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Lore of the Corps

Crime in Germany "Back in the Day":

The Four Courts-Martial of Private Patrick F. Brennan

Fred L. Borch
Regimental Historian & Archivist

Fifty years ago, judge advocates (JAs) stationed in Germany participated in more than a few courts-martial involving undisciplined Soldiers. But military justice "back in the day" was quite different from what one would see today because, under the Uniform Code of Military Justice (UCMJ) as it then existed, there was no JA participation at special courts-martial.[1] Rather, line officers served as trial and defense counsel and, as there also was no military judge or other similar judicial official at special courts, every court-martial was heard by a panel and the senior officer on the panel ran the court.[2] More than anything else, special courts were courts of discipline (although justice certainly was done) but sometimes a Soldier's inability to adhere to the Army's standards could not be solved with a special court-martial—as illustrated by the case of nineteen-year-old Private (PVT) Patrick F. Brennan. The story that follows is that of a teenaged GI who managed to accumulate five convictions by three special courts-martial in just ninety days—topped off by a trial by general court-martial.

Private Brennan's troubles began late in 1962 when he was convicted at a special court-martial of disrespect to a non-commissioned officer (NCO) and disorderly conduct in the barracks. The panel members sentenced him to thirty days hard labor without confinement, which was an authorized sentence under the UCMJ at the time and usually involved manual labor on some menial project. As a consequence of this court-martial conviction, Brennan's commander revoked his pass privileges. Unmarried junior enlisted Soldiers in this era lived in the barracks on post and could not leave their installation without having in their possession a card showing that they were authorized to go off post.[3]

To Brennan's dismay, his commander failed to restore his pass privilege at the end of his thirty-day hard labor sentence. A month later, with his "pass" still "under lock and key," PVT Brennan absented himself without leave (AWOL).[4] As he later explained, "I don't think the Army's pass policy is right. A pass is a right, not a privilege—except when it's withdrawn for disciplinary reasons." As Brennan saw it, since he had completed his sentence, he should have his pass card returned to him. The special court panel hearing the evidence, however, disagreed. It found him guilty and sentenced PVT Brennan to another stint in the stockade.

Shortly after completing this punishment for his AWOL, PVT Brennan was court-martialed the third time for "assaulting a SP5 [Specialist Five/E-5] and disobeying an order." According to a newspaper report in the European edition of *Stars and Stripes*, PVT Brennan served his sentence for this third court-martial at the stockade located at William O. Darby Kaserne, Fürth, Germany.[5]

Just two weeks before nineteen-year-old Brennan was scheduled to be discharged from the Army with a general discharge under honorable conditions, he committed yet another act of indiscipline. Sergeant (SGT) Sylvester J. Williams, then serving as guard commander, was marching a group of prisoners, including PVT Brennan, to eat "chow." As SGT Williams talked to the prisoners, PVT Brennan evidenced a lack of interest, and told Williams "to shut [his] damn mouth." Then, when SGT Williams directed Brennan "to step out of the ranks," an angry PVT Brennan not only stepped over to Williams but "poked the sergeant in the face without any preliminaries."[6] The "astonished prisoners looked on" while other guards "rushed into the fray to help Williams." Specialist Four William S. Minnich, who weighed over 200 lbs., quickly took charge of Brennan. Brennan not only went along quietly, but asked Minnich to "lock him up so he couldn't hurt anyone else."[7]

Private Brennan's chain-of-command had had enough of him. His upcoming separation from active duty was cancelled and PVT Brennan instead found himself before a

[1] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. III, ¶ 6c (1951) [hereinafter 1951 MCM], *available at* http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html (requiring that the appointment orders for trial and defense counsel to address whether counsel are "legally qualified lawyers" or not and, if a trial counsel is a qualified attorney, the defense counsel be a qualified attorney as well).

[2] There was no requirement for legally trained counsel at special courts until the enactment of the Military Justice Act in 1968, when an accused for the first time was "afforded the opportunity to be represented" at a special court by a lawyer. Consequently, absent extraordinary circumstances, convening authorities convened special courts, selected panels, appointed line officers as trial and defense counsel, and took action on findings and sentence without any JA participation. For more on the changes resulting from the Military Justice Act of 1968, see JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 243–51 (1975).

[3] *GI Discharged; Slugged Guard*, STARS & STRIPES, Aug. 1963.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

general court-martial convened by the VII Corps commander. The trial was held in Nurnberg. The trial counsel was Captain Quinlan J. Shea Jr. and the defense counsel was Captain Harry F. Goldberg. Both were fairly recent members of the Corps and were on their first tours as JAs. Shea was a Rhode Island attorney who had graduated in May 1961 from the 34th Special Class (as the Judge Advocate Officer Basic Course was then called). Goldberg was a Massachusetts lawyer who had graduated from the 36th Special Class in early 1962.

