reflect on whether we are right for the Army and whether the Army is right for us. Understanding why senior leaders like him stay challenged me to think through why I am in it every day. I challenge you to do the same.

He stayed because he is a son of the American Revolution who had many ancestors serve throughout the history of our nation, to include paying the ultimate

Colonel Rick Martin

sacrifice, and service is an important part of his family.

He stayed because he didn't want to be a lawyer who sits behind a desk.

He stayed because his clients all took the same oath to support and defend the Constitution of the United States against all enemies, foreign and domestic; that they will bear true faith and allegiance to the same; that they took this obligation freely, without any mental reservation or purpose of evasion; and that they will well and faithfully discharge the duties of the office on which they are about to enter.

He stayed because he knew why he went to work every day.

He stayed because the Corps allowed him to learn and do different things in far flung places he would not otherwise have seen, and his family got to accompany him on this journey.

He stayed because when he became a field-grade officer, he was entrusted to build, mentor, and develop the next generation of leaders.

He stayed because he gets to create conditions for those coming up behind him to succeed.

He stayed because he believes the work he is doing is important work for the Army and the JAG Corps. It's about giving back to the organization and doing right by the Army.

He stayed because he has faith in the system and that on balance, we get it right.

He stayed because he understands that at times, he may need to go do something he would rather not do so others can also grow and have their opportunities.

He stayed because he can still contribute to the cause. He firmly believes that while we all have to leave at some point, you have to be sure you are leaving for the right reasons.

He stayed because despite the bureaucracy and the frustrations, he believes in the mission and in taking care of the people the Corps entrusted him to lead.

He stayed because he has met so many truly good, professional people throughout the Army at every duty location. And had the good fortune to work for inspiring leaders.

He stayed because he just thoroughly enjoyed his time in the Army. If you are not having fun, why stay?

He stayed because he knew what he was doing was far better than anything outside the JAG Corps. He believes in the mission and the people.

He stayed because when he wrote "needs of the Army and the JAG Corps" on his assignment preference worksheet, and on more than one occasion he was genuinely humbled by what the Corps entrusted him to do.

He stayed because of the people. At the end of the day, it's always the people.

Why do you stay and what are you in it for? **TAL**

COL Ku is a Military Judge for the Second Judicial Circuit at Fort Bragg, North Carolina.

Why She Stays

An Interview with Colonel Fansu Ku

By Specialist Ashley M. George

When Colonel Fansu Ku—a military judge in the Second Judicial Circuit—first joined the Army, she thought she would only serve for her three-year minimum obligation. Being the only member of her family to join the military, she had no idea what to expect when commissioning into the Judge Advocate General's Corps. Her initial impression of the Army was not what she had anticipated. She still remembers the discomfort she felt on the first day of her Officer Basic Course (OBC): having to be weighed in an assembly-like fashion and her weight being announced by the cadre for all to hear. She was already asking herself, "What have I done?" Her uncertainty about the Army lasted throughout OBC because it took her all twelve weeks of the course to pass the Army Physical Fitness Test (APFT).

It has now been twenty years since her OBC and she certainly no longer struggles with passing the APFT. She has completed twenty-eight marathons and thirty half marathons, and has run on all six of the main Hawaiian Islands. She has deployed to both Iraq and Afghanistan and has had a diversity of assignments, working in everything from legal assistance to contract appeals. Some of her career highlights include Commissioner at the Army Court of Criminal Appeals; Deputy Staff Judge Advocate; Defense Appellate Division Branch Chief; and Military Judge.

Judge Ku has had a career she is truly proud of, but she never had a traditional five- or ten-year plan. She embraced every step of her career as a learning experience and thrived with every opportunity she was given, but throughout her career, she regularly asked herself if the Army was right for her and based her next move off of that self-reflection.

When I asked her what made the Army right for her, she had several reasons. The most influential reason was simple: her leaders. It was the leaders who took an interest in her personal growth and mentored her when she was a young officer who made all the difference in her decision whether to stay or leave. They gave her opportunities to grow, excel, and even inspired her to try new things, like running for fun and doing marathons.

I followed up with asking her the question of why she continues to stay in. The reason was even simpler: the robe. The robe necessitates that the right decisions be made and the right person make them. As she wears the robe, she is continually aiming at the legal proficiency and technical skill that the robe requires. She refuses to settle for anything less. Judge Ku certainly recognizes that sitting on the bench and presiding over courts-martial plays a significant role in our military justice system. She stays because she takes that role seriously and knows her job truly impacts people's lives.

Judge Ku laughed in reflection of how quickly her twenty years has seemed to pass. She never forgets her early days in the Army, just how far she has come, and all the people who motivated her to get here. She stays in with the hope that, after years of being inspired, she can now inspire the next generation of legal professionals who need to be encouraged to stay and better themselves, the JAG Corps, and the Army.

In the Army, the typical advice to young Soldiers is to stick it out, see it through, and retire. Talking about getting out is usually frowned upon. Judge Ku's wise advice to me, and to all those aspiring to grow in their careers, is not to shy away from examining the reasons to stay in the Army and the reasons to leave. Rather, embrace the introspection and ask yourself: Should I stay in? Is this right for me? From one assignment to the next, these questions help as a way to analyze whether you are doing the right thing for yourself at the right time.

Colonel Fansu Ku

When I finally asked her how long she is going to stay in and what she wants to do next, her response was, "I'm still thinking about it." **TAL**

SPC George is a Court Reporter with the XVIII Airborne Corps in Fort Bragg, North Carolina.

News & Notes

1. Please join us in congratulating nineteen-year old Private First Class (PFC) Tony Ladebu, a paralegal specialist with the U.S. Army Cadet Command, on winning the 2019 Soldier of the Year for Cadet Command at Fort Knox, Kentucky. The five-day competition covered twenty events designed to measure excellence in warrior tasks and skills. Private First Class Ladebu, who arrived at Fort Knox fresh out of basic and advanced individual training, received a pistol, Trojan helmet, and other prizes for his efforts. Outstanding job, PFC Ladebu.

2. On 28 March 2019, the American Society of International Law recognized Major Trent Powell at its annual meeting in Washington, D.C. He was recognized for an article that he co-authored with West Point Professors, Colonel Dave Wallace and Lieutenant Colonel Shane Reeves: *Revisiting Belligerent Reprisals in the Age of Cyber?* The article was published in the Marquette University Law School's Marquette Law Review (102 Marq. L. Rev. 81 (2018)).

3. On 27 March 2019, Sergeant Hannah Smallwood, a paralegal noncommissioned officer with the U.S. Army Recruiting Command (USAREC), had the opportunity to perform a tandem jump with the U.S. Army Golden Knights over central Kentucky. She received this opportunity as a token of gratitude from her command for her many outstanding contributions to the Army mission and USAREC legal mission.

4. The Army Judge Advocate Recruiting Office attended the National Black Law Students Association Annual Convention, which took place in Little Rock, Arkansas, from 12–17 March 2019. The Army Judge Advocate Recruiting Office sponsored the Constance Baker Motley Mock Trial Competition, served as judges and panelists, and had the opportunity to share the JAG Corps' story with hundreds of attendees. During the event, they were able to visit Central High School, the site of forced desegregation after the ruling in *Brown v. Board of Education*. Our very own Captain Mary Awoniyi had the distinct honor of meeting Elizabeth Eckford, one of the Little Rock Nine. Elizabeth Eckford was the first African-American student to integrate into a white southern high school.

5. On 28 and 29 March, The JAG Corps Board of Directors (BOD) met at The Fred W. Smith National Library for the Study of George Washington at George Washington's Mount Vernon in Virginia. The purpose of the BOD is to propose and review the JAG Corps' strategic initiatives while receiving candid feedback and recommendations from a diverse cross-section of our Corps' senior leaders from around the world.

The U.S. Army's Assistant Deputy Chief of Staff for Operations, Plans, and Training, Major General Charles Flynn, spoke to the BOD about the Multi-Domain Operations 2028 Doctrine, outlining the view of the Army's future in dealing with its adversaries.

Afterwards, the BOD discussed several strategic initiatives such as modernization of the JAG Corps' force structure, the military justice redesign pilot program, and strategic talent management. These initiatives directly support The Judge Advocate General's priorities of ensuring readiness to support the war-fighter, building the JAG Corps of the future to support the future Army, and taking care of our people.

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MOS 27D Advanced Individual Training at TJAGSA, circa 2016.

Lore of the Corps

From Legal Clerks to Paralegal Specialists

A Short History of Enlisted Soldiers in the Corps

By Mr. Fred L. Borch

Today, there are some 3,500 men and women in our Corps who have the Military Occupational Specialty (MOS) 27D, Paralegal Specialist. Roughly 1,400 are on active duty, about 1,100 are in the Army Reserve, and about as many are in the Army National Guard. The Judge Advocate General's Corps (JAGC) relies on these paralegals to support the delivery of legal services throughout the Army. Although there have been uniformed lawyers in the Army since 1775, enlisted personnel were not authorized in the Judge Advocate General's Department (JAGD)—as the Corps was then called—until 1918. This means that paralegals, and their forerunners, have been an integral part of Army law for 100 years.

This short history begins by looking at the origins of enlisted personnel in the Corps before examining the role of legal clerks, legal specialists, and paralegal specialists in the Army. It discusses the evolution of the MOS for enlisted men and women and the development of legal education and training for them, including the creation of a Legal Clerk Course and Noncommissioned Officers Academy (NCOA). This article then looks at the origin and evolution of court reporters in the Army before discussing the creation of a position for the top enlisted Soldier in the Corps. It finishes by identifying a handful of enlisted Soldiers who served in Vietnam, Afghanistan, and Iraq before highlighting ten noncommissioned officers of note in Corps history.

Origins

Although the JAGD began requesting that enlisted "clerks" be assigned to it in the 1890s, it was not until World War I that the War Department finally assigned enlisted personnel to the JAGD. General Orders No. 27, published by the Army on 22 March 1918, provided in part that:

> The enlisted personnel for the Judge Advocate General's Department, *authorized for the period of the existing emergency* . . . shall consist of such numbers and grades as may from time to time be authorized by the Secretary of War[1] (emphasis added).
>
> Regimental sergeants major and battalion sergeants major, Judge Advocate General's Department, will be appointed by the Judge Advocate General.[2]
>
> The enlisted personnel of the Judge Advocate General's Department may be appointed from the line of the Army *or may be obtained directly by voluntary enlistment or draft*, and when appointed will be designated in their grades as noncommissioned officers of the Judge Advocate General's Department, National Army[3] (emphasis added).

Note that the language of this General Orders states clearly that "enlisted

Regimental Sergeant Major Toomey (standing) and Major Albert Galen, American Expeditionary Force, Siberia, circa 1919.

personnel" would be assigned only as long as the United States was at war (the "existing emergency"); it was contemplated that after hostilities, the JAGD would go back to an officer-only organization. When one remembers, however, that in 1916 the entire JAGD consisted of but thirteen officers, perhaps this makes sense.[4] The Army no doubt believed that when the fighting in Europe ceased, the JAGD would be reduced to its pre-war numbers, and would not need enlisted personnel.

Note also that the General Orders provided that the Judge Advocate General (tJAG)[5] had the authority—and flexibility—to give the rank of regimental or battalion sergeant major to any man who voluntarily enlisted or was drafted *and* who wanted to serve in the JAGD.

It should come as no surprise that given the language in General Orders No. 27, tJAG's 1919 annual report to the War Department disclosed that the majority of the sixty-one enlisted personnel in the JAGD during World War I had been lawyers or court reporters in civilian life prior to volunteering or being drafted. For example, Regimental Sergeant Major Edmond G. Toomey was a Montana lawyer who, after being appointed by tJAG Enoch H. Crowder,[6] served as a legal clerk in Vladivostok, Russia, with the American Expeditionary Force (AEF), Siberia. From 1919 to 1920, Toomey worked alongside his Montana law partner, Major Albert Galen, who served as the lone judge advocate in the AEF Siberia.[7]

It is important to remember that the enlisted personnel who served in the JAGD during World War I received no education or training when they joined the Department; everything was learned "on the job training" or "OJT." This lack of schooling, however, was the norm. After all, there was no Judge Advocate General's School until 1942; judge advocates also learned military law by osmosis. When clerks like Toomey left active duty at the end of World War I, they were replaced with civilian employees.[8]

Legal Clerks, Legal Specialists, and Paralegal Specialists

In the 1920s and 1930s, enlisted personnel were sometimes detailed to the JAGD as clerks but this was done on an ad hoc basis. Moreover, these men were not "legal clerks" because a legal clerk MOS did not exist until July 1944, when Technical Manual 12-427 announced MOS 279, Legal Clerk. The duties of the MOS were:

> Assists Judge Advocates, Legal Officers, Claims Officers, and Legal Assistance Officers in the performance of their duties. Performs such duties as research in military and civil laws, regulations and other sources of authority; furnishing legal advice in appropriate cases; preparing [court-martial] charges, records of proceedings, orders, opinions, reports, documents, correspondence and other papers required in the conduct of the business of a military legal office; handling the distribution of messages, files, supplies and other matters of office routine. Civilian experience as a lawyer or law clerk required. Knowledge of typing desirable.[9]

Although the War Department now listed the MOS in official documents, there was still no education or training for the MOS; Soldiers were legal clerks by virtue of their assigned position and learned OJT. By the 1960s, however, the JAGC had developed a five-week, self-paced course that a Soldier studied if he wanted to be a legal clerk. At the end of the self-paced course, the Soldier took an exam and, after obtaining a passing score, was reclassified as MOS 713, Legal Clerk. As a general rule, a Soldier could not reclassify into MOS 713 until he had completed his initial enlistment in his original MOS, although there most likely were exceptions to this rule.[10]

Sergeant Arnold Cohen was the court reporter - stenographer (seated in front of bench) for war crimes trials held in the Philippines in 1946.

Sergeants Arnold and William Cohen were verbatim stenographers working in New York City when they were drafted in January 1943. The identical twins spent the war in Atlantic City, New Jersey, and did not deploy overseas until September 1945, when both were assigned to the Far East Air Force Judge Advocate's Office, Manila, Philippines. After being honorably discharge in February 1946, both men remained in Manila as civilian court reporters for the military commissions trying Japanese war criminals.

Creation of the Legal Clerk Course

With the enactment of the Military Justice Act of 1968, and the resulting involvement of judge advocates at special courts-martial when that legislation was implemented in 1969, there was a greatly increased need for legal clerks. The JAGC now recognized that it was no longer practical to rely on reclassification as a method for obtaining legal

In this April 1958 photograph, Specialist Two Gilbert E. Kaschmeier, a court reporter for the Judge Advocate Section, US Army Garrison, Regional Camp Zama, Japan, demonstrates a "stenomask." With this device, he can record every word and describe every gesture during court or board proceedings, as rapidly as 420 words a minute.

Specialist Five court-reporters type records of trial on IBM electric typewriters, circa 1969.

clerks (who now held MOS 71D). After a Department of the Army manpower study confirmed that there was an urgent need for such personnel, and that this required a MOS-qualifying course for legal clerks, the Corps looked for the best way to create a "Legal Clerk Course."[11]

Initially, the Corps planned to establish the legal clerk's course at The Judge Advocate General's School, U.S. Army (TJAGSA), in Charlottesville, Virginia. It soon became apparent, however, that the number of enlisted soldiers who would be trained at TJAGSA was more than that institution could handle, "primarily because of its isolation from a military post and its limited facilities on the University of Virginia (UVA) campus."[12] This makes sense when one remembers that TJAGSA was still located on UVA's main grounds, shared facilities with its law school, and did not have a separate building on North Grounds until 1975.

After discussions with The Adjutant General's (AG) Corps, and given the perceived similarity between legal clerk duties and those of clerks, typists, and stenographers who held AG MOSs, the Army approved the establishment of a Legal Clerk Course at The Adjutant General's School, Fort Benjamin Harrison, Indiana. The first MOS 71D legal clerk instructor reported for duty on 15 November 1971, and he was joined by four more by mid-January 1972. These five instructors spent the first three months of 1972 creating the course, which included selecting tasks to be taught, designing tests, preparing a program of instruction, and preparing instructional material.

The first class of students started on 3 April 1972. The intent of the seven-week, three-day course was to train these men and women "to function as legal clerks at [non-bad conduct discharge] special courts-martial." The plan was to conduct twenty classes a year, with about forty-five students each. Soldiers received classes on non-judicial punishment (32 hours), pre-trial punishment (31 hours), summary courts-martial (20 hours), special courts-martial (84 hours), administrative board actions and line of duty investigations (28 hours), and claims (12 hours). Given the intent of the course—to qualify men and women to serve as legal clerks at special courts—the Soldiers received only background information on general courts and special courts authorized to adjudge a punitive discharge. The idea was that more experienced MOS 71Ds would work at this level of court and that those Soldiers completing the course at Fort Benjamin Harrison would work exclusively at "straight" or "vanilla" special courts.[13] When one considers that the Army tried 18,660 courts-martial in 1972, of which 16,613 were special courts, there was plenty of work for these newly minted legal clerks.[14]

Note that unlike today, enlisted Soldiers complete basic training and then qualify as MOS 27D, Paralegal Specialist, at Advanced Individual Training (AIT) at Fort Lee, Virginia. Soldiers going to the Legal Clerk Course at Fort Benjamin Harrison already were AIT graduates—with most having the MOS 71B10, Clerk Typist. Since they had obtained this MOS at Fort Benjamin, this meant they were going directly from AIT to the Legal Clerk Course. Of course, there were Soldiers reclassifying from other occupational specialties at the Legal Clerk Course, but most Soldiers apparently came to the MOS 71D course after qualifying as MOS 71B. In fact, most students in the Legal Clerk Course were reclassifying from another MOS until the late 1970s.

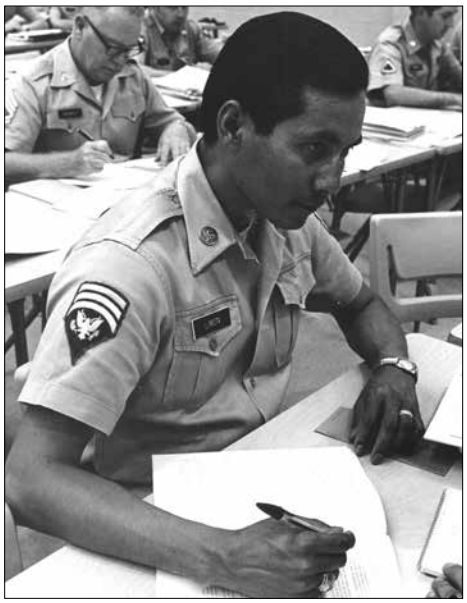
The next major change in the 71D MOS occurred in June 1984, when Career Management Field (CMF) 71 was revised. Under this revision, "Legal Clerk" became "Legal Specialist" and the Legal Clerk Course became the Legal Specialist Course.

On 1 October 1994, MOS 71D Legal Specialist merged with MOS 71E Court Reporter. The latter had been a stand-alone MOS for many years but the Corps combined the MOSs chiefly to give additional opportunities—and increased promotion possibilities—to court reporters. The latter were now 71Ds with the C5 Additional Skill Identifier, i.e., 71DC5.

In 1991, the Base Realignment and Closure process recommended closing Fort Benjamin Harrison, and the Soldier Support Institute (SSI),[15] to which the Adjutant General School now belonged, moved to Fort Jackson, South Carolina. This meant that MOS 71D training went to Fort Jackson, too. All new Soldiers coming into the MOS were trained at Fort Jackson, along with noncommissioned officers in the Corps, who completed their Basic Noncommissioned Officer Course (BNCOC) and Advanced Noncommissioned Officer Course (ANCOC) education at the SSI as well. There also were changes to the curriculum with the move to Fort Jackson, as legal specialists received more training on legal assistance, administrative law, and the emerging field of operational law. These new subjects meant more class time, and the MOS 71D course soon expanded to ten weeks and three days.

As the Corps entered a new century, one of the most important developments in the role of enlisted personnel in the Corps occurred with the establishment of "Career Management Field 27 Paralegal Specialist"

Legal clerk training, Hattiesburg, Mississippi, circa 1969



Legal clerk training, circa 1970.

on 1 October 2001. For the first time in history, the Army recognized enlisted personnel in the Corps as paralegals. The 71D MOS was gone—as were Legal Specialists—and was replaced with the MOS 27D. As judge advocates and legal administrators had MOSs 27A and 270A, respectively, the decision to move enlisted personnel into the same CMF bought them into the "27" series and formally aligned them with officers and warrant officers in the legal field.

Part of the rationale behind this change was a recognition by senior leaders in the Corps that every individual involved in legal operations should be in the same CMF. There was, however, a more fundamental reason for the change: the JAGC no longer needed legal clerks. With the dramatic drop in courts-martial numbers in the 1980s and 1990s, the need for thousands of clerks to record, type, and assemble records of trial disappeared.[16] Additionally, the arrival of personal computers in the work place—first desktops and then laptops—meant that every member of the Corps, regardless of rank, began to do his own typing. The days of Army lawyers drafting letters, motions, and other legal documents in long hand on a yellow pad were at an end—another reason for the declining need for clerks. But what the Corps did need was paralegals who could support judge advocates across the full range of legal operations.

In March 2012, the MOS 27D training moved from Fort Jackson to Fort Lee. Command Sergeant Major (CSM) Joseph "Pat" Lister, then the Regimental CSM, spearheaded this initiative, as he believed—as did others in leadership positions in the Corps—that a move to Fort Lee would take advantage of the NCO paralegal expertise at TJAGLCS, where the Noncommissioned Officers Academy (NCOA) had been in operation since 2004.

On 12 March 2012, "J" (Juliet) Company was activated under the 244th Quartermaster Battalion, 23d Quartermaster Brigade.[17] It was no accident that the company was designated as "J" Company, or that the Soldiers assigned to the company call themselves the "JAGuars."[18] The first paralegal specialist course at Fort Lee began on 26 March 2012.

Noncommissioned Officer MOS 71D & 27D Paralegal Training

As long as legal clerks and legal specialists were part of CMF 71 "Administration," it made sense for them to be trained at the SSI at Fort Jackson. But when the Corps' enlisted personnel became paralegal specialists in CMF 27, there was an increased recognition that the Corps must take more responsibility for the education and training of NCOs, and that the time had come to centralize all officer, warrant officer, and NCO legal training. Since judge advocates and legal administrators were already being taught at TJAGSA, the next logical step was to transfer the NCO courses for MOS 27D from the SSI to TJAGSA.

In November 2002, when the Army Chief of Staff gave "concept approval" to a plan to transform TJAGSA into The Judge Advocate General's Legal Center and School (TJAGLCS), an important part of the TJAGLCS concept was to move "NCO legal training" to Charlottesville.

When Major General Thomas J. Romig, then serving as The Judge Advocate General, examined more closely the possibility of moving the BNCOC and ANCOC courses to TJAGSA, it was soon apparent that there were at least three options. First, the Corps could continue to conduct Phase I (Common Core) at Fort Jackson's SSI, with Phase II (MOS 27D) taught at TJAGSA. Second, Phase I could be taught at Fort Lee (but still under the auspices of SSI), with Phase II at TJAGSA. A third option was to create a stand-alone NCOA at TJAGSA. The first two options would not require the establishment of an NCOA, but it meant that paralegals would remain subject to the policies, direction, and inspections of the SSI. It also meant that BNCOC and ANCOC academic reports and diplomas would be signed by the SSI, NCOA Commandant. Selecting the third option, however, would require the U.S. Army Sergeants Major Academy (USASMA) accreditation of a JAG Corps NCOA.

An early proponent of creating a stand-alone NCOA was SGM Howard Metcalf, who served as Sergeant Major of the Corps from 1998 to 2002. Metcalf was convinced that NCO paralegals must be educated alongside judge advocates, legal administrators, and court reporters because a single, shared learning environment would ensure that the Corps was "training" the way we would "fight." As SGM Cornell Gilmore and CSM Michael Glaze, who followed Metcalf, were no less committed to the idea of bringing NCO education to TJAGSA, a team of judge advocates and paralegals began exploring the best course of action.

In March 2003, Colonel Richard D. Rosen, then serving as TJAGSA Commandant, recommended to TJAG Romig that an NCOA be created in Charlottesville. Major General Romig, convinced that there must be one Regimental home for all members of the Corps, approved this recommendation in May 2003.

Much had to be done before the NCOA could be activated. Members of the NCOA cadre and the TJAGLCS Training Development Department created management plans and standard operating procedures, revised course materials,

SGM Howard Metcalf.

Command Sergeant Major Michael Glaze, first CSM in Corps history.

coordinated training sites, and rehearsed training procedures. On 14 June 2004, the NCOA was activated, with SGM Michael Ray assuming duties as the first Commandant.

The first BNCOC and ANCOC sessions began three months later, in October 2004. In the seven months that followed, the NCOA trained twenty-three senior NCOs and fifty-nine junior NCOs. Central to this early time period was a challenging field training exercise (FTX), which was held at Fort Pickett, Virginia. The FTX served as the culminating event for the students and focused on NCO leadership. A full day of the FTX was devoted to urban combat training and improvised explosive device identification, as these were the two most challenging aspects facing paralegals deploying to Afghanistan and Iraq.

When the USASMA quality assurance team conducted its initial evaluation of the NCOA from 14 to 17 January 2005, they came away impressed with the NCOA's Small Group Leaders and with every other aspect of the NCOA and TJAGLCS. As a result, the NCOA was awarded full Training and Doctrine Command (TRADOC) accreditation and recognized as a "Learning Institution of Excellence." In January 2012, TRADOC again accredited the NCOA as a "Learning Institution of Excellence" (the highest possible accreditation); since that time, the NCOA has continued to maintain this top TRADOC status.

On 2 October 2006, SGM Shannon D. Boyer pinned on Command Sergeant Major insignia and became the first CSM Commandant, another historical "first." On 1 October 2009, BNCOC and ANCOC became the Advanced Leaders Course (ALC) and Senior Leaders Course (SLC), respectively. Today, the NCOA conducts six ALC classes per year, with each class lasting five weeks and five days. As for SLC, the NCOA holds four classes a year, with each class lasting four weeks and five days.[19] Education and training is conducted using the seminar format, which shifts the teaching methodology from "what to think" to "how to think." Students learn through group participation and assignment as discussion leaders.

Court Reporters

While clerks able to handle legal paperwork efficiently and effectively have always been important in the Corps, court reporters were just as critical to legal operations, especially as courts-martial were the biggest part of judge advocate business for many years.

Under Article 90 of the 1806 Articles of War, "[e]very judge advocate . . . at any general court-martial" was required to "transmit" . . . the original proceedings and sentence of such court-martial to the Secretary of War.[20] But the judge advocate, who was prosecuting the case and acting "as counsel for the accused"[21] once the trial was underway, did not have time to record the proceedings. This explains why Article 93 provided for an oath to be administered to a "recorder" who swore that he would

Sergeant First Class Jonathan A. Hall, the first court reporter in history to record a court-martial in both Kuwait and Iraq in a single day, 12 November 2011.

"accurately and impartially record the proceedings of the court, and the evidence to be given in the case in hearing."[22]

Articles 90 and 93, however, did not *require* that the judge advocate utilize a court reporter. Rather, the law required only that "every court-martial . . . keep a complete and accurate record of its proceedings,"[23] with completeness and accuracy left up to the judgment of the judge advocate. Consequently, except in very important cases, the judge advocate typically took some notes in longhand and later transcribed them into a record.

Even when a judge advocate decided that he must employ a "stenographic reporter" to take notes in shorthand, the hiring of this civilian reporter was authorized only for general courts-martial and moneys for this reporter could be expensive.[24] Under the 1905 *Manual for Courts-Martial* (*MCM*), a court reporter was authorized to be paid "$1 an hour for the time occupied by himself" and "10 cents per 100 words for transcribing [his] notes." This reporter also was entitled to claim "8 cents per mile going to the place of holding the court and $3 per day for expenses."[25] When one remembers that a worker in the "building trades" worked an average of forty-five hours a week and made about fifty cents an hour, pay for a civilian court reporter was considerable.[26]

In 1908, the Army provided the first explicit authority for enlisted *military* clerks at courts-martial. The new *MCM* authorized a commanding officer to "detail,

when necessary, a suitable enlisted man as clerk *to assist* the judge advocate of a general court-martial, or military commission, or the recorder of a court of inquiry." (emphasis added). Such assistance did not necessarily mean that the Soldier would serve as a court reporter and this explains why the 1908 *MCM* also provides for the hiring of a civilian court reporter.

But there is no doubt that enlisted personnel were serving as shorthand court reporters in the early 1900s. In fact, Congress enacted legislation in August 1912 that expressly permitted "enlisted men [to] be detailed to serve as stenographic reporters for general courts-martial"[27] and an opinion published that same year in *The Digest of Opinions of the Judge Advocate General* acknowledged that at least one enlisted Soldier had served as a shorthand reporter in a legal proceeding.[28] Interestingly, a Soldier detailed as a court reporter received "extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed."[29] This was a recognition by the Army that stenographic skills did not fall into the category of general clerical skills, and consequently were entitled to extra pay. This extra compensation certainly encouraged a Soldier with shorthand skills to "swear to faithfully perform the duties of reporter."[30]

As for the record itself, there was no requirement that witness testimony be verbatim. Rather, the court reporter need only produce an "accurate" record, with the testimony of each witness be "as nearly as possible in his own language."[31] Unlike today, however, the record of each day's proceedings had to be completed at the end of the day's court session, since the president of the court, and the judge advocate, had to authenticate the record, by "affixing" their "signature to each day's proceedings."[32]

After the War Department authorized the assignment of enlisted Soldiers to the JAGD in 1918, there were almost certainly some court reporters among those Soldiers who received appointments from tJAG Crowder as regimental or battalion SGMs. But just as the Army did not yet have legal clerks, there also still was not a system of dedicated court reporters.

After World War I, the JAGD continued to use both military and civilian court-reporters in legal proceedings. The 1920 *MCM*, authorized the detailing of Army field clerks as court reporters at general courts-martial, but those field clerks could no longer receive extra pay for working as reporters. But if a Soldier had shorthand skills and was not a field clerk, he could collect extra pay at the rate of five cents for each 100 words taken in shorthand and transcribed.[33]

The 1920 *MCM* also continued time limits for completing a record of trial, which had first appeared in the 1917 *MCM*. A court reporter was required "to furnish the type-written record of the proceedings of each session of the court . . . not later than twenty-four hours after adjournment of each session of the court." Additionally, the complete record of trial was to "be finished, indexed, bound and ready for authentication not later than forty-eight hours after completion of the trial proceedings."[34] These time limits stand in contrast to what is expected of a court reporter today.

In 1950, when Congress enacted a new military criminal legal code that was uniformly applicable to all the services, it provided statutory authorization for the detailing of a court reporter to a court-martial. But it was no longer the judge advocate or the president of the court-martial who hired or appointed a court reporter. Rather, Article 28, UCMJ, provided that "qualified court reporters" could be detailed (military) or employed (civilians) by the court-martial convening authority.[35]

This requirement for "qualified" reporters meant increased court reporter education, training and professional development. Court reporters had recorded trial proceedings using stenographic machines in the 1940s and 1950s, but moved into a new era in January 1955, when the first class in "electronic court reporting for enlisted members of the Army" began at TJAGSA.[36] The class consisted of eighteen Soldiers from sixteen general court-martial jurisdictions in the continental United States.

The goal of the six-week course was to "give training in all phases of court reporting."[37] The first two weeks were devoted to study and practice on the "facemask device" and "recorder-reproducer" so that a court reporter could take "court-martial proceedings at more than 200 words per minute."[38] The last four weeks trained court reporters in the proper assembly of records of trial.[39]

On 1 November 1959, court reporter training moved from TJAGSA to the U.S. Naval Justice School, Newport, Rhode Island. The first Army court reporters graduated there on 4 December 1959. Court reporter education and training for soldiers remained in Rhode Island for the next forty years; the court reporter course moved back to TJAGSA during the 1999 academic year.[40]

Today, the Legal Administrator and Paralegal Studies Department, TJAGLCS, is responsible for all court reporter training. This includes instruction on court reporting recording and playback equipment, and software usage, grammar, verbatim transcription, and record of trial assembly.[41]

Three courses are offered: a seven-week "basic" court reporter course (held three times a year); a two-week "advanced" course (held once a year); and a one-week "senior" course (held once a year). The seven week course focuses on "essential redictation speech recognition" training. Classes range from automation, typing, and grammar review to closed-mask and open headset style reporting, and speech recognition training proficiency. There also is instruction on assembling records of trial, both verbatim and summarized. As a general rule, only Soldiers with the rank of specialist (E-4) through staff sergeant (E-6) are eligible; other ranks wanting to attend the instruction are approved on a case-by-case basis. As for the advanced and senior court reporter courses, they focus on significant changes and new developments in court reporting.

Court reporters have been a part of military justice and the Army from the beginning. As long as courts-martial are part of the Army, the need for men and women to accurately and faithfully record legal proceedings will remain. As an aside, court reporters have done well in the Corps: Carlo Roquemore, who served as Regimental SGM from 1988 to 1992, was a court reporter, and Joseph "Pat" Lister was the first court reporter in history to wear CSM rank; he served as the Regimental CSM from 2013 to 2017.

Sergeant Major John H. Nolan, first SGM of the Corps.

Establishment of Sergeant Major of the Corps

On 6 December 1979, the Army approved a "Senior Staff Noncommissioned Officer" position in OTJAG. Major General Alton B. Harvey, who was then serving as TJAG, sent out a letter to major commands the following day requesting nominations. Based on the response to his call for nominations, TJAG Harvey selected SGM John H. Nolan, who was then serving at the Eighth U.S. Army in Korea. Nolan assumed his duties as the first Corps SGM in the Pentagon in May 1980.

In 1986, after the Army adopted the regimental system, and the JAGC obtained Regimental status, the Senior Staff NCO position was re-designated as Regimental SGM, with an effective date of 29 July 1986, the 211th anniversary of the appointment of William Tudor as the first Judge Advocate General. In October 2006, with the appointment of SGM Mike Glaze to CSM, the position became the Regimental Command Sergeant Major of the Corps.

The following have served as the top enlisted Soldier in the Corps since 1980: John Nolan (1980–83); Walter T. Cybart (1983–85); Gunther M. Nothnagel (1985–86); Dwight L. Lanford (1986–88), Carlo Roquemore (1988–92); John Nicolai (1992–94); Jeffrey A. Todd (1994–98); Howard Metcalf (1998–2002); Cornell W. Gilmore (2002–03); Michael Glaze (2004–09); Troy Tyler (2009–13); Joseph P. Lister (2013–17); Osvaldo Martinez Jr. (2017–present).

(Left) Specialist Six Guenther Nothnagel, Legal Clerk, Office of the Staff Judge Advocate, 101st Airborne Division, Vietnam.

(Right) Then SFC Kevin Henderson, paralegal and convoy commander, Afghanistan.

Corporal Krista Bullard, first female paralegal to earn the Combat Action Badge.

Legal Clerks in Vietnam and Paralegals in Afghanistan and Iraq

Enlisted Soldiers in our Corps have always deployed with judge advocates and legal administrators on military operations to faraway locations—as indicated by Regimental Sergeant Major Toomey's deployment to Siberia in 1918.

Hundreds of MOS 71D legal clerks served in Vietnam. While their numbers were comparatively small during the era when the American presence from 1959 to 1963 was a Military Assistance Advisory Group, the arrival of the 173d Airborne Brigade in May 1965 was the beginning of direct U.S. intervention, a greatly increased judge advocate and legal clerk presence. While all 71Ds typed and assembled records of trial and prepared other legal documents, the hallmark of their service was that they did more than supporting legal operations. At the 101st Airborne Division, for example, then twenty-six year old Specialist Six Gunther M. Nothnagel served at "Camp Eagle" from December 1967 to December 1968. Nothnagel had enlisted in 1962 and by 1967 was a court reporter. In addition to recording general courts-martial proceedings, Nothnagel also pulled night perimeter guard duty and helped in the construction of a bunker for protection against Viet Cong mortar and rocket attacks.

Things were no different for MOS 27D paralegal specialists some forty years later. In Jalalabad, Afghanistan, in December 2005, then Sergeant First Class Kevin Henderson, a paralegal specialist, served as a convoy commander providing security for a United Arab Emirates special forces unit while that unit provided humanitarian assistance to local villagers. But paralegal Soldiers performing convoy duty was not that unusual. In Iraq the following year, then Private First Class Krista Bullard was travelling in a convoy from Camp Arifjan, Kuwait to Baghdad, Iraq. She had recently qualified on the .50 caliber machine gun and had volunteered to be a gunner on the convoy. When the convoy was attacked by Iraqi insurgents, Bullard returned fire with the .50 caliber. She subsequently was awarded the Combat Action Badge (CAB) for having personally engaged the enemy in combat. Bullard most likely is the first MOS 27D female to receive the CAB.

Another paralegal specialist whose work took her well out of typical MOS 27D duties was then Sergeant (SGT) Elizabeth "Elli" Holt, who was the NCO-in-Charge of a "Lioness Team" in Ramadi, Iraq, in 2006. This was an all-female team of Soldiers that accompanied combat units on patrol and conducted searches of Iraqi civilian females when clearing buildings and other structures. At one point in October 2006, SGT

(Far left) Then Sergeant Elizabeth "Elli" Holt, Team Lioness NCOIC, Iraq.

Sergeant Major Cornell Gilmore, killed in action in Iraq, 2003.

Holt and her team cleared 3,000 buildings in thirteen hours—a tough mission made more difficult because they were subject to sniper fire.

A handful of MOS 27Ds have given their lives in the service of our Corps and our Army. Regimental SGM Cornell W. Gilmore was killed in action in Iraq in 2003 when the helicopter in which he was a passenger was shot down over Tikrit. Sergeant Michael J. Merila died from injuries received from an improvised explosive device (IED) in Iraq the following year. Corporal (CPL) Coty J. Phelps also died from injuries received from an IED in Iraq in 2007, and CPL Sascha Struble was killed in a helicopter crash in Afghanistan in 2005. They are honored with stained glass windows in TJAGLCS's Hall of Heroes.

Some Legal Clerk, Legal Specialist, Paralegal, and Court Reporter NCOs of Note

While thousands and thousands of men and women have served as enlisted Soldiers in our Corps, here are ten NCOs of note, in alphabetical order.

Frances Black. Frances Lorene Black is the first African American female to reach the rank of SGM in the Corps. Born in Alabama, she enlisted in the Women's Army Corps in 1969 and served in Vietnam as an MOS 71B Clerk Typist. In 1972, she completed the Legal Clerk Course at Fort Benjamin Harrison and then served in a variety of assignments, including: 21st Support Command (Germany), Fort McClellan, Fort Jackson, Fort Gillem, Fort Sheridan, Fort Sam Houston, and the Pentagon. She retired from active duty in 1995.

Eric L. Coggins. Born in 1973, Eric L. Coggins enlisted in the Army after graduating from high school in 1991. He subsequently volunteered for airborne training and, after earning his parachutists wings, served at Fort Bragg. Coggins was then assigned to the 2d Infantry Division at Camp Casey, Korea, where he demonstrated such outstanding abilities that he was chosen to be the noncommissioned officer in charge (NCOIC) of a brigade legal office. Sergeant Coggins was serving in Kuwait when he was diagnosed with liver cancer. He died in 1996, at the age of twenty-three. In 1998, TJAG Walter B. Huffman established the SGT Eric L. Coggins Award for Excellence.[42]

Karla U.B. Frank. Born in Berlin, Germany, Karla Frank enlisted in 1974. In 1980, she was serving as a MOS 71B, Clerk Typist, in the 1st Infantry Division in Germany when she obtained a high cut off score for promotion to specialist six (E-6). When she learned that there was no E-6 slot for a MOS 71B, she took an MOS 71D, Legal Clerk, opening. Frank subsequently served at the U.S. Army Aviation Center

Sergeant Major Francis L. Black, first African American female SGM in Corps history.

Sergeant Major Karla U.B. Frank, first woman to reach rank of SGM in active duty Army JAGC.

at Fort Rucker and at U.S. Army Personnel Command, Alexandria, Virginia. On 1 April 1989, she was promoted to SGM—the first active duty female to reach the top enlisted rank in the Corps. Sergeant Major Frank retired in 1994.

Cornell W. Gilmore. Born in 1957, Cornell W. Gilmore enlisted in the Army in 1981 after graduating from the University of Maryland. He qualified as a Legal Specialist in 1982 and then served in a variety of assignments and locations, including: 1st Armored Division (Germany),

Then Staff Sergeant Lorri Jenkins is decorated for being named Instructor of the Year at The Adjutant General's School, Fort Benjamin Harrison, Indiana, 1990.

3d Infantry Division (Germany), 25th Infantry Division (Hawaii) and I Corps (Washington). In 2003, he was serving as the Regimental SGM of the Corps and was killed in action when the helicopter in which he was a passenger was shot down by a missile or rocket propelled grenade over Tikrit, Iraq. Gilmore was posthumously awarded the Distinguished Service Medal, which makes him the most highly decorated paralegal specialist in history.

Michael W. Glaze. Born in Frankfurt, Germany, in 1960, Mike Glaze enlisted in 1977 and qualified as a legal specialist the following year. He subsequently served multiple tours at Fort Bragg (XVIII Airborne Corps, Special Operations Command), as well as overseas in Kuwait. Glaze was selected as the 10th Regimental SGM of the Corps in 2004 and made history two years later when he was laterally appointed to CSM, the first paralegal specialist in history to hold that rank. Command Sergeant Major Glaze also was the first enlisted Soldier to have more than thirty years in the 71D/27D MOS.

Lorri M. Jenkins. After enlisting in 1976, Lorri Jenkins (then Lorri Greenly) completed a self-paced course as a clerk typist and earned MOS 71B. After a tour of duty in Germany, then Specialist Four Jenkins attended the Legal Clerk Course at Fort Benjamin Harrison and, after earning MOS 71D, was promoted to sergeant. From 1988 to 1990, then SSG Jenkins was an instructor at the Legal Specialist Course and earned honors as Instructor of the Year for the entire Adjutant General's School at Fort Benjamin Harrison. She was the first legal specialist to earn the honor; other MOS 71Ds had won Instructor of the Quarter, but not Instructor of the Year.

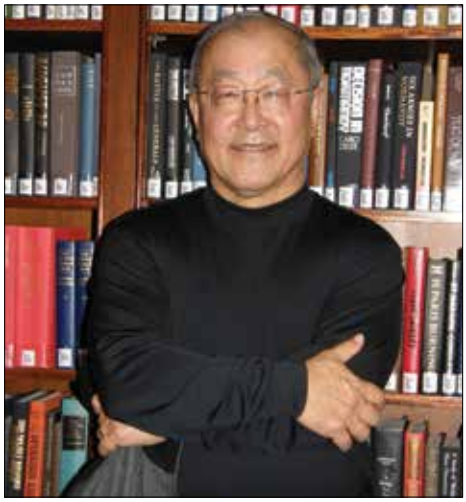
In 1993, Jenkins was selected by Regimental SGM Nicolai to be the Director of Judge Advocate Recruiting and Placement Services. In this position, she helped legal specialists returning to civilian life as the result of the Army's post-Cold War reduction-in-force. After retiring from the Regular Army as a master sergeant (MSG), she served as the Administrative Assistant to the Regimental CSM from May 2006 to September 2018.

Howard Metcalf. After enlisting in 1969, Howard Metcalf served as an infantryman in Vietnam from 1970 to 1971. After a brief tour in Korea, he left active duty and returned to civilian life. In 1977, Metcalf returned to the Army, qualified as a MOS 71D, Legal Specialist and resumed his career as a Soldier. He subsequently served three more tours of duty in Korea, and one in Germany. In 1997, SGM Metcalf was appointed as the eighth SGM of the Corps and, while serving in that position, played a key role in the creation of the Noncommissioned Officers Academy at TJAGLCS. Metcalf retired in 2002.

John H. Nolan. Born in Alabama in 1935, John Henry Nolan enlisted in 1953 and completed MOS training as a wheeled-vehicle mechanic. In 1967, he completed Officer Candidate School as was commissioned as an infantry second lieutenant. Nolan then deployed to Vietnam, where he served a twelve-month tour and was wounded in action. In 1973, now Captain Nolan was subject to a Reduction in Force and agreed to return to the enlisted ranks as a MSG. Unable to return to Infantry Branch because of Vietnam-related injuries, Nolan selected MOS 71D as his new specialty. He was serving as a SGM at U.S. Eighth Army in Korea when selected to be the first Sergeant Major of the Corps in 1979. Nolan served in this position until retiring in 1983.

John A. Nicolai. Born in North Dakota in 1946, John A. Nicolai enlisted in the Army in 1964 and completed MOS training as a medical corpsman. After a break in service from 1968 to 1970, he reenlisted and then reclassified as a MOS 71D legal clerk in 1974. He served as the Chief Legal NCO, 8th Infantry Division, Germany, and Chief Legal NCO, I Corps and Fort Lewis, before assuming duties as SGM of the Corps in 1992. After his death in 2009, the Corps established an annual lecture delivered at TJAGLCS in his honor: the John A. Nicolai Leadership Lecture.

Sergeant Major John Nicolai.



Sergeant Major Tae Sture.

Tae Sture. Born in Korea in 1949 and adopted by an Air Force officer and his wife during the Korean War, Tae K. Sture enlisted in the Army in 1968 and retired in 1991. He is the first paralegal specialist in history to attain the rank of SGM and then, after retiring from active duty, graduate from law school and become a licensed attorney.

Sture began his Army career as an infantryman and served a tour of duty in Vietnam, where he provided security for convoys and also served a legal clerk. After returning from Southeast Asia, Sture served in a variety of locations, including Germany (Berlin), Alaska, and Korea. After retiring from active duty, he worked at the Equal Employment Opportunity Commission (EEOC) as an investigator, supervisory team leader and mediator. He left the EEOC to open his own legal practice after earning his Juris Doctor from Indiana University. Since 2005, his practice has focused on employment law matters for individuals and small businesses. Sergeant Major (retired) Sture joined with other retired Army paralegals to establish the Retired JAG NCO Association, and served as its first president.[43]

As this brief *Lore of the Corps* article shows, the history of enlisted Soldiers in the Corps over the last one-hundred years is a rich and varied one, with the key event being the transformation of the MOS from legal clerk to paralegal specialist as the nature of the Corps' legal practice changed over the last twenty-five years. As MOS 27D Soldiers begin their second century of service in the Army and our Corps, there are certain to be more changes ahead. What also is certain is that paralegal specialists will continue to be valued members of the JAGC Regiment. **TAL**

Mr. Borch is the Regimental Historian and Archivist.

Notes

1. War Dep't, Gen. Orders No. 27 (22 Mar. 1918), para. XII.1.

2. *Id.* para. XII, 2.

3. *Id.* para. XII, 3.

4. 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).

5. It was *the* Judge Advocate General until 1924, when the War Department designated the position as *The* Judge Advocate General. *Id.* at 139.

6. Enoch H. Crowder was the first tJAG to wear two stars, and he served as the Army's top lawyer from 1911 to 1923. 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.

7. Fred L. Borch, *Bolsheviks, Polar Bears, and Military Law*, Prologue, Fall 1998, at 181–91.

8. Judge Advocate General's Department, Annual Report to the Secretary of War, 1919.

9. War Department, Technical Manual 12-427, Military Occupational Classification of Enlisted Personnel (12 Jul. 1944).

10. Over the years, the legal clerk/legal specialist/paralegal specialist MOS was renumbered as the Army renumbered MOSs in other enlisted career fields. MOS 279 was redesignated as MOS 713; it was latter redesignated as MOS 71D before becoming today's MOS 27D.

11. Bland J. Schreiber, *The Legal Clerk's Course*, Army Law., Aug. 1972, at 1.

12. Id.

13. *Id.* In the jargon of the era, any special court that was not empowered to adjudge a punitive discharge was called a "straight" or "vanilla" special. That meant that the maximum punishment was six months confinement at hard labor, forfeiture of two-thirds pay for six months, and reduction to the lowest enlisted grade (E-1).

14. Email from John H. Taitt, Deputy Clerk of Court, U.S. Army Court of Criminal Appeals, to Fred Borch, Regimental Historian, Jan. 29, 2019, 10:36 AM (on file with author). Compare these case numbers to today's court-martial numbers: in 2018, the Army tried fewer than 500 courts-martial, general and special combined.

15. *SSI History*, Soldier Support Institute, https://www.ssi.army.mil/Historian/default.htm (last visited Feb. 23 2019).

16. While the Army tried more than 62,000 courts-martial in 1969 (of which 59,500 were special courts), and 18,600 courts in 1972, it tried only 1,132 cases in 2001.

17. On 16 December 2013, Juliet Company re-aligned under the 263d Quartermaster Battalion, 23d Quartermaster Brigade.

18. Email from Joseph P. Lister to Fred L. Borch (Jan. 30, 2019, 11:36 AM) (on file with author).

19. Email from First Sergeant Charlene M. Crisp to Fred L. Borch (Feb. 21, 2019, 3:35 PM) (on file with author).

20. Article 90, Articles of War, 1806.

21. Article 69, Articles of War, 1806.

22. Article 93, Articles of War, 1806.

23. William Winthrop, Military Law and Precedents 502 (1920).

24. A judge advocate who wanted a court reporter would have to hire a civilian; there simply were no enlisted personnel in the Army who could take notes in shorthand.

25. Manual for Courts-Martial, United States 26 (1905).

26. Facts and Figures, Income and Prices 1900–1999, U.S. Diplomatic Mission to Germany, http://usa.usembassy.de/etexts/his/e_prices1.htm (last visited Feb. 11, 2016).

27. Act of August 24, 1912, 37 Stat. 575.

28. Judge Advocate General's Department, The Digest of Opinions of The Judge Advocate General233 (1917). The issue was whether an "enlisted man at a post . . . employed as a stenographic reporter of a board appointed to examine into . . . the mental status of a prisoner" could be paid "for this extra service." While the Judge Advocate General determined that there was no legal authority to pay for this stenographic reporting, the import of this opinion is that (1) there were soldiers who had the skills to serve as stenographic reporters and (2) that such shorthand reporters were recording legal proceedings.

29. Act of August 24, 1912, 37 Stat. 575.

30. Manual for Courts-Martial, United States 30 (1908).

31. *Id.* at 62.

32. *Id.* at 61.

33. Manual for Courts-Martial, United States paras. 113, 114 (1920).

34. Manual for Courts-Martial, United States para. 112 (1917); Manual for Courts-Martial para. 116 (1920).

35. 10 U.S.C. § 828 (1950).

36. *First Enlisted Men Training as Court Martial Reporters*, Army Times, Jan. 29, 1955, at 8.

37. *Id.*

38. *Id.*

39. *Id.*

40. Annual Bulletin, TJAGSA, 2000–2001, at 3.

41. https://www.jagcnet2.army.mil/Sites/tjaglcs.nsf/homeContent.xsp?open&documentId=6C6219E3864390AC85257D270041F2B5 (last visited Feb. 12, 2016).

42. For more on the Coggins award, *see "For Excellence" as a Junior Paralegal Specialist/Noncommissioned Officer: The History of the Sergeant Eric L. Coggins award*, Lore of the Corps 165 (2018).

43. https://www.linkedin.com/in/tae-sture-5747534/ (last visited Feb. 4 2019). Oral History, Tae K. Sture, Judge Advocate General's Legal Center and School, April 2009. Today, the Retired JAG NCO Association is known as the Judge Advocate General's Association of Legal Paraprofessionals (JAGALP). For more on JAGALP, *see* https://jag3saolp.wildapricot.org/History (last visited Feb. 23 2019).

Colonel James E. Kilian, shown seated just left of the speaker at the podium. (Credit: National Archives)

The Beast of Lichfield

Colonel James A. Kilian and the Infamous 10th Reinforcement Depot

By First Lieutenant Antonino C. Monea

"The buck stops here." That phrase, popularized by President Harry Truman, tells us that responsibility ultimately rests with the person in charge. This concept has long been embraced in international law.[1] So too has it been adopted by the military. Army Regulation (AR) 600-20, para. 2-1 says "Commanders are responsible for everything their command does or fails to do."[2]

But this was not the case for Colonel James A. Kilian. Known as the "Beast of Lichfield," he presided over the "most shocking Army scandal of World War II,"[3] where countless American Soldiers were reportedly tortured—to death in some cases—by their overseers. Yet Colonel Kilian escaped with little punishment, even though some of his subordinates received harsher sentences. His story illuminates the difference between legal ideals and practical realities.

Although war produces many deaths, it produces many more injuries. Take the Battle of the Bulge: for every one man killed, four men were left wounded, missing, or captured.[4] While some injured Soldiers remained permanently so, others could be nursed back to health and redeployed. To accomplish this task, the Army set up various reinforcement centers during WWII to rehabilitate men released from military hospitals and prepare them to rejoin units in the field. The 10th Reinforcement Depot in Lichfield, England, was one such center.

The British loaned the Lichfield Depot to the U.S. Army in 1942 to use as a staging area for the invasion of Normandy. After D-Day, it was converted into a reinforcement center. The compound consisted of three buildings. In addition to holding recuperating Soldiers, one building—the guardhouse—served as a prison for Soldiers who had committed offenses such as absence without leave or theft of Army property.[5] The entire Depot could house as many as 32,000 people at once.[6]

Colonel Kilian was the commanding officer for the Depot. His permanent rank was lieutenant colonel, but he had been temporarily promoted to a full-bird colonel during the war.[7] He ruled the compound like his own fiefdom. After all, he was invested with broad authority over the installation. Under AR 600-375 (1943), the commanding officer had "[f]ull responsibility for the security, management, and rehabilitation of all prisoners."[8]

That same regulation stated that the commander's policies must conform to "well-established principles of . . . humanity."[9] But dark rumors about the Lichfield complex started to spread. Specifically, rumors of the harsh conditions at the guardhouse where prisoners were housed and about the commander's sadistic methods, including lethal punishment. Soldiers recovering in hospitals in England "knew the words Lichfield and Kilian as well as [they] knew the location of the nearest pub."[10]

If even half of the rumors were true, the prison was ghastly. According to the *New York Times*, the facility was an "ugly red brick building[], begrimed by industrial smoke, [that] sat on a treeless limestone hogback. Most of the barracks windows were broken. There were no lawns or plantings around the camp."[11] Guardhouse latrines were filthy and sometimes only a single broken toilet was provided for hundreds of men.[12] Blood was ever-present on the walls.[13] Prison barracks were so crowded that some slept on wall lockers.[14]

The brutal conditions, however, paled when compared to the brutal treatment of the prisoners. The daily schedule, including weekends, called for three and a half hours of calisthenics in the morning, followed by ten minutes to eat. Black Soldiers were singled out to crawl on all fours and bark like dogs to be fed.[15] Anyone complaining of hunger was required to take triple helpings and then force-fed laxatives.[16] Others were forced to eat cigarettes.[17] After lunch, there would be four or five more hours of calisthenics. Everyone had to participate, even the wounded. All the while, guards patrolled the ranks with eighteen-inch billy clubs and used them freely. Those beaten did not receive medical treatment.[18]

And that was far from the end of it. Various accounts told of men being beaten

with fists, clubs, and rifle butts until unconscious, and when they awoke, ordered to clean up their own blood.[19] Guards deliberately jabbed the wounds of Purple Heart veterans and claimed that shooting a prisoner could get them a promotion.[20] Colonel Kilian was reported to have advised one of his lieutenants to take a prisoner and "work him over" and added, "just don't break too many bones."[21]

A favorite punishment at Lichfield was to have inmates stand in the stress position of toes and nose against the wall for hours on end.[22] Worse still, the inmates could be forced to stand against the wall while running in place. This placed Soldiers in a terrible dilemma. They either had to slam their knees into the wall with each step, or risk being beaten for not jogging vigorously enough.[23]

Another punishment called for prisoners to scrub the floor—made miserable by the fact that the compound was largely unheated and temperatures routinely fell below freezing. As a result, Soldiers who scrubbed the floor had to do it as water froze solid—along with the brush—all without even so much as a jacket for warmth.[24] The Army newspaper *Stars and Stripes* called Lichfield "a concentration camp run by Americans for American soldiers."[25]

Attempts to report the abuse suffered by those at Lichfield were severely punished,[26] but word got out eventually. On 19 July 1945, *Stars and Stripes* published a letter from a Soldier who claimed to have been beaten at the Depot, and the Army received separate reports of abuse from other Soldiers around the same time.[27] Soon enough, papers all around the United States picked up the story.[28]

After investigating, the Army convened a court-martial against Sergeant (SGT) Judson Smith, the chief-noncommissioned officer at the guardhouse.[29] Sergeant Smith first enlisted in the Army at fifteen with an eighth-grade education. He was subsequently discharged, went to work as a coal miner, and then decided to reenlist in the Army before being assigned to the 10th Reinforcement Depot. During his military tenure—until being investigated for his time at Lichfield—SGT Smith consistently received "excellent" ratings on his performance reviews.[30]

The court-martial of SGT Smith started on 3 December 1945. Smith's attorneys were first lieutenants, recent law school graduates, and inexperienced—but at least they *were* lawyers. That was not a foregone conclusion since the Articles of War at the time did not require defense counsel to be learned in the law. But the defense counsel were not alone in their inexperience. The prosecutor, Captain Earl Carroll, had only been sworn in as an assistant trial judge advocate a few hours before testimony began.[31]

Testimonial accounts about the prison varied wildly. As many as seven different versions were put forth on some points, and Smith underwent a grueling eight-hour cross-examination.[32] Smith's defense was eerily similar to the Nazi officers who were being tried at Nuremberg around the same time: he was just following orders.[33] This strategy worked as well for him as it did for those tried at Nuremberg: Smith was convicted and sentenced to three years hard labor and a dishonorable discharge.[34] The sentence did not stick, however. Sergeant Smith was released after three months, restored to service, and left the Army with an honorable discharge. He went back to coal mining and died a few years later.[35]

During Smith's court-martial, prosecutors set their sights on the commanding officer of the Lichfield Depot, as well as roughly a dozen officers and enlisted men. All in all, sixteen additional defendants were charged for the abuses at Lichfield. Thirteen of them were convicted.[36] Six of the defendants were officers, and ten were enlisted. Most received fines that amounted to roughly a month's salary, but no prison time.[37]

On 16 May 1946, the court-martial of Colonel Kilian began. His trial was even more chaotic than Smith's. There were "frequent bitter clashes" between the participating attorneys, and defense counsel Lieutenant Colonel Raymond E. Ford was held in contempt for shouting "hot words" in trial.[38] After losing on a technical ruling, the defense counsel charged that the court had "prearranged" the outcome to favor the prosecution.[39] Kilian, for his part, went from tan to pink to red to purple as his rage grew on the stand.[40]

The whole case was almost derailed by a score of prosecution witnesses going on strike and refusing to testify. The witnesses were outraged by the fact that numerous defendants had gotten off nearly scot-free even though the witnesses themselves had experienced the charged torture.[41] The witnesses, somehow, had received far longer prison sentences for far lesser crimes. For example, one witness received a twenty-year sentence for taking an unauthorized trip to London while waiting to testify.[42] At one point, witnesses even tried to tunnel their way out of the holding cell.[43]

After ten weeks of testimony in the Kilian trial, the panel took only two hours to deliberate. The panel acquitted him of "aiding and abetting" the very same cruelties for which nine enlisted guards and three subordinate officers were convicted. Kilian was found to have "permitted" cruel and unusual punishment, but not of having "knowingly" permitted it. As such, he was given a $500 fine, a formal reprimand, and sent on his way.[44]

We may never know why the sentences of those responsible for the abuses at Lichfield were so light, particularly for the man in charge, but we can guess. First, the defense in Kilian's court-martial presented evidence of how incredibly busy the Depot was to lend credibility to the notion that Kilian did not know about the abuse at the time it occurred. The prison was at double its intended capacity and could process anywhere from 200,000 to 250,000 people a year.[45] Although at least twenty-three prisoners and six guards testified about the abuse, the defense called thirty-five witnesses—including chaplains, medical officers, and inspectors—who claimed that they saw no abuse.[46] Despite the fact that AR 600-375 (1943) required Kilian to "personally assure himself by frequent inspections as to the proper enforcement of all prison regulations,"[47] the panel may have believed that Kilian was in the dark.

Second, perhaps the panel saw the draconian treatment as a necessary evil. The purpose of a reinforcement Depot is to take wounded warriors and send them back into harm's way. If the Depot was seen as too accommodating, troops might deliberately try to go there, or get imprisoned there, to avoid combat. It would not be the first time Soldiers were tempted to commit crimes to avoid fighting.[48] Plus, some of the first men sent to the Depot were, in fact, criminals who had been convicted by military courts in the United States of everything from robbery to rape.[49] These men had no

scruples about deserting, so the cadre may have adopted heavy-handed techniques to keep them in line.

Whatever the rationale, the light touch punishments of the Lichfield abusers ignited a firestorm of criticism. *Time Magazine* called it a "wrist-slap [that] satisfied no one but the Army's brasshats."[50] Senator Chapman Revercomb groused that the penalties against Kilian were too light and "entirely out of keeping with his conviction."[51] Before Kilian's sentence was even handed down, Captain Carroll resigned in protest of what he called a deliberate attempt by the Army to protect the high officers in the case.[52]

Colonel Kilian remained defiant until the end. Maintaining his innocence of the charges and his ignorance of the abuse, he claimed a review of his case would "vindicate [him] and inform the people of the truth."[53] His appeal for relief under Article 53 of the Articles of War was rejected after review by the Secretary of the Army and The Judge Advocate General.[54] Undaunted, he launched a libel lawsuit against books and newspapers that stated he was complicit in the torture.[55]

After Kilian's conviction, a journalist noticed his name was on a routine promotion list to be raised to permanent full bird colonel on the basis of seniority. Congress balked.[56] President Truman eventually relented, taking Kilian's name off the list and removing his eligibility for promotion. Shortly thereafter, Congress changed the promotions process to include merit rather than be strictly based on seniority, a system that still exists today.[57]

The Litchfield trials laid bare many of the shortcomings of the previous court-martial process: inexperienced counsel, explosive exchanges between attorneys, and disparate outcomes in sentencing for officers and enlisted. But they also were one of the factors that prompted the development of the Uniform Code of Military Justice and the development of a more detailed Manual for Courts-Martial[58]—both of which help ensure that trials are regularized and that just results can be reached. **TAL**

1LT Monea is a Legal Assistance Attorney with the XVIII Airborne Corps at Fort Bragg, North Carolina.

Notes

1. *E.g.* In re Yamashita, 327 U.S. 1, 15–16 (1946).

2. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 2-1 (6 Nov. 2014).

3. Lorenzor, *Colonel Kurtz in our Midst*, Tamworth Time Hikes (Oct. 17, 2011), https://tamworthtimehikes.wordpress.com/2011/10/17/colonel-kurtz-in-our-midst/; *National Affairs: The Colonel & the Private*, Time (Sept. 9, 1946) [hereinafter *The Colonel & the Private*], http://content.time.com/time/magazine/article/0,9171,855387,00.html.

4. Kennedy Hickman, *World War II: Battle of the Bulge*, ThoughtCo. (Mar. 23, 2017), https://www.thoughtco.com/battle-of-the-bulge-2361488.

5. Jack Gieck, Lichfield: The U.S. Army on Trial 10 (1997).

6. Memorandum Opinion, Application for Relief under Article of War 53 in the Case of Colonel James A. Kilian, 0-5133 (CM-318513), at 177 (1950) [hereinafter Memorandum Opinion].

7. Gieck, *supra* note 5, at 17.

8. Memorandum Opinion, *supra* note 6, at 175 (1950).

9. *Id.*

10. Irvin M. Herowitz, *Cabbages and Kings*, Harv. Crimson (June 21, 1946), https://www.thecrimson.com/article/1946/6/21/cabbages-and-kings-peto-veterans-who/.

11. Gieck, *supra* note 5, at 9.

12. *Id.* at 98.

13. *U.S. Soldier Prisoners Tortured*, Altoona Tribune (July 20, 1945), https://www.newspapers.com/image/57739064/?terms=%22lichfield%2C%2Bengland%22.

14. Herowitz, *supra* note 10.

15. Gieck, *supra* note 5, at 7, 15–16.

16. *The Colonel & the Private*, *supra* note 3.

17. Gieck, *supra* note 5, at 6.

18. *Id.* at 15–16.

19. *The Colonel & the Private*, *supra* note 3.

20. *Id.*

21. Memorandum Opinion, *supra* note 6, at 174, 176.

22. *The Colonel & the Private*, *supra* note 3.

23. Gieck, *supra* note 5, at 16.

24. *Id.* at 11, 19.

25. Lorenzor, *supra* note 3.

26. Gieck, *supra* note 5, at 18.

27. *GI Complaints of Beatings In England Guardhouse Probed*, Lincoln Star (July 19, 1945), https://www.newspapers.com/image/65276796/?terms=%22lichfield%2C%2Bengland%22.

28. *See Army Probing Beating Story*, Detroit Free Press (July 20, 1945), https://www.newspapers.com/image/98156555/?terms=%22lichfield%2C%2Bengland%22; *Letter Charges Guards Beat U.S. Prisoners*, Palladium-Item (July 20, 1945), https://www.newspapers.com/image/253251949/?terms=%22lichfield%2C%2Bengland%22; *Army Investigating Stories of GI Beatings*, Courier-News (July 20, 1945), https://www.newspapers.com/image/221247049/?terms=%22lichfield%2C%2Bengland%22.

29. Herowitz, *supra* note 10.

30. Gieck, *supra* note 5, at 3.

31. *Id.* at 39.

32. *Id.* at 74, 75.

33. *Id.* at 15.

34. Herowitz, *supra* note 10.

35. Gieck, *supra* note 5, at 239–40, 259.

36. *Officer Acquitted in Lichfield Trial: Last of Cases Involving Camp Heard—13 of 16 Who Were Charged Were Convicted*, N.Y. Times (Sept. 8, 1946), https://www.nytimes.com/1946/09/08/archives/officer-acquitted-in-lichfield-trial-last-of-cases-involving-camp.html.

37. *Major Fined in Lichfield Cruelty Trials*, Schenectady Gazette, at 10 (Aug. 28, 1946), https://news.google.com/newspapers?nid=1917&dat=19460828&id=PYouAAAAIBAJ&sjid=qIYFAAAAIBAJ&pg=750,3273200; Associated Press, *Officer Is Fined $250 And Reprimanded For Lichfield Beatings*, at A-9, Evening Star (June 16, 1946), https://chroniclingamerica.loc.gov/lccn/sn83045462/1946-06-16/ed-1/seq-9.pdf; Herowitz, *supra* note 10.

38. Gieck, *supra* note 5, at 236.

39. Associated Press, *Lichfield Witnesses' Escape Thwarted as Tunnel Is Discovered*, at A-13, Evening Star (June 18, 1946), https://chroniclingamerica.loc.gov/lccn/sn83045462/1946-06-18/ed-1/seq-1.pdf [hereinafter *Lichfield Witnesses' Escape Thwarted*]; Gieck, *supra* note 5, at 236.

40. Gieck, *supra* note 5, at xvii.

41. *Id.* at 226.

42. *Id.*

43. *Lichfield Witnesses' Escape Thwarted*, *supra* note 39.

44. *Col. Kilian Is Convicted At Hearing*, Burlington Daily Times-News (Aug. 29, 1946), https://newspaperarchive.com/burlington-daily-times-news-aug-29-1946-p-1/.

45. Memorandum Opinion, *supra* note 6, at 176, 178.

46. *Id.* at 177.

47. Memorandum Opinion, *supra* note 6, at 175.

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55. Kilian v. Doubleday Co., 367 Pa. 117 (1951); *Army Court in Europe Stacked Against Accused, supra* note 52.

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(Credit: istockphoto.com/5second)

Life Hack

College for Under $10K

A Guide to Using the Post-9/11 GI Bill for Your Kids' Tuition

By Major Kyle V. Burgamy

You will hear a lot of folks say, yes, education is important—it is important. (Laughter.) But it requires not just words but deeds. And the fact is, that since most of you were born, tuition, and fees at America's colleges have more than doubled. And that forces students like you to take out a lot more loans. There are fewer grants. You rack up more debt. Can I get an "amen"?[1]

-President Barrack Obama, Remarks at the University of North Carolina, April 24, 2012

Introduction

It's well known that college can be quite expensive. High tuition increases have become an annual tradition at nearly every American university. Despite this, it is entirely possible for two of your children to earn Bachelor's degrees from top-tier private universities for less than $10,000. That's right, less than $10,000. No witchcraft, sorcery, or long nights of driving for Uber required. Through thoughtful planning and creative thinking, service members can parlay transferred Post-9/11 GI Bill benefits into a remarkably powerful tool that can combat the rising tuition costs our children will encounter.

While no one would dispute the many advantages of attending college (namely the significant increase in lifetime earning potential), the rate at which college tuition has risen is enough to alarm college students and parents alike.

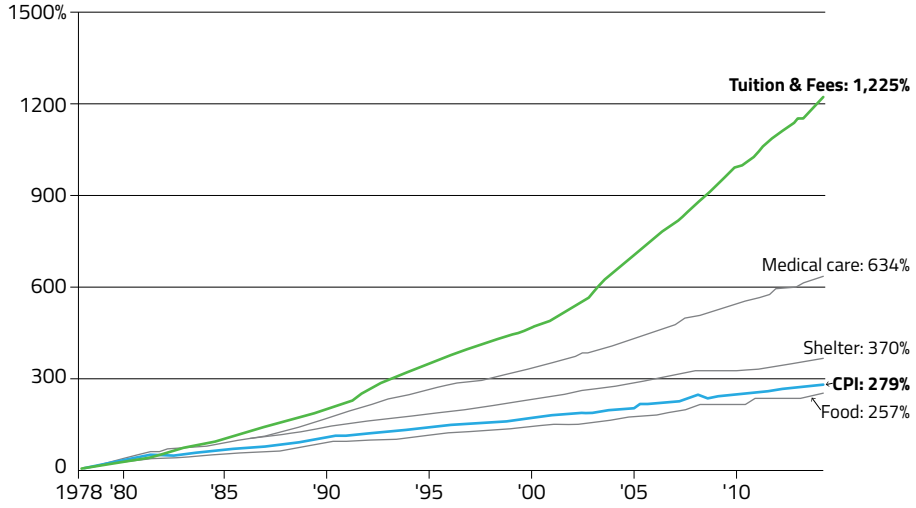
In a recent Princeton Review survey, the top concern of both parents and students is now paying for college, supplanting the top concern from only a decade ago—getting admitted to a student's top choice.[2] For 2017 graduates, the average student debt per borrower reached $37,172.[3] If that is not enough to scare you, by 2030, the total expense to attend a public university for four years will be $170,000 and closer to $350,000 for private universities.[4] Because of these rising costs, we should examine the ways in which career-minded judge advocates can leverage one of their most value assets, the Post-9/11 GI Bill, and position their children for success.

Analysis

1. *The Post-9/11 GI Bill.* I could spend hours talking about what an amazing benefit the Post-9/11 GI Bill is to service members. I suspect I would only be preaching to the choir. Rather, I will start by saying that anyone intending to transfer benefits to their dependents should do so immediately upon hitting six years of service. This will then start the clock on the four-year active duty service obligation. Transferring is accomplished by using the Veteran's Affairs (VA) Transfer of Education Benefits website.[5] Remember, your family member must be enrolled in the Defense Eligibility Enrollment Reporting System before benefits can be transferred to them.

On 16 August 2017, President Trump signed into law the Harry W. Colmery Veterans Educational Act of 2017, commonly referred to as the Forever GI Bill.[6] Among the many improvements, the most significant was the elimination of the fifteen-year limitation on using the Post-9/11 GI Bill.[7] Beneficiaries no longer have to start using transferred benefits within fifteen years of

Percentage increase in consumer prices since the first quarter of 1978



Source: Bureau of Labor Statistics

the service member's separation or retirement, a win for young dependents of—shall we say—more "seasoned" service members.

2. *Yellow Ribbon Program.* Though the Post-9/11 GI Bill is very well known, the Yellow Ribbon Program is its less popular, yet equally valuable sibling. Individuals qualified for the Post-9/11 GI Bill at the one hundred percent rate *and* their child transferees (but not spouses) are eligible for the Yellow Ribbon Program.[8] While the Post-9/11 GI Bill will cover resident public tuition or up to the "national maximum" for private tuition ($23,671.94 in 2018[9]), the Yellow Ribbon Program results in even more money being available for out-of-state students of public universities or students of high-priced private universities. In essence, universities enter into agreements with the VA to contribute money towards a student's tuition, which the VA then matches—dollar for dollar.

This results in some fantastic opportunities for child dependents. Through the Yellow Ribbon Program, many highly-ranked private institutions will cover nearly all tuition for Post-9/11 GI Bill recipients (e.g., Rice University, University of Notre Dame, Vanderbilt University, Stanford University) while others will cover the entirety of their tuition (e.g., Northwestern University, University of Chicago, University of Pennsylvania, University of Southern California, Cornell University, Dartmouth College).[10] The VA also provides an online comparison tool, allowing parents and prospective students to review expenses at different institutions after accounting for that school's Yellow Ribbon Program contributions.[11]

3. *Community College can be Cool.* Thus far, I probably haven't said anything you find even remotely controversial. Encouraging you to send your precious young child to—gasp—community college probably is. Before you dismiss the idea entirely, consider that many remarkably intelligent people have attended community college. Eileen Collins, the first female to command a space shuttle mission, earned an Associate's degree from Corning Community College before matriculating at Syracuse University and Stanford University.[12] Other successful individuals who have attended community colleges include George Lucas, Amy Tan, Tom Hanks, and Jim Lehrer.[13] Recent studies have shown that transfer students from community college have performed just as well as native students at four-year universities, despite the fear of "transfer shock."[14] Also, a recent study conducted at Columbia University found that the economic benefit of obtaining an Associate's degree before going to a four-year university can add up to nearly $50,000 over the span of twenty years.[15]

A frequent criticism of attending community college before transferring to a four-year institution is the fear of losing credit hours. Luckily, slumping enrollment numbers at private universities and legislative prodding of public universities has forced universities to accept a greater percentage of transfer hours.[16] Community college is also remarkably inexpensive when compared to tuition at four-year institutions. In fact, Tennessee, Oregon, and Rhode Island now offer community college free to their residents, regardless of need or income.[17] Even my hometown of Dallas is getting in on the action, offering free tuition at every community college in the county for graduates of thirty-one area high schools.[18]

Just as you would research a four-year university, parents and students should also review a community college's articulation agreements. These agreements are increasing in number, exponentially, and outline a curriculum of study at a community college that automatically transfer, credit-for-credit, to the four-year institution.[19] Websites exist that have aggregated information about existing articulation agreements in each state.[20] States have also begun adopting standardized numbering systems for courses at both community colleges and public four-year institutions, making it even easier for students to forecast which classes will transfer.[21]

4. *529 Plans.* Before contributing to a qualified tuition plan (commonly referred to as a 529 plan), service members should ensure they are appropriately saving money for their own retirement. Assuming that is occurring, they should also consider opening a tax-advantaged savings plans for their children's education. These plans offer federal and state tax benefits to account holders while minimizing the impact on a student's financial aid award.[22] Even if your child's tuition, fees, books, and housing expenses are fully covered by the Post-9/11 GI Bill, a college meal plan and any necessary technology expenses (laptops, software, and internet access) would count as "qualified expenses" under a 529 plan.[23]

Assuming your named beneficiary in a 529 plan decides not to go to college, or receives a full scholarship, you can easily name a new beneficiary of the plan, such as a grandchild, and let compound interest take care of the rest.[24] The owner of the 529 plan maintains all control over the account, and ownership of a 529 plan passes at death

to a successor-in-interest, making them a wonderful vehicle for creating generational family wealth.[25] Finally, it should be noted that you can also withdraw funds from your Roth IRA penalty free in order to pay for your children's qualified education expenses. There are pros and cons for each savings method.[26] Generally speaking, I would encourage individuals to use 529 plans and leave the retirement funds for, well, retirement.

5. *Other Means.* Depending on your state of residence, and your child's desires regarding college, growing college tuition can be mitigated in other ways. For example, if you claimed Texas as your state of residence when you joined the military, are honorably discharged after serving at least 181 days on active duty, return to Texas, and have no remaining GI Bill benefits, you qualify for benefits under the Hazlewood Act.[27] The Hazlewood Act provides an education benefit worth up to 150 credit hours of tuition exemption to Texas public universities and can be transferred to children similarly as Post-9/11 GI Bill benefits can be transferred.[28] Sending your sweet second or third born child to a public university in the state of Texas may sound frightening, but I can assure you that Texas Tech University learned me pretty good.

No other state offers a veteran's incentive as financially advantageous as the Hazlewood Act in Texas, but you should still research programs available to your children as a result of your service. Seeking a Reserve Officer Training Corps (ROTC) scholarship is an entirely separate discussion, but if your child does apply for one, they should carefully weigh which schools offer additional incentives to ROTC scholarship recipients. Many will offer free room and board along with additional tuition assistance or book stipends, akin to the Yellow Ribbon Program supplementing the Post-9/11 GI Bill.[29]

Conclusion

College is obviously vital to long-term financial stability. For every Steve Jobs or Michael Dell dropout success story, there are millions of others living paycheck-to-paycheck, or worse. On average, obtaining a Bachelor's degree alone results in seventy-four percent greater lifetime earnings than those who only graduated from high school.[30] On the other hand, between 2004 and 2017, the total student loan debt in the United States has increased from $260 billion to $1.4 trillion.[31]

Given this dichotomy, it is vital that all of us begin planning a course of action for our children. Lucky for us, leveraging the Post-9/11 GI Bill and Yellow Ribbon Program can help our children avoid a debt-laden future while still reaping the benefits of a college degree. In addition to these programs, I would highly encourage you and your children to look beyond the stigma associated with community college, and consider it as a viable means of keeping college expenses down.

If you have two children, sending each to community college before attending a four-year university will cost a minimal amount of money (or may be entirely free). By doing so, you can turn one Post-9/11 GI Bill into a Bachelor's degree for two children. Assuming they make the grades, and you help them research schools participating in the Yellow Ribbon Program, these degrees could even come from prestigious universities for practically nothing. **TAL**

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(Credit: istockphoto.com/tumsasedgars)

Practice Notes

Recent Changes to the Anti-Deficiency Act

What Do They Mean?

By Major Matthew B. Firing

In the midst of a leadership turnover in Congress and a partial government shutdown, the 116th Congress of the United States of America quietly passed the Government Employee Fair Treatment Act of 2019.[1] Nine days later, Congress enacted the Further Additional Continuing Appropriations Act of 2019.[2] Both of these Acts amended the Anti-Deficiency Act, specifically 31 United States Code (U.S.C.) § 1341,[3] adding a new subsection and more than 200 new words.[4] The amendments more than doubled the text of 31 U.S.C. § 1341.[5] On its face, such voluminous changes to a statute appears drastic.[6] However, in this case, the considerable amount of text added to 31 U.S.C. § 1341 is generally inconsequential for the practicing fiscal law attorney.

Background: The Anti-Deficiency Act

History of the Act

The Anti-Deficiency Act arguably regurgitates the Constitutional imperative of Article I, section 9, clause 7, of the United States Constitution that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[7] Its genesis is a result of years of legislative frustration with the executive branch's self-serving reading of, and sometimes disregard for, this clause of the Constitution.[8]

Initially, Congress enacted the precursor to the Anti-Deficiency Act, which required that sums appropriated by law shall be applied to objects for which they were appropriated.[9] This legislation did little to frustrate executive agencies' indifference towards recognizing Congress' "power of the purse."[10] Thus, as agencies' apathy ensued, so did corresponding legislative controls on agency spending.[11] This constitutional cat and mouse game ultimately culminated in the enactment of the original form of the Anti-Deficiency Act, codified in Title 31 of the U.S. Code.[12]

Congress was prompted to enact the Anti-Deficiency Act to serve two primary purposes.[13] First, the Act functions as a legislative measure for Congress to exercise its "power of the purse" over the executive branch and deter agencies from requesting deficiency or supplemental appropriations.[14] Second, the Anti-Deficiency Act provides Congress a remedial means to affix responsibility on those officials of the government responsible for incurring deficiencies in appropriations.[15]

Subsequent amendments to the Title 31 version of the Anti-Deficiency Act were made in 1905 and 1906, respectively, to further enforce the congressional intent of hindering agencies from requesting deficiency appropriations.[16] Congress enacted additional amendments in the 1950s to account for administrative control of funds,[17] while in the 1990s, Congress subjected the Anti-Deficiency Act to further changes to enforce the Balanced Budget Act and Emergency Deficit Control Act of 1985.[18]

Currently, the Anti-Deficiency Act primarily resides in section 1341 of Title 31 of

the U.S. Code.[19] The Act prohibits agency employees from obligating or expending public funds in excess of appropriations.[20] It also requires agencies to report violations of the Anti-Deficiency Act to the President of the United States, the Comptroller General, and the Congress.[21] The Anti-Deficiency Act serves as a strict liability statute with no *mens rea* element required to impose administrative discipline on its violators.[22] Meanwhile, criminal penalties may attach to any officer or employee of the United States who "knowingly and willfully" violates the Anti-Deficiency Act.[23]

The Department of Defense's implementation of the Anti-Deficiency Act is centrally located in Volume 14 of the Department of Defense (DoD) 7000.14-R, Financial Management Regulation (FMR).[24] The DoD FMR provides the agency with policy for the administrative control of funds, common Anti-Deficiency Act violation scenarios, and procedures for conducting Anti-Deficiency Act violation investigations.[25] This guidance, read in conjunction with the Defense Finance and Accounting Service-Indianapolis 37-1, Finance and Accounting Policy, provide a solid framework for a judge advocate to enforce and administer the Act on behalf of the DoD.[26]

Recent Amendments[27]

On 21 December 2018, a Continuing Resolution that funded several government agencies to include, but not limited to, the Departments of State, Interior, and Homeland Security was set to expire.[28] At midnight on 22 December 2018, the U.S. federal government failed to extend or provide further budget authority for these agencies beyond 21 December 2018 and hence began a funding gap, or what is more commonly referred to as a "partial 'government shutdown.'"[29]

Absent some statutory exception, during a shutdown or lapse in appropriations, agencies without budget authority may not incur new obligations.[30] Moreover, regardless of whether agencies are or are not incurring obligations pursuant to some statutory exception, no disbursements are permissible.[31] Consequently, this results in certain excepted federal employees that are incurring obligations under the auspices of some statutory exception to work without pay.[32]

Given the undesireable reality of having federal employees work without compensation, the Senate hastily introduced the Government Employee Fair Treatment Act of 2019 on 3 January 2019.[33] This bill was subsequently enacted into law on 16 January 2019.[34] The amendment added subsection (c) to the Anti-Deficiency Act and stated that all federal employees, whether furloughed as a result of a funding gap or working under the auspices of some statutory authority during a funding gap, would receive their standard rate of pay for that given period of time.[35]

This legislation was met with nearly unanimous support and favoritism by lawmakers;[36] however, any potential impact that it could have served saw its demise just nine days later.[37] In subsequent legislation, the Congress further amended 31 U.S.C. § 1341, and specifically subsection (c), to have the previously promised pay of furloughed and excepted employees during a funding gap be "subject to the enactment of appropriations Acts ending the lapse."[38]

Discussion

Funding Gaps[39]

In light of the Anti-Deficiency Act's prohibition against incurring obligations in advance of or in excess of an appropriation,[40] a lapse in appropriations logically means agencies can no longer continue operations that necessitate further obligations or expenditures.[41] This includes precluding federal government employees, who are paid with those appropriations that have lapsed, from working after the expiration of their agency's annual appropriation.[42] Agency employees reporting to work under those circumstances risk running afoul of the Anti-Deficiency Act under sections 1341 and 1342 of Title 31.[43]

Such a strict reading of the Anti-Deficiency Act and government shutdowns does not occur in practice.[44] Rather, agencies recognize several exceptions to a complete and total shutdown, both as a matter of law and legal interpretation.[45] First, agencies and programs may continue to operate with available budget authority.[46] The available budget authority generally derives from multiple or no-year appropriations previously provided.[47] A second exception permits agencies to incur obligations in advance of appropriations for "emergencies involving the safety of human life or the protection of property."[48] Employees working under the umbrella of this exception are referred to as "excepted employees."[49] Agencies are generally given the discretion to designate employees as "excepted" or "non-excepted."[50]

Other recognized exceptions include incurring obligations (1) in order to facilitate the orderly shutdown of activities,[51] (2) to carry out core constitutional powers,[52] (3) that are "necessary by implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency,"[53] and (4) in advance of an appropriation as permitted by law.[54]

Other than the exception concerning programs with pre-existing budget authority, a common theme amongst these exemptions is that any such obligations incurred under the auspices of these exceptions cannot be liquidated.[55] Stated differently, disbursements and payments will not be made during a funding gap regardless of whether obligations are being incurred.[56] It follows that this includes those employees that work during a government shutdown.[57]

An Unrestrained Liability Short-Lived

The perception of federal government employees working without compensation is not a winning political platform many elected officials are eager to get behind.[58] Unpaid federal employees, whether working or not working, carries significant political ramifications, especially in an era of twenty-four-hour news cycles and social media.[59] During the most recent shutdown, this unpopularity was compounded by a funding gap that lasted thirty-five days, and perhaps more importantly, two pay periods.[60]

As such, the Government Employee Fair Treatment Act of 2019 unanimously passed in the Senate and overwhelmingly in the House of Representatives with 411 of 434 representatives supporting the Act.[61] This amended the Anti-Deficiency Act and specifically 31 U.S.C. § 1341 to provide, among other things, that federal employees working or furloughed as a result of a lapse in appropriations shall be paid for the period of the funding lapse.[62] This was

intended to pacify concerned federal employees who were not receiving pay,[63] but also arguably serve as an exception to the Anti-Deficiency Act.[64]

Moreover, as initially passed on 16 January 2019, this amendment represented a massive unfunded liability[65] and perhaps even a new entitlement[66] by means of backdoor spending.[67] This is in addition to the current trillions in payments the government has promised its citizens without the funds to fulfill those obligations.[68] The new changes promised that all federal employees, whether furloughed as a result of a funding gap or working as a result of being an excepted employee, would be paid for the time the federal employee was furloughed or worked regardless of the availability of funds.[69] Astonishingly, a liability or an entitlement of this magnitude passed without a Congressional Budget Office Cost Estimate.[70]

However, nine days later, Congress quickly retreated from this ambitious position by passing Public Law 116-5.[71] Section 103 of Public Law 116-5 further amended 31 U.S.C. § 1341 at the end of its preceding amendment with the following dispositive language: "and subject to the enactment of appropriations Acts ending the lapse."[72] This qualifying language effectively signified that employees either working or furloughed during a funding gap would be compensated for the time period of the funding gap, *if the appropriations act that ended the funding gap provided appropriations.*[73]

Consequently, federal employees impacted by a government shutdown will only be paid as provided for in future appropriations acts.[74] This is consistent with prior funding gaps.[75] Federal employees receiving back pay for any period of a funding gap has been contingent on subsequent appropriations.[76]

Thus, the subsequent amendment to 31 U.S.C. § 1341 clarifies that budget authority for federal employees' pay continues in the form of appropriations[77] and that disbursements of pay are contingent on appropriations.[78] Unlike other forms of budget authority[79] and authority to make payments,[80] Congress made clear in this subsequent legislation that the outlay[81] of excepted and furloughed employees' pay, and probably their corresponding obligations,[82] are subject to appropriations.[83]

In sum, in response to a politically sensitive topic, the 116th Congress passed a significant amendment to the Anti-Deficiency Act incurring a substantial unfunded liability for the Federal Government.[84] However, any potential impacts from this act were quickly eviscerated just nine days later by that same legislative body.[85]

Before the recent changes to the Anti-Deficiency Act, federal employees furloughed or working during a funding gap were paid for the period of the funding gap if an appropriations act provided appropriations for that purpose.[86] Following the January 2019 amendments to 31 U.S.C. § 1341, nothing has changed in order to pay federal employees. Payments to federal employees, whether working or furloughed during funding gaps, are still contingent on an appropriations act providing appropriations for that purpose.[87]

So, what do the additional 261 words in the Anti-Deficiency Act mean to the fiscal law practitioner? Practically nothing. **TAL**

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Notes

1. Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3 (2019) [hereinafter GEFTA].

2. Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10 (2019) [hereinafter CR].

3. For purposes of this article, "31 U.S.C. § 1341" and "Anti-Deficiency Act" will be used interchangeably. Although other statutes are generally considered part of the Anti-Deficiency Act, 31 U.S.C. § 1341 will be the only relevant provision discussed.

4. (a) (1) *Except as specified in this subchapter or any other provision of law, an officer* or employee of the United States Government or of the District of Columbia government may not- (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; (C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or (D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Control Act of 1985.

(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.

(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

(c) (1) In this subsection –

(A) the term "covered lapse in appropriations" means any lapse in appropriations that begins on or after December 22, 2018;

(B) the term "District of Columbia public employer" means –

(i) the District of Columbia Courts;

(ii) the Public Defense Service for the District of Columbia; or

(iii) the District of Columbia government;

(C) the term "employee" includes an officer; and

(D) the term "excepted employee" means an excepted employee or an employee performing emergency work, as such terms are defined by the Office of Personnel Management or the appropriate District of Columbia public employer, as applicable.

(2) Each employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates and subject to the enactment of appropriations Acts ending the lapse.

(3) During a covered lapse in appropriations, each excepted employee who is required to perform work shall be entitled to use leave under chapter 63 of title 5, or any other applicable law governing the use of leave by the excepted employee, for which compensation shall be paid at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.

31 U.S.C. § 1341 (2019) (emphasis added).

5. *Id.*

6. *Id.*

7. U.S. Const. art. I, § 9, cl. 7. *See also* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937) (reaffirming that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress"). The restriction limits both what funds may be expended for, how much will be available for the expenditure, and to compel spending for specific purposes. Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray,* 11 Pub. Cont. L.J. 155, 159 (1979).

8. Fenster & Volz, *supra* note 7, at 159.

9. Act of March 3, 1809, ch. 28, 2 Stat. 535 (providing that all obligations by the Secretary of the Treasury, War, or Navy shall specify the particular appropriation or appropriations to which it should be charged).

10. Fenster & Volz, *supra* note 7, at 159.

11. *See, e.g.,* Act of May 1, 1820, ch. 52, § 6, 3 Stat. 568 (stating that "[n]o contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment"); Act of March 2, 1861, ch. 84, § 10, 12 Stat. 214, 220 (stating that "[n]o contract of purchase shall hereafter be made, unless the same be

authorized by law or be under an appropriation adequate to its fulfillment"); Act of February 12, 1868, ch. 8, § 2, 15 Stat. 35, 36 (stating that "no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated").

12. Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251 (codified at 31 U.S.C. § 3679 (1870)) (stating that "[i]t shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations"). *See also* Pub. L. No. 97-258, 96 Stat. 877 (1982) (recodifying the Anti-Deficiency Act from 31 U.S.C. § 3679 to 31 U.S.C. § 1341).

13. U.S. Gov't Accountability Off., GAO-06-382SP, 2 Principles of Federal Appropriations Law 6-35 (3d ed. 2006) [hereinafter "GAO Red Book"].

14. *Id.*

15. *Id.*

16. Act of March 3, 1905, ch. 1484, § 4, 33 Stat. 1257 (stating that "[n]o Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law" and requiring apportionment of appropriations in monthly allotments to prevent deficiencies); Act of February 27, 1906, ch. 510, § 3, 34 Stat. 48 (stating that apportionments shall be adhered to and not waived except upon the happening of some "extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment").

17. Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 765; Act of August 1, 1956, ch. 814, § 3, 70 Stat. 783 (providing for funding limitations of administrative formal subdivision of funds).

18. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13213(a), 104 Stat. 1388 (1990) (providing amendments to 31 U.S.C. § 1341(a)).

19. 31 U.S.C. § 1341 (2019) (stating a federal officer or employee may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation").

20. *Id.*

21. 31 U.S.C. § 1351 (2004) (requiring agency heads to report immediately to the President and Congress all relevant facts and a statement of actions taken when there has been a violation of 31 U.S.C. § 1341).

22. 31 U.S.C. § 1349 (1982) (subjecting federal officers and employees violating 31 U.S.C. § 1341(a) or 1342 to "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office"). *See also* A-86742, (Comp. Gen. Jun. 17, 1937) (stating that "[w]here a payment is prohibited by law, the utmost good faith on the part of the officer, either in ignorance of the facts or in disregard of the facts . . . cannot take the case out of the statute").

23. 31 U.S.C. § 1350 (1982) (stating that for knowing and willful violations of 31 U.S.C. § 1341, criminal penalties up to a fine of not more than $5,000, imprisonment for not more than two years, or both).

24. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation, vol. 14 (Apr. 2019) [hereinafter DoD FMR].

25. *Id.*

26. *Id.*; Defense Finance and Accounting Service-Indianapolis 37-1, Finance and Accounting, ch. 4 (Mar. 2017) [hereinafter DFAS-IN 37-1].

27. *See generally* U.S. Gov't Accountability Off., B-202135, Funding Gaps Jeopardize Federal Government Operations (Mar. 3, 1981) (providing a report to Congress where the Government Accountability Office (GAO) recommended similar legislation as that which was enacted in 2019; however, GAO did not recommend those legislative changes to take place within the Anti-Deficiency Act); *see also,* U.S. Gov't Accountability Off., B-241730, Government Shutdown: Permanent Funding Lapse Legislation Needed (Jun. 6, 1991) (recommending similar legislative changes).

28. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) (extending budget authority for these agencies until 7 December 2018); Pub. L. No. 115-298, 132 Stat. 4382 (2018) (providing budget authority for several agencies until 21 December 2018).

29. Megan Henney, *Partial Government Shutdown Begins: Here's What You Need to Know*, FOXBusiness, (Dec. 22, 2018), https://www.foxbusiness.com/politics/partial-government-shutdown-deadline-looms-heres-what-to-know.

30. Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, for the Director Office of Management and Budget, subject: Government Operations in the Event of a Lapse in Appropriations (16 Aug. 1995) [hereinafter Dellinger Memorandum] (stating that when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations except as to situations authorized by other law).

31. U.S. Office of Pers. Mgmt., Guidance for Shutdown Furloughs (Sept. 2015) [hereinafter OPM Shutdown Guidance]. *See also* Memorandum from the Deputy Sec'y of Def. for Secretaries of the Military Dep'ts et al., subject: Guidance for Continuation of Operations During a Lapse of Appropriations (18 Jan. 2018) (providing Department of Defense-specific guidance on what activities can continue during a funding gap under some statutory exception) [hereinafter DoD Shutdown Guidance].

32. *Id. See also* Memorandum from Julia C. Matta, Managing Associate General Counsel, U.S. Government Accountability Office to The Honorable Betty McCollum, Chair, et al., subject: Testimony Before the Subcommittee on Interior, Environment, and Related Agencies, Committee on Appropriations, House of Representatives—Application of the Antideficiency Act to a Lapse in Appropriations, B-330720 (6 Feb. 2019) [hereinafter Matta Testimony]; Frequently Asked Questions During a Lapse in Appropriations, The White House (2018), https://www.whitehouse.gov/wp-content/uploads/2018/12/Frequently-Asked-Questions-During-a-Lapse-in-Appropriations.pdf (stating that "[a]fter appropriations are enacted, payroll centers will pay all excepted employees for time worked."). All excepted employees are entitled to receive payment for obligations incurred by their agencies for excepted work during the period of the appropriations lapse. *Id.*

33. GEFTA, *supra* note 1. *See also* 116 Cong. Rec. S133-34 (2019); 116 Cong. Rec. H498-502 (2019) (providing the legislative history surrounding the passage of GEFTA).

34. GEFTA, *supra* note 1.

35. *Id.*

36. *Id.*

37. CR, *supra* note 2 (making payments to furloughed and excepted employees subject to appropriation acts).

38. *Id.*

39. *See generally* Captain Matthew Freeman, *Bridging the Funding Gap: The Implementation of Fiscal Law and Policy to a Lapse in Appropriations*, Army Law., Jan. 2014 at 4 (providing an overview of the impact of funding gaps on the Department of Defense).

40. 31 U.S.C. § 1341 (2019).

41. GAO Red Book, *supra* note 13, at 6-146 (describing the fiscal implications of a lapse in appropriations).

42. Testimony to Gladys Noon Spellman, House of Representatives, B-197841 (Mar. 3, 1980) (stating that "[d]uring a period of expired appropriations, the only way the head of an agency can avoid violating the Anti-Deficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted.") [hereinafter Spellman Testimony]; *see also* GAO Red Book, *supra* note 13, at 6-147 (stating that during a funding gap, permitting employees to come to work would result in an obligation to pay salary for the time worked and represent an obligation in advance of an appropriation).

43. *Id.* 31 U.S.C. § 1342 (1996) (prohibiting the acceptable of voluntary services).

44. Dellinger Memorandum, *supra* note 30 (stating that when funding gaps are referred to as "shutting down the government" it is an "entirely inaccurate description"). *See also* Jared C. Nagel, Cong. Research Serv., R41759, Past Government Shutdowns: Key Resources (2019).

45. *Id. See also* The President, 43 U.S. Op. Att'y. Gen. 224 (1980) [hereinafter Civiletti Memo 1980]; The President, 43 U.S. Op. Att'y. Gen. 293 (1981) [hereinafter Civiletti Memo 1981].

46. *Id.* This also includes other types of permanent authority made available outside the annual appropriations process. Matta Testimony, *supra* note 32. *See generally* 2 U.S.C. § 622 (2011) (providing that other forms of budget authority include borrowing authority, contract authority, and offsetting receipts and collections).

47. *Id.* Not all government functions are funded with annual appropriations and some operate under multi-year appropriations that do not require passage of annual appropriations, such as social security. *Id.*

48. Dellinger Memorandum, *supra* note 30; Civiletti Memo 1980, *supra* note 45; Civiletti Memo 1981, *supra* note 45. The emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to the near at hand and demanding of immediate response. *Id. See also* 31 U.S.C. § 1342 (1996). This is the authority commonly relied upon by the Department of Defense. DoD Shutdown Guidance, *supra* note 31. *But see* B-208985 (Oct. 5, 1982); B-208951 (Oct. 5, 1982) (cautioning that not all military personnel fit this emergency exception).

49. 31 U.S.C. § 1341 (2019); OPM Shutdown Guidance, *supra* note 31 (defining excepted employee as "employees who are performing emergency work involving the safety of human life or the protection of property or performing certain other types of excepted work").

50. *See, e.g.* DoD Shutdown Guidance, *supra* note 31 (providing specific DoD guidance on those activities that are essential or excepted and should continue in the absence of appropriated funds).

51. Dellinger Memorandum, *supra* note 30; Civiletti Memo 1980, *supra* note 45; Civiletti Memo 1981, *supra* note 45.

52. Dellinger Memorandum, *supra* note 30.

53. *Id.* (describing that certain functions should continue despite a lapse in appropriations because the lawful continuation of other activities necessarily implies that these functions continue).

54. *Id.* (providing an example of the food and forage authority which authorizes the Department of Defense to contract for clothing, subsistence, etc. without an appropriation).

55. Spellman Testimony, *supra* note 42 ("Under these circumstances, an employee who reports for work under the direction or with the consent of his or her supervisor is entitled to be paid for the time worked, and the United States is legally bound to pay the employee. The entitlement of the employee and the liability of the Government exists independently of any appropriation although, of course, funds may not be disbursed to pay the employee unless an appropriation for that purpose is enacted.").

56. *Id.*

57. *Id.*

58. 116 Cong. Rec. S133-34 (2019); 116 Cong. Rec. H498-502 (2019).

59. Garth Sundem, *How Have 24-Hour News Stations Affected Society?*, Howstuffworks.com (Mar. 11, 2011), https://people.howstuffworks.com/culture-traditions/tv-and-culture/24-hour-news-stations-affected-society.htm (stating how twenty-four-hour news cycles cause overblown stories).

60. Megan Henney, *Federal Workers Miss 2nd Paycheck as Shutdown Reaches Day 35*, FOXBusiness (Jan. 22, 2019), https://www.foxbusiness.com/politics/federal-workers-likely-to-miss-second-paycheck-as-shutdown-drags-into-32nd-day (explaining how most government employees missed two paychecks during the 35-day government shutdown).

61. GEFTA, *supra* note 1; 116 Cong. Rec. S133-34 (2019); 116 Cong. Rec. H498-502 (2019).

62. GEFTA, *supra* note 1.

63. *Id.*; 116 Cong. Rec. S133-34 (2019); 116 Cong. Rec. H498-502 (2019).

64. GEFTA, *supra* note 1. The addition of "[e]xcept as specified in this subchapter or any other provision of law," the absence of any language making obligations subject to the availability of funds, and CR, *supra* note 2, § 137, referencing subsection (c) as "obligations," compounded by the location of the amendment in 31 U.S.C. § 1341, strongly suggests the Congress caused the Government Employee Fair Treatment Act of 2019, Pub. L. No. 116-1, 133 Stat. 3 (2019) to serve as an exception to the Anti-Deficiency Act. *See also* GAO Red Book, *supra* note 13, 6-88, 6-91, 6-93 (discussing various legislation that act as exceptions to the Anti-Deficiency Act).

65. *See generally Unfunded Liability*, InvestorWords, http://www.investorwords.com/19346/unfunded_liability.html (Unfunded liability is "[t]he amount, at any given time, by which future payment obligations exceed the present value of funds available to pay them. For example, a pension plan's payment obligations, including all income, death and termination benefits owed, are compared to the plan's present investment experience, and if the total plan obligations exceed the projected plan assets at any point in time, the plan has an unfunded liability."). The author of this article was unable to calculate the monetary value of such a liability and is not aware of any research or data that could corroborate any estimate. It is fair to assume that the amount would be quite substantial. *But see* 29 U.S.C. § 206 (1938) (providing a minimum wage for federal employees under the Fair Labor Standards Act). Compensation for excepted employees working during a funding lapse have been subject to litigation and arguably may be entitled to compensation for the work they perform during a shutdown. Ann E. Marimow, et al., *The Essence of Involuntary Servitude: Federal Unions Sue the Trump Administration to Get Paid for Shutdown Work*, Wash. Post (Jan. 15, 2019), https://www.washingtonpost.com/nation/2019/01/15/essence-in-voluntary-servitude-federal-unions-sue-trump-administration-get-paid-shutdown-work/?utm_term=.d0d1a39792fc.

66. 2 U.S.C. § 622 (9) (2011) (defining entitlement authority as the authority to make payments, the budget authority for which is not provided for in advance by appropriations Acts). *See also* U.S. Gov't Accountability Off., GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process 47 (Sept. 2005) [hereinafter GAO Glossary].

67. *Id.* at 16 (defining backdoor authority or backdoor spending as budget authority provided in laws other than appropriations act, including contract authority and borrowing authority, as well as entitlement authority and the outlays that result from that budget authority).

68. Myra Adams, *Unfunded Govt. Liabilities — Our Ticking Time Bomb*, RealClear Politics (Jan. 10, 2019), https://www.realclearpolitics.com/articles/2019/01/10/unfunded_govt_liabilities_—_our_ticking_time_bomb.html#! (describing at least $122 trillion in unfunded liabilities by the federal government).

69. Memorandum from the U.S. Office of Pers. Mgmt. for Heads of Executive Dep'ts and Agencies, subject: Government Employee Fair Treatment Act of 2019 (Jan. 23, 2019) (providing guidance to furloughed and non-furloughed federal employees on their compensation during the funding gaps).

70. Congressional Budget and Impoundment Control Act of 1974, 93 Pub. L. No. 344, 88 Stat. 297, §§ 401, 402 (1974) (providing specific requirements associated with any pending legislation that provides new authority to enter into contracts under which the United States is obligated to make outlays and additional requirements of the Congressional Budget Office to prepare an estimate of costs incurred for that pending legislation).

71. CR, *supra* note 2.

72. Id.

73. *Id.* (emphasis added). *See also,* GAO Red Book, *supra* note 13, 6-90, 6-91 (discussing legislation with "subject to the availability to appropriations" language and how there is "no legal obligation to pay unless and until appropriations are provided"). This amendment also ensured agencies would not be leveraging any transfer or reprogramming authority it may have received to compensate federal employees during a funding lapse. *See* 31 U.S.C. § 1532 (1982); Matta Testimony, *supra* note 32.

74. CR, *supra* note 2. *See also,* GAO Red Book, *supra* note 13, 6-88, 6-91 (stating that to constitute an exception to the Anti-Deficiency Act, express authority to incur obligation or expend funds in excess or advance of appropriations is needed, vice some general authority).

75. *See, e.g.,* Extension of Continuing Appropriations Act, 2018, Pub. L. No. 115-120, 132 Stat. 28, § 154 (2018); Pay Our Military Act, Pub. L. No. 113-39, 127 Stat. 532 (2013); s*ee also* Sam Wice, *Why Federal Employees Will Not Be Working for Free During the Shutdown,* Yale J. on Reg.: Notice & Comment (Dec. 24, 2018), http://yalejreg.com/nc/why-federal-employees-will-not-be-working-for-free-during-the-shutdown/.

76. *Id.*

77. CR, *supra* note 2. It is still questionable whether the Congress' appropriation, ending the funding lapse, will specifically provide for appropriations that identify subsection (c) of § 1341 or whether a general lump sum agency appropriation that ordinarily would fund the agency employees' salary would suffice. The most recent legislation suggests that the Congress will proceed with the former; however, that could also be that the Congress was compensating for its unrestrained liability legislation drafted in GEFTA, *supra* note 1.

78. *Id. See also* Matta Testimony, *supra* note 32.

79. GAO Glossary, *supra* note 66, at 20–21 (defining forms of budget authority as (1) appropriations, (2) borrowing authority, (3) contract authority, and (4) authority to obligate and expend offsetting receipts and collections.). *See e.g.,* 41 U.S.C. § 6301 (2011), 42 U.S.C. § 2210(j) (2006) (providing contract authority as the form of budget authority).

80. *See, e.g.,* GAO Glossary, *supra* note 66, at 47 (defining entitlement authority as the authority to make payments, the budget authority for which is not provided for in advance by appropriations Acts).

81. *See* GAO Glossary, *supra* note 66, at 73 (defining outlay as the issuance of checks, cash or funds to liquidate an obligation).

82. *Id.* at 70 (defining obligation as a definite commitment that create a legal liability for the payment of goods or services ordered or received). If employee obligations are not contingent on appropriations and thus, subsection (c) represents an exception to the Anti-Deficiency Act, the next reasonable question and issue is what, if any, recourse is there under the Anti-Deficiency Act for having all federal employees work during a lapse in appropriations. 31 U.S.C. § 1341(a)(1)(B) (providing that a violation of the Anti-Deficiency Act would occur if the government obligated payment of money before an appropriation is made *unless authorized by law* (emphasis added). *But see* GAO Red Book, *supra* note 13, at 6-88, 6-91 (providing a discussion on what constitutes an exception to the Anti-Deficiency Act and generally requiring something more in the legislative language beyond just authority to undertake a particular activity).

83. CR, *supra* note 2. Therefore, the Congress continued to keep budget authority for federal employees' pay as subject to appropriations. *Id. See also* GAO Glossary, *supra* note 66, at 21 (discussing appropriations as a form of budget authority and stating that sometimes appropriations are contingent upon the occurrence of some other action specified in the appropriation law, such as the enactment of a subsequent authority or the fulfillment of some action by the executive branch).

84. GEFTA, *supra* note 1.

85. CR, *supra* note 2.

86. Spellman Testimony, *supra* note 42.

87. CR, *supra* note 2. *See also* Matta Testimony, *supra* note 32.

An Overview of the Judgment Fund and How Its Availability Can Impact Claim Settlements

By Lieutenant Colonel (Retired) Timothy A. Furin

The Judgment Fund was established by Congress in 1956 to alleviate the need for specific legislation following every successful claim against the United States.[1] The purpose behind the Judgment Fund was to eliminate the procedural burdens involved in getting an individual appropriation from Congress, allowing for the prompt payment of judgments and reducing the amount of interest accrued between the time the judgment was awarded and payment was made.[2] Although the Judgment Fund successfully eliminated the need for legislative action in almost every case—and in most cases resulted in prompter payments to successful claimants—it also had the unintended consequence of incentivizing procuring agencies to avoid settling meritorious claims in favor of prolonged litigation.[3] Specifically, an agency could avoid making payment from its own appropriated funds if it refused to settle a case and instead sought a decision from a court, subsequently providing it access to the Judgment Fund, which draws money straight from the Treasury.[4] Congress eliminated this problem when it passed the Contracts Disputes Act (CDA) of 1978,[5] which requires agencies to reimburse the Judgment Fund with appropriated funds that are current at the time of the judgment against the agency.[6] Although contracting officers are no longer incentivized to avoid settlement, the source and availability of funds can still impact whether or not they decide to settle a claim because there are differences between how a judgment is funded and how a settlement is funded. This article will examine those differences to ensure that practitioners understand how something as simple as a funding source can impact the procedural outcome of a claim potentially resulting in higher costs and delays in payment.

An Overview of the Judgment Fund

Basic Fiscal Law Principles

Before discussing the Judgment Fund and its characteristics, it is necessary to quickly review some basic fiscal law principles. The Appropriations Clause of the Constitution (Article I, § 9, cl. 7) provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[7] Accordingly, Congress must pass and the President must sign an annual appropriations act before executive agencies can spend any money.[8] In basic terms, an appropriations act is a statutory authorization that allows agencies to incur obligations and make payments out of the Treasury for specified purposes.[9] An appropriations act can contain many different provisions of budgetary authority, which are typically referred to as "colors of money," "pots of money," or simply "appropriated funds."

Appropriated funds are available for obligation only for a defined period of time, which is known as the period of availability.[10] The periods of availability are different for each type of appropriation.[11] For example, the period of availability for the Operations and Maintenance (O&M) appropriation is one year while the period of availability for the Military Construction (MILCON) appropriation is five years.[12] If appropriated funds are not obligated during their period of availability, then the funds expire and agencies cannot use them to make new obligations.[13] Expired appropriations, however, retain their fiscal identity and remain available to adjust and liquidate previous obligations for a period of five years.[14] These adjustments can include settlements for claims that relate to in-scope contract changes.[15] A fund is closed five years after the end of its period of availability and is no longer available for any purpose to include settling claims.[16]

The Judgment Fund is a permanent, indefinite appropriation that is available to pay those final judgments,[17] awards,[18] and compromise settlements[19] that are statutorily specified for payment out of the Judgment Fund.[20] Unlike the two examples used above, the Judgment Fund has no fiscal year limitations (its period of availability is indefinite meaning that it is always available), nor are there any limits with respect to the amount

of funds available for withdrawal from the Treasury.[21] The CDA does, however, require an agency to reimburse the Judgment Fund from its operating appropriations that are current at the time of the judgment against the agency.[22] This reimbursement requirement is often a critical factor for contracting officers when they are considering whether or not to settle a case.

Availability and Limitations of the Judgment Fund

Identifying when the Judgment Fund is available, and exactly what costs it can be used for, is often a difficult task for both contracting officers and fiscal law practitioners alike. Payments from the Judgment Fund can only be made when the following four conditions are met: (1) payment of the judgment, award or compromise settlement is authorized by statute; (2) the judgment, award, or compromise settlement is final; (3) the judgment, award, or compromise settlement is monetary; and (4) payment may not legally be made from any other source of agency funds.[23] These four requirements are discussed in greater detail below.

Authorized by Statute

Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund.[24] In the federal acquisition arena, authorized payments include judgments made by a United States District Court[25] or the Court of Federal Claims,[26] awards made pursuant to the CDA by a Board of Contract Appeals (BCA),[27] or compromise settlements negotiated by the Department of Justice to dispose of actual or imminent litigation.[28] There are many other instances where judgments and awards are eligible for payment from the Judgment Fund but they are not directly applicable to the issues discussed in this article.

Finality Required

The Judgment Fund is only available for judgments, awards, and compromise settlements that are final.[29] This requirement is necessary because it is in the government's best interest to pay claims only when the government's obligation and a claimant's entitlement are fixed and not subject to change.[30] For purposes of the Judgment Fund, finality attaches to those proceedings which "have become conclusive by reason of loss of the right to appeal."[31] A proceeding becomes final if any of the following circumstances are met: (1) a court of last resort issues a decision or elects not to hear an appeal; (2) both parties decide not to seek further review; or (3) the time permitted to file an appeal has expired.[32]

Monetary Awards Only

The Judgment Fund is only available for judgments where a court directs the government to pay monetary damages, as opposed to where a court orders some form of specific performance or other injunctive relief.[33] The Government Accountability Office (GAO) addressed this issue in a 1991 opinion dealing with a class action suit brought against the Department of Veterans Affairs (VA) in the Sixth Circuit.[34] In that case, the VA argued that both the district court judgment and a compromise settlement pending before the circuit court (whichever became final first) should be payable from the Judgment Fund.[35] The GAO disagreed and instead found that both the district court order and the pending compromise settlement only required the VA to perform a discretionary act, which did not constitute a monetary award payable from the Judgment Fund.[36] The GAO specifically determined that "in order to qualify for payment from the Judgment Fund, there must be a monetary award against the United States under a judgment or settlement agreement (that is, the judgment or agreement must direct the government to pay money), as opposed to judgments and settlements which are injunctive in nature (i.e., which either direct the government to perform, or not to perform, some particular action)."[37]

Not Otherwise Provided For

Finally, the Judgment Fund is only available if payment cannot legally be made from any other source of agency funds.[38] The GAO addressed this issue in an unpublished 1993 opinion dealing with the source of payment for claims administratively settled pursuant to the Military Claims Act (MCA).[39] In that case, the Air Force sought guidance from the GAO concerning whether it was required to pay, from its own appropriations, the first $100,000 of any MCA claim that it administratively settled.[40] The GAO found that the Air Force was required to use its own appropriations to pay for any administratively settled claims up to $100,000.[41] The GAO reasoned that the Judgment Fund was only available to pay that portion of any settlement that exceeded $100,000 because another source of funds—the MCA—was available to pay the first $100,000 of any settled claim.[42] Specifically, the GAO noted that 10 U.S.C. §§ 2733(d) and 2734(d) "otherwise provided" the funding source for the first $100,000 on a MCA settlement.[43] Payment is considered to be "otherwise provided for" when another appropriation is legally available to satisfy the judgment or award.[44]

Allowable Costs: Interests, Fees and Other Expenses

Identifying which costs can be paid from the Judgment Fund can be as confusing as identifying whether the Judgment Fund is available in any particular case. Obviously if the four aforementioned criteria are met, the judgment, award, or compromise settlement itself can be paid from the Judgment Fund. Claimants however, often incur additional costs when pursuing a claim. These costs can include accrued interest, attorney's fees, and other expenses associated with litigation like administrative court fees, compensation for court-appointed experts, and costs associated with preparing expert reports.[45] In some cases, these costs are allowable and can be paid from the Judgment Fund, in other instances they cannot.

Accrued interest associated with disputes against the United States is generally not recoverable unless expressly allowed by a statute or the underlying contract.[46] The CDA is one of the few statutes that allow a claimant to recover accrued interest on a meritorious claim.[47] Interest under the CDA accrues from the date the contracting officer receives a valid claim, with the necessary certification if required, to the date that final payment is made.[48] Allowable interest on claims under the CDA is calculated as simple interest in accordance with the rates established by the Treasury and is payable from the Judgment Fund.[49]

In most cases, each party involved in litigation is required to pay their own legal expenses. The Equal Access to Justice Act

(EAJA)[50] is a statutory exception to this general rule that allows a prevailing party to recover certain costs and fees from the government if the government's legal position was not substantially justified.[51] The term "substantially justified" means that the government's position must be "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person."[52] This standard does not create a presumption that the government's position was not substantially justified just because it lost the case.[53] Rather, the government's position must have a reasonable basis in both law and fact.[54]

Additionally, the Judgment Fund may also be used to pay a prevailing party's costs or fees if a court or board approves a claimant's EAJA application[55] after finding that the government's position was not substantially justified.[56] However, if a claimant is awarded attorney's fees those fees cannot be paid from the Judgment Fund.[57] Instead, EAJA specifically requires agencies to pay attorney's fees using appropriated funds that are current at the time of the judgment or award.[58]

Funding Settlements and Judgments

The differences between how a judgment is funded versus how a settlement is funded can impact a contracting officer's decision of whether or not to settle a claim. This could mean higher litigation costs for both parties and significant delays before meritorious claims are payed. This result seems to run counter to the reason that the Judgment Fund was originally established—to reduce costs for the government and provide prompter payment to claimants.

Obligating Funds Following a Judgment or Award

Determining the source of funds following a judgment, award, or compromise settlement is a pretty straight forward task. If the agency has current funds available, the Judgment is paid using those funds and not the Judgment Fund.[59] If current funds are not sufficiently available, then the Judgment Fund must be used to pay the judgment.[60] As noted earlier, the CDA requires an agency to reimburse the Judgment Fund from its operating appropriations that are current at the time of the judgment.[61] At first glance it appears that the CDA's reimbursement requirement renders any distinction between these two funding sources moot because in both instances the payment will ultimately come from an agency's current funds. However, this is not necessarily the case because the CDA does not specify an exact time period for reimbursement, which provides the agency with some discretion to choose when (i.e., which fiscal year) it reimburses the Judgment Fund.[62]

The GAO addressed this issue in a 1987 opinion and found that the CDA's reimbursement requirement does not mandate that an agency needs to disrupt its ongoing activities or programs to find the money to immediately reimburse the Judgment Fund.[63] Rather, an agency has some flexibility regarding the timing of reimbursement which is necessitated by the fact that an agency's annual budget for a given fiscal year will likely be set well in advance of any judgment or award.[64] The GAO found that "the earliest time an agency can be said to be in violation of 41 U.S.C. 612(c) [the CDA's reimbursement requirement] is the beginning of the second fiscal year following the fiscal year in which the award is paid."[65] This flexibility is a factor that can be considered by contracting officers when deciding whether or not to settle a case or proceed with litigation.

Obligating Funds Following an Agency-Level Settlement

A settlement is an administrative determination that disposes of a claim whether by full or partial allowance or by disallowance.[66] Most agency-level settlements occur as a result of settlement discussions between the parties that end in an agreed-to compromise of the BCA appeal and the underlying claim.[67] Settlements are typically implemented through a bi-lateral agreement between the parties and a subsequent contract modification.[68] Payment is made by the contracting officer following the same obligation rules that are used for standard contract changes.[69] The Judgment Fund is generally not available to pay agency-level settlements.[70]

If a settlement relates to an in-scope contract change, the settlement should be funded from the same appropriation cited on the original contract.[71] If the appropriation that funded the original contract has expired, it may still be used to fund the settlement if the liability relates back to the original contract.[72] This is known as the "relation-back theory" and is subject to different agency restrictions.[73] If the appropriation that funded the original contract has expired and is exhausted (no remaining funds), the contracting officer should look to see if the same type of expired funds are available from somewhere else within the agency. If no other expired funds are available within the agency, a consent judgment will be required to settle the case.[74]

As noted above, the Judgment Fund is generally not available to pay agency-level settlements.[75] One way that parties can work around this limitation is for the agency and claimant to stipulate or consent to an entry of judgment or award based upon the terms of the settlement.[76] This is called a consent judgment (or sometimes a stipulated judgment). The Judgment Fund is available to pay consent judgments however the agency is still required to reimburse the Judgment Fund from current appropriations.[77] In practice, consent judgments are subject to prohibitive agency restrictions which make them difficult to use.[78] For example, the Army policy requires contracting officers to notify the Department of the Army and receive authorization from the Assistant Secretary of the Army (Financial Management & Comptroller) prior to entering into a consent judgment.[79]

Finally, if the appropriation that was used to fund the original contract is closed, the settlement must be paid using current agency funds. The same is true if a settlement relates to an out-of-scope contract change.

Will This Claim Settle?

With few exceptions, contracting officers are authorized, within the limits of their warrant, to decide or resolve all claims arising under or relating to the contract that they are responsible for administering.[80] The Federal Acquisition Regulation (FAR) shows us that the resolution of claims by mutual agreement is preferred over prolonged litigation.[81] Specifically, the FAR provides that agencies should attempt to resolve all claims by mutual agreement if possible.[82] Courts have also weighed-in on this matter and have found that one of the main reasons

behind the CDA was to "induce resolution of contract disputes with the government by negotiation rather than litigation."[83] When considering whether or not to settle a claim, there are many factors that a contracting officer must consider. One of those factors is how a settlement will be funded.

As discussed above, there are significant differences between how a judgment is funded versus how a settlement is funded. These differences can impact a contracting officer's decision of whether or not to settle a claim. In practice, the driving factors behind this decision are the source and availability of funds, and the impact, if any, to an agency's ongoing or planned activities or programs. For example, a settlement will have little impact on an agency if the settlement relates to an in-scope contract change and there are still funds available (either current or expired) from the same appropriation cited in the original contract. In this case, a contracting officer is very likely to settle a meritorious claim. The same is true where there are expired funds of the same type still available within the agency and the claim relates back to the original contract.

The more difficult cases are those where the funding source is exhausted or closed, or the settlement relates to an out-of-scope contract change that requires the settlement to be paid from current funds. In those cases, the contracting officer will have to assess whether settling a claim will significantly impact an agency's ongoing activities or programs. If so, the contracting officer might decide to pursue a consent judgment which could provide some flexibility regarding the timing of reimbursement to the Judgment Fund. Alternatively, the contracting officer could decide to litigate the claim and hope that any appeal is denied, knowing that if the appeal is sustained it will take a considerable amount of time before the judgment or award is final and payment is due. Ultimately, a contracting officer's decision could come down to whether or not there is a cash flow advantage to the procuring agency.

If the contracting officer decides to litigate a claim, both the government and claimant will incur additional legal expenses. Litigating an appeal can also result in a delayed payment to a claimant on a meritorious claim and an increased amount of accrued interest owed by the government.

Although contracting officers are no longer incentivized to avoid settlement, the source and availability of funds can still impact whether or not they decide to settle a claim because of the effect that a funding source can have on an agency's programs or activities. It is essential that fiscal law practitioners understand the differences between how a judgment is funded versus how a settlement is funded so they can properly advise clients on the potential financial impacts to the procedural outcome of a claim. **TAL**

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Notes

1. *See* H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

2. *See* United States v. Varner, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

3. *See* S. Rep. No. 95-1118, 95th Cong., 2d Sess. 33 (1978).

4. *Id.*

5. 41 U.S.C. § 7108.

6. *See* 41 U.S.C. § 7108(c); U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 10, ch. 12, para. 120210 (July 2017) [hereinafter DoD FMR]; DFAS-IN 37-1, Table 8-6, para. 15.

7. U.S. Const. art. I, § 9, cl. 7.

8. *See generally*, Gov't Accountability Off., GAO-04-261SP, Principles of Federal Appropriations Law (2d ed.), vol. I, ch. 1, 1-26 – 1-27 (Jan. 2004).

9. *Id.*

10. U.S. Gov't Accountability Off., GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process 23 (2005) [hereinafter GAO Glossary].

11. *See* Department of Defense Appropriations Act, 2018, Pub. L. No. 115-141 (2018).

12. *Id.*

13. GAO Glossary, *supra* note10, at 23.

14. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary.

15. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary.

16. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary.

17. A judgment is a "decision issued by a court . . . that resolves a case, as far as that court is concerned, by ruling on the issue in that case." *See* Ralph C. Nash et al., The Government Contracts Reference Book 305 (4th ed., 2013).

18. An award is a decision issued by an administrative board such as the Boards of Contract Appeals.

19. A compromise settlement is an "agreement reached by the parties involving mutual concessions." Gov't Accountability Off., GAO-08-978SP, Principles of Fed. Appropriations Law (3d ed.), vol. III, ch. 14, at 14-34 (Jan. 2004) (citing Op. Att'y Gen. 94, 95–96 (1933)) [hereinafter GAO Red Book].

20. 31 U.S.C. § 1304(a)(3), (b), (c); *see also* GAO Red Book, *supra* note 19, vol. III, ch. 14, at 14-32.

21. 31 U.S.C. § 1304.

22. *See* 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15.

23. *See generally*, GAO Red Book, *supra* note 19, vol. III, ch. 14, 14-30 – 14-44; *See also*, *Bureau of the Fiscal Service*, U.S Dep't. of Treasury, https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/background.htm (last visited May 29, 2018).

24. Nash, *supra* note 17.

25. *See* 28 U.S.C. § 2414.

26. *See* 28 U.S.C. § 2517; *See also* 41 U.S.C. § 7108(a).

27. *See also* 41 U.S.C. § 7108(b).

28. *See* 28 U.S.C. § 2414.

29. 31 U.S.C. § 1304(a).

30. *See generally*, GAO Red Book, *supra* note 19, vol. III, ch. 14.

31. Christian v. United States, 49 Fed. Cl. 720,727 (2001). *rev'd in part on other grounds*, 337 F.3d 1338 (Fed. Cir. 2003).

32. GAO Red Book, *supra* note 19, vol. III, ch. 14, 14-34.

33. Availability of Expired Funds for Non-Monetary Judicial Awards, B-238615, 70 Comp. Gen. 225, 228 (1991).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. 31 U.S.C. § 1304(a)(1).

39. Lieutenant Colonel Hervey A. Hotchkiss, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993) (unpub.).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. 28 U.S.C. § 2412(d).

46. *See, e.g.,* Monroe M. Tapper & Assocs. v. United States, 611 F.2d 354, 357 (Ct. Cl. 1979).

47. 41 U.S.C. § 7109; Servidone Constr. Corps. v. United States, 931 F.2d 860, 862–863 (Fed. Cir. 1991).

48. 41 U.S.C. § 7109; Servidone Constr. Corps. v. United States, 931 F.2d 860, 862–863 (Fed. Cir. 1991).

49. FAR 33.208(b); ACS Constr. Co. v. United States, 230 Ct. Cl. 845 (1982). *See also* A.T. Kearney, Inc., 86-1 BCA 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing a claim).

50. 28 U.S.C. § 2412(d)(1)(A).

51. 41 U.S.C. § 7109(a)(1).

52. Pierce v. Underwood, 487 U.S. 552, 565 (1988).

53. *See* Scarborough v. Principi, 541 U.S. 401, 415 (2004).

54. Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991).

55. Access to EAJA funds is not automatic and is limited by factors such as a party's net worth.

See 28 U.S.C. § 2412(d).

56. 28 U.S.C. §§ 1920 and 2412(d).

57. *See* 5 U.S.C. § 504(d); DoD FMR, vol. 10, Ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16.

58. 5 U.S.C. § 504(d); DoD FMR, vol. 10, Ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16.

59. *See* AFARS 5133.212.98(d).

60. *See* AFARS 5133.212.98(d).

61. 41 U.S.C. § 7108(c); *see also* 41 U.S.C. § 612.

62. The Permanent Judgment Appropriation: Overview, B-217990.25-O.M. (Oct. 30, 1987).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g.,* 10 U.S.C. § 2731 (defining the verb to "settle" as to "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance").

67. *See, e.g.,* FAR 33.204; FAR 33.210.

68. *Id.*

69. *See* DoD FMR, vol.3, ch. 8, para. 080304.

70. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98(c)(2)(iii); s*ee, e.g.,* Casson Constr. Co., GSBCA No. 7276, 84-1 BCA¶ 17,010.

71. *See* DoD FMR, vol. 3, ch.8, para. 080306.B, E; DFAS-IN 37-1, Table8-7, para. 4.

72. *See* Recording Obligations Under EPA Cost-Plus-Fixed-Fee Contract, B-195732, 59 Comp. Gen. 518 (1980); To the Adm'r. Small Bus. Admin., B-155876, 44 Comp. Gen. 399 (1965).

73.*See* DoD FMR, vol. 3, ch.8, para. 080306.B, E; DFAS-IN 37-1, Table8-7, note 1 (requiring submission of written documentation).

74. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B.

75. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98(c)(2)(iii); s*ee, e.g.,* Casson Constr. Co., GSBCA No. 7276, 84-1 BCA¶ 17,010.

76. *Id.*

77. *Id.*

78. DoD FMR, vol. 10, ch. 12, para. 120208.B.

79. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98(c)(2)(iii); s*ee, e.g.,* Casson Constr. Co., GSBCA No. 7276, 84-1 BCA¶ 17,010.

80. *See* FAR 33.210 (regarding the settlement of claims involving fraud).

81. FAR 33.204; FAR 33.210.

82. FAR 33.204; FAR 33.210.

83. *See* Patham Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).

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An Intelligence Law Primer for the Second Machine Age

By Major John C. Tramazzo

An army without spies is like a man without ears or eyes.[1]

Armies have always collected and analyzed as much information as possible about their enemies' capabilities, intentions, and activities. Espionage is an ancient, primitive art. As detailed in the biblical Book of Numbers, God urged the prophet Moses to dispatch twelve spies to explore Canaan.[2] They returned with a detailed report on the number and vitality of the people there, the fertility of the land, the vegetation, and the city walls and fortifications.[3] In the Roman Empire, military leaders successfully employed *exploratores* and *speculatores* to monitor enemy movements, collect human intelligence (HUMINT), and provide assessments to the emperor.[4] During the Middle Ages, English noblemen recruited traveling Dominican friars, sworn to poverty, and paid them quite well to provide reports of potential rebellions and enemy activity.[5] The Mongols constructed far-reaching roads specifically to facilitate their spies traveling under cover as merchants.[6]

During the American Revolution, British and American forces relied heavily on espionage. George Washington famously managed human sources throughout his time as the Commander of the Continental Army, but his patriots also suffered from Loyalist counterintelligence operations.[7] During the American Civil War, Union generals relied on Allan Pinkerton and his National Detective Agency for routine intelligence reports and counterespionage.[8] During World War II, the U.S. Office of Strategic Services managed nearly 13,000 spies to collect, analyze,

and disseminate crucial intelligence in every theatre of war.[9] Today, the United States Intelligence Community[10] employs nearly one million people and boasts an annual budget of over $80 billion.[11]

As Canadian spymaster Sir William Stephenson noted in 1976, "Among the increasingly intricate arsenals across the world, intelligence is an essential weapon, perhaps the most important."[12] Timely, accurate, and insightful information about the activities, capabilities, plans, and intentions of foreign powers, organizations, persons, and their agents, is essential to U.S. national security.[13] The integration of intelligence into military operations is considered an inherent responsibility of command.[14] It is, therefore, a staff's inherent responsibility to understand the legal, policy, and operational implications of what the commander's "eyes and ears" are doing.

Exponential advances in technology will continue to open new doors for intelligence professionals. Prolific reliance on smart phones and social networking websites has elevated the importance of the Open Source Intelligence (OSINT) discipline, which has required the U.S. Intelligence Community and the Department of Defense's Intelligence Components to quickly develop tactics, techniques, procedures, and policies to govern a rapidly changing information landscape.[15] Internet-based intelligence operations have also driven the development of novel, CONUS-based activities that will require judge advocates in garrison to understand complicated legal principles and unique command relationships. As new technology gives rise to new collection and analytical methods, staff, brigade, group, battalion, and command judge advocates will be called upon more frequently to provide advice on the lawfulness of intelligence activities.