Brennan was charged with one specification under Article 91—striking an NCO while that NCO was in the execution of his office. At the time, the authorized maximum penalty for this offense was one year confinement at hard labor, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge (DD).[8] Brennan testified at his own trial, and admitted that he had struck SGT Williams. He "confessed" that he "wasn't rational at all." Not surprisingly, Brennan was convicted by the VII Corps panel of the specification and the charge.[9]

On sentencing, CPT Goldberg tried to put the best possible spin on his client's situation. "If what Private Brennan did was a senseless act, we feel it was an emotional outburst." Goldberg then quoted Supreme Court Justice Oliver Wendell Holmes's famous quip that "even a dog distinguishes between being kicked and stumbled upon." Goldberg added: "We feel this was more a case of being stumbled upon."[10]

Trial counsel CPT Shea responded when it was his turn to argue: "I believe this adds up to five convictions prior to this general court-martial." Continued Shea: "Sometimes we feel that deterrence is a dirty word. But the evidence presented by the defense asks you almost to reward Brennan for his offense. The Government is confident that you are not going to reward him." Captain Shea then asked the panel to impose the maximum sentence. As the *Stars and Stripes* reported, the nine member panel "went along with everything but the discharge, substituting a BCD [Bad Conduct Discharge] for the DD."[11]

United States v. Brennan is not reported as a case considered by the Army Board of Review. The Court of Military Appeals also did not hear an appeal. Consequently, it seems likely that Brennan simply served his confinement and then returned to civilian life. Today, this teenaged Soldier would be nearly seventy years of age. One wonders what, if anything, he learned from his time as a Soldier in Germany "back in the day."

As for Captains Shea and Goldberg? Goldman was released from active duty in December 1964. Captain Shea remained on active duty for another ten years; his last known assignment was in the Military Justice Division, Office of the Judge Advocate General. Then Major Shea left active duty in 1972.[12]

More historical information can be found at

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[8] 1951 MCM, *supra* note 1, ch. XXV, ¶ 127c, tbl., at 221.

[9] *GI Discharged; Slugged Guard*, *supra* note 3.

[10] *Id*.

[11] *Id*.

[12] OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Aug. 1963); OFFICE OF THE JUDGE ADVOCATE GENERAL, JAGC PERSONNEL AND ACTIVITY DIRECTORY (Sept. 1973).

Navigating the Restoration of Capacity and Civil Commitment of a Mentally Incompetent Accused

Major David M. O'Dea[*]

I. Introduction

When an accused is found mentally incompetent to stand trial, convening authorities and their judge advocates are thrust into the management of a unique capacity restoration process.[1] Born largely out of necessity, mentally incompetent service members are managed using a hybrid military-civilian process that "plugs the military justice system into the title 18 framework," which was designed for the handling of incompetent civilian defendants in federal district court.[2] As the federal insanity statutes were not originally crafted for the military, there are specific wrinkles regarding their application in military cases that would be wholly unfamiliar to a seasoned federal practitioner.[3] Because Article 76b, Uniform Code of Military Justice (UCMJ), explicitly integrates the federal insanity statutes, military justice practitioners must be familiar not only with court-martial procedures, but also with the same statutes, regulations, and case law that federal courts routinely wrestle with.[4] The process of restoring capacity can be complex enough in a purely federal setting, but this task is more vexing in this hybrid setting because the federal civilian and military sides must cooperate with each other using a process that is likely unfamiliar to each.[5]

This article attempts to bridge the gap between the two systems while providing a linear framework for navigating the hybrid process of capacity restoration. The first part of this article examines the issue of capacity in military courts while describing the procedure by which an accused would be subject to the federal insanity statues related to restoring capacity. The second part examines the restoration process, with a particular emphasis on the use of psychotropic medications in that process. The third part examines the steps which must be taken if restoration is unsuccessful and a service member is civilly committed. It is ultimately the goal of this article to provide some clarity to a process that can only succeed if there are coordinated efforts of medical and legal professionals, and the cooperation of two very distinct federal court systems.[6]

II. Arriving at Capacity Restoration

Mental capacity or mental competency to stand trial refers to an accused's ability to "consult with counsel and to comprehend the proceeding."[7] Capacity involves an ongoing evaluation of the accused's ability to "participate meaningfully" in the trial process from the preferral of charges through approval of the sentence by the convening authority.[8] Capacity, which is the focal point of this article, is not the same as the lack of mental responsibility defense.[9] Where capacity focuses on the accused's mental condition throughout the trial process, the defense of mental responsibility focuses solely on the accused's mental condition at the time of the criminal offense.[10]

The Supreme Court established the constitutional standard for competency in *Dusky v. United States* when it stated that a defendant standing trial must have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[11] The Supreme Court has unambiguously

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[1] *See* Joint Service Committee on Military Justice Report, *Analysis of the National Defense Authorization Act Fiscal Year 1996 Amendments to the Uniform Code of Military Justice*, ARMY LAW., Mar. 1996, at 144–46 [hereinafter JSC Report].