This article is a basic primer for how to analyze any military intelligence law issue with an emphasis on how new technology is impacting the legal landscape. It will cover the judge advocate's role in providing counsel to intelligence units and personnel, as well as provide a framework for analyzing legal issues related to the collection, evaluation, and retention of information by intelligence personnel.

Background

Although most judge advocates will not serve at the National Security Agency (NSA), the Defense Intelligence Agency (DIA), or at a Service-level intelligence headquarters, almost every judge advocate will serve among intelligence professionals. The U.S. Army's infantry brigade combat team (IBCT), for example, is authorized a robust menu of intelligence assets.[16] Within the IBCT S2, there are twenty trained personnel, to include two HUMINT collectors. Every IBCT is also authorized a Military Intelligence Company (MICO), which boasts additional HUMINT collectors, Unmanned Aerial System operators, signals intelligence (SIGINT) collectors, OSINT collectors, and geospatial intelligence (GEOINT) analysts.[17] There are additional intelligence Soldiers at the battalion level, and "every Soldier is a sensor," which requires every Soldier, and therefore every Army lawyer, to have a basic understanding of the commander's priority intelligence requirements (PIRs).[18] Further, for judge advocates who serve in special operations units, the ability to analyze an intelligence law issue is indispensable.[19] Commanders look to their attorneys to understand the line between intelligence and operational activities, the impact of different legal constructs, and how to comply with complicated DoD oversight and reporting requirements.

Notwithstanding, a mere 10/538 (.01%) pages in the Army's 2018 Operational Law Handbook are dedicated to intelligence law, most of which are focused on detention and interrogation operations.[20] As the author of *The Army Lawyer*'s only comprehensive Intelligence Law primer observed, "precious little has been written about intelligence oversight for those who do not practice in intelligence law or national security fields, by those who do."[21] Further, there have traditionally been few opportunities to practice intelligence law. Judge advocates in garrison are not often asked to research or write about intelligence legal issues, and many of the most relevant sources, ideas, authorities, and restrictions are tucked away in classified basements. Even in foreign areas of hostilities, conventional military intelligence personnel are not regular consumers of legal advice, as they employ clearly authorized methods to collect and analyze information in response to well-defined requirements (e.g., the weather, main supply routes, enemy personnel in the commander's area of operations, and potential threats to Forward Operating Bases and Combat Outposts).[22]

Yet, an intense focus on the cyber domain requires all military lawyers to understand the basic intelligence law framework now. Publicly available information (PAI) on the Internet has created new collection opportunities for intelligence professionals in combat zones *and* at home station. Military attorneys must be prepared to answer questions about the lawfulness of new collection efforts and tools, particularly where U.S. person information is involved, U.S. based social networking websites are leveraged, or large amounts of data are sought. A recent report found that members and sympathizers of the terror group Daesh, the so-called Islamic State, were recently uploading over one hundred thousand posts each day to websites and mobile applications like Facebook, YouTube, Twitter, Instagram, Telegram, Skype, Zello, Tumblr, Snapchat, Silent Circle, WhatsApp, Kik, Archive.org, Google Drive, dating websites, Quora, Threema, WordPress, and many others.[23] Vast repositories of data left in the wake of such ubiquitous smart phone and Internet use have produced what some observers call the "second machine age."[24]

Predictive data analytics, software robots, machine learning, facial recognition programs, and the development of the "Internet of Things," are all driving new collection and analysis tactics, training programs, and doctrine. The current operating environment will challenge judge advocates to thoroughly understand their commanders' PIRs, their units' technical capabilities, and the rules governing their units' intelligence activities. Judge advocates must gain access to, and master, the documents governing their units' intelligence activities, including research, development, and training, to ensure compliance with applicable laws and regulations. Legal advisors must stay abreast of advances in technology and be prepared to identify and resolve intelligence law issues. An inability to spot and address intelligence law issues may lead to the execution of questionable

intelligence activities, complicated investigations, and potential discipline for members of the command.[25]

The Intelligence Law Framework

Mission and Authority

The primary question a judge advocate must consider in analyzing an intelligence law issue is whether his or her unit "has the mission" to perform an intelligence or intelligence-related act.[26] Under Executive Order 12333, *United States Intelligence Activities*, the Department of Defense is authorized to conduct defense and defense-related foreign intelligence and counterintelligence activities.[27] Foreign intelligence is defined as "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorists."[28] Counterintelligence means "information gathered and activities conducted to identify, deceive, exploit, disrupt, or protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons, or their agents, or international terrorist organizations or activities."[29] These broad mandates do not permit every military intelligence component to collect, analyze, produce, and disseminate intelligence about any foreign person or to attempt to disrupt all foreign espionage efforts. They simply reflect the menu of intelligence activities available to senior leaders when tasking subordinate units to accomplish specific missions. It is, therefore, vital for a judge advocate to understand the scope of their specific unit's intelligence mission; an intelligence component may only collect information deemed reasonably necessary to accomplish its assigned mission.

As Richard M. Whitaker wrote in *U.S. Military Operations: Law, Policy, and Practice*, "intelligence law is a quasi-restrictive area of law, which means that every intelligence activity or operation must be tied to an authority that can be traced to either Congress or the Commander in Chief."[30] Judge advocates must be able to locate and articulate the source(s) of law that undergird their units' intelligence activities and operations. Put simply, military units should not conduct intelligence operations in the absence of some positive authority, such as an Execute Order (EXORD) or Deployment Order (DEPORD). Every intelligence collection must have a purpose consistent with the relevant orders and intelligence taskings.

In addition to EXORDs and DEPORDs, judge advocates should consult Geographic Combatant Command Operations Orders and delegations, Operations Plans, Concept Plans, Fragmentary Orders, Operational Directives, approved unit charters, and commander PIRs. A judge advocate must know, and be able to articulate, whether the unit has both the mission *and* the properly delegated authority to conduct a proposed intelligence activity. Further, each intelligence discipline requires unique training, skill sets, and authorities. Even if "intelligence operations" are generally authorized in an EXORD, a particular type of intelligence activity (e.g., a military source operation or a signals intelligence collection) likely requires its own approved concept plan and may only be executed by individuals trained and certified to do so.

To illustrate, an intelligence component with the explicit authority to passively monitor PAI about al-Qaida and its affiliates would exceed the scope of its assigned intelligence mission by hacking into al-Qaida social media accounts. Likewise, the same unit would lack the authority to collect YouTube videos posted by Real Irish Republican Army members, even though it too is considered a Foreign Terrorist Organization by the U.S. Department of State.[31] Finally, depending on the intelligence discipline concerned, explicit authority may be required to employ certain tactics (e.g., "direct approach" interrogations may be approved following an operation, but additional approvals are required to employ interrogation approaches like "Mutt and Jeff" or techniques like "separation").[32]

Department of Defense Manual 5240.01

Once a legal advisor has a firm grasp of the unit's assigned intelligence mission, the commander's intelligence requirements, and the properly delegated authorities and permissions, one must turn to the Department of Defense's Manual 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*, dated 8 August 2016 (DoD Manual 5240.01).[33] A legal advisor must not only understand the positive authority for a unit's intelligence activities; they must also know the body of restrictive oversight rules that regulate and limit how those activities are conducted. As Sir William Stephenson also noted, "safeguards to prevent [intelligence abuses] must be devised, revised and rigidly applied."[34] Lawyers are in a unique position to enable intelligence personnel by ensuring they carry out their legitimate functions effectively while also protecting the privacy and constitutional rights of U.S. persons.

Some history is necessary to fully appreciate the importance of DoD Manual 5240.01. In 1975, following a series of high profile abuses by American intelligence organizations, a U.S. congressional committee led by Idaho senator Frank Church concluded that government-wide reform was needed.[35] "Abuses included routine opening and reading of vast amounts of first-class mail and telegrams and drug experiments conducted on unwitting American subjects, as well as illegal wiretapping, break-ins, infiltration of and covert action attempting to influence domestic political groups. Targets included the 'Women's Liberation Movement' and every Black Student Union, as well as judges, Members of Congress, and political candidates."[36] During the Vietnam War, military intelligence actors compiled personal information on more than 100,000 politically active Americans in an effort to quell civil rights and anti-war demonstrations.[37] The U.S. Army used 1,500 plainclothes agents to watch demonstrations, infiltrate organizations, and spread disinformation.[38] The Church Committee, looking into a variety of intelligence community abuses, called the Army program "the worst intrusion that military intelligence has ever made into the civilian community."[39]

In 1980, the Church Committee moved Congress to pass the Intelligence Oversight Act. The following year, President Ronald Reagan signed Executive Order 12333, *United States Intelligence Activities*, which further defined the roles of the various intelligence agencies and codified a host of oversight procedures. In the fall and

Paragraph	Description	Example	Evaluation Period	Extension
3.3.c.(1)	Intentionally collected USPI Focus of the collection is a U.S. person located inside or outside the U.S.	Travel itinerary and foreign hotel bills with credit card information of a specific New York citizen who has traveled to Iraq to join an international terrorist organization	Promptly, or up to 5 years if necessary	▪ 5 years ▪ Approved by head of DIC or delegee ▪ May be given at time of collection or later
3.3.c.(2)(a)	USPI incidentally collected where target is in the U.S. Focus of the collection is non-US person located inside the U.S., and USPI is incidentally acquired	Travel VISAs for John E. Smith, a foreign national currently residing in New Jersey, which returned prior VISA's for Jon E. Smith, a lawful permanent resident of New York	5 years	▪ Same as above
3.3.c.(2)(b)	USPI incidentally collected where target is outside the U.S. - Focus of the collection is a U.S. or a non-U.S. person overseas, and USPI is incidentally acquired	Imagery of the "Fair Winds", a yacht known to belong to a foreign narcotics smuggler anchored next to the "Blue Skies", a yacht belonging to a Florida citizen off the cost of the Bahamas.	25 years	▪ No extension
3.3.c.(3)	Voluntarily provided USPI Volunteered Information reasonably believed to be about a U.S. Person	Thumb drive dropped off at the U.S. Embassy in France with a note on it that says "past 2 years of recruiting rosters for international terrorist outpost in California"	Promptly, if necessary up to 5 years	▪ 5 years ▪ Approved by agency head or delegee ▪ May be given at time of collection or later
3.3.c.(4)	Special circumstances	Thumb drive dropped off at the U.S. Embassy in France with a note on it that says "all patient files at a U.S. hospital treating a key foreign target"	5 years	▪ 5 years ▪ Approved by USD(I) ▪ May be given at time of collection or later
3.3.d	Information disseminated by another Component or IC element	IC Element hosts a database of all known international terrorist groups	Same time as originating entity	▪ No extension

winter of 1982, Secretary of Defense Caspar "Willard" Weinberger[40] and U.S. Attorney General William French Smith[41] approved Department of Defense (DoD) 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components That Affect United States Persons*, a sixty-four page implementation of President Reagan's Executive Order 12333.[42] The DoD 5240.1-R established oversight guidance that Defense Intelligence Components relied on for thirty-four years.

In August 2016, after an extensive interagency review process,[43] Secretary of Defense Ashton Carter and U.S. Attorney General Loretta Lynch approved a new manual for the Department of Defense. The 2016 DoD Manual 5240.01 re-affirms many of the well-established procedures for handling U.S. person information, but it also outlines several new procedures for the handling of new technology, bulk commercial data, and PAI on the Internet.

The 2016 manual includes major substantive updates to several procedures, but its basic organization mirrors the 1982 document.[44] Procedures 1 through 4 still provide rules for the collection, retention, and dissemination of information. Procedures 5 through 10 still govern specialized collection techniques (i.e., Electronic Surveillance, Concealed Monitoring, Physical Searches, Searches of Mail, Physical Surveillance, and Undisclosed Participation). While Procedures 11 (Contracting for Goods and Services), 12 (Provision of Assistance to Law Enforcement), and 13 (Experimentation of Human Subjects for Intelligence Purposes) from the 1982 manual remain in effect. DoD Directive 5148.13, *Intelligence Oversight*, dated April 26, 2017, replaced Procedures 14 and 15 of the 1982 manual.

Collection and U.S. Person Information

The most significant update deals with the Procedure 2 concept of "collection."[45] A Defense Intelligence Component may only collect information believed to be necessary for the performance of an authorized intelligence mission. Most importantly, intelligence components may only collect certain types of U.S. person information, defined and discussed in detail below, and collection triggers a requirement to evaluate information for its necessity. Legal advisors must therefore understand precisely when collection occurs and be able to advise on the requirements that follow.

Under the 1982 regulation, information was considered to be collected only when it had been "received for use by an employee of a DoD intelligence component in the course of his official duties."[46] Data acquired by electronic means was collected only when it had been "processed into intelligible form."[47] As a result, raw metadata on a Defense Intelligence Components' servers could be lawfully stored in perpetuity until and unless an analyst queried the server and reviewed intelligible information. Under the 1982 regulation, a component had ninety days from the point of collection to evaluate whether retention of the information was reasonably necessary to accomplish an authorized intelligence mission.[48]

Under the new DoD Manual 5240.01, information is considered collected as soon as it is "received by a Defense Intelligence Component, whether or not it is retained."[49] Regardless of the form of the data, as soon as a component ingests information into a database or repository, the information has been collected. While the manual urges "prompt" evaluation of collected U.S. person information, Defense Intelligence Components now

have up to five years to evaluate intentionally collected U.S. person information and up to twenty-five years to evaluate incidentally collected U.S. person information from outside of the United States.[50] Legal advisors must analyze Procedures 2 ("Collection of USPI") and 3 ("Retention of USPI") of the manual in order to properly advise intelligence units that collect U.S. person information, even inadvertently.

To illustrate, consider how one should advise a military intelligence unit commander whose mission it is to reconnoiter foreign vessels via overhead imagery. Suppose that the commander, in his search for foreign ships, incidentally collects high definition video of an identifiable, U.S. flagged commercial vessel operating in international waters. For how long can his intelligence unit retain the video files before DoD Manual 5240.01 requires an evaluation of whether the information is reasonably necessary for mission accomplishment? The answer is for twenty-five years because the information was "incidentally collected from outside of the United States."[51] Depending on a careful evaluation of the ship's relevance to the unit's assigned intelligence mission, the video files of the U.S. vessel should either be purged or retained. The legal advisor plays a critical role in navigating these legal and policy requirements.

Consider another example: Can an intelligence unit conducting counterterrorist-focused OSINT activities lawfully retain screenshots of tweets posted by an American freelance journalist living in Iraq? Probably, but the answer depends on the content and its relationship to the unit's mission. If the journalist's tweets illuminate the adversary's activities, the answer is likely yes. If the tweets are criticisms of the President of the United States, the answer is almost certainly no. A legal advisor must assist in conducting a careful assessment of what information is reasonably necessary for the accomplishment of the unit's intelligence mission. For example, the unit and its lawyer must ask whether the journalist's name and the Twitter logo, both examples of U.S. person information, are *required*. Only a careful analysis of DoD Manual 5240.01's application to a particular set of facts will produce sound legal counsel.[52]

It is important to note that, in addition to granting Defense Intelligence Components more time to evaluate U.S. person information, the new definition of "collection" explicitly excludes certain categories of data. Information has not been collected if it only "momentarily passes through a computer system" of the Component.[53] Therefore, an analyst with the authority to monitor Twitter activity does not "collect" every tweet that momentarily emerges on his or her screen. Likewise, information on the Internet or in an electronic forum or repository outside the Component that is simply viewed or accessed by a Component employee but is not "copied, saved, supplemented, or used in some manner" is not collected.[54] Therefore, if a military intelligence officer travels to the local Federal Bureau of Investigation (FBI) field office for a meeting and views a file containing U.S. person information, he does not trigger a requirement to evaluate the information absent an additional action (e.g., copying the file or using the information upon return to his office).

Finally, under the new manual, information can only be collected one time. Therefore, if the NSA disseminates properly collected and evaluated information to the DIA, the DIA has no obligation to conduct a second evaluation of any U.S. person information included in the data, so long as it can verify that the information received is reasonably necessary for the accomplishment of its mission.[55] Despite the new, broad definition of "collection," these concise exceptions carry significant weight in considering whether a unit's Intelligence Oversight obligations have been triggered.

U.S. Person Information

"United States person" is defined in the same way it was in 1982, but the new manual provides modern examples.[56] A U.S. person is either: 1) a U.S. citizen; 2) a permanent resident alien of the United States, also known as a "green card holder;" 3) a corporation incorporated in the United States; or 4) an unincorporated association substantially composed of U.S. citizens or permanent resident aliens.[57] United States person information includes "any information that is reasonably likely to identify one or more specific U.S. persons."[58] Therefore, it could be a name (John Smith) or unique title (the Governor of California); government-associated personal or corporate identification numbers (a Social Security, passport, or driver's license number); unique biometric records (fingerprints or a passport photograph); financial information (bank or tax records); street addresses, telephone numbers, and even Internet Protocol address information. However, references to American products or the use of American company names in a descriptive sense (e.g., Boeing 737 or Ford Mustang) do not require an evaluation under Procedure 3 of the manual. A photo of a foreign terrorist wearing a New York Yankees ball cap does not require an evaluation or redaction of the Bronx Bombers' logo.[59]

It is also important for intelligence personnel and legal advisors to know that a person or organization in the United States is presumed to be a U.S. person, unless specific information to the contrary is obtained.[60] Conversely, a person or organization outside the United States, or whose location is not known to be in the United States, is presumed to be a non-U.S. person, unless specific information to the contrary is obtained.[61] Therefore, even though John Smith is a common American name, John Smith is presumed to be a foreigner if he lives in Turkey. If Mr. Smith posts a photo of himself walking around Istanbul in a Washington Nationals jersey, the appropriate intelligence personnel should consider investigating whether Mr. Smith is a U.S. person. Similarly, if a Defense Intelligence Component collects an image of a military-aged male in traditional Afghan attire displaying an ISIS flag, but he appears to be standing in downtown Manhattan, one must presume he is a U.S. person until contrary information is discovered (e.g., evidence that he is an Afghan citizen).

Permissible Categories

Under the new manual, Defense Intelligence Components may not intentionally collect U.S. person information unless it is reasonably believed to be necessary for the performance of an authorized intelligence mission; *and* falls within one of the thirteen categories identified in Procedure 2 of the manual.[62] The thirteen

categories, which are carefully defined in the manual, are:

- Publicly available information;
- Consent;
- Foreign intelligence;
- Counterintelligence;
- Threats to safety;
- Protection of intelligence sources, methods, and activities;
- Current, former, or potential sources of assistance to intelligence activities;
- Persons in contact with sources or potential sources;
- Personnel security;
- Physical security;
- Communications security investigations;
- Overhead and airborne reconnaissance; and administrative purposes.

In considering the effect of the various categories, it is essential to consider the foundational principle that an intelligence unit must have both the authority *and* the mission to conduct proposed intelligence activities. For example, just because DoD Manual 5240.01 permits the intentional collection of publicly available U.S. person information does not mean that an intelligence analyst may monitor all publicly available message boards or public chat rooms hosted by U.S. websites and populated by American Internet users. Obvious examples of impermissible activities include "LOVEINT" (spying on actual or potential romantic partners), and intelligence collection for domestic political purposes. Notwithstanding, intelligence personnel may, in their personal capacities and not related to their employment, maintain social media pages, take photographs, and read U.S. news reports (so long as they exercise operational security).

Finally, the DoD has no authority to conduct domestic intelligence activities in the absence of a DoD nexus, a reality that has been complicated by the worldwide web.[63] Legal advisors should always consider whether to coordinate with the FBI when intentionally collecting information about a U.S. person reasonably believed to be engaged in international terrorism or working on behalf of a foreign government. Further, a Defense Intelligence Component may never collect U.S. person information solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States.[64] Judge advocates play a crucial role in considering when the exercise of free speech (e.g., harsh criticism of the U.S. military involvement in fighting in Afghanistan) becomes material support to terrorism (e.g., re-tweeting of ISIS "kill lists").[65] Strong working relationships with interagency partners and their attorneys is key to striking the appropriate balance.

Least Intrusive Means Feasible

If intelligence units have both the authority and a specific mission that requires the intentional collection of U.S. person information, the component must always use the "least intrusive collection techniques feasible."[66] Legal advisors should ensure that their clients attempt to collect U.S. person information from publicly available sources or with the consent of the person concerned. If collection from publicly available sources or obtaining consent from the person concerned is not feasible or sufficient, such information may be collected from "cooperating sources." If collection through publicly available sources, consent, or cooperating sources is not feasible or sufficient, approval may be sought through the Department of Defense Office of General Counsel for the use of intelligence collection techniques that require a judicial warrant or approval from the Attorney General (e.g., electronic surveillance conducted under the Foreign Intelligence Surveillance Act).[67] No matter what technique is employed, intelligence components must never collect any more U.S. person information than is reasonably necessary to accomplish the assigned mission.[68]

Further, judge advocates assigned to units that intentionally collect U.S. person information should assist in the implementation of safeguards. For example, the unit should adopt written procedures for approval of such collection efforts. A commander should regularly review subordinates' decisions to retain U.S person information. The senior intelligence officer should restrict access or dissemination of information, and they should mask U.S. person information from those without a need to know. Additionally, physical and logical access controls, training programs, and written legal reviews are always sensible.[69]

The consequences of violating these policies are contained in the Department's aforementioned issuance, DoD Directive 5148.13, *Intelligence Oversight*.[70] A "questionable intelligence activity" (QIA) is broadly defined as any intelligence or intelligence-related activity when there is reason to believe such activity *may* be unlawful or contrary to an E.O., Presidential Directive, Intelligence Community Directive, or applicable DoD policy governing that activity.[71] All DoD personnel are obligated to identify any QIA to their chain of command or supervision immediately.[72] Failure to report a QIA is a QIA.[73] If it is not practical to report a QIA or significant/highly sensitive matter to the chain of command or supervision, reports may be made to the applicable Inspector General or legal counsel.[74] Questionable intelligence activities must be investigated to the extent necessary to determine the facts and "to assess whether the activity is legal and consistent with applicable policies."[75]

Questionable intelligence activities are reported each quarter to the DoD Senior Intelligence Oversight Officer who informs the Attorney General and appropriate congressional committees as required.[76] All QIA reports require a description of what specific law, Executive Order, Presidential or Intelligence Community Directive, or DoD policy was violated.[77] The reports also require an analysis of how or why the incident occurred, the remedial action taken or planned to prevent recurrence, and a description of internal investigative findings and intelligence oversight program developments.[78] Unless the unit's servicing judge advocate understands the law and policy governing intelligence activities, they will be unable to competently advise investigating officers tasked with assessing the lawfulness of a particular activity.

Publicly Available Information and Open Source Intelligence

Judge advocates serving today must familiarize themselves with the dynamic field of OSINT law and policy. It is often stated that ninety percent of intelligence comes from open sources.[79] In 2004, the

(Credit: istockphoto.com/matejmo)

National Commission on Terrorist Attacks Upon the United States (also known as the 9/11 Commission) "identified shortfalls in the ability of the United States to use all-source intelligence, a large component of which is open source intelligence."[80] In the Intelligence Reform and Terrorism Prevention Act of 2004, the U.S. Congress called for increased coordination in the collection, analysis, and production of OSINT.[81] In the 2006 National Defense Authorization Act, Congress found that "open-source intelligence is a valuable intelligence discipline that must be integrated into intelligence tasking, collection, processing, exploitation, and dissemination to ensure that United States policymakers are fully and completely informed."[82] There can be no dispute that publicly available sources are fertile grounds for information; however, vast repositories of data can be difficult to manage, and they present a multitude of legal and oversight issues.

Open Source Intelligence is the process of using PAI for intelligence purposes; the discipline is not new, but the type and amount of data is. The OSINT discipline is formally defined as the "systematic collection, processing, and analysis of publicly available information in response to known or anticipated intelligence requirements."[83] The DoD Manual 5240.01 defines PAI as "information that has been published or broadcast for public consumption, is available on request to the public, is accessible on-line or otherwise to the public, is available to the public by subscription or purchase, could be seen or heard by any casual observer, is made available at a meeting open to the public, or is obtained by visiting any place or attending any event that is open to the public."[84] Since the Second World War, U.S. intelligence analysts have regularly collected, analyzed, and disseminated pertinent information from newspapers, magazines, AM/FM radio, television broadcasts, and other open communications platforms. However, the modern OSINT discipline is informally defined by cutting edge sources of, and methods for exploiting, PAI on the Internet.

As referenced earlier, several violent extremist organizations have demonstrated a "mastery of modern digital tools."[85] Enemy propagandists leverage these tools to dictate their story, word for word, to an international audience. The Islamic State, for example, was "as much a media conglomerate as a fighting force."[86] The impact of their digital propaganda is measurable. Between 2014 and 2016, over 30,000 individuals, including hundreds of Americans, were radicalized online and motivated to leave their homes to enter the conflict zone.[87] Our adversaries' reliance on social media and open source networks presents significant challenges, but also many opportunities.[88]

While the body of modern OSINT law and policy is still maturing, there are several well-established principles. First, military intelligence units require written and explicit authority—either direct or delegated—to collect and analyze PAI for intelligence purposes.[89] Next, only trained and authorized intelligence personnel may conduct OSINT activities.[90] Finally, even with proper authority, OSINT analysts must not exceed the scope of their mission while performing research and analysis of PAI. In the cyber domain, OSINT collectors risk overlapping with HUMINT collectors (i.e., those who are eliciting information from other humans online) and even SIGINT collectors (i.e., those tasked with intercepting private communications online).[91] Judge advocates and their intelligence clients must understand and respect these borders.

Additionally, judge advocates must be aware of the technical requirements to conduct OSINT activities online. "New methods and systems necessitate a high level of technical knowledge for collectors obtaining and analysts processing PAI."[92] Modern OSINT activities may include the research or use of social media on computer systems that protect U.S. Government intentions, missions, or tradecraft. The use of commercial-off-the-shelf technology to collect and manage vast amounts of PAI will demand regular intelligence, ethics, and fiscal law reviews. System acquisitions, software purchases, and engagements with both traditional and atypical defense contractors all necessitate a legal advisor's early involvement.

Advanced collection methods must only be conducted by appropriately trained and qualified personnel under clearly delegated authority. Intelligence units conducting OSINT activities must conduct regular risk assessments (defined by "tier" in Army Directive 2016-37 and other documents). Risk assessments will determine approval authorities; all lawyers can help their clients appropriately manage risk. Collectors must always protect OPSEC and comply with the requirements of DoD S-5105.63, *Implementation of DoD Cover*

and Cover Support Activities.[93] A thorough understanding of these concepts will likely require a trip to the aforementioned classified basement.

Finally, legal advisors should have an appreciation for the subtle difference between "subscription" and "membership" as it relates to social media platforms. Recall that PAI includes information "available to the public by subscription or purchase." A legal advisor must evaluate whether OSINT personnel may lawfully seek "membership" in social media platforms under a theory of subscription. To answer the question, lawyers must read (and re-read) Procedure 10 of DoD Manual 5240.01, *Undisclosed Participation in Organizations (UDP).*

The 2016 Procedure 10 applies to the collection of PAI on the Internet from social media platforms incorporated in the United States if intelligence personnel must "provide identifying information."[94] Put simply, Procedure 10 applies when DoD intelligence personnel seek to establish accounts with American social media companies, with or without identifying themselves as Defense intelligence personnel, for the purpose of obtaining information posted by the organization's members (e.g., logging onto Facebook and collecting information of foreign intelligence value).[95] Depending on the OSINT concept plan, risk assessment, and collection methodology, written approval by the Defense Intelligence Component head or a delegee may be required under Procedure 10. Legal advisors whose clients engage in UDP must be intimately familiar with the procedure, including what activity that procedure generally prohibits (e.g., the collection of information about "domestic activities" of U.S. persons; actions taken to influence the organization or its members; and interactive elicitation of information from other human beings in cyberspace).[96] Certain collection methodologies require elevated levels of review and approval. Every Procedure 10 request requires a thorough legal review.

Indeed, the Army's 2016 OSINT Directive provides that "when a social media service requires registration for access or to 'join' a group or become a member, intelligence professionals must consult with their servicing staff or command judge advocate's office to determine whether these requirements are an interactive activity and ensure compliance with DoD Manual 5240.01 . . . ." By policy, lawyers must be at the table, prepared to shape the future of OSINT activities online.

All judge advocates must understand three foundational Intelligence Law principles: 1) military intelligence units require positive grants of authority to conduct intelligence acts; 2) oversight rules found primarily in DoD Manual 5240.01 regulate and limit intelligence operations, their scope, and the techniques available to carry them out; and 3) the collection of U.S. person information, whether intentional or incidental, triggers a requirement to carefully evaluate the information.

Operational and intelligence commanders, both at home and deployed overseas, will increasingly rely upon judge advocates to define the gray spaces within these principles. Further, as intelligence components take advantage of opportunities presented by smart phone reliance, vast amounts of PAI, and the advanced tools available to analyze it all, lawyers must be prepared to ensure compliance with the applicable policies and directives. As lawmakers concluded following the September 11, 2001, attacks, "with the Information Revolution, the amount, significance, and accessibility of open-source information has exploded,"[97] and as the defense intelligence community continues to take advantage, the military legal community must be prepared and open for business. **TAL**

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Notes

1. Sun Tzu, The Art of War, Chapter XIII.

2. *Numbers* 13:1.

3. *Id.* at 13:26-33.

4. Rose Mary Sheldon, Intelligence Activities in Ancient Rome: Trust in the Gods, but Verify (2005).

5. B.A.H. Parritt, The Intelligencers: British Military Intelligence From the Middle Ages to 1929, (2011).

6. Paul Kahn, The Secret History of the Mongols (Cheng and Tsui Co., 1984).

7. Alexander Rose, Washington's Spies: The Story of America's First Spy Ring (2014).

8. Jay Bonansinga, Pinkerton's War: The Civil War's Greatest Spy and the Birth of the U.S Secret Service (2012).

9. Patrick O'Donnell, Operatives, Spies, and Saboteurs: The Unknown Story of the Men and Women of WWII's OSS (2004).

10. A federation of sixteen separate intelligence agencies, including the Defense Intelligence Agency, National Security Agency, Twenty-Fifth Air Force, U.S. Army Intelligence and Security Command, Marine Corps Intelligence Activity, and Office of Naval Intelligence [hereinafter "Service-level intelligence headquarters"]. While neither U.S. Special Operations Command nor tactical military intelligence units are members of the Intelligence Community, the foundational legal and policy principles applicable to the IC, SOF, and conventional military intelligence activities are similar.

11. *U.S. Intelligence Community Budget,* Off. of Director of Nat'l Intelligence, https://www.dni.gov/index.php/what-we-do/ic-budget; William Arkin & Dana Priest, *Top Secret America*, Wash. Post, July 19, 2010.

12. William Stevenson, A Man Called Intrepid: The Incredible True Story of the Master Spy Who Helped Win World War II (1976).

13. Exec. Order No. 12,333, 3 C.F.R. 200, Preamble (1981), *as amended by* Exec. Order No. 13284 Fed. Reg. 4075 (Jan. 23, 2003) [hereinafter E.O. 12333].

14. *See* Joint Chiefs of Staff, Joint Pub. 2-0, Joint Intelligence, Executive Summary (22 Oct. 2013).

15. *See, e.g.*, David Kris, *The CIA's New Guidelines Governing Publicly Available Information*, LAWFARE (Mar. 21, 2017, 12:31 PM), https://www.lawfareblog.com/cias-new-guidelines-governing-publicly-available-information.

16. The same can be said for other Services' judge advocates. For example, Marine Corps Warfighting Pub. 2-1, *Intelligence Operations*, describes the organic intelligence assets at the Marine Expeditionary Force level (e.g., Radio Battalions, Intelligence Battalions). Additionally, as part of the Marine Corps' distributed operations concept, the USMC has developed Company Level Intelligence Cells, or "CLICs." *See* Marine Corps Interim Pub. 2-10.1i, *Company Level Intelligence Cell.*

17. U.S. Dep't of Army, Field Manual 3-96, Brigade Combat Team (8 Oct. 2015).

18. U.S. Dep't of Army, Training Circular 3-21.75, The Warrior Ethos and Soldier Combat Skills ch. 9 (13 Aug. 2013).

19. *See, e.g.*, Major Ian W. Baldwin, *Advising Special Forces*, Army Law., May 2016, 17; *see also* Major Gary L. Walsh, *Role of the Judge Advocate in Special Operations*, Army Law., Aug. 1989, 5–6.

20. *See* Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Operational Law Handbook 109-118 (2018) [hereinafter Operational Law Handbook]. Interrogation is a categorized as a Military Source Operation, a sub-set of Human Intelligence (HUMINT).

21. *See* Kevin W. Kapitan, *An Introduction to Intelligence Oversight and Sensitive Information: The Department of Defense Rules for Protecting American's Information and Privacy*, Army Law., April 2013, 3.

22. See U.S. Dep't of Army, Field Manual Interim 34-130, Specific Tactics, Techniques, and Procedures

and Applications for Intelligence Preparation of the Battlefield (31 Mar. 2009).

23. Harleen Gambhir, *The Virtual Caliphate: ISIS's Information War*, Inst. for Study of War (Dec. 20, 2016), http://www.understandingwar.org/backgrounder/virtual-caliphate-isiss-information-warfare.

24. *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* by Erik Brynjolfsson and Andrew McAfee highlights digitization and the automation of cognitive tasks.

25. A questionable intelligence activity refers to any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any executive order or presidential directive, including E.O. 12333 or applicable DoD policy. U.S. Dep't of Def., Dir. 5148.13, Intelligence Oversight (26 Apr. 2017) [hereinafter DoDD 5148.13].

26. Executive Order 13,470, 73 Fed. Reg. 53593, § 1.5(f) (Aug. 27, 2004).

27. *See* E.O. 12333, *supra* note 13; Exec. Order No 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004); and Exec. Order No. 13,470, 73 Fed. Reg. 45323 (July 30, 2008) [hereinafter E.O. 13470].

28. E.O. 12333, *supra* note 13, para. 3.5(e).

29. E.O. 12333, *supra* note 13, para. 3.5(a).

30. VanLandingham, Corn, and Reeves, U.S. Military Operations: Law, Policy, and Practice 520 (Oxford University Press, 2016).

31. *See* 8 U.S.C. § 1189 (2004); *see also Foreign Terrorist Organizations*, U.S. Dep't of State, https://www.state.gov/j/ct/rls/other/des/123085.htm.

32. Operational Law Handbook, *supra* note 20 at 117; *see also* U.S. Dep't of Army, Field Manual 2-22.3, Human Intelligence Collector Operations, at 8–65 (Sept. 2006).

33. U.S. Dep't of Def., DoDM 5240.01, Procedures Governing the Conduct of DoD Intelligence Activities (8 Aug. 2016) [hereinafter DoDM 5240.01].

34. Democratic Oversight of Intelligence Services 212 (Daniel Baldino ed., Federation Press 2010).

35. S. Select Comm. to Study Gov't Operations with Respect to Intel. Activities, S. Rep. No. 94-755 (1976), http://www.aarclibrary.org/publib/church/reports/book2/contents.htm [hereinafter Church Committee Report].

36. *See* Kris, *supra* note 15.

37. Church Committee Report, *supra* note 35, at 784.

38. *Id.*

39. *Id.* at 792.

40. Secretary Weinberger (1917–2006) served as an intelligence officer on General Douglas MacArthur's staff during World War II.

41. Smith served as a judge advocate in the United States Navy from 1942–1946.

42. U.S. Dep't of Def., 5240.1-R, Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons (Dec. 1982) [hereinafter DoD 5240.1-R].

43. The update was overseen by the DoD Senior Intelligence Oversight Official in coordination with officials from each Defense Intelligence Component (including the Department's Senior Official for Privacy), the Department of Justice (including the Department's Privacy and Civil Liberties Officer), and the Office of the Director of National Intelligence.

44. For a thorough overview and practical guide to the now superseded DoD 5240.1-R, *see* Kevin W. Kapitan, *An Introduction to Intelligence Oversight and Sensitive Information: The Department of Defense Rules for Protecting American's Information and Privacy*, Army Law., April 2013.

45. DoDM 5240.01, *supra* note 33, at 45.

46. DoD 5240.1-R, *supra* note 42, at 15.

47. *Id.*

48. *Id.* at 21.

49. DoD 5240.01, *supra* note 33, at 45.

50. *Id.* at 15–16.

51. *Id.* at 16.

52. The training materials available on the Department of Defense Senior Intelligence Oversight Officer's website are vital, unclassified sources of assistance. *See* https://dodsioo.defense.gov/Training/.

53. DoDM 5240.01, *supra* note 33, at 16.

54. *Id.*

55. Procedure 4 of the manual only permits the dissemination of U.S. person information if the collecting component properly collected and retained it in accordance with Procedures 2 and 3.

56. DoD 5240.1-R, *supra* note 42 at 12.

57. DoDM 5240.01, *supra* note 33 at 54.

58. *Id.*

59. *Id.* at 55.

60. *Id.*

61. *Id.*

62. *Id.* at 11–13.

63. *See* Kapitan, *supra* note 21, at 9.

64. DoDM 5240.01, *supra* note 33, at 14.

65. *See* Andrew Blake, *ISIS Supporter Sentenced to 20 Years for Reblogging "Kill List,"* Wash. Times (Aug. 3, 2017), https://www.washingtontimes.com/news/2017/aug/3/terrence-mcneil-islamic-state-supporter-sentenced-/.

66. DoDM 5240.01, *supra* note 33, at 14.

67. 50 U.S.C. §§ 1801–1862 (2011).

68. DoDM 5240.01, *supra* note 33, at 14.

69. *Id.* at 19–20.

70. DoDD 5148.13, *supra* note 25.

71. *Id.* at 16.

72. *Id.* at 10.

73. *Id.* ("DoD personnel *must* identify any QIA . . . immediately" (emphasis added)).

74. *Id.*

75. *Id.*

76. *Id.* at 11.

77. *Id.* at 13.

78. *Id.* at 14.

79. Richard. Best & Alfred Cumming, Cong. Research Serv., RL31340, Open Source Intelligence (OSINT): Issues for Congress 7 (2007), http://www.au.af.mil/au/awc/awcgate/crs/rl34270.pdf.

80. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 931(a)(5), 119 Stat. 3136, 3411.

81. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638.

82. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 931, 119 Stat. 3136, 3411.

83. *See, e.g.,* U.S. Special Operations Command Directive 525-30, Open Source Intelligence 2 (8 May 2017).

84. DoDM 5240.01, *supra* note 33 at 53.

85. *Id.*

86. Charlie Winter, *ISIS is Using the Media Against Itself*, The Atlantic (Mar. 23, 2016), https://www.theatlantic.com/international/archive/2016/03/isis-propaganda-brussels/475002/.

87. Brendan Koerner, *Why ISIS is Winning the Social Media War*, Wired (Apr. 2016), https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/.

88. *Id.*

89. U.S. Dep't of Army, Dir. 2016-37, U.S. Army Open Source Intelligence Activities para. 4 (22 Nov. 2016) [hereinafter DoDD 2016-37].

90. *Id.* para. 7.

91. Heath Williams & Ilana Blum, *Defining Second Generation Open Source Intelligence (OSINT) for the Defense Enterprise*, RAND Corporation 9 (Jan. 1, 2018), https://apps.dtic.mil/dtic/tr/fulltext/u2/1053555.pdf.

92. *Id.* at 1.

93. DoDD 2016-37, *supra* note 89.

94. DoDM 5240.01, *supra* note 33, at 39.

95. *Id.* at 41.

96. *Id.*

97. National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, § 931(a)(2), 119 Stat. 3136, 3411.

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Government Communication with Industry

More Necessary Now Than Ever

By Lieutenant Colonel Alan M. Apple

The times they are a-changin'
Bob Dylan

Today is a new day. Gone are the days where the U.S. government dominates the dollars spent to create significant technological innovation. In 2017, Amazon and Google combined to spend over $38.2 billion for research and development, which is an increase of $9 billion from 2016.[1] This may seem significantly lower than the $58.3 billion invested by the Department of Defense (DoD), or the $133 billion spent by the entire federal government, however, it is important to consider that overall business investment in research and development in the United States accounted for $347.7 billion.[2] In fact, business research and development investment has been outpacing government investment since 1981 and is skyrocketing while government spending has flattened.[3] To compound matters, U.S. rivals like China have increased research and development spending over seventy percent in the last five years and some believe that their spending will surpass the United States this year.[4] This presents a dilemma for the U.S. government: how to maintain an advantage on potential adversaries without dominating research and development investment?

To stay ahead of our adversaries, the government must continuously communicate with industry to understand the current "state of the art" technology or current innovation and use it to help inform requirements in order to maximize DoD capability and readiness.[5] In support of that effort, the government must limit its reliance on "tribal knowledge"[6] and use market research to inform requirement development. It must also take adequate measures to ensure that communication with industry and market research do nothing to reduce the competitive field of offerors, impair the acquisition timeline, or result in avoidable protests while taking every opportunity to communicate with industry and learn of its innovation.

Limiting Reliance on "Tribal Knowledge"

Tribal knowledge is sometimes known as the collective wisdom and capabilities of the people within a group. It can be great for keeping a competitive edge. As long as the collective group of people you are using for a specific purpose know more than everyone else and can somehow harness that knowledge to stay ahead in the development of that knowledge, there are few issues. Unfortunately, we live in an era where more people have access to information and technology which results in more sources of innovation than ever before. As such, the potential for significant innovation and development from outside of the government is higher than ever.

These "changin' times" require a paradigm shift that recognizes and incorporates the fact that private industry is a source of significant innovation that will give the U.S. government advantage over their adversaries. Accordingly, it is imperative that government organizations stay informed of industry innovation and harness its benefits.

The Importance of Staying Informed of Innovation

Defining mission requirements based on the limits of tribal knowledge can be problematic. If innovation is occurring outside of your organization, then your organization is probably lagging behind these advancements. Thus, you must stay informed of the innovation to acquire or use its benefits to articulate or define a command or agency requirement.

Granted, many government requirements require little outside knowledge such as: custodial services, general construction, dining facility service, and, sometimes, security services. However, even among

these types of repetitive requirements, an organization can utilize innovative business practices or processes that revolutionize how the government can or should now look at their requirements and define them. The benefits are only amplified in more complex areas of the technology sector.

Government personnel can employ many methods of staying informed of innovation: attending conferences, symposiums, working groups; following recent research and periodicals discussing relevant advances in the area of interest; and continuous market research or communication with the marketplace. Any combination of methods can help inform an agency requirement and help the U.S. Government maintain a competitive advantage over its adversaries.

Communication with Industry: A Permissible Exercise of Authority

Current acquisition statutes, policies, and regulations are more permissive than most believe. In fact, "if a specific [acquisition] strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the [Federal Acquisition Regulation (FAR)], nor prohibited by law (statute or case law), Executive order, or other regulation, that strategy, practice, policy or procedure is a permissible exercise of authority."[7] This broad authority applies to the entire procurement process: requirement development, acquisition planning, contract administration, closeout, and—the focus of this article—market research and communication.

Generally, one can view market research in two phases. Phase one is the continuous research the government might do to stay informed or learn about the "state of the art" of technology, services, or industry. This helps inform requirement owners so that they can define requirements to maximize the current state of innovation in their area of need. Once a requirement is defined, it passes to a contracting activity to "acquire" the good or service, starting phase two: FAR based market research.[8]

Though somewhat time consuming, phase two market research at the contracting activity is controlled, predictable, and effective. It allows vendors seeking to do business with the government the opportunity to identify requirements and submit proposals or bids. Unfortunately, outside innovators—the target market—are not familiar with the defense acquisition system and unaware of its requirements.[9] This amplifies the need to have significant outreach and communication to both our normal vendors who already do business with the government and to those outside innovators who now develop technology that the government needs.

Common Issues with Vendor Communication

Communication between government and industry will always amplify concerns of bid protests and resulting acquisition delays, or even worse, disqualification of sources. While valid concerns, the benefits of communication with industry and market research overwhelmingly outweigh them. In fact, if government officials can avoid the pitfalls identified below, most issues associated with vendor communication will be minimized, and the government will enjoy all of the benefits associated with leveraging commercial innovation.

Creating an Appearance of Favoritism

When one vendor has unique access to government officials or information, it routinely causes a perception of favoritism. There is no requirement that you meet or communicate with all vendors while learning about a particular product or service. However, it is important that you communicate with at least some industry players to learn about current offerings.

Ethical rules and the Competition in Contracting Act (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. In fact, even creating an appearance that an agency is giving preferential treatment to a certain vendor can cause delay and unnecessary complications to the acquisition process.

Office Calls from "Friends" and Former Commanders

One of the most common methods that industry uses to maintain access to commanders and organizational leaders is to hire former commanders and organizational leaders to lead a business venture in the sector where they had previous experience. Many of the subordinates of the former commander will ascend to positions of power and some will hold similar leadership assignments which opens the door for the former commander or organizational leader to provide insight, advice, and counsel. At a minimum, this linkage helps maintain a relationship between the government organization and the former organizational leader or commander.

All too often, these relationships and others that develop naturally over the course of someone's prior service act as a segue to schedule an "office call" to visit a friend. During the "friendly" visit, the conversation turns to the new job of the former senior leader and offerings that would have made his time at the command better or help the Army in some way or the conversation turns to existing contracts and how they are performing. At best, the conversation has turned to some form of industry communication/market research. At worst, the conversation has transitioned to contract administration, modification, or requirement development which is best conducted by contracting activities rather than requiring activities and their senior leaders. Regardless, at this point there are at least two issues with which to grapple: (1) doing business or communicating with government officials during the one year cooling off period, and (2) the need for the command to drive requirements rather than industry.

The first issue relates to the risk of influencing the government immediately after leaving government service. Certain Senior Government Officials[10] who leave service are required to observe a one year cooling off period before doing business or communicating back with government officials with the intent to influence the government on behalf of any entity other than the government.[11] This helps prevent former government officials from immediately trying to influence the government after leaving its ranks. It has the added benefit of avoiding the obvious conflict of interest that would arise from the associated job search and organizational requirements development process.

The second issue relates to government driving its requirements rather than potential vendors. While many potential vendors are well intentioned, they are in

the business of selling their products and services rather than identifying government requirements and finding the most efficient use of command (tax payer) funds. Commanders and other organizational leaders should be more informed of the true state of their requirement and better situated to determine how to satisfy such a requirement. Accordingly, government requirements are managed and driven by government agencies and personnel.

Revealing Too Much Information About Existing Requirements

While still a form of favoritism, giving too much information about government requirements to a single vendor gives them an unfair competitive advantage over their competition. Once discovered, it will often end in a protest.[12] When vendor interaction substantially involves potential contract terms and conditions it is a good idea to include a contracting officer.[13] The contracting officer will be able to navigate any concerns in this area and is the appropriate government official to discuss the intricacies of the Defense Acquisition System and government contracts. This is especially true during the post-solicitation phase of the government acquisition process.

Most communication, before the government issues a solicitation, should be about what the company can offer rather than what the government needs. Focusing questions on the company, its offerings, and capabilities, ability to modify existing goods or services, and unique characteristics will help a requiring activity define future or existing requirements.

It is when the conversation turns to existing requirements that communication may be inappropriate. A good example of this is when industry gets too involved in requirement development and starts to offer written products that the government uses to define its requirement, such as, a performance work statement. Relinquishing too much control to industry to define requirements is normally counterproductive. Only the government and government officials should decide what the government needs and how it's delivered, not potential vendors. Other potential offerors would most likely view this as an unfair competitive advantage which can delay the acquisition through bid protests or other litigation.

Discussing Ongoing Litigation or Competitions

Contract litigation's posture, progress, and ultimate resolution principally involves the contracting activity and the servicing litigation unit. Communication between the contracting activity and contract holder is limited to protect the government litigation position and ultimately help the government protect its interests. Statements made by leaders in the requiring organization, whether accurate or not, can be attributed to the government as a whole and undermine its position and litigation posture. As such, when normal market research or vendor communication approaches the subject of ongoing litigation, it should stop immediately to avoid complicating an already complex and expensive litigation process.

Similarly, it is easy for normal market research or industry communication to turn to the subject of ongoing competitions. This is especially prevalent when the government communicates with companies who cater to government agencies. However, once a requirement is publicized through the government point of entry,[14] the dialog with potential offerors and the government is controlled to ensure all offerors have the same information from which to base their offers. One potential offeror having more information than other potential offerors can result in a competitive advantage which the government acquisition system is designed to avoid.

The government can avoid giving a competitive advantage to a potential offeror by using formal communication methods that are outlined in the FAR. These methods include pre-solicitation conferences, sources sought synopsis, and industry days. All of these help shape government requirements and reduce uncertainty in the offeror. The government also communicates with potential offerors through "exchanges,"[15] which help clarify offers, or even "discussions," to help improve proposals.[16] Using these communication techniques helps ensure information is accurate, controlled, and available to all eligible offerors.

Changes to Ongoing Contracts and Unauthorized Commitments

When organizational leaders speak with contract holders there is always a risk of contract holders believing they received direction to change their performance under a contract. Changes to government contracts should only be done by a contracting officer. Contracting officers are designated in writing[17] and possess authority to obligate the government through the Defense Acquisition System. Obligations created by other than designated contracting officers result in unauthorized commitments (UACs) that require a time-consuming ratification process that is eventually approved by a contracting officer.[18]

Unfortunately, it is common for contract holders and their representatives to request meetings with organizational leaders outside of the contracting activity because contract holders know that the organizational leader (commander) normally drives the requirements process. They decide what is important and what is not, and how resources will be allocated. As such, contractors seek out every opportunity to talk to organizational leaders about mission requirements and sometimes leave those meetings believing (rightly or wrongly) that the government has made changes to an existing contract or given direction to start additional work. This complicates the contract administration process, usually costs additional money, and results in requests for equitable adjustments[19] or UACs. Having a contracting officer present for such conversations or meetings can avert these problems. Therefore, it is important to include contracting officers or the appropriate contracting activity personnel in any discussion about ongoing contracts.

Accepting Gifts

Gifts from industry representatives always pose problems. First, they create an appearance of impropriety. When a government representative receives something of value from a company representative who holds a government contract or who is seeking or may seek a government contract it appears that they are trying to gain favor or advantage in a competition. This contradicts the full and open default competitive standard that the Competition and Contracting

Act mandates[20] and it undermines public trust in our procurement system. Though gifts are generally prohibited there is an exception that allows those less than $20 per source or occasion and do not exceed $50 in a calendar year.[21] Nevertheless, it is normally best to decline such gifts to avoid possible negative appearances.

Receiving Unsolicited Proposals[22]

The U.S. Government encourages submission of new and innovative ideas in response to Broad Agency Announcements, Small Business Innovation Research topics, Small Business Technology Transfer Research topics, Program Research and Development Announcements, or any other government-initiated solicitation or program. When new and innovative ideas do not fall under these publicized programs, they may be submitted as unsolicited proposals.[23]

Unsolicited proposals are sometimes submitted to senior leaders or contracting activities during or after an office call. The government is to handle these proposals in accordance with agency procedures to control receipt, evaluation, and disposition of the proposal while also controlling reproduction of material identified by the offeror as subject to disclosure restrictions.[24] Using this process protects the government and avoids unnecessary complaints about industry developing government requirements and possible favoritism.

Despite potential risks to the acquisition process, it is necessary to communicate with innovators in industry. The government no longer monopolizes investment in research and development. Instead, investment in research and development and its resulting innovation are being realized by other governments and private industry alike. As a consequence, it is more important than ever for government representatives to communicate with industry. The benefits of communication with industry are profound. It helps the government harness innovation to shape its requirements. It helps the government define requirements in such a way as to realize the benefits of innovation. It helps the government become more efficient with time and money by using industry-generated innovation rather than its own resources to develop requirements. It also helps the government utilize technology/innovation on the battlefield or in support of the battle to maintain a competitive edge on our adversaries. All of these benefits significantly outweigh potential issues, especially taking into account that most issues can be negated or resolved through consideration of the points above, thoughtful guidance and advice of counsel, and avoiding appearances of favoritism. **TAL**

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Notes

1. Rani Molla, *Amazon spent nearly $23 billion on R&D last year- more than any other U.S. company*, Vox (Apr. 9, 2018, 11:36 AM), https://www.vox.com/2018/4/9/17204004/amazon-research-development-rd.

2. *U.S. R&D: Slow Growth and Opportunities*, R&D Magazine, https://digital.rdmag.com/researchanddevelopment/2017_global_r_d_funding_forecast?pg=7#pg7Winter 2017 (last visited Feb. 19, 2019).

3. Ana Maria Santacreu, *R&D Business Spending Up, Government Spending Flat*, Federal Reserve Bank of St. Louis (May 14, 2018), https://www.stlouisfed.org/on-the-economy/2018/may/rd-business-spending-up-government-spending-flat.

4. *National Science Board Statement on Global Research and Development (R&D) Investments NSB-2018-9*, National Science Foundation, https://www.nsf.gov/news/news_images.jsp?cntn_id=244465&org=NSF (last visited Feb. 19, 2019).

5. On 4 April 2011, the Office of the Undersecretary of Defense, Acquisition, Technology, and Logistics directed agencies to develop vendor communication plans in an effort to promote responsible and constructive exchanges with industry. Memorandum from Dir. Def. Procurement and Acquisition Policy to Deputy Assistant Sec'y of the Army (Procurement) *et. al*, subject: "Myth-Busting": Addressing Misconceptions to Improve communication with Industry during he Acquisition Process (04 April 2011). In response to this memo, the Department of Defense (DoD) issued a Vendor Communication Plan encourages agency officials to engage in more frequent information exchanges with vendors, particularly during the pre-solicitation phase, for high dollar, more complex procurements, so long as sensitive or proprietary information is protected on behalf of the government and vendors alike. U.S. Dep't of Def., Vendor Communication Plan, https://www.acq.osd.mil/dpap/dars/pgi/docs/DoD_Vendor_Communication_Plan.pdf.

6. *Tribal knowledge*, Definitions.Net, https://www.definitions.net/definition/Tribal+knowledge (last visited Feb. 19, 2019).

7. Federal Acquisition Regulation 1.102(d) (2017) [hereinafter FAR].

8. The Federal Acquisition Regulation (FAR) defines market research as "collecting and analyzing information about capabilities within the market to satisfy agency needs." FAR 2.101.

9. The Army Futures Command (AFC) has developed pilot programs to find "outside innovators" and bring them in contact with "experienced insiders" who can help navigate the complex Pentagon and acquisition process. The AFC has developed an Army Applications Laboratory (AAL) to bring innovators to people in the Army with the money and authority to turn their ideas into reality. Sydney Freedberg Jr., *Army Futures Command Wants YOU (To Innovate)*, Breaking Defense (Oct. 23, 2018), https://breakingdefense.com/2018/10/army-futures-command-wants-you-to-innovate/.

10. Commissioned Officer in the pay grade of 0-7 and above, employed in a position where basic pay is equal to or greater than 86.5% of the rate of basic pay for a Level II of the Executive Schedule, or other position defined 18 U.S.C. § 207(c)(2).

11. 18 U.S.C. § 207(c)(2).

12. A bid protest is a challenge to the award or proposed award of a contract for the procurement of goods and services or a challenge to the terms of a solicitation for such a contract.

13. FAR 15.201(f).

14. FedBizOps is the recognized point of entry to publicize government requirements. It can be located at https://www.fbo.gov/.

15. FAR 15.306(a).

16. Discussions are communications between offerors and the government after a competitive range is set. FAR 15.306(d). Requirements can be awarded with or without discussions. This is controlled by the contracting activity, but can be included in most FAR Part 15–*Contracting by Negotiation* acquisitions. Requests for proposals are required to contain language that gives notice of the government's intent to either hold discussions or not. 10 U.S.C. § 2305(a)(2)(B)(ii)(I) and 41 U.S.C. § 3306(b)(2)(B)(i).

17. Contracting officers are appointed by agency heads or their designees in writing. Their appointment letter shall give clear instructions regarding the limits of their authority. FAR 1.602-1(b) & FAR 1.603-1.

18. FAR 1.602-3.

19. A Request for Equitable Adjustment (REA) is "anything but a 'routine request for payment.' It is a remedy payable only when unforeseen or unintended circumstances, such as government modification of the contract, differing site conditions, defective or late-delivered government property or issuance of a stop work order, cause an increase in contract performance costs." Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).

20. Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304; 41 U.S.C. § 403.

21. 5 C.F.R. § 2635.204(a).

22. Advertising material, commercial item offers, or contributions, or routine correspondence on technical issues are not unsolicited proposals. FAR 15.6-3(b).

23. FAR 15.602.

24. FAR 15.606; Army Federal Acquisition Regulation Supplement (AFARS) 5115.606; U.S. Dep't of Army, Pam. 70-3, Army Acquisition Procedures (17 Sept. 2018).

(Credit: istockphoto.com/Bastiaan Slabbers)

A Writ of Habeas Corpus *Ad Prosequendum*

Federal Authority to Secure Soldiers Who Are State Prisoners at Court-Martial

Captain Patrick S. Wood

Imagine that an active duty Soldier begins to sexually abuse his minor daughter while stationed at Fort Sam Houston, Texas. Unfortunately, his criminal behavior continues after his Permanent Change of Station (PCS) to Germany because his daughter is too fearful to report her father's sexual abuse to authorities. Indeed, the abuse continues even after the family's next PCS to Virginia. The Soldier is later assigned to Fort Riley, Kansas, but occasionally visits his family who remains in Virginia, where he continues to sexually abuse his daughter. Thankfully, while the Soldier is assigned to Fort Riley, the victim finally develops the courage to report her father's sexual abuse that occurred in Texas, Germany, and Virginia to Virginia authorities. Ultimately, the accused Soldier confesses to Virginia authorities that he sexually abused his daughter in Virginia.

Crimes have occurred in Texas, Germany, and Virginia while the Soldier was on active duty. Can the Army assert jurisdiction in each instance? How should a trial counsel proceed after learning of these allegations? Presumably, the easiest way forward would be for each of the civilian jurisdictions to defer prosecution to the military because the military has jurisdiction over all of the offenses.[1] However, Virginia is adamant about prosecuting the offenses that the Soldier committed in Virginia. The commonwealth has a confession and feels strongly about prosecuting this Soldier for the heinous crimes that occurred within its borders. Further, Virginia intends to expeditiously prosecute its case in light of the strength of its evidence. The accused eventually pleads guilty in Virginia for the crimes committed there, and a circuit court sentences the accused to twelve years in prison.

Assuming that charges have been preferred covering the crimes that occurred in Texas, Germany, and Virginia, what should Fort Riley do now? Let the crimes that occurred in Texas and Germany go unpunished and simply eliminate the Soldier based on the conviction in Virginia?[2] Transfer the case to an Army installation in Virginia in order to facilitate easier transportation of the Accused to and from proceedings? Proceed with a court-martial at Fort Riley? Ultimately, with the goal of ensuring that the Accused is adequately punished for the entirety of his criminal conduct, Fort Riley decides to pursue the charges against the Accused covering his criminal behavior that occurred in Texas and Germany. Now, Fort Riley is faced with logistical and procedural obstacles. The accused is sitting in a Virginia prison. How will the Army coordinate his release from state authorities in order to stand trial at Fort Riley, Kansas?

This article discusses the authority for, and benefits of, using a writ of habeas corpus *ad prosequendum*[3] in order to secure the presence of a Soldier, who is confined in a state prison, at a court-martial; highlights why a writ of habeas corpus *ad prosequendum* should be preferred over a detainer under the Interstate Agreement on Detainers Act[4]; and attempts to provide a practical framework that can be used if a writ of habeas corpus *ad prosequendum* is pursued.

The All Writs Act and the Military Judge

The All Writs Act[5] allows the "Supreme Court and all courts established by an Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[6] Importantly, military courts are included as courts established by an Act of Congress empowered to issue writs.[7] "[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act."[8]

Debate exists as to what all "military courts" this grant of authority extends. Case law and the Rules for Courts-Martial are clear that military appellate courts are courts created by Congress for purposes of the All Writs Act and as such can resort to and entertain petitions for extraordinary

relief.[9] Unfortunately, few courts have answered whether or not the military judge presiding over a court-martial has powers under the All Writs Act.

Albeit in dissent, Senior Judge Gray of the Air Force Court of Military Review—while discussing how a general court-martial in session is a court of the United States provided for by an Act of Congress where the military judge performs in the image of a civilian judge—made an eloquent argument in favor of the military judge exercising such power when he stated: "It necessarily follows, then, that the military judge in the present case possesses all of the inherent powers necessary or appropriate in aid of the jurisdiction of the court-martial, including those expressly conferred upon Federal courts by the All Writs Act. It is inconceivable to me that Congress in 'revolutionizing military justice' and establishing a completely independent trial judiciary whose judges are to perform in the image of a Federal district judge during the trial, intended him not to exercise power to grant relief on an extraordinary basis, when the circumstances so require."[10] In the same case, Senior Judge Gray, while discussing how no civilian jurisdiction had permitted extension of All Writs powers to courts of limited jurisdiction, stated the following: "In this connection I repeat that a general court-martial is a court of unlimited jurisdiction albeit only with respect to military criminal cases. The fact that a court is empowered by Congress to act only in a specially defined area of law does not make it any the less a court established by Congress."[11] Additionally, when presented with an opportunity to state whether or not a military judge presiding over a court-martial has power under the All Writs Act, the United States Court of Military Appeals has avoided answering the question.[12]

Considering the reasoning laid out above and judicial reluctance to answer the question, the argument can be made that once a military judge is detailed to a general court-martial that has been properly convened pursuant to a congressional statute, then that court is "established" for purposes of the All Writs Act.[13] The counter argument is that Congress does not establish specific courts-martial and did not intend for military judges, given that they do not sit on courts of continuous jurisdiction and only deal with a specific court-martial, to have authority under the All Writs Act.

Congress does not pick who sits on the military appellate courts and it has no say as to who sits on the bench at Fort Sill; yet the former clearly have authority under the All Writs Act.[14] Concerns about military judges at the court-martial level abusing authority under the All Writs Act can be allayed by the fact that the military appellate courts and the Supreme Court provide additional layers to correct the military judge that has lost their way.[15] More importantly, the writ is an exceptional remedy and the professional judges in our military understand that only extraordinary circumstances will warrant its issuance. Further, case law supports the notion that, unless Congress has said otherwise, federal judges should have the authority to craft and issue writs in the pursuit of justice.[16] "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."[17] If no common law form of habeas corpus fits a situation where it is necessary to bring a prisoner to court, the court may issue its own generic variety of habeas corpus to insure the prisoner's presence.[18] If desired, Congress or the Supreme Court should state that military judges at the general court-martial level do not have power under the All Writs Act. Until such time, military judges at this level should issue extraordinary writs when appropriate.

Finally, an argument can be made that the writ of habeas corpus *ad prosequendum,* our focus here, more closely resembles regular criminal processes and really was not intended to be an extraordinary writ. "Moreover, when federal courts have had occasion to resort to habeas corpus in aid of jurisdiction, the writ has been used primarily as a procedural device to obtain a prisoner's presence in court where such presence was vital to determination of a pending cause. This use of habeas corpus as an auxiliary writ seems in no way to involve a grant of extraordinary relief, but instead resembles the ordinary judicial process to secure the presence of parties and witnesses."[19]

The Writ of Habeas Corpus *Ad Prosequendum*

"[E]xpressly included within this authority [to grant writs of habeas corpus] is the power to issue such a writ when it is necessary to bring a prisoner into court to testify or for trial."[20] Further, "the statutory authority of federal courts to issue writs of habeas corpus *ad prosequendum* to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in state custody, has never been doubted."[21] As for timing, writs of habeas corpus *ad prosequendum* are issued by a court when charges have been lodged against the prisoner.[22]

The purpose of the writ is to request that the individual who has custody of the accused make him available to stand trial in another sovereign.[23] Moreover, a writ of habeas corpus *ad prosequendum* "is a court order requesting the prisoner's appearance to answer charges in the summoning jurisdiction."[24] More importantly, "a writ of habeas corpus *ad prosequendum* . . . is not a 'detainer' within the meaning of the Agreement on Detainers."[25] Unlike a detainer, which merely puts prison officials on notice that the individual is wanted in another jurisdiction, the writ is immediately executed.[26] In fact, a prisoner is not even in custody when he appears in another jurisdiction's court pursuant to an *ad prosequendum* writ.[27] Rather, the prisoner is merely loaned to that jurisdiction.[28] Thus, the sending sovereign's custody and control over the incarcerated accused is never interrupted.[29] As such, the prisoner remains within the legal custody of the sending state. "The writ swiftly runs its course, and is no longer operative after the date upon which the prisoner is summoned to appear."[30] Principles of comity require that when the federal *ad prosequendum* writ is satisfied, the receiving federal jurisdiction returns the incarcerated accused to the sending sovereign.[31]

Accordingly, as outlined above, once charges have been referred to a properly convened general court-martial, All Writs Act jurisdiction attaches, and the military judge detailed to the case has the power to issue a writ of habeas corpus *ad prosequendum* in order to secure a state prisoner for that court-martial.[32] The military judge can

issue such a writ to the state official who has custody of the accused directing the state prisoner's appearance at a court-martial. Because the writ is to be immediately executed and the state prisoner will merely be on loan to the U.S. Army, the state never loses legal custody of the state prisoner. Once the Accused has been tried at a court-martial, the federal government must return the prisoner to state officials as soon as possible. Rule for Courts-Martial 1107(d)(3) supports this process in that it allows the convening authority to defer service of the sentence until the Accused has been permanently released to the armed forces by a state.[33]

Most importantly, once the state receives a writ of habeas corpus *ad prosequendum* from a military judge, it must comply with the order.[34] In *United States v. Pleau*, the court stated:

> That a state has never had authority to dishonor an *ad prosequendum* writ issued by a federal court is patent. Under the [Supremacy Clause of the United States Constitution], 28 U.S.C. § 2241(c)(5)—like any other valid federal measure—overrides any contrary position or preference of the state, a principle regularly and famously reaffirmed in civil rights cases . . . . State interposition to defeat federal authority vanished with the Civil War.[35]

In *Pleau*, the federal government wanted to prosecute a state prisoner on charges that carried the possibility of the death penalty.[36] The governor opposed the death penalty, so he cited the Interstate Agreement on Detainers Act and principles of comity as giving him the authority to deny the federal request.[37] The First Circuit cited *United States v. Mauro*[38] and stated that the federal government always has the authority to obtain a state prisoner by filing a writ of habeas corpus *ad prosequendum* and that the Supremacy Clause required that the states comply with issued writs because they have never had the authority to dishonor such a writ.[39]

Detainer Under the Interstate Agreement on Detainers

The Interstate Agreement on Detainers Act has been enacted by over forty-five states to encourage the expeditious and orderly disposition of charges outstanding against a prisoner.[40] "It prescribes procedures by which a member [s]tate may obtain for trial a prisoner incarcerated in another member jurisdiction and by which the prisoner may demand the speedy disposition of certain charges pending against him in another jurisdiction."[41] However, the Act is not triggered until a detainer is filed with the custodial state by another state having untried charges pending against the prisoner.[42] Once filed, the detainer only puts the prison on notice that another jurisdiction wants to try the prisoner upon their release from prison. The receiving state must also submit a written request for temporary custody or availability of the prisoner.[43]

If the federal government files a detainer against a state prisoner, then the terms of the Interstate Agreement on Detainers will be controlling.[44] Once filed, "[t]he warden of the institution in which the prisoner is incarcerated is required to inform him promptly of the source and contents of any detainer lodged against him and of his right to request final disposition of the charges."[45] If a prisoner does request final disposition of his charges, then the prisoner must be brought to trial by the requesting jurisdiction within 180 days.[46] Once the prosecuting authority has obtained the presence of the prisoner, "trial shall be commenced within [120] days of the arrival of the prisoner in the receiving State."[47] Additionally, the governor of the sending state may disapprove the request, upon his own motion or upon motion of the prisoner, within thirty days after the request is received.[48] Further, the request cannot be honored until these thirty days pass.[49] In the event that the request is honored, the prisoner must be tried by the receiving state before being returned to the state where he was imprisoned.[50] If this does not happen, the charges are of no further force and effect and will be dismissed with prejudice.[51]

Why the Writ of Habeas Corpus *Ad Prosequendum* is Preferable to a Detainer

When a military judge issues a writ of habeas corpus *ad prosequendum* to the state official with custody of the accused, it is an immediately executable federal court order that the state must comply with. The state must loan the prisoner to the federal government, but the state never loses legal custody of the prisoner. The federal government's only obligation is to return the prisoner to the state after trying them at a court-martial. Finally, because it is not a detainer, the federal government is not bound by the requirements of the Interstate Agreement on Detainers Act which imposes multiple restrictions and penalties for non-compliance.[52]

When the federal government lodges a detainer to procure a state prisoner at a court-martial, the federal government is merely providing the state with notice that it wants to try the Accused at a later date.[53] This must be followed up with a written request for temporary custody.[54] Further, even if both the detainer and a written request are filed, the governor of the sending state can disapprove the request.[55] As a result, a properly filed detainer is not immediately effective and offers no guarantee that the state will comply with the request. Additionally, once the detainer is filed, the federal government is bound by the Interstate Agreement on Detainers Act.[56] The result is that the state prisoner can request speedy disposition of the charges against them.[57] If such a request is made, the federal government must bring the prisoner to trial within 180 days or within 120 days of receiving the prisoner at their installation.[58] This can create real problems if a detainer is filed before any real efforts have been made to prosecute the accused. Finally, since the federal government has legal custody of the accused, all outstanding charges against the accused must be disposed of before the accused is returned to the sending state.[59] If they are not, all charges will be dismissed with prejudice.[60] As a result, filing a detainer does not guarantee that the state will produce the accused for a court-martial, and it imposes requirements that, if violated, can lead to dismissal of the federal charges against the accused. This can all be avoided by the issuance of a writ of habeas corpus *ad prosequendum.*

Practical Application

After preferral, but before referral of charges, the trial counsel should coordinate

with their installation Provost Marshall Office and the U.S. Marshall Service in order to ensure that seamless transport and custody of the accused can be accomplished from the sending state to the federal government, and vice versa.[61] The trial counsel should also coordinate with state officials to see if any additional requirements are likely to be required and to see whether resistance to a writ is likely. Doing these things will allow the military judge acting on the matter to make an informed decision.

Next, the charges should be referred to a general court-martial and served on the accused. Referral to a properly convened general court-martial is critical because there must be primary jurisdiction to which the All Writs Act can attach.[62] As stated before, a court-martial does not have continuous jurisdiction and, pursuant to statute, needs the following in order to be properly convened and to establish primary jurisdiction: a convening order issued by the proper convening authority that establishes the court-martial and the referral of charges to that court-martial by competent authority.[63] Once properly convened, however, a given court-martial may try an unlimited number of cases so long as they are properly referred to it and will exist indefinitely because customary practice does not include terminating a given court-martial; rather, no new cases are referred to it.[64]

Following referral, the government should file a motion for appropriate relief with the military judge outlining their authority to issue extraordinary writs and asking that they issue a writ of habeas corpus *ad prosequendum.*[65]

Generally, the military judge will have to determine if issuance would be in aid of existing jurisdiction.[66] Assuming there are no jurisdictional issues, this is likely the easier hurdle as the accused's presence is necessary to decide the case at hand. It is important to make clear to the military judge that issuance would not expand power, but rather only aid in the exercise of authority that the military judge already has.[67] The military judge will also have to determine whether or not issuance of the writ would be agreeable to the usages and principles of law.[68] In other words, the military judge will have to decide if the case before them is an exceptional case where extraordinary relief is reasonably necessary in the interest of justice.[69] A military judge will likely have to decide, amongst other things and with no one factor being dispositive or always relevant, if other adequate means exist to obtain the relief requested.[70] Arguing that production of the accused via the writ is agreeable to the usages and principles of law should focus on the writ's purpose. "The historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause."[71] Further, if proper, arguments should be advanced that, without its issuance, the government does not have other adequate means or any guarantees that ensure the accused will be produced for court-martial.

If granted, the writ of habeas corpus *ad prosequendum* should be signed by a military judge and sent to the prison warden or official that has custody of the accused. A copy of the writ should also be sent to the state department of corrections, the state attorney general, and the installation Provost Marshal Office. At a minimum, the writ should outline the authority for the writ, the accused who will be transported, the location they will be transported to, when this transport will take place, why they are being transported, which federal agents will transport the accused, when and where the accused will be returned by federal agents, and where the accused will be held while awaiting the court-martial.

For example, in *Jiron-Garcia v. Commonwealth of Virginia*,[72] the U.S. District Court for the Eastern District of Virginia issued a writ of habeas corpus *ad prosequendum* directly to the supervisor of the Riverside Regional Jail directing him to surrender Jiron-Garcia to the U.S. Marshal on 20 October 2004 for a 1430 court proceeding.[73] "The writ further provided that appellant was to be 'returned forthwith by the U.S. Marshal' to Riverside Regional Jail."[74]

Proper coordination between the trial counsel, the installation Provost Marshal Office, the U.S. Marshal Service, and the state government officials involved in prosecuting and/or incarcerating the accused should occur to ensure that all logistical requirements are addressed and a clear path that avoids resistance is made before the federal government requests that a military judge issue a writ of habeas corpus *ad prosequendum.* Provided that the federal government has proper jurisdiction over an accused, has referred charges against that accused to a properly convened general court-martial, and has filed a motion for appropriate relief, a military judge is empowered by the All Writs Act to issue a writ of habeas corpus *ad prosquendum* ordering the supervisor of a state confinement facility to deliver a state prisoner to federal agents for a court-martial. The writ is then immediately executed and the state has no power to refuse to turn over the prisoner. Because the prisoner is merely on loan—and never in the custody of the federal government—the prisoner must be returned to the state at the conclusion of the court-martial so that the prisoner can finish serving his state sentence. Absent a concurrent running of the sentence, once the Soldier has served his state sentence, he will be transferred to federal authorities to serve any remaining court-martial sentence.[75] Finally, because the writ is not a detainer, there is no room for the state to disapprove the request and the federal government is not bound by the Interstate Agreement on Detainers Act's restrictions and harsh penalties for non-compliance.[76]

The scenario presented at the beginning of this article is based on an actual case.[77] The military preferred charges against that Soldier for conduct that occurred in Texas, Germany, and Virginia prior to Virginia authorities requesting the Soldier's presence for a state trial. The Soldier returned to Virginia and was convicted of the charged crimes and sentenced to confinement in the Virginia state prison system.[78] Trial counsel at Fort Riley coordinated with the installation Provost Marshal's Office and Virginia authorities to see if there would be any resistance to the Army seeking the Soldier's presence for court-martial. Using the steps outlined in this article, the trial counsel—after referral of the charges covering conduct that occurred in Texas and Germany—requested that the military judge issue a writ of habeas corpus *ad prosequendum.*[79] The military judge issued the writ and the U.S. Marshal Service ensured the prisoner's transport to Fort Riley.[80] Once at Fort

Riley, the Soldier pled guilty to the charged offenses, was found guilty and sentenced, and was promptly returned to Virginia to continue serving his state sentence.[81] Once the prisoner has served his state sentence, he will be transferred to Fort Leavenworth, Kansas, to serve his federal sentence. **TAL**

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Notes

1. *See* Uniform Code of Military Justice arts. 2, 5 (2018) [hereinafter UCMJ].

2. *See* U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges ch. 4 (12 Apr. 2006) (RAR, 13 Sept. 2011).

3. A writ of habeas corpus *ad prosequendum* is "a writ of habeas corpus which issues for the purpose of removing a prisoner in order to prosecute him in the proper jurisdiction." Ballentine's Law Dictionary (3d ed. 2010).

4. *See* Pub. L. No. 91-358, 84 Stat. 1397 (1970).

5. The All Writs Act is the common nomenclature used when referring to 28 U.S.C. § 1651 (2018).

6. *See* 28 U.S.C. § 1651 (2018). *See also* United States v. Frischholz, 16 U.S.C.M.A 150, 152 (1966) (stating that a "court established by Act of Congress" . . . includes courts other than those established by Congress under Article III).

7. *See* United States v. Denedo, 556 U.S. 904 (2009).

8. *Id.* at 904–05.

9. *See* Noyd v. Bond, 395 U.S. 683, 689 (1969). *See also* United States v. Snyder, 18 U.S.C.M.A 480, 483 (1969). *See also* Dettinger v. United States, 7 M.J. 216, 219 (C.M.A. 1979). *See also* Manual for Courts-Martial, United States, R.C.M. 1203 and 1204 (2019) [hereinafter MCM] (Collectively, these rules allow for the Court of Criminal Appeals and the Court of Appeals for the Armed Forces to entertain petitions for extraordinary relief and issue all writs necessary or appropriate in aid of their jurisdiction and agreeable to the usages and principles of law.).

10. Gagnon v. United States, 42 C.M.R. 1035, 1042 (A.F.C.M.R. 1970).

11. *Id.* at 1043 (citing Glidden Co. v Zdanok, 370 U.S. 530, 561 (1962)).

12. *See* Zamora v. Woodson, 19 U.S.C.M.A. 403, 404 (1970).

13. *See* UCMJ arts. 22 and 26 (2019); MCM, *supra* note 9, R.C.M. 504.

14. *See* UCMJ arts. 26 and 66 (2018). *See also* Pub. L. No. 90-632, 82 Stat. 1335 (1968).

15. *See* UCMJ arts. 66, 67, 67a (2018).

16. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942).

17. *Id.* at 273.

18. *See* Price v. Johnston, 334 U.S. 266, 281–284 (1948).

19. Major Thomas Rankin, *The All Writs Act and the Military Judicial System*, 53 Mil. L. Rev. 103, 113 (1971).

20. United States v. Mauro, 436 U.S. 340, 357 (1978).

21. *Id.* at 358; *see also* 28 U.S.C. § 2241(c)(5) (2018) (discussing how a writ of habeas corpus should not extend to a prisoner unless it is necessary to bring him into court to testify or for trial).

22. *See* Stewart v. Bailey, 7 F.3d 384, 389 (4th Cir. 1993).

23. *See Mauro*, 436 U.S. at 357–358.

24. *Stewart*, 7 F.3d at 389.

25. *Id.* at 390.

26. *See id.* at 389.

27. *See id.*

28. *See id.*

29. *See* Jiron-Garcia v. Commw. of Va., 48 Va. App. 638, 648 (Va. Ct. App. 2006).

30. *Stewart*, 7 F.3d at 390.

31. *See Jiron-Garcia*, 48 Va. App. at 648.

32. *See* Benson v. St. Board of Parole and Probation, 384 F. 2d 238, 239 (9th Cir. 1968), *cert. denied,* 391 U.S. 954 (1968) (discussing how jurisdiction conferred by the All Writs Act is ancillary and dependent upon primary jurisdiction conferred by other statutes).

33. *See* MCM, *supra* note 9, R.C.M. 1107(d)(3)(A–C).

34. *See* United States v. Pleau, 680 F.3d 1 (1st Cir. 2012).

35. *Id.* at 6.

36. *See id.* at 3.

37. *See id.*

38. *See* United States v. Mauro, 436 U.S. 340, 357 (1978).

39. *See Pleau,* 680 F.3d at 7.

40. *See Mauro*, 436 U.S. at 343.

41. *Id.*

42. *See id.*

43. *See id.* at 352.

44. *See id.* at 349.

45. *Id.* at 351.

46. *See id.*

47. *Id.* at 352.

48. *See id.*

49. *See id.*

50. *See id.*

51. *See id.* at 353.

52. *See* 18 U.S.C. App. § 2, Articles III(d), IV(e), and V(c) (2018).

53. *See Mauro*, 436 U.S. at 351.

54. *See id.* at 352.

55. *See id.*

56. *See id.* at 349.

57. *See id.* at 351.

58. *See id.* at 351–52.

59. *See id.*

60. *See id.* at 353.

61. *See* MCM, *supra* note 9, R.C.M. 202 (court-martial jurisdiction over the person occurs when action with a view to trial is taken).

62. *See* Benson v. St. Board of Parole and Probation, 384 F. 2d 238, 239 (9th Cir. 1968), *cert. denied,* 391 U.S. 954 (1968).

63. *See* UCMJ art. 22 (2018); MCM, *supra* note 9, R.C.M. 201, 504, 601, 602.

64. *See* 1-13 Court-Martial Procedure § 13-10.00 (2016).

65. *See* UCMJ art. 39 (2018) (discussing how once referred charges has been served on the Accused, the military judge may consider motions in an Article 39(a) session).

66. *See* 28 U.S.C. § 1651 (2018).

67. *See* United States v. Snyder, 18 U.S.C.M.A 480, 483 (1969).

68. *See* 28 U.S.C. § 1651 (2018).

69. *See* Price v. Johnston, 334 U.S. 266, 279 (1948).

70. *See* Bauman v. United States Dist. Court, 557 F.2d 650, 656 (9th Cir. 1977). *See also* Dew v. United States, 48 M.J. 639, 648–49 (Army Ct. Crim. App. 1998).

71. *Price*, 334 U.S. at 283.

72. *See* Jiron-Garcia v. Commw. of Va., 48 Va. App. 638, 648 (Va. Ct. App. 2006).

73. *Jiron-Garcia*, 48 Va. App. at 643.

74. *Id.*

75. *See* MCM, *supra* note 9, R.C.M. 1113(e)(2).

76. *See* Stewart v. Bailey, 7 F.3d 384, 389 (4th Cir. 1993); *see also* United States v. Pleau, 680 F.3d 1 (1st Cir. 2012).

77. United States v. Gumataotao, 2016 LEXIS 413, Army 20150765 (Army Ct. Crim. App. 22 Jun 2016) (mem. op.).

78. Virginia convicted the accused of fornication/incest with a child and aggravated sexual battery with a child. The accused was sentenced to serve twelve years confinement.

79. Gov't Motion for Appropriate Relief: Government Request for Continuance and Writ of Habeas Corpus *Ad Prosequendum*, United States v. Gumataotao (3d Judicial Circuit, U.S. Army, 2015) (on file with author).

80. Writ of Habeas Corpus Ad Prosequendum, United States v. Gumataotao (3d Judicial Circuit, U.S. Army, 2015) (on file with author).

81. Major Gumataotao was charged with two specifications of willful disobedience of a superior officer in violation of Article 90, UCMJ, three specifications of lewd acts with a child in violation of Article 120b, UCMJ, and two specifications of sexual assault with a child in violation of Article 120, UCMJ. Major Gumataotao was sentenced to a dismissal and twenty years of confinement.

A U.S. Army National Guard Soldier watches as a water bucket douses flames during the Mendocino Complex wildfires in California last year. California National Guard helicopters dropped close to a half-million gallons of water in one week. (Credit: California National Guard)

We Didn't Start the Fire

A Primer on Mutual Aid Agreements for Fire Suppression Services

By Lieutenant Colonel William (Bill) M. Stephens and Major Faith R. Coutier

We didn't start the fire. No we didn't light it, But we tried to fight it![1]

- Billy Joel

Every twenty-four seconds in the United States, a fire department responds to a fire emergency.[2] In August 2018, the Mendocino Complex Fire became the largest wildfire in California history. It indiscriminately consumed 459,123 acres of grasslands and forests, and destroyed over 280 businesses and homes.[3] By way of comparison, the incineration was equivalent to approximately 69% of the entire state of Rhode Island burning in less than forty days.[4] Firefighters battled the blaze by every means available; from clearing firebreaks to building containment lines, to resorting to old-fashioned water saturation, but it was not enough. Fire suppression teams from around the state, including teams from the Presidio of Monterey, plus over 200 federal troops and several hundred National Guard troops were called to join the battle and, through this community effort, the fire was contained and potentially thousands of homes were saved.[5]

The Mendocino fire, as well as the recent "Camp Fire" of Butte County, illustrate that federal assistance to state fire and emergency fire fighting forces is morally and ethically in the best interests of American citizens, the Army, and the United States. This article is designed to give the reader an overview of mutual aid agreements (MAAs) for fire suppression and management, as well as to provide a "how to" guide on drafting these agreements for the mutual benefit of both the Army and the local communities.

Evolutionary History of Mutual Aid Agreements

Prior to the enactment of Title 42 of the United States Code, Section 1856a[6] in 1955, federal facilities could not expend appropriated funds for the purpose of fighting fires outside of federal reservations unless federal property was endangered. Therefore, federal agencies were prohibited from entering into MAAs with any non-federal firefighting units or organizations.[7] Congress enacted 42 U.S.C. § 1856a

to remedy this situation and enable the "federal government to provide maximum fire protection for its installations and activities throughout the world at a minimum cost by utilizing local civilian fire protection personnel and facilities on a reciprocal basis."[8]

Since the enactment of 42 U.S.C. § 1856a, the Department of Defense (DoD) has emphasized the importance of integrating the military's emergency response capability with the local community. It is DoD policy to, when called upon and approved by the appropriate authority, make DoD fire and emergency services (F&ES) capabilities available to assist civil authorities under mutual aid agreements, host nation support agreements, and Defense Support of Civil Authorities (DSCA).[9]

Thanks to these policies, the Army has a long history of successfully teaming with local fire departments for the mutual benefit of both the Army and the local communities with respect to fire suppression and management.[10] Mutual aid agreements have allowed Army installations and their surrounding communities to enjoy the benefits of a regional approach to the delivery of fire services by using standardized response protocols and operational procedures, allowing for the exchange of expertise and information, and providing a source of potential resources that are unencumbered by geographical or jurisdictional boundaries.

Benefits of Mutual Aid Agreements

The primary advantage of MAAs is to expand the response resources available to any one jurisdiction. However, these agreements can also help jurisdictions to coordinate planning,[11] ensure timely arrival of aid,[12] increase a department's ability to respond to a large scale or complex incident,[13] and arrange for specialized resources.[14] This is key for many Army installations that do not have the capability to respond to extraordinary events requiring aerial fire suppression or involving hazardous material or chemical warfare. Federal law prohibits the use of DoD appropriated funds for the purpose of entering into a contract for the performance of firefighting functions at any military installation or facility.[15] Accordingly, if an installation is unable to provide the needed resources, then they can mitigate those deficiencies through MAAs.

Mutual aid agreements also allow Army installations to provide maximum fire protection for minimum cost.[16] The needs of Army installations and jurisdictions vary greatly and require risk assessments to determine potential resource shortfalls in F&ES capabilities. Mutual aid agreements can cost-effectively address these shortfalls by using resources from other jurisdictions and departments to better handle incidents that require resources beyond the installation's capability. Most fire incidents begin and end locally and are managed by the installation fire department and neighboring county. However, some incidents require additional support or expertise from multiple jurisdictions. A cascading MAA—also known as a tiered MAA—codifies an understanding to provide tiered levels of support when additional resources or capabilities are needed, thus preventing the risk of any jurisdiction from being overwhelmed in times of crisis.[17]

Under a cascading MAA, the amount of required F&ES resources increases as the size and complexity of the incident increases. For example, an installation's fire department responds to a fire incident at their installation. As the fire spreads, if the installation does not have enough available resources, or requires special equipment or resources, then they request aid from the local fire department in accordance with their MAA. If those combined resources cannot suppress the fire, then the installation can request resources from the regional fire department, and so on, until the installation has the capabilities to extinguish the fire.