[2] *See id.* at 145 (The present military incompetency procedure "grew out of Senator Strom Thurmond's desire to have a mechanism for dealing with a soldier who was incompetent to stand trial").

[3] *See id.* at 145 n.16 (stating the federal insanity statutes "were enacted when the federal civilian criminal justice system discovered it lacked an established procedure to handle the incompetent defendant. This deficiency first surfaced prominently when John Hinkley attempted to assassinate President Reagan."); *see also* Steven V. Roberts, *High U.S. Officials Express Outrage, Asking for New Laws on Insanity Plea*, N. Y. TIMES, June 23, 1982, at B.

[4] *See* 10 U.S.C. § 876b (2006).

[5] *See* Richard D. Willstatter, *The Federal Criminal Mental Competency System*, CHAMPION, June 2006, at 16 (describing the federal insanity laws as a "daunting statutory and case law framework").

[6] *See* NAT'L JUD. COLL., MENTAL COMPETENCY BEST PRACTICES MODEL (2011), *available at* http://mentalcompetency.org/model/BP-Model.pdf (providing a discussion of the scope and challenges of competency related problems within the United States, and a model framework for developing competency processes).

[7] Pate v. Robinson, 383 U.S. 375, 388 (1966) (Harlan, J., dissenting). In this article the terms capacity and competency will be used interchangeably.

[8] RONALD ROESCH, PATRICIA A. ZAPF & STEPHEN D. HART, FORENSIC PSYCHOLOGY AND LAW 31 (2009) ("[I]t is unfair to try a defendant if is he or she is unable to participate meaningfully in the proceeding."); *see Pate*, 383 U.S. 388; *see also* MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 909 and 1107(b)(5) (2012) [hereinafter MCM].

[9] United States v. McGuire, 63 M.J. 678, 680 n.1 (A. Ct. Crim. App. 2006) (citing Lieutenant Colonel Donna M. Wright, *"Though This Be Madness, Yet There Is Method in It": A Practitioner's Guide to Mental Responsibility and Competency to Stand Trial*, ARMY LAW., Sept. 1997, at 18).

[10] *Id.*

[11] 362 U.S. 402 (1960).

stated that a "prohibition" on trying a mentally incompetent individual is "fundamental to an adversary system of justice," and that any trial involving an incompetent individual would necessarily violate his "due process right to a fair trial."[12] *Dusky's* constitutional floor for competency has been incorporated into the military justice system's competency standard by case law and statute.[13]

Article 76b, which mirrors the federal statutory definition of competency, refines the *Dusky* standard even further for court-martial purposes.[14] It states that an accused cannot stand trial if he is "presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case."[15]

Concerns regarding an accused's capacity to stand trial can emerge at any stage of the criminal proceeding, including during trial.[16] In the military, the trigger for further inquiry regarding mental capacity is quite low.[17] If it merely appears to "any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member" that "there is reason to believe" the accused lacks capacity to stand trial, that information must be passed along to the convening authority or military judge.[18] If the issue of capacity is raised prior to referral, the convening authority "before whom the charges are pending" has the authority to order that a sanity board be conducted to inquire into the capacity concerns.[19] If the issue of capacity arises after referral, the military judge can order the board.[20]

The motion for a sanity board should be granted by the military judge or convening authority "if it is not frivolous and is made in good faith."[21] Should the convening authority deny a request for a sanity board prior to referral, the military judge retains the authority to order the board after referral of the charges.[22] The decision to grant or deny the motion for a sanity board will be reviewed under a deferential "abuse of discretion standard."[23]

The order to conduct a sanity board regarding capacity must state the "reasons for doubting" the accused's mental capacity.[24] In response to the order, the sanity board must make an explicit finding on the *Dusky* test for capacity by determining whether the accused is "presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense."[25]

Like the federal incompetency statute, Rule for Court-Martial (RCM) 909 presumes capacity to stand trial.[26] Prior to referral, if the sanity board reports that the accused lacks capacity to stand trial, the convening authority has two options—either agree or disagree with the findings of the sanity board.[27] If the convening authority disagrees with the finding that the accused lacks capacity, she may dismiss, forward, or refer the charges.[28] If the convening authority agrees with the board's finding of lack of capacity, the convening authority must forward the charges to the general court-martial convening authority (GCMCA).[29] If the GCMCA disagrees with the board's finding of lack of capacity, she may dismiss, forward, or refer the charges to trial.[30] If the GCMCA agrees that the accused lacks capacity, she must "commit the accused to the Attorney General."[31]

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[12] Drope v. Missouri, 420 U.S. 162, 172 (1975).