By using a cascading MAA, an Army garrison commander can focus his or her resources where there are perceived vulnerabilities, including increasing response times to emergencies by incorporating municipal or local assets into responding to emergencies. For example, the Ord Military Complex located in Monterey, California—the location of the Defense Language Institute at the Presidio of Monterey and the Naval Post Graduate School—has two housing areas, each located in a separate municipality and the main installation borders two additional municipalities. Through an MAA, the Presidio of Monterey Garrison Commander can incorporate and plan for the municipalities to respond to a fire in the housing areas within their respective jurisdictions. This will decrease the response times to less than nine minutes with an engine and three firefighters, versus the fifteen to eighteen minutes if the more distant firefighting response team from the Presidio of Monterey was required to respond first.[18] A decrease of four to seven minutes in response time could mean the difference between life and death.

Recent natural disasters have stretched civil authority resources, resulting in an increase in the Army's participation in cascading MAAs. It is important to note that as fire incidents change in size, scope, and complexity, Army installations must also adapt their response efforts to meet the requirements of a changing environment. Congress enacted 42 U.S.C. § 1856a to allow federal agencies to meet this demand by using civilian fire protection personnel and facilities on a reciprocal basis. While not specifically addressed, the language of the statute clearly contemplates the use of cascading MAAs as a mechanism for reciprocal fire support with local municipalities.[19] Additionally, DoD policy permits installations and civilian fire departments to set their own parameters regarding mutual aid.[20]

Difference Between Mutual Aid Agreements and Other Legal Authorities

It is important to note that the MAA process is separate and distinct from the assistance provided under DSCA or the immediate response authority. In the absence of an MAA, installation commanders are authorized to render emergency assistance to preserve life and property in the vicinity of a DoD installation when, in their opinion, such assistance is in the best interest of the United States.[21] This assistance can be provided under immediate response authorities[22] or emergency response authorities,[23] as described in 32 Code of Federal Regulations (CFR) Part 185.4 and Department of Defense Directive (DoDD) 3025.18.[24] However, any assistance provided under these authorities must end when the necessity giving rise to the response is no longer present, or within

seventy-two hours, whichever comes first. If the necessity extends beyond seventy-two hours, any continuing or additional aid would have to be approved by the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD (AT&L)).[25] Furthermore, the phrase, "in the vicinity of" limits how far that assistance can extend.

Such limiting restrictions make the immediate response authorities one sided, allowing for garrison/unit commanders to respond to emergencies in the immediate area around their facility only upon request by a competent authority. An MAA, by contrast, is a much broader method of both providing and receiving assistance when dealing with an urgent fire suppression need.

Requirements for a Mutual Aid Agreement

Building good relationships throughout the community and surrounding fire departments through mutual training and support is important and benefits the communities both on and off an installation. An MAA allows those working relationships to continue despite changes in personnel, mission, and the inevitable loss in understanding due to the passage of time.

Before two parties enter into an MAA, they must first determine whether there's a possibility that one might need the other's resources to combat fires or to respond to extraordinary events. If not, then an MAA is not beneficial. However, sometimes it can take a tragic event to show the benefit of mutual aid. For example, on 12 July 1973, a disastrous fire at the National Personnel Records Center destroyed approximately 16–18 million Army and Air Force Official Military Personnel Files. The fire burned for four and a half days and took the participation of forty-two fire districts to combat the blaze.[26] A standing, cascading MAA could have produced more manpower and equipment in a timely fashion, resulting in a reduction in time the fire burned and less destruction.[27] This is especially important in light of the Comptroller General's decision that the federal government could not reimburse the forty-two fire districts.[28]

Another reason for a Garrison Commander to seek an MAA is specialized training, where each respective fire suppression team trains on the greatest likely threat to its jurisdiction. For example, a fire at an ammunition factory off-base may require specialized training and protective equipment which the Army uniquely possesses. Similarly, a rare Class D fire (a fire involving sodium, titanium, and magnesium) on an installation may be more appropriately handled by a civilian firefighting team who has trained in the use of powder for fire suppression. In this scenario, a cascading MAA would allow each signatory to call on the other for those specialized resources.

There are varying opinions regarding the breadth and detail required in an MAA and while this paper does not attempt to resolve that debate, there are certain provisions required by law. First, each MAA must be formally documented and only the Garrison Commander, acting on behalf of the Secretary of the Army, may execute an MAA with an authorized representative of the fire organization.[29] Determining who or which authorized representative of the appropriate fire organization(s) is the proper signatory may not be easily apparent. In many jurisdictions, there are several fire organizations operating in the same area, which may require multiple signatories to the MAA. For example, in Monterey County—the area where the Ord Military Community and the Presidio of Monterey are located—the installation may employ services from the County of Monterey, as well as services from the municipalities of Seaside, Marina, Monterey, and Pacific Grove.

Mutual aid agreements with multiple signatories result in the most comprehensive coverage and were anticipated by Congress.[30] Furthermore, current Army policy also emphasizes the importance of mutual aid provided by multiple partners.[31] In circumstances where there may be several interested municipalities, localities or jurisdictions, each of their fire organizations may be a signatory to the MAA.

Second, an MAA must address the covered response services and permit the external agencies to visit for preplanning purposes.[32] Whatever the services provided, MAAs should also clarify that support under the agreement is voluntary and determined on a case-by-case basis; so long as supporting the local community does not interfere with the readiness posture of the Army installation's fire department. Furthermore, the installation receiving a request for assistance should immediately inform the requesting agency if, for any reason, assistance cannot be rendered.[33]

Next, each MAA must define the area of coverage and include a provision that states each party will agree to participate in a mutual response system that, when requested, will dispatch the most appropriate response resource(s) available to the incident location, without regard to jurisdictional boundary lines. Additionally, the MAA should state the installation may recall loaned resources to the extent necessary to provide for its own protection.

When determining the coverage area of an MAA, drafters should consider the distance from the facility for planning and response contingencies and not necessarily limit the response location to the vicinity of the installation. The response area and duration of fire suppression allowed under an MAA is much broader than that allowed under 42 U.S.C. § 1856b or the immediate response authority.[34]

However, as a best practice note, a savvy judge advocate will have some in-depth conversations with their installation's Director of Emergency Services, as well as the Garrison Commander, as to how far fire suppression team assistance should be extended. Nonetheless, it is inherently a Garrison Commander's decision as to how much risk they may wish to assume in committing firefighting assets too far away to be recalled in a timely manner to an emergency at the home station.[35]

Both the Army and the Air Force have followed DoD guidance when entering into cascading MAAs. The Army deployed F&ES assets to support numerous California fires through activation of cascading MAAs from local, county, and state jurisdictions. The Air Force has a cascading MAA between Beale Air Force Base and the California Fire and Rescue Mutual Aid System, Yuba County Operational Area Fire and Rescue Coordinator's Office, and other locations throughout California. Similarly, a Garrison Commander has the flexibility to incorporate all available assets regardless of State, county line boundaries,

National Guardsmen practice containing wildfires at the Oregon Department of Public Safety Standards and Training in Salem, Oregon. (Credit: John Hughel, Army National Guard)

or the contiguousness of counties when considering the best suppression resources to employ.

In addition to minimum and maximum potential areas of coverage, an MAA should also include a provision that states a signatory may not be able to fully comply with the all of the provisions of the MAA, depending on the nature and scope of each incident and the resources available. Such a provision recognizes the various strengths and weakness of each signatory's fire organization and sets expectations regarding the amount of aid that can be provided at any given moment.

Finally, no discussion of providing reciprocal services would be complete without addressing the issue of the cost of those services. An MAA is based on a mutual agreement to provide aid to each signatory; therefore, it must include the terms for the reimbursement of each party for all or any part of the costs incurred in furnishing aid to the other party,[36] as well as a waiver by each party of all claims against every other party for compensation for any loss, damage, personal injury, or death occurring in consequence of the performance of such agreement.[37]

The DoD Financial Management Regulation specifically discusses reimbursement for fire protection, stating claims pursuant to reciprocal mutual aid are to be submitted to the Federal Emergency Management Agency (FEMA) by the responding firefighting organizations.[38] A claim for reimbursement must be filed within ninety days of the incident and is limited to direct expenses or losses over and above normal operating costs including, but not limited to, items such as overtime, fuel, food, and damages to equipment engaged in fire suppression activities.[39] If the DoD files the claim for fire protection/suppression, then the reimbursement will go to the installation/fire team which responded to the fire.[40]

In addition to the required provisions, garrison commanders may want to supplement the MAA with an annex or a companion standard operating procedures (SOP) document, which can be updated as capabilities and technologies evolve. The signatories should each participate in the drafting of any annex/SOP sought in conjunction with the MAA, however, the lack of such documents should not be an impediment or delay implementation of an MAA.

In addition to the Mendocino Complex Fire in 2018, California experienced the deadliest and most destructive fire in the state's history with eighty-five persons confirmed dead in the Camp Fire and over

Army Staff Sgt. Ge Xiong checks a 600-gallon water bucket before a mission at the Mendocino Complex Fires in Lake, Colusa, and Mendocino counties California last year. (Credit: Army Staff Sgt. Edward Siguenza)

19,382 structures destroyed or damaged.[41] For each of those fires, response was swift but the rampant destruction illustrates that even a swift response by a limited force is not always sufficient for a complex incident. Instead, it took the collective local, state, and national emergency firefighting presence to contain these fires. California's situation is not unique and there will be more opportunities in the future for collective responses in multiple locations. Relationships and coordination of services should be established before the emergency and encapsulated in a reciprocal MAA. The forward-looking garrison commander and judge advocate should consider the benefits of entering into an MAA as a way to respond to the future and inevitable fire in their area. Mutual Aid Agreements facilitate mutual training and standardize response protocols, operational procedures, and command/controls. Furthermore, MAA partners are not limited to a geographic or jurisdictional area, allowing for a more comprehensive response by regional partners and greater exchange of expertise and information. Every twenty-four seconds in the United States, a fire department responds to a fire emergency.[42] By engaging in these relationships, garrison commanders can ensure they have a network in place with the necessary resources to effectively manage these disasters and protect the lives entrusted to their care as well as support the local communities in their most desperate time of need. **TAL**

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Notes

*The authors wish to thank Chief John W. Staub, Chief, Army Fire and Emergency Services and Chief T. Joyce, Fire Chief Presidio of Monterey Fire & Emergency Services for all of their insight and guidance on this topic.

1. Billy Joel, *We Didn't Start the Fire*, *on* Storm Front (Columbia Records 1989).

2. *Reporter's Guide: The Consequences of Fire*, NFPA.org, https://www.nfpa.org/News-and-Research/News-and-media/Press-Room/Reporters-Guide-to-Fire-and-NFPA/Consequences-of-fire [hereinafter *Reporter's Guide*].

3. *Mendocino Complex Information*, InciWeb – Incident Information System, https://inciweb.nwcg.gov/incident/6073/ (last visited Feb. 23, 2019).

4. The entire State of Rhode Island is 1,045 square miles. *Fun Facts & Trivia*, RI.gov, https://www.ri.gov/facts/trivia.php (last visited Feb. 23, 2019).

5. Ryan Pickrell, *The Army is Sending 200 Soldiers to Combat the Wildfires Raging Across the Western US*, Business Insider (Aug. 6, 2018), https://www.businessinsider.com/the-army-is-sending-200-active-duty-soldiers-to-fight-fires-out-west-2018-8.

6. "Each agency head charged with the duty of providing fire protection for any property of the United States is authorized to enter into a reciprocal

agreement, with any fire organization maintaining fire protection facilities in the vicinity of such property, for mutual aid in furnishing fire protection for such property and for other property for which such organization normally provides fire protection . . . ." 42 U.S.C. § 1856a.

7. Comptroller General Warren to the Secretary of the Navy, 32 Comp. Gen. 91 (1952).

8. S. Rep. No. 274, 84th Cong., 1st Sess. 2 (1955). Additionally, the Comptroller General noted that 42 U.S.C. § 1856a gave broad discretion to heads of federal installations to enter into mutual aid agreements to provide the maximum protection for federal property against fire and related disasters at minimum cost. B-222821 (Comp. Gen. Apr. 6, 1987), https://www.gao.gov/products/449612#mt=e-report.

9. U.S. Dep't of Def., Instr. 6055.06, DoD Fire and Emergency Services (F&ES) Program, (21 Dec. 2006) [hereinafter DoDI 6055.06]. F&ES includes firefighting, fire prevention, structural, firefighting, aircraft rescue firefighting (ARFF), hazardous material (HAZMAT) response, emergency medical service response, and disaster preparedness planning. *Id.*

10. First Army policy regarding fire and emergency services and mutual aid was Army Regulation (AR) 420-90, *Fire and Emergency Services*, 25 September 1992. Current policy continues to emphasize the importance of mutual aid ("Directors of Installation Management Command Regions will promote...cooperative mutual/reciprocal aid agreements with civil sector fire departments."). U.S. Dep't of Army, Reg. 420-1, Fire and Emergency Services para. 25-4h (25 Sept. 1992) (RAR 24 Aug. 2012) [hereinafter AR 420-1].

11. "Agreements should facilitate and complement local and regional joint planning for large-scale incidents that will have far-reaching consequences." *Best Practice, Mutual Aid Agreements: Types of Agreements,* Homeland Security Digital Library, https://www.hsdl.org/?view&did=765527.

12. *Id.* The quicker the response, the more lives that could be saved.

13. E-mail from Joyce, T., Fire Chief, Presidio of Monterey Fire and Emergency Services, to LTC William Stephens (Feb. 19, 2019) (on file with author).

14. "Chemical, biological, radiological, nuclear, and explosives (CBRNE) terrorism will demand unique and often scarce resources. Mutual aid agreements should seek to ensure the timely arrival of vital equipment and personnel." *Id.*

15. 10 U.S.C. § 2465, *Prohibition on contracts for the performance of firefighting or security-guard functions.*

16. Fire & emergency services are expensive; the Army's program is approximately $496 million annually, and that only covers funding civilian personnel requirements to approximately 71% of the modeled requirement.

17. Homeland Security, National Response Framework (3d ed., June 2016), https://www.fema.gov/media-library-data/1466014682982-9bcf-8245ba4c60c120aa915abe74e15d/National_Response_Framework3rd.pdf.

18. The POM fire station is five miles away from the installation versus the City Monterey station being located seven miles from the installation. Email from Joyce, T., Fire Chief, Presidio of Monterey Fire and Emergency Services, to LTC William Stephens (Feb. 19, 2019) (on file with author).

19. "Each such agreement shall include a waiver by each party of all claims against every other party for compensation for any loss, damage, personal injury . . . ." 42 U.S.C. § 1856a. Such language anticipates agreements that include more than two signatories.

20. "Mutual aid . . . permits routine assistance to and from local jurisdictions as defined in a mutual aid agreement." DoDI 6055.06, para. E5.1.4.

21. 42 U.S.C. § 1856b. In the absence of any agreement authorized or ratified by section 1856a of this title, each agency head is authorized to render emergency assistance in extinguishing fires and in preserving life and property from fire, within the vicinity of any place at which such agency maintains fire-protection facilities, when the rendition of such assistance is determined, under regulations prescribed by the agency head, to be in the best interest of the United States. *Id.*

22. Immediate response authority allows commanders to "temporarily employ resources under their control, subject to any supplemental direction provided by higher headquarters, and provide those resources to save lives, prevent human suffering, or mitigate great property damage in response to a request for assistance from a civil authority, under imminently serious conditions when time does not permit approval from a higher authority within the United States." U.S. Dep't of Def., Dir. 3025.18, Defense Support of Civil Authorities (29 Dec. 2010) para. 4.g. [hereinafter DoDD 3025.18].

23. Emergency response authority allows commanders, "in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because: (1) Such activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or, (2) When duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions. Federal action, including the use of Federal military forces, is authorized when necessary to protect the Federal property or functions." DoDD 3025.18, at 16 (Glossary).

24. DoDD 3025.18.

25. DoDD 3025.18 implementing 32 C.F.R. § 185.

26. Walter W. Stender & Evans Walker, *The National Personnel Records Center Fire: A Study in Disaster,* Nat'l Archives, https://www.archives.gov/files/st-louis/military-personnel/NPRC_fire_a_study_in_disaster.pdf.

27. *Id.*

28. To the Administrator, General Services Administration, 53 Comp. Gen. 410 (1973).

29. AR 420-1, para. 25-9e(1) and (2). Furthermore, garrisons must review and update all MAAs every other year. *Id.*

30. *See* 42 U.S.C. § 1856a. "Each such agreement shall include a waiver ***by each party*** of all claims against every other party for compensation for any loss, damage, personal injury . . . . Any such agreement may provide for the reimbursement of ***any party*** for all or any part of the cost incurred by such party in furnishing fire protection for or on behalf of ***any other party***." *Id.* (emphasis added).

31. "Directors of Installation Management Command Regions will promote . . . cooperative mutual/reciprocal aid agreements with civil sector fire ***departments.***" AR 420-1, para. 25-4h (emphasis added). As a practice note, installations which are in major metropolitan areas may consider including as many signatories as possible. This may have the added benefit of gaining greater visibility of assets for fire and emergency services among each of the respective jurisdictions.

32. DoDI 6055.06. F&ES include firefighting, fire prevention, structural firefighting, firefighting ARFF, HAZMAT response, emergency medical service response, and disaster preparedness planning. *Id.*

33. AR 420-1, Figure S-1.

34. As previously noted, an installation garrison commander must follow the guidance of 32 C.F.R. § 185 and DoDD 3025.18 when responding to a request for support from local authorities outside of the MAA coverage. The garrison commander could only provide "emergency assistance in extinguishing fires and in preserving life and property from fire, within the vicinity of any place at which [he] maintains fire-protection facilities, when the rendition of such assistance is determined, under regulations prescribed by the agency head, to be in the best interest of the United States." 42 U.S.C. § 1856b. If emergency support is provided outside the scope of the MAA for more than seventy-two hours, then the garrison commander must seek approval to provide continued support from USD (AT&L).

35. The garrison commander should also be cognizant of the potential for negative publicity if the fire teams are deployed too far from their home station. For example, it should require a serious national emergency for fire teams from California to be deployed to fight wildfires in Kansas.

36. DoDI 6055.06. Additionally, MAAs must conform to 15 U.S.C. § 2210, which provides for compensation to municipalities for direct costs and losses (over and above normal operating costs) sustained while fighting fire on Federal property.

37. 42 U.S.C. § 1856a. Furthermore, this provision can be tailored to add other specifications, such as indemnification language, with the claims process and contact information for third party claims, detailed in a separate document, should this be desired.

38. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 10, ch. 12, *120318 (Sept. 2015) [hereinafter DoD FMR].

39. *See* https://www.usfa.fema.gov/grants/firefighting_federal_property.html (last visited Nov. 17, 2018). The only costs which cannot be expensed and reimbursed is wear and tear on the vehicles. E-mail from Staub, J. W, Chief, Army Fire and Emergency Services, to LTC William Stephens (Nov. 11, 2018) (on file with author).

40. DoD FMR, section C.12-24.

41. Morgan Winsor, *California Wildfire Death Toll Climbs to Eighty-Seven, Almost 500 Still Unaccounted For,* ABCNews (Nov. 23, 2018), https://abcnews.go.com/US/relentless-california-wildfires-leave-87-dead-600-unaccounted/story?id=59262994; *Camp Fire: Incident Overview*, InciWeb – Incident Information System (Nov. 25, 2018), https://inciweb.nwcg.gov/incident/6250/.

42. *Reporter's Guide: supra* note 2.

AROUND THE CORPS

LTC Edward C. Linneweber, right, in the reflective vest, leads members of the Officer Basic Course on a morning run through Grounds at the University of Virginia. (Credit: Chris Tyree).

A miniature replica of the The Lone Sailor statue sits in the office of James E. McPherson, the Acting Under Secretary of the Army. McPherson is a lone sailor of sorts: he is the highest-ranking official of the Army who had a career in another service, having served in the Navy and ultimately becoming its Judge Advocate General. (Credit: Aaron C. Sweet, United States Government Publishing Office)

No. 1

From MP to Under Secretary

Acting Under Secretary of the Army James McPherson Discusses His Life of Service and Unique Career Path

By Sean P. Lyons

Before his appointment in late June to Acting Under Secretary of the Army, James E. McPherson, then the General Counsel of the Army, sat down with The Army Lawyer *to talk about his life and military career. McPherson, a former Judge Advocate General of the Navy who began his military career in the Army as part of the Military Police (MP), previously served as the executive director of the National Association of Attorneys General and as the general counsel of the Department of Defense's Counterintelligence Field Activity. McPherson is a recipient of the Distinguished Service Medal, the Legion of Merit, and the Meritorious Service Medal.*

TAL: Can you tell us how you went from Army MP to Navy TJAG to General Counsel of the Army? It's not exactly a typical career path.

MCPHERSON: Good question. I was an undergrad in 1972 at Bethel College in St. Paul, Minnesota. I was from San Diego, but Bethel was a church-affiliated school, and they offered me scholarships and financial aid and I was dying to get away from the parents, the usual adolescent stuff. I found out as a freshman that I was likely going to be drafted for Vietnam in the fall of my sophomore year. And I thought, "That's crazy. Why don't I join?" When I went home for summer break, the first thing I did was go to all the recruiter offices. At the time, the Army was the only service that had a three-year enlistment. All the rest were four, five or six. That made it obvious: I'm going in the Army.

So instead of going back to college, off I went to Fort Ord, California, for basic training. Then to Fort Gordon, Georgia, where the MP school was at the time, for AIT. My first duty station was at the Presidio in Monterey, California, which was like being a park ranger. And then I went to Pusan, South Korea, and I was very fortunate because I was in the Eighth Army, which was pretty far from the DMZ. We were just security guards, watching the offloading of equipment and storage and everything else from a ship onto a railcar. I did that for a little over a year. And then my next assignment was the 1st Infantry Division at Fort Riley, Kansas. The crime rate on Army posts at the time was off the charts; drugs everywhere. It was like suddenly being thrust into the job of a cop in New York City. I always planned on going back to school. So while I was in the Army, I took advantage of taking classes wherever I went. I had credits from all over the place. Put all those credits together and I was actually a junior when I got out of the Army and started back in college at San Diego State.

After I graduation, I took the LSAT. I scored pretty good and got into University of San Diego Law. But at that time the economy was in fairly bad shape and people were graduating law

McPherson goes over notes with his Executive Officer, Colonel Jeff A. Bovarnick, center, and his Legal Administrator, Chief Warrant Officer Two, Eric R. Boatwright. (Credit: Aaron Sweet/GPO)

school and bussing tables at Denny's. Not that that's a bad career, but not what you plan to do when you were in law school. So I started thinking maybe there's a program out there where I can join now, whether it be a corporation or somewhere, and have a guaranteed job upon graduation and passing the bar. And I wondered if the military had something like that because I was familiar with JAGs. Being an MP, I could remember testifying in courts-martial and stuff. So I went to all the Services, except the Coast Guard, only because I did not know if they had JAGs. I went to all the Services and there was only one Service that offered a student program at that time where you could join while still in law school and it was the Navy. That's how I went in the Navy JAG Corps. There was no money involved for tuition, but it was a guaranteed job. I was commissioned as an ensign in the Naval Reserve while in law school and when I graduated I came on active duty in the Navy JAG Corps.

Had you intended to make it a career at that point?

No. I had always intended to stay in for the three-year gig and then get out.

How did you move up from that to TJAG?

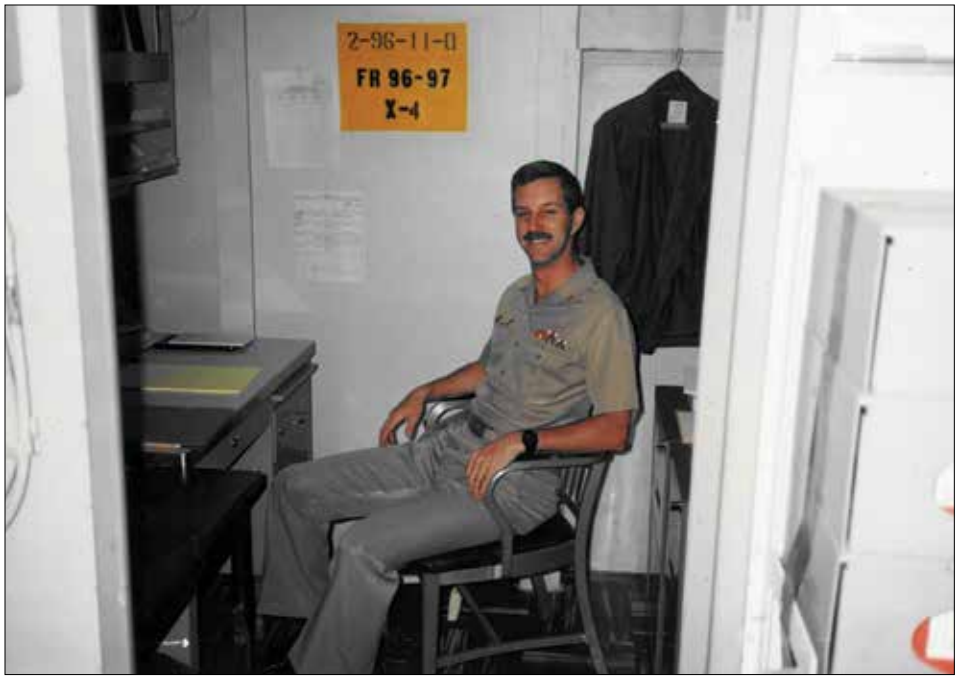
Well, first, TJAGLCS is what made the Navy a career for me. As mentioned, I always intended to get out after three years. I went to the Philippines as an SJA, and then I was the SJA on the U.S.S. Theodore Roosevelt and had a great time. By the time I completed that tour, I had ten years. TJAGLCS was next. And if I went there, I would owe the Navy not only the year I spent here, but three years in addition to that. So, once I'm over the ten-year mark, I knew that it would be a career. And that was the career decision I made, to come here and then make it a career.

After TJAGLCS, I went off and did more SJA stuff. And one day I'm sitting my office—I'm the SJA at Submarine Forces Atlantic, which is in Norfolk—and my boss is a three-star. He's in charge of all the submarines in the Atlantic fleet—and I get a phone call from my detailer. He asked if I would mind filling out a nomination slate as counsel to the Vice Chief of Naval Operations. At the time, the JAG Corps had a policy that before we assign anybody to another flagstaff senior officer, we gave that officer a slate of three names and their bios and everything else, and then they can either hold interviews or select whoever they want. And there is always one of those who is the one the JAG Corps really wants to fill the position. And the two others have to be credible nominations, but the JAG Corps does not really want the others to be picked. The euphemism the Navy calls them is a "pair of shower shoes." So my detailer calls me up and says, "Jim, I need you as a pair of shower shoes." I said, "Fine. I'm happy where I'm at. I won't get selected. I don't have to worry about it. Yeah, you can put my name in." I figured that would be the end of it. But then he called me

about a week later and he said, "Jim, kind of weird. The Vice Chief wants to interview all three. We never had interviews before. We thought there'd just be a paper drill." So I went up to the Pentagon, first time I ever stepped foot inside the building. But I'm still thinking there's no way I will get picked. I have no Pentagon experience. I'm just a poor JAG Corps commander out there doing my thing. Well, come to find out, I didn't even know it at the time, the Vice Chief of Naval Operations then was a guy by the name Admiral Joe Prueher. I knew Joe Prueher when he was a Captain on board the U.S.S. Theodore Roosevelt. He had been the Air Wing Commander during our deployment and I had worked with him on a couple of investigations. To the point that once when we were in port visiting Wilhelmshaven, Germany, one of his pilots got in trouble and arrested by local German police and he came and grabbed me and said, "Jim, can you help me come and get this guy out of jail?" I said, "Sure, Captain." I went with him to the Wilhelmshaven Police Station and handed out ball caps and coins to the local police and they released the lieutenant to us. So Admiral Prueher knew me. So I come walking into his office for the interview and he says, "Jim, how you doing? Been a long time since I've seen you." And I said, "Wow, Admiral, I'm doing great. But I've only been promoted once since we last worked together and you've been promoted four times. You're doing much better than I am." He laughed. And the interview consisted of him saying, "So would you like to work for me again?" And I said, "That'd be great."

And so you are at the Pentagon, and it's just a matter of luck and pluck from there?

Yes, essentially. From then it just—I did okay in that job. Admiral Prueher left, went to PACOM. And the person that came behind him was Admiral Jay Johnson. He was the Vice Chief for about six months until Admiral Mike Boorda committed suicide. Then Admiral Johnson became the Chief of Naval Operations (CNO), asks me to be his counsel and that was the springboard to being selected for Deputy JAG. It's a strange story. It's luck for sure, right place right time. But it is also working hard and doing a good job wherever you find yourself.



McPherson in 1991, serving as the Legal Advisor (the equivalent of a senior judge advocate) on board the U.S.S. Roosevelt. The yellow sign above him, required in every room of a naval ship, gives his office's location on the ship. (Courtesy: James E. McPherson)

Your father was a veteran. Was he in the Army?

He was in the Navy. He was a Seabee. We—my brother and I—knew he was a Seabee in the Navy. But he never talked about what he did and we never asked. And I am sorry about that to this day. He passed away early. He was an alcoholic; drank, smoked, abused himself. He died of emphysema when he was sixty-four. A couple of years after he passed away—I was a lieutenant commander at that time—I began to wonder what his record looked like. So I wrote to the records center in St. Louis and told them who I was and that I was interested in getting my dad's service record.

He never talked about it? That's how you found out, through a records request?

Yes. So they sent me the service record and I looked through it and I discovered that he was assigned to a Seabee battalion and that he had an award that indicated he had participated in the D-Day operation. I wondered what that was all about. I contacted the Seabee museum at Port Hueneme, California, and asked if they had any records from his battalion in World War II, and it turned out they did. They sent me the records, and it included the after-action report from D-Day, and sure enough, his battalion's mission was at Omaha Beach. They landed around noon on D-Day. Their job was to build that pontoon pier you see coming out from Omaha Beach on D+2, D+3. That Seabee battalion built that pier and my dad was part of that battalion.

And so he spent D-Day on Omaha Beach. And you know, the interesting thing is something clicked when I learned that. I grew up in San Diego, ten miles from the beach. And during the summer time, my mother would load all the neighborhood kids and me and my brother in the station wagon and we'd go to the beach. She was a beach person. She loved the beach. We would go to the beach. My father never went to the beach. Not once. And I used to think to myself "that old bum." I mean, look at this, the family goes to the beach and he never goes. And when I read that report about Omaha Beach, it all came home. No wonder he never went to the beach. And to this day, I wish I would have sat down with him with a tape recorder and said, "Dad, tell me about World War II." So his unit spent the next six months or so in Normandy. And then they went back to the United States, back

to Port Hueneme on the West Coast, and then got on a transport to make the D-Day landing on Okinawa in April 1945.

Okinawa too?
Yeah. Okinawa too. Yeah, I never knew. But that's his generation.

So you guys never talked about—when you were in the Navy or the Army, you guys never talked about that?
He never mentioned it.

And when you went to law school and you became a judge advocate, was he still alive?
Oh, yeah. He was still alive.

So this Seabee who had been at Normandy and Okinawa never said anything about his son being a lawyer in the military?
Never, ever. Never talked about it. Isn't that sad? I never captured that for my kids, my grandkids. Never got that tape recording—

But also, your relationship to him wasn't made more whole.
My relationship too. It was never really good. He was abusive. Wasn't around a whole lot. He provided for the family; worked hard. He was in construction, but, you know, he always had these ghosts that chased him. And I never knew what the ghosts were.

Until you—
Until I looked through his record. Right.

Let's shift gears. I was talking to some of the judge advocates here and nobody really thought they had a clear understanding of the General Counsel's operations. What do you do? How does that work within the hierarchy of the Army?
Absolutely. So Headquarters, Department of the Army, is divided into two parts. One part is called the Secretariat and those are the political appointees: the Secretary, the Undersecretary, the Assistant Secretaries, and the General Counsel. When I was on active duty as the Navy JAG, we would call the political appointees "just another empty suit." So now I am "just another empty suit." And the Secretariat does policy and oversight; that's the mission of the Secretariat. So that's the Secretariat side. On the other side is the Army staff. The Army staff takes those policies, turns them into plans and programs, and then sends them out to the field where they are implemented. So the easy way to think of it is on the Secretariat side, the political appointee side, and their staff, my staff, we do policy. And on the Army staff side, those working for the Chief of Staff, they do planning, program, implementation. That is the general idea of the divide, and there are gray areas in between all of those things. My client is the Secretary of the Army and all the Assistant Secretaries. I have an exceptional staff of thirty-five to forty attorneys in the building. We divide up into portfolios that support the Assistant Secretaries. There is a lot of overlap with TJAG's offices in the Pentagon, but the key to that overlap is ensuring there is no friction in the relationship between General Pede, General Risch, and me. That is what it is all about.

I do hear about a certain historical tension between the two sides.
Oh, sure. Absolutely, there's been a tension.

And what's that's like, particularly as somebody who used to be a Judge Advocate General?
So when I was the Deputy JAG for the Navy, and then TJAG at that time, the relationship between the Army JAG and the Army General Counsel—more so the Air Force TJAG and the Air Force General Counsel—was not the best. From my perspective, they were at each other's throats constantly for a variety of reasons. It got so bad at one point that the TJAG of the Air Force and the General Counsel of the Air Force refused to be in the same room with each other. Think about that—that is absolutely astounding. Juxtapose that to the Navy. Alberto Mora was the Navy General Counsel and he was such a gentleman, such a professional. The first day that I met him, I was the incoming Deputy and he said to me, "Jim, my philosophy is that this is one law firm and we are equal partners in that law firm." And he not only had that philosophy, but he actively put that philosophy into action every single day. We had a tremendous relationship. We became very good friends. I stay in touch with him now. He works for the ABA. We see each other, go to lunch together, all that sort of stuff. We became not just professional colleagues, but friends.

So, when I was tagged to come to this job as the Army General Counsel, I resolved that I was going to have the same relationship with General Pede that I had with Alberto Mora, and the first time I reached out to General Pede, I shared that story with him, and I said, "General, I want to have not just a good working relationship with you, I want to have a friendship with you as well because I want our people to look at us, you and me, and see how well we work together and they will follow our lead work together well." And it's true.

So you used that template from the Navy.
Absolutely. I absolutely did. And it works. One of the things I touch every single day is—and my XO will tell you one of the first questions I have if an issue comes up is—whose lane is this in? Does this belong to General Pede, and if it does, it is his. Every once in a while, my staff will say, "Oh, but, sir . . . ." And I'll say, "No, that belongs to General Pede's staff. We will assist them. As a matter of fact, I want you to call up your counterpart and say 'I know you're working this issue, how can we be of help?'" But General Pede has lead and he briefs the Secretary, I have no problem with that. He corresponds directly with the Secretary. I not only do not have any problem with that, I ask him to do that. We de-conflict those issues before they ever arise and our people see that.

Was General Pede surprised when you first approached him?
You'll have to ask him that. But I think he was a little taken aback.

Just because he aware of that historic tension?
When I came into the job, I learned that there were certain portions of my staff that did not get along well with their counterparts in OTJAG. Several of them have moved on, which was good. The ones that are there now—the leaders that are there

now, get along with their counterparts very well. So yes, it's all about relationships.

So in your role, you're a political appointee. You have to account for the social and political implications that come with a policy, for example, transgender Soldiers. But on the other hand, you're a lawyer, and as someone who was TJAG, you know the institutions limits and rules. How do you work that? How does that all come together?

It may sound corny, but I fall back upon the oath that I took, and that is one of the things that I learned when I was a young SJA. I had a great mentor who said to me, you know, the first job of a staff judge advocate is to be the constitutional conscience of their command. You are the constitutional conscience of your command and I've always touched upon that no matter what assignment I went to, and I touch upon it with this assignment as well. Yes, I am a political appointee, but who or what did I take an oath to? I did not take an oath to President Trump. I did not take an oath to the Republican Party. I took an oath to the United States Constitution. So that is my touchstone and I come back to that and I actually think about that frequently. When facing something like transgender issues, you ask, "What constitutionally is the right thing to do here, balancing what the Army's needs against what the Constitution requires?" And I'm of the philosophy that those can always be resolved; there's no unresolvable issue in that formula. That's what I come back to all the time. What's the constitutionally right thing to do in this case? It is not an outright ban on transgender individuals. It comes back to readiness more importantly than anything else. That the more important part is that we are ready to fight our nation's wars. So people who are transgender—there are people who are transgender that do not suffer any behavior health issues whatsoever. They do not have gender dysphoria, which is the term for it, and they can serve. We do not care what they do on their time off on the weekends. If a man wants to wear women's clothing, or if a woman wants to wear male clothing, on the weekends, that is their right. They can do that.

When it becomes a problem is when the gender dysphoria is involved, or they suffer from that and that requires treatment, and we just do not have the facilities to treat that and still maintain a ready force. One of the touchstones of being ready is deployability, so we require our troops to be deployable. You have to be deployable to be on active duty. To treat somebody who has gender dysphoria is a long process, during which time they would not be deployable. So you would take this set of Soldiers, Sailors, Airmen, Marines out of the equation of being deployable; out of the equation of being Soldiers who are ready to go fight our nations wars, and they would be over here and you could not use them for lengthy periods of time while undergoing this therapy. And that is going to be true for not just people that suffer from gender dysphoria, but people that suffer from any physically debilitating disease or injury.

What do you think is the greatest legal challenge that the Army faces today?

The greatest legal challenge we face today is what to prepare for tomorrow. There are legal issues out there that surround cyber. How we are going to fight the next war, whether it be tomorrow or twenty years from now. How do you apply rules of engagement to cyber warfare? What a difficult question. Those are tough questions. One of the jobs that Chuck Pede and Stu Risch have is training the young JAGs so that they are able to provide that advice when they are SJAs twenty years from now. So what should they be training for now? How are we able to look beyond the horizon, figure out what combat is going to look like, and what are the legal issues that are going to be surrounding it?

So, given that, what would you say to your typical captain or major out there, what sort of advice would you have for them?

My advice to the young captains out there is to know your client just like any attorney would. So if I worked for Boeing, I would know what Boeing's product line is. I would know what they market and I would know what their plan is for future marketing. I would study and know all the things about my client to effectively represent them. My advice to the young captain is to get to know your client. If you are assigned to an infantry brigade, know what that infantry brigade does. What is their mission? What weapons do they use? What is the capability of those weapons? Go out and spend time with your clients—get down to the unit; go to the field with them. Talk to them and ask questions about what they do. Everyone loves to tell you about their job and what they do in the Army.

To bring it back to my Navy days, what I used tell the young lieutenants in the Navy is if you are assigned to an aircraft carrier I was assigned to an aircraft carrier—make it your mission to learn all you could about that carrier. I made it my mission to study the carrier and learn everything about it—how it would fight a war, what the airplanes were, what their capabilities were, what the tactics were. Get to know my client. The hardest part of that was when I went to submarines. When I reported into Submarine Forces Atlantic, my predecessor had been doing just strictly legal stuff; reviewing investigations, doing Freedom of Information Act, that sort of stuff. And I said this is not what I want to do. I want to get involved in the operational part of what this command does, so I went to my Chief of staff and I said, "Chief of Staff, I want to become an operational lawyer here in the submarine community. How do I do that?" And he said, "Oh, let me show you." They sent me to classes, sent me to schools, got me security clearances. Eventually it came to the point where I was actually helping them—preparing mission plans and other operational documents because I knew my client. I knew the capabilities of that submarine. I knew their tactics. I knew their weapon systems so I could give better advice to my client because I knew what my client's product line was. So I would say to the young captains in the Army what I said the young lieutenants in the Navy: know your client.

Time for one last question: Army/Navy game, who do you root for?

[Laughing] So, I worked hard on this, but I have to always pause because it does not roll off the tongue naturally: Go Army, Beat Navy.

(Credit: istockphoto.com/kanyakits)

No. 2

Welcome to the Wild West

A Guide to Arming in Stand-Alone Facilities

By Major Julie A. Worthington

It is painful enough when we lose members of our armed forces when they are sent in harm's way, but is unfathomable that they should be vulnerable for attack in our own communities.[1]

Introduction

On 16 July 2015, in only seven minutes, Mohammad Youssef Abdulazeez attacked a military recruiting center and a Navy Operational Support Center in Chattanooga, Tennessee.[2] In the intial three to five minutes, Abdulazeez killed four Marines and mortally wounded a Sailor.[3] In cases where the time was ascertainable, seventy percent of active shooter incidents were over in five minutes or less.[4] However, nationwide, only 24.9% of the time do police arrive on the scene within five minutes of the initiation of a violent crime.[5] Therefore, in the vast majority of active shooter incidents, the attack is over before armed police even arrive at the scene.[6]

Military stand-alone facilities (SAFs) provide soft targets for "Homegrown Violent Extremists" (HVEs) to engage and therefore present "challenging security environment[s]."[7] Stand-alone facilities such as military recruiting centers, reserve centers, and Reserve Officer Training Corps facilities, are frequently located in urban areas easily accessible to the public and unprotected by force security protection measures such as gates, guards, or even fences.[8] United States Army Reserve Command (USARC) has approximately 1,400 SAFs nationwide[9] and United States Army Recruiting Command (USAREC) has approximately 1,500 recruiting centers nationwide.[10] These SAFs are not located on military installations and primarily rely on local law enforcement (LE) for protection; thus, these facilities present an alluring high-value target of opportunity for our enemies, both foreign and domestic, to attack.

Following the Chattanooga, Tennessee, attacks, Secretary of Defense Ashton Carter (SecDef Carter) directed the Service Secretaries on 2 October 2015, "to arm appropriately qualified individuals at select off-installation facilities evaluated to require further protection."[11] This article will synthesize the various authorities implementing this important decision and provide a resource for Army active and reserve component commanders and their legal advisors to utilize. Additionally, this primer will highlight the 18 November 2016, reissuance of Department of Defense Directive (DoDD) 5210.56, which establishes the policy and assigns responsibilities for arming, carrying of firearms, and the use of force by Department of Defense (DoD) personnel when related to their official duties.[12] Department of Defense Directive 5210.56 also permits DoD personnel to carry privately owned firearms (POFs) on DoD property in limited circumstances.[13]

This article is not an all-encompassing resource to address every requirement prior to arming or legal issue that may arise when arming Army personnel for self-defense. Rather, Part II

Family members spend their last few moments with Soldiers of the New Jersey Army National Guard's Charlie Company, 1-114th Infantry Regiment, after a departure ceremony at the Blackwood, N.J. Armory in January. (Credit: U.S. Air National Guard Master Sergeant Matt Hecht)

provides an overview of historical events that led to the arming of SAFs. Part III identifies the arming authorities in accordance with DoDD 5210.56, *Arming and the Use of Force*, and with what type of firearm (government issued or POF) personnel may be armed. Part III also provides an analysis of the DoD decision to allow personnel to carry a POF for personal protection while on DoD property and how that request differs from arming qualified individuals. Part IV examines the applicable rules for the use of force (RUF).[14] Lastly, Part V recommends training for judge advocates (JAs), as well as crucial force protection or security best practices when advising commanders on arming qualified Army personnel.

Overview of Decision to Arm Stand-Alone Facilities (SAFs)

The Chattanooga shooting—the impetus for the decision to arm SAFs—is tragically only one of the most recent attacks committed against unarmed military sites. From March 2008 to July 2015, four attacks occured on recruiting centers nationwide,[15] with terrorism motivating three of the four attacks.[16] In 2009, Abdulhakim Mujahid Muhammad shot and killed Private William A. Long and injured Private Quinton Ezeagwula, both of whom were taking a break from recruiter duties and standing outside a recruiting station located in a "bustling suburban shopping center."[17] Muhammad later wrote a letter to the judge stating, "I'm affiliated with Al Qaeda in the Arabian Peninsula. Member of Abu Basir's Army. This was a Jihad."[18] Yonathan Melaku, a former Marine reservist,[19] pleaded guilty in January 2012 to "five separate shootings at military installations in northern Virginia between October and November 2010 and attempting to injure veterans' memorials at Arlington National Cemetery."[20] Prosecutors stated, "[Yonathan Melaku] had 'a large amount of jihadist material on his computer.'"[21] Following the Chattanooga attacks, Federal Bureau of Investigation (FBI) Director James Comey explained the shootings were "motivated by foreign terrorist organization propaganda."[22] Law enforcement agents discovered Abdulazeez's diary where he wrote about his desire to "become a martyr" and discovered online searches for "militant Islamic 'guidance' on committing violence" that would absolve in the afterlife his sins on earth.[23] Agents also discovered in the weeks preceeding the shooting Abdulazeez had viewed Anwar al-Awlaki's videos.[24] Despite the lack of evidence tying Abdulazeez's killings to the Islamic State of Iraq and Syria,[25] Abdulazeez sent a text to a friend only hours before the shootings "with a link to an Islamic verse, which states, '[w]hosoever shows enmity to a friend of Mine, then I have declared war against him.'"[26]

In the days following the Chattanooga attacks, a flurry of activity addressing the issue of arming servicemembers ensued at both the state and national level. Four Governors increased the security of National Guard (NG) recruiters and facilities in their states by authorizing arming of recruiter personnel for self-defense or relocating recruitment centers to armories.[27] Between 20 July and 22 July 2015, Congressmen introduced ten different bills in both the House of Representatives and the Senate regarding firearm access, including POFs, by military personnel.[28] On 29 July 2015, SecDef Carter requested recommendations from the Secretaries of the Military Departments, the National Guard Bureau, and the Combatant Commands, on how best to protect servicemembers.[29] On 2 October 2015, SecDef Carter directed the "Service Secretaries to arm appropriately qualified individuals at select off-installation facilities evaluated to require further protection."[30] Concurrently, SecDef Carter published the seven *Guiding Principles for Augmenting Security* to "guide commander-level decision-making to augment installation and facilities security with additional, armed personnel."[31]

While all seven guiding principles are germane, three are especially pertinent. First, armed DoD personnel will be trained in the RUF contained in DoDD 5210.56 and these rules will be communicated to local LE.[32] Second, it provides the "Military Departments, Services, and other Components" the authority to determine "at which level of command the decision to arm additional DoD personnel will be made."[33] Included within this decision to arm are criteria for commanders to evaluate including:

> a current assessment of the probability of the threat at a particular location, the timeliness and adequacy of protection already provided by DoD protective personnel, the timeliness and adequacy of armed response by Federal, State and local law enforcement/security authorities, and the adequacy of existing facility measures to prevent, deter, or mitigate the risk from violent attacks.[34]

Third, commanders should maximize arming "current or former uniformed military and civilian employees . . . who have had previous training in scaled use of force" such as security, law enforcement, and counterintelligence personnel before considering arming other personnel.[35]

Current Policies

Following SecDef Carter's decision to arm qualified DoD personnel at SAFs, Headquarters Department of the Army (HQDA) published Execution Order (EXORD) 011-16 and subsequently five fragmentary orders (FRAGO) from which the Army derives its arming policy. [36] Judge Advocates within United States Army Reserve Command (USARC) should consult Operation Order (OPORD) 16-013 and subsequent FRAGOs [37] for historical purposes and Operation Order 17-001 and its FRAGO, [38] which is still in effect.

While United States Army Recruiting Command (USAREC) may have armed individuals at its approximately 1,500 locations nationwide, USAREC has taken defensive measures, consisting of control access technology, perforated window film, ballistic benches, and ballistic partitions[39] just to name a few. Further, facilities will be modified to have a second point of egress to permit escape from an active shooter or any other threat.[40]

In November 2016, the DoD issued a new DoDD 5210.56, which authorized DoD Components to arm personnel in the performance of their official duties either by allowing them to open or conceal carry a government issued firearm or to open or conceal carry a POF on DoD property related to their official duties.[41] In addition, the new DoDD 5210.56 provides DoD personnel a method by which they "may request permission to carry a [POF] on DoD property for personal protection" unrelated "to the performance of official duties or duty status."[42] However, until the SecArmy implements guidance, Army personnel will not be armed except for LE personnel and those personnel performing security duties.[43]

The following subparagraphs contain guidance as specified in DoDD 5210.56. Although SecArmy has not implemented guidance based on the new directive, it is important to understand DoDD 5210.56 sets the floor for arming authorities and the ceiling on who may be permitted to carry, in either an open or concealed manner, government issued firearms and POFs. Additionally, the HQDA EXORD and its subsequent FRAGOs, as well as USARC's OPORD 17-001 and its FRAGO, are all still currently in effect.

Authority to Arm

Department of Defense Directive 5210.56 contemplates four designated arming authorities dependent upon two factors: the owner of the firearm (government or privately owned) and whether DoD personnel will carry the firearm open or concealed.[44] A commander in the rank of O-4 "or above in the chain of command or the civilian equivalent in the chain of supervision" is the arming authority to open carry "government-issued firearms on or off DoD property" in the performance of official duties.[45] In order to conceal carry a government issued firearm on or off DoD property in the performance of official duties, the arming authority "must be an O-6 commander or above in the chain of command or the civilian equivalent in the chain of supervision."[46] The arming authority "[f]or the concealed or open carrying of . . . [POFs] on DoD property in connection with official duties . . . is the Secretary of the Military Department concerned, the Chief of Staff of the Military Service concerned, or the Defense Agency or Activity director or their deputy directors."[47] The arming authority to permit the open or concealed carry of POFs on "DoD property for personal protection" unrelated to the indvidual's "official duty or duty status" must be "[a]t a minimum . . . a commander in the grade of O-5 or civilian equivalent."[48]

Armed Qualified Personnel

Commanders must use their best judgment in choosing whom to arm in their official capacity with the massive responsibility of protecting their fellow servicemembers, civilians, and facilities. All commanders must ensure qualified individuals, before being authorized to carry a firearm, "have been properly screened in accordance with the provisions of Chapter 44 of Title 18, U.S.C.; DoD 5200.2-R; DoDI

The 69th Regiment Armory, located in Manhattan. The building, built in 1906, still houses the headquarters of the New York Army National Guard's 1st Battalion, 69th Regiment. (Credit: istockphoto.com/Warren Eisenberg

[Department of Defense Instruction] 5200.46; the Lautenberg Amendment; and DoDI 6400.06" and "must complete DD [Department of Defense] Form 2760."[49] The new DoDD 5210.56 allows the same arming authority who chose to arm DoD personnel to permit personnel to store the government owned and issued firearm at their residence.[50]

Once the commander chooses who to arm, those individuals must receive requisite training leading to their qualification to be armed. Armed qualified individuals "will satisfactorily complete DoD-approved firearm proficiency training and qualification and use-of-force training every twelve months, as a minimum."[51] Extensions for live-fire qualification are authorized up to an additional twelve months, however, extensions cannot "exceed 24 months since the last qualification."[52]

Privately Owned Firearms (POFs)[53]

The recent reissuance of DoDD 5210.56 now provides three ways in which DoD personnel may either open or conceal carry a POF on DoD property.[54] First, DoD personnel performing counterintelligence, law enforcement, or security duties who routinely carry a government owned and issued firearm for duty may be authorized to carry their POF.[55] Second, DoD personnel may carry a POF open or concealed in connection with official duties when there is a "threat of harm related to the person's duties or status."[56] An example of this is when a trial counsel is under threat from an accused and law enforcement or security personnel are not located on site or within a reasonable proximity.[57] As previously noted, "the arming authority is the Secretary of the Military Department

concerned, the Chief of Staff of the Military Service concerned, or the Defense Agency or Activity director or their deputy directors."[58] These authorizations may last up to a maximum of ninety days and may be renewed for as long as the threat exists.[59] Third, DoD personnel may be permitted to carry a POF either open or concealed for personal protection unrelated to their official duty or duty status.[60] This is a drastic change to past regulatory provisions that restricted government owned and issued firearms to law enforcement or security personnel and prohibited POFs on DoD property.[61]

Hypothetically, if a DoD civilian employee is in an abusive relationship and has documented the threat, the employee may request to carry a concealed POF for personal protection.[62] In this instance, the threat of harm is related purely to his personal circumstances, not his status as a DoD employee. The following subsections will address the eligibility qualification for DoD personnel to carry a POF for their personal protection unrelated to their official duty or status, including the requirements that must be contained in the request and the written authorization.

Eligibility

There are both specific and general eligibility criteria. The specific eligibility criteria requires the arming authority, after consulting with the servicing JA, to specifically determine that an exception under Title 18 U.S.C. § 930(d) applies before authorizing DoD personnel to bring the POF inside a federal building.[63] The general eligibility section contains criteria the arming authorities should consider when deciding whether to allow DoD personnel to carry a POF on DoD property for their personal protection unrelated to their official duties.[64] First, DoD personnel should be at least twenty-one years of age and not be subject to past or present action under the Uniform Code of Military Justice (UCMJ) for any offense that calls into question the fitness of the servicemember to carry a firearm.[65] Second, DoD personnel should neither be facing chanrges in federal or state court, nor should they have been preivoulsy convicted for any "offense that could result in incarceration, or for any offense listed in Section 922 of Title 18, U.S.C."[66] Third, DoD personnel must be competent with the firearm either through a government or state firearms safety course or through a safety or training course offered to the public.[67] Finally, the commander should consider whether DoD personnel have either a Law Enforcement Officers Safety Act (LEOSA)[68] credential or authorization to carry a firearm by the state in which the installation is located.[69]

Request

The requestor must affirm in writing that he meets applicable federal or state laws to carry a firearm by submitting proof of a concealed handgun license under federal or state law in the location where the DoD property is located.[70] The requestor must confirm that he will not be "under the influence of alcohol" or any other "intoxicating or hallucinatory drug or substance" that may cause drowsiness or impair judgment while carrying a firearm.[71] The requestor must also state that he meets the general and specific eligibility requirements to carry a POF and will notifiy the arming authority regarding any change in condition that would affect his ability or permission to carry a POF.[72] For instance, if the threat dissipates, it would change the requestor's need to carry a POF on DoD property. Additionally, he must acknowledge his compliance with "federal, state, and local law regarding possession and use including but not limited to those concerning the reasonable use of deadly force, self-defense, and accidental discharge."[73] Lastly, the request must contain an acknowledgment that the requestor "may be personally liable for the injuries, death, and property damage proximately caused by negligence in connection with the possession or use [of POFs] that are not within the scope of federal employment."[74] The last two requirements are because the servicemember or DoD employee is not carrying their POF in their official capacity; therefore, the RUF contained in Section 3 of DoDD 5210.56 are not applicable.[75]

Written Permission

Permission allowing DoD personnel to carry a POF either open or concealed on DoD property for personal protection unrelated to official duty or status must be in writing.[76] Similarly, to carry a POF for official purposes, permission will be valid for up to ninety-day increments as long as the threat exists.[77] The written permission will include the individual's name, duration of permit, type of firearm allowed, and whether permission is granted to carry the weapon openly or concealed.[78] The directive implies but does not specify that, to avoid issues with other DoD personnel, the individual should always maintain the written permission on their person while armed. Now that qualified individuals are armed the issue then becomes in what circumstances personnel may use force.

Applicable Rules for the Use of Force (RUF)[79]

Department of Defense personnel who are armed for official purposes "are authorized to use force in the performance of their official duties."[80] The amount of force used must be reasonable and not excessive.[81] Department of Defense Directive 5210.56 contemplates the reasonable use of less than deadly force[82] in six instances.[83] Department of Defense personnel may only use deadly force "when there is a reasonable belief that the subject of such force poses an imminent threat of death or serious bodily harm to a person."[84] There is no requirement that DoD personnel attempt less than deadly force before resorting to deadly force; however, "[i]f less than deadly force could reasonably be expected to accomplish the same result without unreasonably increasing the danger to armed DoD personnel or to others," then less than deadly force should be used.[85] There is a requirement to issue an oral warning prior to utilizing deadly force, provided the situation permits and "if doing so does not unreasonably increase the danger to DoD personnel or others."[86] This is a noticeable change from the previous directive that did not mandate an oral warning if it would "increase the danger to DoD personnel or others."[87] It is implied in the current guidance that an oral warning will increase the danger to DoD personnel, but if the danger is unreasonably increased then an oral warning is not required.[88]

Department of Defense Directive 5210.56 also contains a non-exhaustive list

of circumstances when the use of deadly force may be reasonable.[89] Armed individuals may use deadly force "to defend themselves or other DoD personnel in their vicinity"[90] and "to protect non-DoD personnel in their vicinity when there is probable cause to believe the target" of the deadly force "poses an actual or imminent threat of death or serious bodily harm."[91] Furthermore, the "defense of those non-DoD personnel . . . [must be] reasonably related to the performance of their assigned mission or to their duty status, or is within the scope of federal employment."[92] An example of this type of situation would be if a potential recruit is shot at while entering a recruiting station. An armed recruiter may use deadly force against the shooter to protect the recruit because the shooter poses an actual or imminent threat of death or serious bodily harm and it is reasonably related to the recruiter's assigned mission or to the recruiter's duty status. However, an armed recruiter may not use force to intervene against an armed robber of a nearby business. In this scenario the armed robbery is not related to the armed recruiter's assigned mission, duty status, and the defense of the nearby business is not within the scope of the armed recruiter's employment; it is within the scope of civilan law enforcement's duties.

The RUF only apply when DoD personnel are carrying a firearm in the performance of official duties, not when DoD personnel are carrying POFs unrelated to the performance of official duties.[93] Further, DoDD 5210.56 directed the Chairman of the Joint Chiefs of Staff to recommend "Standing Rules for the Use of Force consistent" with the rules contained in the directive. [94] Just like the SecArmy has not issued implemting guidance, the Chairman of the Joint Chiefs of Staff has not issued a new instruction updating the SRUF. A JA knowledgeable in this evolving armed policy is a force multiplier for their command.

Arming Stand-Alone Facilities and the Judge Advocate

Training

The JA plays a major role in advising commanders who have authority to arm as well as the responsibility in selecting the right individuals to arm. Training for JAs in this ever-changing area of arming DoD personnel is crucial. To adequately perform the function of training qualified armed individuals on the applicable use of force, it is highly recommended JA attend specialized training in this area.[95]

Best Practices for Advising the Command and Armed Personnel

The three primary methods to ensure armed DoD personnel safely handle government issued firearms or POFs are: "proper screening," "proper training," and "responsible leadership."[96] The *Guiding Principles for Augmenting Security*, as well as DoDD 5210.56, provide direction and considerations for commanders to consult prior to implementing an arming plan.[97]

Commanders must initially and continually screen individuals based on medical, judicial, and temperamental criteria. While the S-3 or G-3 should lead the commander's arming program, the legal office should maintain a running list of armed DoD personnel and should regularly cross-reference it with investigations trackers and administrative separation actions trackers. Additionally, legal personnel should also cross-reference the list of armed DoD personnel with the personnel section (S-1 or G-1) to determine if anyone armed is flagged in accordance with AR 600-8-2, and, if the flag warrants it, alert the commander.[98] The commander should immediately suspend "arming authorizations for DoD personnel who are no longer qualified to be armed" and should retrieve any government property including the firearm and ammunition.[99]

Commanders should prioritize who they decide to arm with the fullest consideration focusing on DoD personnel who have had previous training in scaled use of force or who have qualified on the firearm they will use to perform the arming duty.[100] During initial entry training, Soldiers receive training on engaging a hostile threat with an M4/M16 rifle.[101] Usually, only officers, MPs, and special forces personnel receive training on the use of a handgun.[102] Thus, JAs should strongly advise and encourage commanders, especially in the reserve component, to mandate extra training for unit Soldiers regularly assigned the M4/M16 to also qualify with a government owned service pistol.[103] Therefore, if the commander decides to arm Soldiers with a service pistol for force protection or security, the Soldier is already familiar with the preferred government issued firearm. Additionally, JAs should encourage commanders to train Soldiers at ranges or small arms training simulators that simulate active shooter scenarios.

The concept of responsible leadership entails not only permitting the right DoD personnel to arm but also ensuring DoD personnel know their left and right limits. Judge advocates should assist commanders by providing training on the Posse Comitatus Act (PCA) and the RUF most appropriate to fulfill mission requirements as well as ensure Soldier safety.[104] Department of Defense Directive 5210.56 allows arming authorities to approve the storage of a government owned and issued firearm at the person's residence.[105] If the Army should implement guidance permitting Soldiers to carry a firearm outside a SAF's boundaries, these training objectives will be essential for all armed Soldiers.

Conclusion

Army SAFs, like recruiting centers and reserve centers are located in urban areas, are easily accessible to the public due to mission requirements, and as the past eight years have clearly shown, provide unique targets of opportunity for HVEs. As the attacks in Chattanooga, Tennessee, proved, "HVE attacks occur with little to no warning."[106]

Commanders have an explicit duty "[t]o promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge."[107] Soliders and civilians serving in SAFs are "sitting ducks . . . they're stationary" targets.[108] Soldiers have difficulty understanding why the government trusts them with a firearm while deployed, yet does not trust them with a firearm to defend themselves and their fellow Soldiers in a SAF that is undefended.[109]

Recent policy changes beginning with the SecDef memo, which stated, "[t]here is no such thing as perfect security, but we can and must improve the safety of our people at thousands of sites"[110] and which authorized commanders to arm qualified

DoD personnel with government issued firearms, allows commanders the discretion and flexibility to arm DoD personnel at SAFs. The reissuance of DoDD 5210.56 permits certain arming authorities to allow DoD personnel to carry their POF for official purposes or for personal protection unrelated to official duty or status.[111] In the over two years since the directive, SecArmy has yet to issue implementing guidance with regard to DoDD 5210.56; however, commanders still have discretion to arm DoD personnel with government issued firearms for force protection or security purposes.[112] Arming DoD personnel within SAFs deters and mitigates the potential lethal risks for DoD personnel who work inside a SAF. **TAL**

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Notes

1. Barbara Starr & Theodore Schleifer, Pentagon, *Governors Boost Security for Military After Chattanooga Shooting*, CNN (July 18, 2015), http://www.cnn.com/2015/07/17/politics/chattanooga-shooting-military-protection/index.html (quoting Oklahoma Governor Mary Fallin).

2. Shelly Bradbury, *Minute by Minute: A Timeline of the Chattanooga Attack Revealed*, Times Free Press, (Jul. 23, 2015), http://www.timesfreepress.com/news/local/story/2015/jul/23/minute-minute-timeline-abdulazeezs-attack/316028/.

3. *Id.* Mohammad Youssef Abdulazeez fired on a recruiting center at a Chattanooga strip mall injuring one recruiter. Ed Payne, *U.S. Military Recruiting Center Attacks, from New York to Chattanooga*, CNN (July 17, 2015), http://www.cnn.com/2015/07/17/us/recruiting-center-attacks/index.html. He then drove seven miles to the Navy Operation Support Center where he killed four Marines, Gunnery Sergeant Thomas Sullivan, Lance Corporal Squire "Skip" Wells, Staff Sergeant David Wyatt, and Sergeant Carson Holmquist, and shot one Sailor, Petty Officer 2nd Class Randall Smith, who later died of his wounds. Bradbury, *supra* note 2. Abdulazeez also shot a Marine recruiter in the leg and Dennis Pedigo, a Chattanooga police officer, in the ankle. Ed Payne & Victor Blackwell, *Chattanooga Shooting: Fifth Service Member Dies*, CNN (July 18, 2015), http://www.cnn.com/2015/07/18/us/tennessee-naval-reserve-shooting/index.html. During the attack, Lieutenant Commander (LCDR) Tim White and another servicemember fired their personally owned weapons at Abdulazeez to "provide cover" for other servicemembers to escape over a fence; however, it was unclear if LCDR White's shot hit Abdulazeez. Associated Press & Staff Report, *FBI Explains How Chattanooga Shooting Played Out, How Mohammad Abdulazeez Was Killed*, Times Free Press (July 22, 2015), http://www.timesfreepress.com/news/local/story/2015/jul/22/live-updates-press-conference-chattanooga-shootings/315906/ [hereinafter *FBI Explains*]. Chattanooga police officers shot and killed Abdulazeez. *Id.*

4. *See* U.S. Dep't of Justice , Fed. Bureau of Investigation, A Study of Active Shooter Incidents in the United States Between 2000 and 2013, at 8 (Sept. 16, 2013), https://www.fbi.gov/file-repository/active-shooter-study-2000-2013-1.pdf. *See also*, Major Anthony M. Osborne, *Becoming a Harder Target: Updating Military Firearms Policies to Combat Active Shooters*, 223 Mil. L. Rev. 726, 769 (2015).

5. *See* U.S. Dep't of Justice , Criminal Victimization in the United States, 2007 Statistical Tables 107 (Feb. 2010), http://www.bjs.gov/content/pub/pdf/cvus07.pdf (last visited Nov. 4, 1016).

6. *See id.* Based on data compiled by the Department of Justice, police arrive to the scene of a violent crime in six to ten minutes 28.5% of the time and eleven minutes to one hour 37.6% of the time. *See id.*

7. Memorandum from Sec'y of Defense to Sec'ys of the Mil. Dep'ts, et al., subject: Force Protection Efforts Following the Chattanooga Attacks 1 (2 Oct. 2015) [hereinafter Force Protection Efforts].

8. Andrew Welsh-Huggins, *In a Switch, Civilians Guard Military*, U.S. News (July 22, 2015), http://www.usnews.com/news/us/articles/2015/07/22/after-tennessee-shootings-armed-citizens-guard-recruiters. Brian Lepley, United States Army Recruiting Command (USAREC) spokesman stated, "Recruiting stations need to be out in the public; we need to be out where young people are." *Id.*

9. Telephone Interview with MAJ Michael A.S. Goba, Chief, Int'l & Operational Law, U.S. Army Reserve Command (USARC) (Nov. 10, 2016).

10. Telephone Interview with Charles Abel, Command Anti-Terrorism Officer/Physical Security/Operational Security Officer, USAREC (Dec. 13, 2016). In Fiscal Year 2013, there were 7,872 Active Duty and Reserve Soldiers assigned as recruiters. *Support Army Recruiting*, U.S. Army Recruiting Command, http://www.usarec.army.mil/support/faqs.htm#recruiters (last visited Nov. 4, 2016).

11. Force Protection Efforts, *supra* note 7, at 1.

12. U.S. Dep't of Def., Dir. 5210.56, Arming and the Use of Force glossary (18 Nov. 2016) [hereinafter DoDD 5210.56]. The term Department of Defense (DoD) personnel is defined as "U.S. military personnel and DoD civilian employees." *Id.*

13. *See id.* sec. 4.

14. This primer is not applicable to the arming of National Guard (NG) personnel in a Title 32 U.S.C. status or in a state active duty status. *See* DoDD 5210.56, *supra* note 14, para. 1.1.a.(4). The NG is an organized militia. 10 U.S.C. § 311 (2012). The state Governors and the State Adjutants Generals have discretion consistent with pertinent state law and federal law on whether to arm members of the NG. DoDD 5210.56, *supra* note 13, para. 1.1.(4).

15. Payne, *supra* note 3. In March 2008, "a bomb exploded in front of a Times Square recruiting station . . . ." *Id.* The other attacks occurred in Little Rock, Arkansas in 2009, in Washington D.C. and northern Virginia (Va.) in 2010, and in Chattanooga, Tennessee in 2015. *Id.* Additionally, on July 10, 2017, a US Air Force recruiting station in Bixby, OK was bombed. Brynn Gingras & Holly Yan, *Explosion Hits US Air Force Recruiting Office in Oklahoma*, CNN (July 11, 2017), https://www.cnn.com/2017/07/11/us/oklahoma-air-force-recruiting-office-explosion/index.html. The attacked did not result in any injuries. *Id.*

16. *Id. See also* Abdul Hakim Mujahid Muhammad, Letter to Judge Jan. 12, 2010), http://www.investigativeproject.org/documents/case_docs/1172.pdf (also known by the spelling Abdulhakim Muhammad in other sources); Kristin Sgueglia, *Chattanooga Shootings "Inspired"by Terrorists, FBI Chief Says*, CNN (Dec. 16, 2015), http://www.cnn.com/2015/12/16/us/chattanooga-shooting-terrorist-inspiration. Authorities were not able to solve the New York recruiting station bombing. Payne, *supra* note 3.

17. Steve Barnes & James Dao, Gunman Kills Soldier Outsdie Recruting Station, N.Y. Times (June 1, 2009), http://www.nytimes.com/2009/06/02/us/02recruit.html?_r=0.

18. Muhammad, *supra* note 17. On July 25, 2011, Abdulhakim Muhammad pleaded guilty to capital murder, attempted capital murder, and other charges and received a sentence of life in prison without the possibility of parole. CNN Wire Staff, *Man Pleads Guilty to Recruiting Center Killing, Gets Life*, CNN (July 25, 2011), http://www.cnn.com/2011/CRIME/07/25/arkansas.recruiter.shooting/.

19. Payne, *supra* note 3.

20. Press Release, Federal Bureau of Investigation, Washington Field Office, *Man Pleads Guilty to Shooting Military Buildings in Northern Virginia*, (Jan. 26, 2012), https://archives.fbi.gov/archives/washingtondc/press-releases/2012/man-pleads-guilty-to-shooting-military-buildings-in-northern-virginia. The five shootings occurred "at the following locations: the National Museum of the Marine Corps (twice), the Pentagon, a Marine Corps recruiting sub-station in Chantilly, Va., and a U.S. Coast Guard recruiting office in Woodbridge, Va." *Id.*

21. Payne, *supra* note 3.

22. Sgueglia, *supra* note 16. Director Comey also stated, "[t]here is no doubt that the Chattanooga killer was inspired, motivated by foreign terrorist organization propaganda." *Id.*

23. Brian Ross, et. al., Chattanooga Shooter Researched Religious Justification for Violence: Official, ABCNews (July 20, 2015), http://abcnews.go.com/US/chattanooga-shooting-fbi-recovers-gunmans-disturbing-diary/story?id=32558310.

24. Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. Times Mag. (Aug. 27, 2015), https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html?_r=1.

25. Ross, *supra* note 23.

26. Manny Fernandez, et. al., *In Chatanooga, a Young Man in a Downward Sprial*, N.Y. Times (July 20, 2015), http://www.nytimes.com/2015/07/21/us/chattanooga-gunman-wrote-of-suicide-and-martyrdom-official-says.html?_r=0.

27. Starr & Schleifer, *supra* note 1.

28. *See* S. 1815, 114th Cong. (2015-2016); S. 1819, 114th Cong. (2015-2016); S. 1821, 114th Cong. (2015-2016); S. 1823, 114th Cong. (2015-2016); S.1835, 114th Cong. (2015-2016); S. 1839, 114th Cong. (2015-2016); H.R. 3115, 114th Cong. (2015-2016); H.R. 3138, 114th Cong. (2015-2016); H.R. 3139, 114th Cong. (2015-2016);

H.R. 3146, 114th Cong. (2015-2016).

29. Force Protection Efforts, *supra* note 7.

30. *Id.* at attachment. The arming of qualified DoD personnel is not a violation of the Posse Comitatus Act (PCA), which states, "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1385 (2012). The military purpose doctrine allows service members to protect themselves and other service members. *See* 10 U.S.C. §375 (2012). *See also* U.S. Dep't of Def., Instr. 3025.21, Defense Support of Civilian Law Enforcement Agencies (27 Feb. 2013).

31. Force Protection Efforts, *supra* note 7, at attachment.

32. *Id.* The *Guiding Principles for Augmenting Security* were published in October 2015. *Id.* At that time, the prior DoDD 5210.56, *Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities*, dated April 1, 2011, was in effect. U.S. Dep't of Def., Dir. 5210.56, Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order, or Counterintelligence Activities (1 April 2011) [hereinafter Previous DoDD 5210.56]. Thereafter, the Department of Defense rescinded the previous version with the publication of DoDD 5210.56, *Arming and the Use of Force*, dated November 18, 2016. *See* DoDD 5210.56, *supra* note 12.

33. Force Protection Efforts, *supra* note 7, at attachment.

34. *Id.*

35. *Id. See* DoDD 5210.56, *supra* note 12, para. 2.4b(1).

36. *See* Headquarters Dep't of the Army, Execution Order 011-16 (9 Oct. 2015) (on file with author); Headquarters Dep't of the Army, Fragmentary Order 1 to HQDA Execution Order 011-16 (14 Dec. 2015) (on file with author); Headquarters Dep't of the Army, Fragmentary Order 2 to HQDA Execution Order 011-16 (18 May 2016) (on file with author); Headquarters Dep't of the Army, Fragmentary Order 3 to HQDA Execution Order 011-16 (12 Aug. 2016) (on file with author); Headquarters Dep't of the Army, Fragmentary Order 4 to HQDA Execution Order 011-16 (28 Jan. 2017) (on file with author); Headquarters Dep't of the Army, Fragmentary Order 5 to HQDA Execution Order 011-16 (21 Apr. 2017) (on file with author).

37. *See* United States Army Reserve Command, Operation Order 16-013 (2 Oct. 2015) (on file with author); United States Army Reserve Command, Fragmentary Order 001, . . . to OPORD 16-013 (22 Dec. 2015) (on file with author); United States Army Reserve Command, Fragmentary Order 002, . . . to Operation Order 16-013(23 May 2016) (on file with author); United States Army Reserve Command, Fragmentary Order 003, . . . to Operation Order 16-013 (20 June 2016) (on file with author).

38. United States Army Reserve Command, Operation Order 17-001 (28 Oct. 2016) (on file with author); United States Army Reserve Command, Fragmentary Order 001, . . . to Operation Order 17-001 (11 Dec. 2016) (on file with author).

39. Abel, *supra* note 10.

40. *Id.*

41. DoDD 5210.56, *supra* note 12, paras. 2.4.l(1)-(3). The directive implemented Section 526 of the National Defense Authorization Act for Fiscal Year 2016, Section 2672 of Title 10, U.S.C., and Section 926A of Title 18, U.S.C.:

Not later than December 31, 2015, the Secretary of Defense, taking into consideration the views of senior leadership of military installations in the United States, shall establish and implement a process by which the commanders of military installations in the United States, or other military commanders designated by the Secretary of Defense for military reserve centers, Armed Services recruiting centers, and such other defense facilities as the Secretary may prescribe, may authorize a member of the Armed Forces who is assigned to duty at the installation, center or facility to carry an appropriate firearm on the installation, center, or facility if the commander determines that carrying such a firearm is necessary as a personal or force-protection measure.

10 U.S.C. § 2672 note (2015) (Establishment of Process by Which Members of the Armed Forces May Carry an Appropriate Firearm on a Military Installation). The directive does not supersede agreements for DoD personnel in "General Services Administration-managed, owned, or leased facilities protected by the Department of Homeland Security." DoDD 5210.56, *supra* note 12, para. 1.2.h(2).

42. DoDD 5210.56, *supra* note 12, para. 1.2.e. Except as specifically authorized in DoDD 5210.56 or specifically authorized in other DoD policy, "the possession of a privately owned firearm on DoD property is prohibited." *Id.* para. 1.2.h.

43. All Army Activities Message, 105/2016, 161829A Dec 16, U.S. Dep't of Army, subject: ALARACT Carrying of Firearms on Army Installations para. 3, 5.A (16 Dec. 2016) [hereinafter ALARACT]. Department of Defense Directive 5210.56 "does not change current Army policy regarding arming (government issued or [POFs])." ALARACT, *supra*, para. 2.

44. DoDD 5210.56, *supra* note 12, para. 2.4.l. The DoD component heads are tasked the responsibility to "[d]esignate arming authorities for DoD personnel other than DCIO [Defense Criminal Investigative Organizations], counterintelligence, law enforcement, or security duties . . . ." *Id.* The difference between open and conclead carry is the visilibity of the firearm to the public.

45. *Id.* para. 2.4.l(1).

46. *Id.* para. 2.4.l(2).

47. *Id.* para. 2.4.l(3).

48. *Id.* para. 2.4.n. Privately owned firearms are discussed in more detail in Part III.C. *infra*.

49. DoDD 5210.56, *supra* note 12, para. 3.1.b. Chapter 44 of Title 18 United States Code is the chapter addressing firearms. Department of Defense 5200.2-R details requirements for a security clearance. *See* U.S. Dep't of Def., 5200.2-R, Personnel Security Program, (Jan. 1987) (C3, 23 Feb. 1996). Department of Defense Instruction 5200.46 "prescribes procedures for investigating and adjudicating eligibility to hold a CAC [Common Access Card]. U.S. Dep't of Def., Instr. 5200.46, DoD Investigative and Adjudicative Guidance for Issuing the Common Access Card (CAC) (9 Sept. 2014). Department of Defense Instruction 6400.06 implements the Lautenberg Amendment. U.S. Dep't of Def., Instr. 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel (21 Aug. 2007) (C2, 9 July 2015).

50. DoDD 5210.56, *supra* note 12, para. 3.3.e(2). Department of Defense personnel authorized to carry government owned and issued firearm or POF while performing official duties may also be permitted to store the firearm at their residence. *Id.* Department of Defense personnel allowed to store the firearm (government issued or privately owned) at their residence "may transport or carry it to and from their residence." *Id.*

51. *Id.* para. 3.2.b. Security, law enforcement, or other personnel who are required to carry a firearm must complete "DoD Component-approved training every 12 months, including firearms familiarization (classroom academic), live-fire qualification, and use-of-force training." *Id.* para. 3.2.a.

52. *Id.* para. 3.2.b(2).

53. The new DoDD 5210.56 defines a POF as "[a] non-government-issued firearm (including handguns)." *Id.* at glossary.

54. *Id.* paras. 2.4.l(3), 2.4.m, 2.4.n. Except as specifically permitted in DoDD 5210.56 or other DoD policy, "the possession of a privately owned firearm on DoD property is prohibited." *Id.* para. 1.2.i. The previous DoDD 5210.56 allowed DoD personnel to carry only government owned and issued firearms and ammunition when performing official duties. *See* Previous DoDD 5210.56, *supra* note 32, para. 1.b(6).

55. DoDD 5210.56, *supra* note 12, para. 2.4.m. This primer does not address the requirements for these personnel to carry a POF. Instead, this primer addresses the other two types of personnel who may be permitted to carry a POF.

56. *Id.* para. 2.4.l(3).

57. *Id.* para. 1.2.b.

58. *Id.* para. 2.4.l(3).

59. *Id.*

60. *Id.* para. 2.4.n. The arming authority will at a minimum be a "commander in the grade of O-5 or civilian equivalent in charge of the DoD property." *Id.*

61. *See* Previous DoDD 5210.56, *supra* note 32. *See also* U.S. Dep't of Army, Reg. 190-14, Carrying of Firearms and the Use of Force by DoD Personnel Engaged in Security, Law and Order or Counterintelligence Activities (12 Mar. 1993) [hereinafter AR 190-14]. LCDR Timothy White was one of two service-members who were carrying POFs inside the Navy Operational Support Center at the time of the Chattanooga attack. Tara Copp, *Navy: No Charges Against Officer for Weapons Violations in Attack*, Stars and Stripes (Aug. 6, 2015), http://www.military.com/daily-news/2015/08/06/navy-no-charges-against-officer-for-weapons-violations-in-attac.html. During Abdulazeez's attack, LCDR White returned fire with his POF. Dan Lamothe, *Outrage and an Officer: The Anatomy of a Navy Controversy After the Chattanooga Attack*, Wash. Post (Aug. 4, 2015), https://www.washingtonpost.com/news/checkpoint/wp/2015/08/04/outrage-and-an-officer-the-anatomy-of-a-navy-controversy-after-the-chattanooga-attack/. After an investigation and public backlash, the Navy did not charge LCDR White with any weapons violations. Copp, *supra*.

62. See DoDD 5210.56, *supra* note 12, para. 4.2.a.

63. Id. See 18 U.S.C. § 930(d) (2012). Title 18 U.S.C. Section 930(a) makes it a crime to knowingly possess

"or cause to be present a firearm . . . in a Federal facility" or attempt to do so. 18 U.S.C. § 930(a) (2012). Title 18 U.S.C. Section 930(d) states that the provision does not apply to:

(1) the lawful performance of official duties by an officer, agent, or employee of the United States, a State, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law; (2) the possession of a firearm or other dangerous weapon by a Federal official or a member of the Armed Forces if such possession is authorized by law; or (3) the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes.

18 U.S.C. § 930(d) (2012).

64. *See* DoDD 5210.56, *supra* note 12, para. 4.3.b.

65. DoDD 5210.56, *supra* note 12, paras. 4.3.b(1)-(2).

66. *Id.* para. 4.3.b(3). The Lautenberg Amendment amended the 1968 Gun Control Act and is codified in 18 U.S.C. 922(g)(9). *Id.* at glossary. The Lautenberg Amendment "makes it a crime for any person who has been convicted of a misdemeanor crime of domestic violence, or who is subject to a protective order for domestic violence, to possess a firearm." *Id.* The Lautenberg Amendment is implemented in Department of Defense Instruction 6400.06. *Id.*

67. *Id.* para. 4.3.b(4).

68. The Law Enforcement Officer Safety Act is codified in 18 U.S.C. Sections 926B and 926C. The act allows "the 'qualified law enforcement officer' and the 'qualified retired or separated law enforcement officer' to carry a concealed firearm in any jurisdiction of the United States" or its territories regardless of local laws, with certain exceptions. http://www.leosaonline.com/ (last visited Dec. 16, 2016).

69. DoDD 5210.56, *supra* note 12, para. 4.3.b(5).

70. *Id.* para. 4.2.b(1).

71. *Id.* para. 4.2.b(2).

72. *Id.* paras. 4.2.b(3)-(4).

73. *Id.* para. 4.2.b(5).

74. *Id.* para. 4.2.b(6).

75. *See id.* para. 3.4.

76. *Id.* para. 4.2.a(1).

77. *Id.*

78. *Id.*

79. The applicable rules for the use of force (RUF) are contained in DoDD 5210.56. DoDD 5210.56, *supra* note 12, para. 3.4. The Standing Rules for the Use of Force (SRUF) are contained in enclosure L to the Chairman of the Joint Chiefs of Staff (CJCS) Instruction 3121.01B. Chairman, Joint Chiefs of Staff, Instr. 3121.01B, Standing Rules of Engagement/ Standing Rules for the Use of Force for US Forces, encl. L (13 June 2005). The current DoDD 5120.56 directed the CJCS to recommend to the Secretary of Defense SRUF which are consistent with the rules in the directive. DoDD 5210.56, *supra* note 12, para. 2.5. Further, each state or territory's NG may have a different set of RUF. This article does not discuss each state's RUF.

80. DoDD 5210.56, *supra* note 12, para. 3.4.a. The RUF contained in DoDD 5210.56 are not applicable when DoD personnel are carrying POFs unrelated to the performance of official duties. *See id.* secs. 3, 4. Local laws will govern the legality of use of force.

81. DoDD 5210.56, *supra* note 12, 3.4.a. The reasonableness of force "is determined by assessing the totality of the circumstances that led to the need to use force." *Id.*

82. Less lethal force is defined as "[t]he degree of force used that is unlikely to cause death or serious physical injury." DoDD 5210.56, *supra* note 12, at glossary. It is "synonymous with less than deadly, non-lethal and less than lethal force." *Id.* "[T]he term 'less than deadly force' is used as there is no guarantee that" non-lethal weapons (NLW) "will not cause severe injury or death." DoDD 5210.56, *supra* note 12, para. 3.4.d(1). Non-Lethal Weapons are defined in DoDD 5210.56 as "[w]eapons, devices, and munitions that are explicitly designed and primarily employed to incapacitate targeted personnel or material while minimizing fatalities, permanent injury to personnel, and undesired damage to property in the target area or environment." *Id.* at glossary. Department of Defense Directive 3000.03E is the directive on point for NLW policy and adds "NLW are intended to have reversible effects on personnel and materiel." U.S. Dep't of Def., Dir. 3000.03E, DoD Executive Agency for Non-Lethal Weapons (NLW), and NLW Policy glossary (25 Apr. 2013).

83. *See* DoDD 5210.56, *supra* note 12, paras. 3.4.d(3)(a)-(f). Less than deadly force may be used: "[t]o defend oneself from actual or imminent threat of physical injury or death,"; "[t]o defend other persons from actual or imminent threat of physical injury or death,";"[t]o overcome the active or passive resistance offered to a lawful detention, arrest, or to accomplish the lawful performance of assigned duties,"; "[t]o prevent the destruction of DoD property"; "to prevent the escape of a prisoner"; and lastly "to control or restrain animals presenting an ongoing or imminent threat of bodily harm against oneself or others." DoDD 5210.56, *supra* note 12, paras. 3.4.d(3)(a)-(f).

84. Id. para. 3.4.e(2).

85. Id. para. 3.4.e(2)(b). Furthermore, "[w]arning shots are prohibited in the United States" and "are also prohibited outside the United States unless otherwise authorized by applicable host-nation law and status of forces agreements and in accordance with Standing Rules on the Use of Force in non-United States locations." *Id.* para. 3.4.b.

86. *Id.* para. 3.4.e(3).

87. Previous DoDD 5210.56, *supra* note 32, encl. 2, para. 4c.

88. *See* DoDD 5210.56, *supra* note 12, para. 3.4.e(3).

89. DoDD 5210.56, *supra* note 12, paras. 3.4.e(4)(a)-(g).

90. *Id.* para. 3.4.e(4)(a).

91. *Id.* paras. 3.4.e(4)(a)-(b). The non-exhaustive list also contains four other situations when deadly force may be reasonably used against persons and one situation where deadly force may be used against animals. *See id.* paras. 3.4.e(4)(c)-(g). The four situations are to protect "assets vital to national security," to protect "inherently dangerous property," to protect "national critical infrastructure," and to perform "an arrest or apprehension," or prevent escape. DoDD 5210.56, *supra* note 12, para. 3.4.e(4)(c)-(f). Deadly force may be used against "vicious animals" to defend oneself or others. *Id.* para. 3.4.e(4)(g).

92. *Id.* para. 3.4.e(4)(b).

93. *See id.* secs. 3, 4.

94. DoDD 5210.56, *supra* note 12, para. 2.5.

95. The Judge Advocate General's Legal Center and School presents an annual weeklong training on Domestic Operational Law and Domestic Operations, which provides training on the applicable RUF and the PCA. *See* https://tjaglcspublic.army.mil/documents/27431/27889/TJAGLCS+Catalog/72bb4063-880e-4b07-a00b-f29850a3401d (last visted Feb. 23, 2017).

96. Osborne, *supra* note 4, at 769. *See* AR 190-14, *supra* note 61, paras. 1-4, 2-5.

97. *See* Force Protection Efforts, *supra* note 7, at attachment; DoDD 5120.56 *supra* note 13, para. 2.4.b.

98. *See* U.S. Dep't of Army, Reg. 600-8-2, Suspension of favorable Personnel Actions (FLAG) (11 May 2016). A flag is meant to prevent favorable action for DoD personnel in an unfavorable status. *Id.* para. 2-1. There are two categories of flags, transferrable and non-transferrable. *Id.* para. 2-1g. The underlying circumstances supporting a non-transferrable flag should preclude arming the flagged individual or support suspending the arming authorization. *See id.* para. 2-2.

99. DoDD 5210.56, *supra* note 12, para. 2.4.j.

100. *Id.* para. 2.4.b(1).

101. See U.S. Dep't of Army, STP 21-1-SMCT, Soldier's Manual of Common Tasks ch. 3 (10 Aug. 2015).

102. *Discovering the Weapons Used in Basic,* Military.com, http://www.military.com/join-armed-forces/discovering-the-weapons-used-in-basic.html (last visited Dec. 4, 2016).

103. Todd South, *New in 2018: Army rolling out new handgun across the force*, ArmyTimes, (Dec. 26, 2017), https://www.armytimes.com/news/your-army/2017/12/26/new-in-2018-army-rolling-out-new-handgun-across-the-force/.

104. The PCA is not applicable when there is a military purpose such as force protection. Dep't of Def Inst. 3025.21 Defense Support of Civilian Law Enforcement Agencies, encl. 3, paras. 1.b(1)(e), 1.c(1)(d) (27 Feb. 2013). Direct assistance to civilian law enforcement officials is prohibited. *Id.* para. 1.c. Examples of direct assistance include surveillance or pursuit of individuals or vehicles, interdiction of a vehicle, and arrest or apprehension. *Id.* para. 1.c(1).

105. DoDD 5210.56, *supra* note 12, para. 3.3.e(2).

106. Force Protection Efforts, *supra* note 7, at 2.

107. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 1-5 (6 Nov. 2014).

108. Welsh-Huggins, *supra* note 8 (quoting Stewart Rhodes).

109. Osborne, *supra* note 4, at 753 (citing Michelle Tan, *Soldiers Want OK to Carry Concealed Weapons on Base*, Army Times (Apr. 8, 2014), http://www.armytimes.com/article/20140408/NEWS05/304080069/).

110. Force Protection Efforts, *supra* note 7, at 2.

111. DoDD 5210.56, *supra* note 12, paras. 2.4.l(3), 2.4n.

112. ALARACT, *supra* note 43, paras. 3, 5.A. *See* EXORD 011-16, *supra* note 11.

Photos of the chief judges of what is now called the U.S. Army Court of Criminal Appeals adorn a wall inside a meeting room at the court located at Fort Belvoir, Virginia. (Credit: Chris Tyree)

No. 3

Independent but Invested

The Army's Trial Judiciary Turns Fifty

By Colonel Timothy P. Hayes Jr. and Lieutenant Colonel Christopher E. Martin

The implementation of the Military Justice Act of 2016 on 1 January 2019 ushered in the most revolutionary changes in military justice practice since the Military Justice Act of 1968 (MJA 1968). As we look forward to the fiftieth anniversary of MJA 1968, which had an effective date of 1 August 1969, it is worthwhile to examine the role and responsibilities of the U.S. Army Trial Judiciary, which effectively came into being with the passage of that Act. While MJA 1968 authorized an independent judiciary, and our judges should and do scrupulously guard their independence, the Army's Trial Judiciary remains an integral part of The Judge Advocate General's Corps. Trial judges have a vested interest in, if not shared responsibility for, the training of counsel and outreach to the community for the betterment of our justice system and our Corps.

When MJA 1968 was enacted, it was applauded for taking a "major step toward providing judges who are both legally trained and free from influence by the local military 'brass' to preside over both general and special courts-martial," and because it "raised the standard of due process within the military justice system."[1] In fact, MJA 1968 created the title "military judge," replacing the previously identified law officer,[2] and provided that a commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial "may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee."[3] Some of the more paradigm-shifting and far-reaching procedural changes borne out of MJA 1968 included the option for an accused to be tried and sentenced by a judge alone, the authority for a judge to call the court into session without the panel members, and judicial determination on challenges for cause.[4] By far the most significant cultural change was the separation of the military judge from the local command and their assignment and responsibility to The Judge Advocate General, or their designee, to protect and guarantee the judge's independence.[5] This independence is fiercely guarded by trial judges, as it should be. However, this independence comes with an opportunity—if not mandate—to participate in the training of counsel and outreach to the community from the unique perspective of the bench. This is an opportunity that judges should embrace and advocates on both sides of the aisle and in the greater community should solicit.

The approximately twenty-five active duty lieutenant colonels and colonels that form today's Trial Judiciary are assigned to the U.S. Army Legal Services Agency (USALSA) and senior rated by the USALSA Commander as The Judge Advocate General's designee.[6] The USALSA Commander also serves as the Chief Judge of the Army Court of Criminal Appeals. As such, all trial judges are rated only by other judges. Unlike the federal courts that are established by Article III of the United States Constitution,[7] military judges do not have lifetime tenure. They are selected as part of the normal assignment cycle and many frequently leave the bench after a three-year assignment to take another assignment within

Judges of the U.S. Army Court of Criminal Appeals participate in a mock hearing at Fort Belvoir, Virginia. (Credit: Chris Tyree)

the Corps.[8] In that sense, while judges enjoy and exercise judicial independence while on the trial bench, they remain invested in the Army and The Judge Advocate General's Corps. Trial judges have a personal and a professional interest in both the organization they serve and its people. Make no mistake, this interest has no bearing whatsoever on what happens between an arraignment and an adjournment, where the only focus is a fair trial for all parties. But the individual trial judge, and the judiciary as a whole, understandably feels a sense of duty to see the players in the system improve. When the players improve, the system improves—both in perception and reality. This is no different from a National Football League referee explaining to a pass rusher why he was called for a personal foul for roughing the passer. The referee is not trying to help the pass rusher or the quarterback, he is trying to enforce the rules, ensure they are applied fairly, and explain them to the outside audience.

To that end, in celebration of fifty years as an independent judiciary, we propose that staff judge advocates and senior and regional defense counsel take a more proactive approach to inviting their local military judges into their counsel and paralegal training programs. Likewise, we encourage military judges to seek out such opportunities to train counsel and paralegals. While some training can and does happen during trial, as we often learn best by doing, more nuanced issues and broader topics are best taught outside of court. While many judges continue to conduct "bridging the gap" sessions with counsel at the conclusion of a court-martial, those sessions only benefit the counsel involved unless the information is shared, and the judge is limited by what they can disclose with respect to a particular case.[9] A precipitous decline in the number of courts-martial over the years means there are even fewer opportunities for on-the-job training of counsel in court or in bridging the gap sessions, making out of court training sessions even more valuable.

In contrast to bridging the gap sessions, regular training sessions for all counsel benefit the entire local military justice bar, and issues and trends can be identified and corrected without reference to any particular case. We have found that a quarterly training session is ideal for ensuring new counsel receive training early in their tours and for reinforcing key points with more seasoned counsel. These sessions are best docketed by the judge outside of the Office of the Staff Judge Advocate and Trial Defense Service training calendars.

Presence on the docket ensures maximum attendance for counsel, and all attorneys and paralegals should be encouraged to attend. The emphasis in this training is a review of the Army Rules of Practice, as well as a discussion of the types of issues that have come up in recent cases that bear discussion and training, without reference to any specific case, issue, or counsel. More significant topics such as discovery practice, motions practice, or trial advocacy are best trained in additional sessions which can be coordinated in advance with both sides and placed on the local leadership development program training calendar or on the training calendars of the military justice and trial defense offices. The effective use of both types of training sessions, along with responsive bridging the gap feedback when offered and appropriate, provides a solid and deliberate judicial focus on military justice training to complement, not replace, regularly conducted unit-level training.

Although military justice is the first priority, a military judge's role in professional development and outreach need not be limited to this area. Much like our Article III civilian counterparts, military judges should be coveted speakers at local bar association meetings, professional organizations, and in schools and universities, as standard practice and to mark special events. For example, the American Bar Association oversees a recurring National Judicial Outreach Week, which presents an opportunity for judges nationwide, including military judges, to educate the public on the theme of "Preserving the Rule of Law."[10] To that end, the 2nd Judicial Circuit recently invited a local county judge to present an informational brief on the local Veteran's Treatment Court to an audience of judge advocates and paralegals from throughout the Fort Bragg community. Judges in other circuits have participated in mock trials and reading programs. The 4th Judicial Circuit invited a 3L at the University of Washington Law School to participate in a fourteen-credit judicial externship in the fall of 2018. Military judges can support a broad array of similar training and outreach to develop military justice professionals which, in the end, enhances recruiting efforts, raises the profile of the Corps and the Trial Judiciary, and most importantly, improves the quality of our military justice practice. Independence need not mean isolation. On 1 August 2019, as our Corps strives to improve its efficiency and effectiveness with initiatives like the Military Justice Pilot Program, and as senior leaders continue to develop and train our counsel and paralegals, may the Trial Judiciary not only celebrate fifty years of independence but also make a new commitment to engagement. Through training, outreach, and education dedicated to raising the level of practice in Army trial courts while advancing the professionalism and prestige of our service and our Corps, the Army's trial judges can be both independent and invested. **TAL**

COL Hayes currently serves as the Chief Circuit Judge for the 4th Judicial Circuit. He was recently selected to serve as the Army's next Chief Trial Judge. LTC Martin currently serves as a Circuit Judge in the 2nd Judicial Circuit at Fort Bragg, North Carolina.

Notes

1. Francis T. McCoy, *Due Process for Servicemen – The Military Justice Act of 1968*, 11 Wm. & Mary L. Rev. 66, 70 (1969), http://scholarship.law.wm.edu/wmlr/vol11/iss1/3.

2. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

3. *Id.*

4. Fred L. Borch, *A Court-Martial Revolution: How the Military Justice Act of 1968 Turned Military Criminal Law Upside Down*, Army Law., Sept./Oct. 2018, at 8.

5. *Id.*

6. The active duty judges are also ably supported by approximately the same number of U.S. Army Reserve military judges that are assigned to the 150th Legal Operations Detachment (LOD) but supervised and rated by active duty chief circuit judges. From the authors' perspective, nowhere in the Army is the Active Component/Reserve Component integration more fully and successfully realized than in the Trial Judiciary and the 150th LOD.

7. U.S. Const. art. III, § 1.

8. Prior to their current judiciary assignments, the authors had the pleasure of concurrently serving as the 2d Infantry Division Staff Judge Advocate and Deputy Staff Judge Advocate. The consensus among those that have served as both judges and staff judge advocates (SJAs) is that, while being an SJA may not necessarily make you a better judge, being a judge certainly makes you a better SJA when it comes to training counsel and advising convening authorities. While some officers may be well-suited to perform either role, a healthy stable of long-term judges is also desirable and necessary for continuity and expertise. This article endorses both of those assignment strategies working in tandem for an experienced and well-rounded judiciary.

9. Bridging the gap sessions are a "hot wash" between the judge and counsel immediately after a trial concludes, with the goal of improving advocacy. However, a judge must be circumspect in his or her information sharing if they decide to conduct bridging the gap sessions, as any substantive information shared could be the subject of appellate litigation. *See, e.g.*, U.S. v. McNutt, 59 M.J. 629 (A. Ct. Crim. App. 2003). A judge should never disclose his or her deliberative process.

10. *See National Judicial Outreach Week*, ABA, https://www.americanbar.org/groups/judicial/committees/judicial_outreach_network/njow/ (last visited Nov. 21, 2018).

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No. 4

Leading an OSJA Team

By Colonel William R. Martin

I have had the good fortune and, more importantly, the honor and privilege, to serve in numerous leadership positions during my Army career. I have learned much by watching and studying leaders—both good and bad—"practicing" leadership. These observations have led me to conclude that there is no right or wrong way to lead; everyone is different and must develop their own leadership style. I would suggest that everyone think about leading early and commit to a leadership philosophy, with a willingness to adjust when appropriate. For a leader of any sized organization, I cannot emphasize enough that leading is a privilege, the opportunity is fleeting, and how you execute your responsibility will impact those you lead personally and professionally far beyond your service with them in that organization.

The thoughts below embody an approach to leadership that I have adopted over time. While impossible to adhere 100% to a philosophy each and every day, I make a daily effort to stay true to my approach. I offer these thoughts for your consideration to either adopt in full, in part, or discard.

People and Trust: What Else Do You Need?

It starts and ends with the people you lead, without them you will fail. You cannot thank them enough for what they do each and every day; all that they do, whether routine or extraordinary, contributes to the success of the mission. Great leaders genuinely care about the members of their organization on a personal and professional level. In your own way, you must let them know you care. You should make every effort to engage everyone every day, if only briefly, and let them know you are accessible and able to lend assistance if required. If you have remote teammates, identify ways to engage them on a regular basis. This will require extra effort to keep them connected, but it is a "must do." If a member of your team encounters a significant life event, do not delegate the task of communication. Instead, personally reach out to them and offer your personal assistance. Most will not seek assistance and attempt to remain self-sufficient, but your communication will often provide the opportunity for them to reach out to you and seek your support. It is the constant connection in all things, good and bad, that inspire them to serve on a team that cares about them personally and professionally.

Trust your people. There is possibly no phrase more empowering than "I trust you, I know you won't let me down." You can only do so much and be in so many places; your people are your "agents for good" each and every day. It sounds simple, but concerted effort is required to adhere to the principle of simply trusting your people.

From day one, build and nurture trust by a drawing a generous circle, then continue to rapidly expand it. Adopting this approach comes with some risk and personal discomfort—that is natural and okay. You must remind yourself that although you have the skills and knowledge to do the work you assign your subordinates, you do not have the time. Moreover, by attempting to do everything yourself, you deprive your subordinates of the opportunity to learn and develop. By affording your team the freedom to operate within a circle of trust/risk, you allow them to safely gain skill and knowledge.

To prevent people from becoming lost in that circle you have created, take time to explain your expectations to those you lead—how they should approach all issues, what is important from your perspective and how it should form the foundation for every action. Make especially clear when they should seek further guidance prior to action, as well as any "third rail/danger" issues to avoid. By providing this framework, you create a mutual understanding and the foundations for a professional relationship grounded in trust, flowing both ways, which help empower them into positive action.

Trust is a two-way street and it is not automatically extended just because you are in a leadership position. Trust from those you lead must be earned by you. Once earned, it is not retained without effort. Earning and preserving it will pay enormous dividends not only for you, but for your entire team. Your trust in your people—and theirs in you—lays the groundwork for similar relationships throughout your organization. When you infuse trust into your organization, it will not only flow vertically, but horizontally among all team members. The goal is to have all team members in the organization trusting and mutually supporting one another—this begins with the example you set.

Building trust can be difficult. You must demonstrate to your team that you trust them; show it to them in all your actions and allow them to excel. If they have given their best effort and stumble a bit, your reaction is critical to maintaining and building upon the trusting relationship. Discuss how to improve and, if required, reinforce the expectations that you established in your initial counseling and subsequent interactions and send them back to work.

Lastly, trust depends on your subordinate's ability to rely on you. Your team must be able to rely on you to act consistently and fairly at each and every turn. One thing that increases reliability is your unchanging application of the leadership philosophy you have shared with your team. Subordinates who know and understand your philosophy understand how it helps steer the organization and empowers them to action.

Leadership Philosophy

Through personal experience, professional development, and self-study, everyone—to include your most junior Soldier—has informally developed a leadership philosophy. Throughout your career, you will move between positions that do not require you to be the "formal" leader by position. Before assuming a formal leadership position, you should reflect on your leadership philosophy and take the time to commit it to writing. It does not have to be lengthy or memorialized in a formal document—although that may be helpful—but it needs to reflect your thoughts on those things that are most important to you and how you want those in your organization to support those tenets of your philosophy. You then must provide this philosophy to everyone in your organization in order to create a shared understanding.

You should encourage your subordinates to adopt a similar approach to leadership and discuss with them the importance of developing their own leadership philosophy early in their career. As most have experienced, the Army will plunge you into a leadership opportunity before you think that you are completely ready. When afforded that opportunity, the common reaction will to be to forgo the opportunity to reflect on how you want to lead and instead set about to accomplish the numerous tasks before you. When given this opportunity, only a select few take time to really reflect on our own leadership philosophy and how it can be used to empower the organization prior to embarking on our new assignment.

Your leadership philosophy is and should be ever evolving. To advance yours, examine the leadership practices of the best leaders both inside and out of the Army. Ask your mentors to jot down their leadership philosophies for you to contemplate. Read biographies to discern the leadership philosophies of inspirational leaders you admire. However you formulate your own initial philosophy, ensure you do not just do it once. Reassess and modify it several times, at various points in your career, so as to incorporate valuable experience and difficult lessons learned. Because all leaders are constantly learning and adapting, your philosophy should remain consistent at its core, but should allow for your own growth as a leader.

Leading, Generally

If leading were easy, anyone would be assigned to do it. You have been placed in a leadership position to solve problems. Rarely is there a quick fix or school-approved solution to the myriad of complex problems you'll encounter during your leadership tour. Leading requires an application of equal amounts of knowledge, judgment, and common sense. Although it is tempting to seek the perfect solution each and every time, it almost never exists, and that endless pursuit of perfection may consume an enormous amount of time and resources. "Good enough" for routine matters will almost always carry the day and allow you to move on to the next challenge.

As the leader, you must serve as the both the lighting rod and shield for subordinates. Trust your team to be able to "hold their own" and provide the unpopular legal advice in difficult situations, but understand when you need to insert yourself in the equation in order to provide supervisory "cover." Although the advice may be the same, sometimes our clients need to hear it from a more senior member of the firm. When this happens, it should not be disruptive—to your relationship with the subordinate or to the subordinate's relationship with the client. When subordinates are aware of your willingness to serve as lightning rod and shield in difficult situations, they are more likely to seek your help when such situations arise. United, you and your subordinates will be able to provide responsive advice to the client, which will, in turn, empower your subordinates for future action.

Our teams are exceedingly talented. They can accomplish almost any task assigned and will be sought after for assistance by numerous entities within your Command. You, however, must defend their time in order for them to accomplish their never ending legal missions. As their leader, you can and must professionally push back on those tasks that are clearly outside the legal lane, *and* although an important Army mission, ultimately detrimental to the legal mission. It can be difficult to discern which tasks, although

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outside the legal lane and detrimental to the mission, might be tasks that would broaden your subordinate. A leader must be able to weigh those factors, recalling that just because your team *can* work a number of actions does not mean that they *should*; you must find the balance between being a team player, assisting in accomplishing the "Army mission," and preserving your team to perform its legal mission.

Providing professional space and a reasonable amount of time under the circumstances for your subordinates to complete a task prevents micro-managing and increases trust. The more predictability you can provide within your leadership realm, the more efficient your team will become. Professionals plan and complete their work either through guidance issued by their supervisors or by establishing internal suspenses based on the work they know they must accomplish. Frequent and unexpected changes to your teammates' external or internal suspenses has a direct, adverse impact on productivity. The adverse impact is often two-fold: (1) constantly reacting to every changing suspense prevents one from working effectively to accomplish assigned tasks in an organized manner, and (2) it will impact personal obligations and commitments outside of the office. Neither scenario is good. Over time, it will be an increasing source of frustration and will impact the morale of the organization. Further, constant switching creates a climate of confusion, with subordinates completely unable to discern what is critical, important, necessary, or just routine.

Leaders are entrusted with a great deal of information, some requiring immediate action, some action at a later time, and often no action will ever be required. Within an organization at any given time, there are actions and information that only a small number of members actually need to know about. Everyone does not need to know what you know at all times; thus, the timing of sharing information with your teammates is important. Notification earlier than necessary can lead to distraction both professionally and personally. By the same token, if the information—although negative or distracting—might lead to improvement—self or situational—then a leader must know *how* to share it in addition to *when*. Making this call of how and when often dictates the usefulness of the information to members of your team.

Crisis Response

First, most crises are not actually crises; they just appear to be to those closest to the problem. If a crisis is brought to you, you must serve as the calming influence. Adding further stress to the situation does nothing to solve the problem. Reflect on how you receive bad news and then develop your own technique as to how you will respond and start solving the problem with your team. A great technique I have learned and employed over the years is to repeat back the problem presented to you. This ensures that you have a thorough understanding of the problem and builds in a reflection period for yourself prior to responding. When contemplating how you would like to respond to a crisis, deliberately think about experiences you have observed of poor leadership under stressful situations and vow not to repeat them. You must redouble your efforts to avoid repeating those practices as you interface with members of your team in developing the best course of action to solve the crisis at hand. Your

team will turn to you when they perceive crisis—it is up to you keep everyone's emotions in check and chart a course towards resolution.

Communication

Always make time to talk to everyone in the office; if there is something urgent that prevents an immediate conversation, reengage after the event has passed. Where communication takes place can also be pivotal. Consider the best location to communicate based on the topic of discussion. If it is informational, their office is ideal. If it is related to counseling/performance/discipline, your office is best. As you seek to open lines of communication, try to engage everyone, even if only to exchange daily greetings at events like physical training sessions, office functions, or other section gatherings.

Employ a varied approach to communicating, as everyone is different and there are countless ways to communicate with your team. Evaluate whether group settings, face-to-face, personal/hand-written notes, or group memorandums/letters are the best way to tell your team what you need them to know.

In terms of communication frequency, although obvious, more is better. Adopting an annual communication strategy is a non-starter. Always have an initial meeting with new members of your team and encourage your subordinate leaders to do the same. Based on the size of the group and your supervisory role, consider more frequent meetings with no structured agenda: simply ask how things are, what resources they require, and what organizational improvements should be made. Communication early and often with everyone makes future mandatory discussions easier for everyone. Your interactions should not be limited to those with challenges, but should include those who are excelling. Everyone appreciates acknowledgment of the work they do on a daily basis.

In addition to daily personal engagement, there is immense value in personal correspondence. Make it a practice to draft and deliver one handwritten note per week to someone in your organization. It may be for a special project or accomplishment; or it may be just because of a solid performance each and every day. This type of informal recognition communicates your appreciation for their efforts.

Formal recognition, on the other hand, communicates not only your appreciation, but also that of the organization. Because humility is the unstated Army Value possessed by almost all who choose a path of public service, if asked, most will say they do not desire formal recognition. Remember that the formal recognition is not just for the individual, but also for everyone else in the organization to understand what efforts you value and want to reward. It is an important Army tradition, so you must think about and deliberately seek recognition opportunities for your team members—taking into account the *entire* team. It is always good to remember that civilian teammates do not routinely reach the PCS window that generates an award discussion. Seeking opportunities to routinely recognize them for their contributions is a worthwhile endeavor.

Train Your Team

The leadership task of developing, training, and motivating is less daunting if you fall in on a high performing team. Reality, however, is that an overwhelming majority of us will be assigned to an organization that has a certain number of leadership challenges. You must learn how to coach the team that has been given to you. Notwithstanding illegal, immoral, or unethical behavior, all play a critical role and have the ability to provide significant contributions; your job is to identify areas for growth and maximize the existing talents of everyone on your team.

Further, your goal must be to make everyone better, understanding that all improve at a different pace. If you inherit an underachieving team, your first task is to get everyone into the boat and paddling in the same direction. It may seem simple enough, but the amount of time and effort required to accomplish this simple feat will be enormous. Accomplish this by establishing reasonable expectations for improvement and motivate everyone to achieve a higher level of performance, but acknowledge up front that you cannot do this alone: train your junior leaders on this approach. While they cannot make everyone an all-star overnight, they can assist those on their smaller teams within your organization to make improvements. In cyclical fashion, they will in turn create more improved teammates for subsequent leaders, perhaps even sowing the seeds of tremendous leaders in their young subordinates. It is every leader's responsibility to incrementally improve the quality of their teammates not only for their team, but for the team that will be assembled after the leader's departure. Beginning and ending your leadership efforts with your people in mind leads to a relationship of trust between subordinate and superior.

One of a leader's most important tasks is training the next generation of leaders. This undertaking requires a multi-faceted approach and constant attention. Afford your subordinates opportunities to lead; build confidence by assigning them the most challenging tasks; allow them to wrestle to find the answer; have them be your representative to present proposed solutions to the most senior leaders in the organization; encourage them to observe and capture great leadership practices from others and figure out how they can adapt them to their own personality; talk to them about the complexity and challenges in leadership; share with them challenges you have encountered and possible solutions to those challenges; and describe your failures along with your successes.

Approach to the Role of Counselor

The importance of in-person counsel to our clients cannot be overstated. You must instill this value in our next generation of legal professionals. Electronic communication has improved the speed in which we can provide advice; however, if it is the only form employed when we fulfill our role and obligations as counselor, we are at grave risk of doing a disservice to our clients. The advice we provide often has a direct and life-long impact on Soldiers and their Families; thus, we owe it to Soldiers and the Army to provide our advice in a forum that provides for discussion and a complete understanding of all the issues surrounding a case.

Electronic or written communication places limits on the ability to ensure a complete understanding. As an example, a client usually seeks legal counsel because of

a less than desirable life situation. Although they seek legal counsel, the client has already developed an idea of what a desirable outcome to the situation would be. The question is usually whether the outcome the client desires is legally supportable. As a legal counselor, you can craft a very comprehensive electronic response; however, if a client thinks that they have found the resolution they are seeking in the first paragraph, they may fail to read the response in its entirety, and then act upon a fraction of your intended advice. This may result in the client returning to you at a later date in a more difficult place. You must emphasize and explain the importance of in-person counsel in a digital age. This will make your team better legal professionals and, in turn, their clients will benefit.

Performance Expectations

Everyone giving 110% every day is admirable, but, in my opinion, not realistic—with one exception discussed later in this paragraph. I encourage all in my organization to strive toward a 95% tempo rate each and every day. This does not mean that the work produced is not a "gold" or "professional" standard. The quality of the work should never be diminished; it is only the rate at which it will be produced that is modified. There will be frequent opportunities for teammates to increase the tempo and produce at close to the 100% level. In order to increase tempo, there has to be physical space to accomplish this request. If everyone is already at 100% there is no ability to "surge." Demanding a 100% tempo rate every day will increase the probability of mental or physical fatigue that will adversely impact the mission. A tempo rate that permits "minor diversions" from the work at hand improves overall morale and promotes the rapid transition to a sense of urgency and a willingness to contribute to mission accomplishment when the situation dictates. Expect everyone to swim hard, but ensure all know that no one goes under and the team always stands ready to assist. The only exception to the 95% tempo rate is during the hours of physical training: the opportunity to conduct daily physical activity is a gift that helps maintain overall physical and mental health, which in turn allows for increased productivity. This gift should not be taken for granted and, if afforded the opportunity, one should devote 100% effort to derive the maximum benefit during the hours set aside for physical fitness.

From your initial counseling, impress upon members of your team that they are professionals, and as professionals, you expect them to perform as such. Do not watch their clock, but expect that they are available during the "duty day," which can be an extended day based on position and type of assignment. Expect them to know and work to complete their requirements for the day, week, and month without constant reminders of deadlines. Based on life events, or with the approval of their immediate supervisor, subordinates should be free to manage their own schedules.

Balance in All That We Do

Sometimes referred to as work/life balance, I just refer to it as personal balance. Without it, we all will eventually fall. Balance requires work and constant reassessment to maintain. Fence off time to think about your performance in this essential task and rebalance yourself as required. Make those who work for you think about it and watch them to ensure they put it into practice. Challenge them to watch out for their peers; they are in the best position to detect personal or professional challenges that might impact their peers' balance. When you or a member of your team detect a problem, do something about it. That is engaged leadership.

Further, you must make balance a priority and lead by example within your organization. The mission comes first, but seldom is there a situation when the mission will fail by employing a balanced approach. This balanced approach ensures everyone remains healthy—both physically and mentally—and performs at the optimal level. In order to maintain balance, you must sincerely support your team's participation in life events. When conducting initial counseling, tell your subordinates that, short of a national emergency, you plan on attending your life events and you expect that they will do the same. Tell them that they are professionals and you expect that they will accomplish all missions assigned. But also, as professionals, they have the flexibility to adjust their schedules in order to accomplish the mission as well as participate in their life events. Following that conversation, you must attend your own life events to reinforce that you are not merely saying it, but that you mean it.

Quality Staff Work: It Does Not Just Occur Naturally

Legal professionals should strive to be the best staff officers of any organization, and the principles of quality of staff work need to be taught. Staff work is difficult. Although there are many aspects to good staff work, it is important to remember the following: the best staff work is work that is done early for your client, shaped from the outset, and meets the client's intent in compliance with all applicable guidance; understanding the client's intent/concern/question is paramount; if you don't understand ask early—it will save unnecessary time and effort; and know the suspense, anticipate difficulties meeting it, and ask for an extension early, if required.

Initially, the foundation of becoming a contributing staff member is built upon the relationships you have with fellow staff members. To foster good relationships, you must be responsive, even to preliminary assessments or inquiries. Ensure that you understand the issue prior to beginning work; if you don't understand, ask. Failure to seek clarification wastes time and energy. When researching and developing a solution you may discover an issue not initially presented; seek clarification. Although not originally articulated by the client, this may be the central issue that needs to be resolved. Leverage the talents of your internal and external team. Seek assistance, direction, or advice from others; this is no substitute for doing your own work, but being inclusive rather than exclusive provides important perspectives as you frame an issue.

At the end of the day, it is all about providing the very best product to the client. Those new to the staffing process (especially at lower levels of command) often erroneously approach it as a competition, either within the commander's staff or legal staff at subordinate or senior units. We work to produce the "gold standard" legal product grounded on solid research,

communication, and coordination. Think especially about the reach or impact of any opinion you provide. For those issues extending beyond the command, coordinate your response with your legal counterparts. You may ultimately reach differing conclusions, but it will afford them an advance opportunity to consider the issue. No one likes surprises, so this type of coordination within your functional area (legal) is pivotal to maintain those legal relationships.

As you finalize your work, you might reach a conclusion that may not be either popular or the desired result. In those cases, it is important to remember that it is often not the opinion that your clients will remember, but rather the manner in which you deliver it. In much the same way that you should not email bad news that you could instead deliver in person, you should deliver an unpopular legal opinion in person as well. Make it a point to get out from behind the desk and explain the rationale for the opinion. Your client may not like the opinion, but they will respect you for your genuine concern about the issue. This will go a long way to preserving and building relationships for future staff actions.

Mentoring, Career Advice, and Other Stuff

Senior leaders must play a critical role in the mentoring process. In that role, you must make it one of your many priorities. If asked, junior members should not respond that their primary—or only—source of career advice is from their peers. You should extend the invitation to discuss career questions/concerns at any time and then make yourself available when asked. You must discuss career progression during initial in-briefs, periodic counselings, and OER counselings. Also, during one of these counselings, you must discuss the JAG Corps' career model pertaining to that particular officer. It is important that all within the Corps understand their career model and the assignment process. You should emphasize that job and assignment diversity and building expertise serves multiple purposes. For captains, developing as a diverse judge advocate prepares one for success at the next higher rank. It also provides the JAG Corps flexibility to assign those captains to any future position with confidence in a successful tour. Moreover, a diverse assignment pattern allows those captains to make an informed decision as to whether the JAG Corps is the career organization for them. The JAG Corps as a career is not for everyone; you must be able to assist your subordinates in making that critical assessment, and, if necessary, inform certain subordinates that you do not think the Army is a good fit for them.

You should similarly discuss the responsibilities of a professional officer with each young judge advocate: updating DA photos with each PCS, periodically reviewing ORBs to ensure the information is current; etc. You should discuss with them that the Army is small and the JAG Corps is smaller. Their reputation among subordinates, peers, and supervisors matters, and matters even more as one moves forward in their career when peer groups become smaller. Discuss the fact that "nobody likes a jerk." Whether working with teammates or clients, your ability to "work and play well with others" has a direct impact on overall effectiveness. You must emphasize that the Army is a values-based organization and there are standards that apply 24/7, 365. It is always good to remind them that adult decisions have adult consequences. Along those lines of advice, encourage them to enjoy life outside of the Army duty day—responsibly.

Personnel Actions: Evaluations, Awards, Profiles, Leave, and Transition

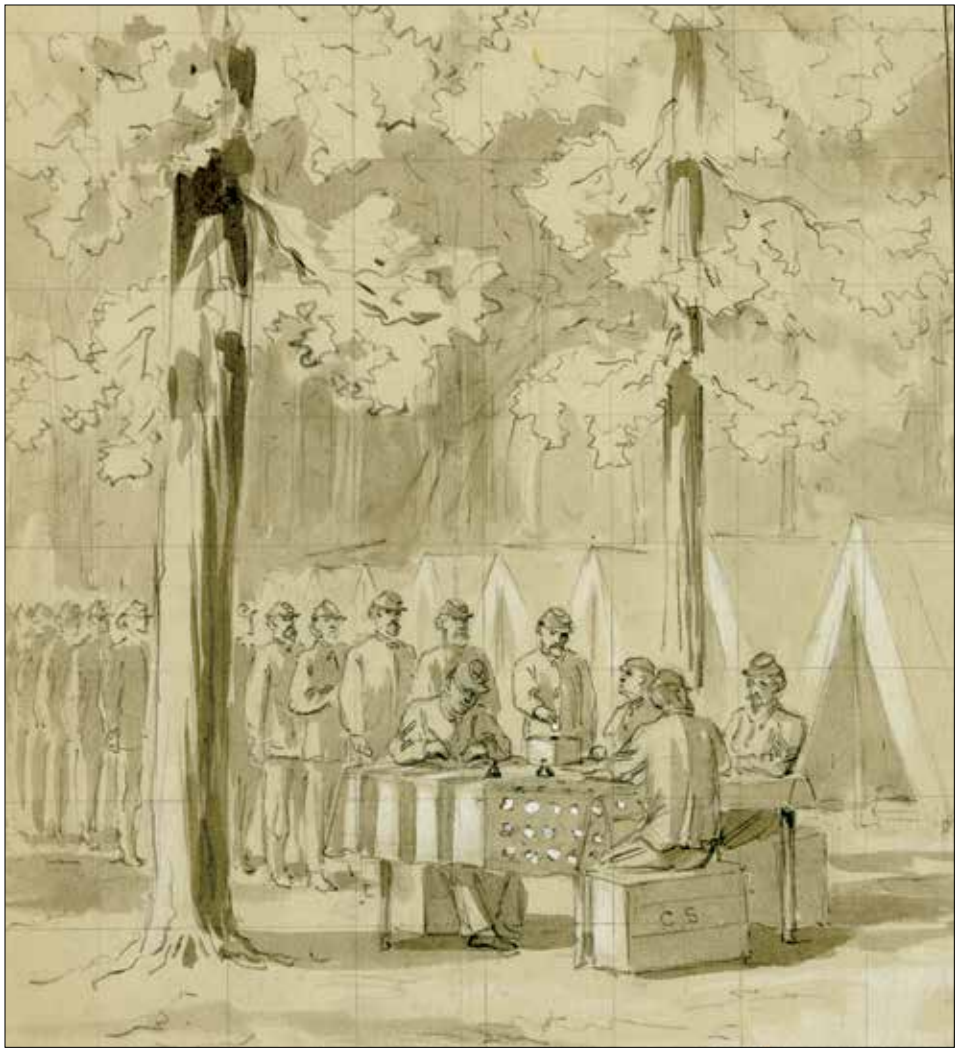
Personnel actions are one of the most important responsibilities for a leader. Short of a true emergency, there is no reason for a late personnel action (evaluation or an award). In almost every case, you have at least 364 days of preparation time. You can't start too early: draft and redraft; have the appropriate person/s review your draft to ensure intended, and prevent unintended, messages. Ninety days in advance is a proper planning figure; outstanding accomplishments can always be added.

As a rater or senior rater, review, plan, and track the execution of your profile from the first day you assume responsibility of evaluating personnel. You should forecast your profile using a two-year window as your planning assumption. Where possible, create flexibility in your profile for unexpected evaluations. Keep a running Order of Merit List to assist with management of your profile. Profile limitations impact box checks—if one of your people will be affected by that, explain the problem to the rated officer during counseling.

Leave is a critical component of balance. Take your leave and encourage subordinates to do the same. Make it a topic of discussion with those you rate/supervise early in the fiscal year. Everyone should have an annual leave plan to avoid forfeiting "use or lose" leave time. There are very few circumstances that warrant denying leave, even with multiple people on leave during the same time. Proper planning should permit effective management and accomplishment of required work in their absence. In the same vein, permit maximum flexibility for PCS leave and passes. Unless deploying, give Soldiers sufficient time to PCS (incoming and departing), to include all associated tasks. Transition overlap is critical in combat, but otherwise, it is helpful, not necessary. Ensure you and your subordinates prepare successors for success with useful transition products, like continuity books, forecasts of requirements for the successor's first thirty days, and a prescheduled itinerary of required activities to ensure a smooth entry into the unit.

The foregoing thoughts just begin to touch on the myriad of complex issues a leader faces on a daily basis. There is no single correct approach and the best leaders do not get it exactly right every time. I would just ask you to embrace your leadership opportunity. You have been entrusted to lead one of the Army's great legal teams. Remember, at the end of the day, leadership begins and ends with your people. No matter the situation—and whether or not great leadership comes naturally to you—if you care about your people, care about doing your best by them, and care about the organization in which you serve, then you have positioned yourself and your team for success in accomplishing any legal mission. **TAL**

COL Martin currently serves as the Chief of Professional Responsibility at the Office of The Judge Advocate General.



A sketch of members of the Army of the James voting during the Civil War in 1864 (Credit: Waud William/Library of Congress).

Closing Argument

Officers Should Vote Early and Often

By Lieutenant Colonel Jess R. Rankin

The American military jealously guards its status as an apolitical institution. This status is enshrined in regulation and tradition dating back to George Washington.[1] Some well-intentioned officers take this tradition and Professor Huntington's model of a modern apolitical Soldier to a logical and self-defeating extreme when they advocate that officers abstain from voting.[2] Persuading officers to abstain from voting to maintain professional impartiality is a cure far more insidious than the proposed disease of political partisanship. It misinterprets our oath of office, ignores American history and constitutional framework, and falsely proposes a bright line separating politics from war. American Soldiers' connection to their country through the exercise of the secret ballot is not a weakness, but a strength. Voting makes officers more effective and, more importantly, better citizens.

The founding fathers had a fear of standing armies. This fear was inherited from colonial memories of the English Civil War[3] and then reinforced during the age of Napoleon.[4] A fear of standing armies is reflected in our founding documents: the Declaration of Independence, the Federalist Papers, and the Constitution. However, it is not fear of such a standing army itself, but rather a fear of who controls that standing army. The Declaration of Independence lists all the abuses of the British King. Prominent among those abuses is the maintenance of a standing army in the colonies responsive solely to the King.[5] The founders' fears and experiences with the British monarchial army are reflected in the U.S. Constitution with the most glaring example being the reservation to Congress the ability to fund and raise an Army.[6] Additionally, our Bill of Rights explicitly prevents the forced quartering of Soldiers in private homes with the 3rd Amendment.[7]

The founders feared a standing army that would be used to trample democracy and advocated maintaining a small army with primary reliance on the militia.[8] In our modern age, with a large military establishment, suggesting officers should not vote removes one of our most effective democratic safeguards. Officers abdicating their right to vote so they may more loyally fulfill the orders of a president reduces them to mercenary agents of the executive branch. Concern about impartiality to the presidency also blindly ignores the constitutional obligations officers owe beyond a resident under the Constitution. Our oath as officers is to

support and defend the Constitution from enemies foreign and domestic.[9] In order to support and defend the Constitution, we must serve both Congress and the President.

Arguing officers should abstain from voting also ignores American military history. During our greatest wartime struggles, both in the Civil War and World War II (WWII), Soldiers regularly voted in wartime. While General Grant did not vote in the 1864 election, he regularly encouraged subordinates to support Soldiers' ability to vote. This verbal encouragement was reinforced in deed with furloughs home and mailed ballots.[10] Efforts were also conducted in WWII to ensure GIs could vote in far flung theaters during the decisive year of 1944.[11] The Soldiers ballot, including officers, was considered crucial to President Lincoln's reelection in 1864.[12] If officers had abstained from voting in 1864, and thereby allowed General McClellan to be elected on a peace ticket, they would have invalidated the very military purpose for which they had spent the last four years fighting. This highlights the logical absurdity in trying to divorce the political realm from the military application of force.

Perhaps most damning is how overbroad the results would be to abstain from voting to preserve political impartiality under a president. Presidential elections happen every four years, congressional elections every two years, and local elections and initiatives every year. Should someone who is concerned about remaining impartial about the presidential election outcome truly skip the ballot box, thereby forgoing a vote on the local school bond initiative, state environmental proposition, and representative to Congress? This fear of a slippery slope of political contagion seeping into professional advice would cut the very cords that tie us to the society we protect. Officers voting on issues affecting their families and communities constitutes a vital personal tie to the body politic. To remove that intimate connection would be creating conditions for resentment, apathy, and, worst of all, disregard.

Exercising suffrage rights makes officers more effective professionally, not less so. There is a recurring desire to have clean lines separating politics from the use of force. The desire to abstain from voting in order to keep military advice pure reflects this philosophy. It is a false panacea, for it ignores reality as espoused by Clausewitz's dictum that war is conducted for the purposes of political objectives.[13] Politics and warfare cannot be neatly separated, and we forget this at our peril. Officers must understand the political forces involved in the decisions they are ordered to execute, otherwise they are operating blindly. Officers will be most effective if they are invested in the successful outcome of these political decisions by participating in the democratic process. Otherwise we are merely professional employees of the Executive.[14] Being an active participant in our political process through the practice of informed voting provides insight and gives us "skin in the game."[15] Armies invested in their society fight more effectively and endure far greater privations than purely professional forces. This can be seen throughout western military history from the Greek Persian wars, through both American and French Revolutionary Wars, and perhaps to the modern wars of counterinsurgency.

Our highest oath as officers is to the Constitution, and we will defend the Constitution far more deeply and effectively if we actually exercise our rights as guaranteed under the Constitution. We will be more successful officers if we understand, and are committed to, the politics driving military decisions, and most importantly, we will be better citizens. **TAL**

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Notes

1. U.S. Dep't of Def., 5500.07-R, Joint Ethics Regulation ch. 6 (JER) (2018); Ron Chernow, Washington: A life 434–36 (2010).

2. M.I. Cavanaugh, *I Fight for Your Right to Vote. But I Won't Do It Myself*, N.Y. Times (Oct. 19, 2016), https://www.nytimes.com/2016/10/19/opinion/i-fight-for-your-right-to-vote-but-i-wont-do-it-myself.html; Samuel Huntington, The Soldier and the State: The Theory and Politics of Civil-Military Relations (1957).

3. Kevin Phillips, The Cousins' War 107 (1999).

4. Elizabeth Webber & Mike Feinsilber, Merriam-Webster's Dictionary of Allusions 345 (1999). Man on horseback is a military leader who presents himself as the savior of the country during a period of crisis who assumes dictatorial powers. Early in Napoleon's consulate he tried to draw comparisons to George Washington as a military leader called to political leadership. The irony being, Napoleon later failed to follow President Washington's example in stepping down from power, instead crowning himself as Emperor. Andrew Roberts, Napoleon 233, 353 (2014).

5. After the preamble in the Declaration of Independence, there is a list of injuries and usurpations by the British King on the American Colonists. These include maintaining a standing army in time of peace without legislature approval, quartering soldiers in private homes, and the utilization of mercenary troops.

6. U.S. Const. art. I, § 8, cl. 12; U.S. Const. amend. II.

7. U.S. Const. amend. III.

8. The Federalist No. 8 (Alexander Hamilton). This reliance on the militia as a democratic safeguard was then subsequently enshrined in the 2nd Amendment. U.S. Const. amend. II.

9. 10 U.S.C. § 1031 (2018).

10. James McPherson, Battle Cry of Freedom 804 (1988).

11. Don S. Inbody, *Monkey Cage*, Wash. Post (Nov. 11, 2015).

12. McPherson, *supra* note 10, at 805.

13. Carl Von Clausewitz, On War 87 (Michael Howard & Peter Paret eds., Princeton University Press 1976).

14. Lord Alfred Tennyson, The Charge of the Light Brigade (1854). A famous charge during the Crimean War with no hope of success, but executed regardless and with great loss of life.

15. Nassim Nicholas Taleb, Skin in the Game (2018). Chernow, *supra* note 1, at 434–36.

AROUND THE CORPS

The Hall of Heroes at The Judge Advocate General's Legal Center and School provides a place for reflection for students, faculty, and staff. (Credit: Chris Tyree)

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