[13] United States v. Barreto, 57 MJ 127, 130 (C.A.A.F. 2002); United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993); 10 U.S.C. § 876b (2006).

[14] *Compare* 18 U.S.C. § 4241 (d) (2006) ("presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"), *with* 10 U.S.C. § 876b (2006) ("be presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case")

[15] 10 U.S.C. § 876b (2006).

[16] *See* United States v. Usry, 68 M.J. 501, 502–03 (C.G. Ct. Crim. App. 2009) (the accused's competency to stand trial arose at trial during a colloquy regarding medications).

[17] MCM, *supra* note 8, R.C.M. 706(a).

[18] *Id.*

[19] *Id.* R.C.M. 706(b)(1).

[20] *Id.* R.C.M. 706(b)(2).

[21] United States v. Nix, 36 C.M.R. 76, 80 (1965).

[22] MCM, *supra* note 8, R.C.M. 706(b)(2); United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008) ("[a] military judge has the authority to order a sanity board after referral under R.C.M. 706 if it appears there is reason to believe the accused lacked mental responsibility at the time of a charged offense or lacks the capacity to stand trial").

[23] *Mackie*, 66 M.J. at 199.

[24] MCM, *supra* note 8, R.C.M.706(c)(2).

[25] *Id.*; *see* Dusky v. United States, 362 U.S. 402 (1960).

[26] *Compare* MCM, *supra* note 8, R.C.M. 909(b) ("a person is presumed to have the capacity to stand trial"), *with* 18 U.S.C. § 4241(d) (2006) (the court must find by preponderance that the accused lacks capacity).

[27] MCM, *supra* note 8, R.C.M. 909(c).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* R.C.M. 909(c)-(f).

After referral, the military judge will determine if the accused has the capacity to stand trial.[32] If any previous sanity board found that the accused lacks capacity to stand trial, the court is required to conduct a hearing into the accused's capacity.[33] The presumption of capacity will be overcome if it is established by a "preponderance of the evidence that the accused is presently suffering from a mental disease or defect."[34] During the hearing, the court is not limited by the rules of evidence, except privileges.[35] A military judge's ruling on capacity will be treated as a question of fact that will only be overruled "if it is clearly erroneous."[36] If the military judge finds that the accused lacks capacity to stand trial, the judge must report this matter to the GCMCA.[37]

If the accused is found incompetent to stand trial, the GCMCA is required to commit the accused to the attorney general pursuant to 18 U.S.C. § 4241.[38] The view that this is a nondiscretionary act is consistent with federal courts examining this issue.[39] Even if the GCMCA is of the opinion that the accused will not regain capacity with treatment, the GCMCA "does not have the discretion, prior to a reasonable period of hospitalization in the custody of the Attorney General," to make that determination.[40]

The process of remanding the accused to the attorney general is accomplished by contacting the Bureau of Prisons (BOP) via the United States Attorney's Office.[41] Once the BOP takes custody of an accused, he will be transferred to a Federal Medical Center (FMC).[42] Federal Medical Centers are federal prisons with "inpatient psychiatric unit[s]."[43] The BOP presently has five FMCs: Butner, North Carolina; Lexington, Kentucky; Rochester, Minnesota; Devens, Massachusetts; and Carswell, Texas.[44]

III. Restoring Capacity

The Supreme Court held in *Jackson v. Illinois* that a person who is committed based on a lack of capacity for trial can only be held for a "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[45] Because of this, once an accused arrives at the designated FMC, the government must diligently monitor the accused's potential for restoration or it risks violating the accused's due process rights.[46] If the government cannot restore the accused, it must "either institute the customary civil commitment proceeding," or discharge him.[47] If the government reasonably believes that it can quickly restore the accused "his continued commitment must be justified by progress toward that goal."[48]

A. Section 4241(d)

The restoration of an incompetent service member is based entirely on the process established in 18 U.S.C. § 4241(d).[49] This code provision was specifically tailored to meet the court's concerns regarding unlimited civil detention in *Jackson*.[50] The process begins with a four-month evaluation period.[51] During that four-month time period, the staff of the FMC must determine whether "there is a substantial probability that in the foreseeable future" the accused will regain the capacity to proceed to trial.[52] The purpose of the commitment at this phase is to allow "medical professionals to accurately determine" whether the accused can be restored to capacity.[53] This process will

[32] *Id.* R.C.M. 909(d).

[33] *Id.*

[34] *Id.* R.C.M. 909(e)(2).

[35] *Id.*

[36] United States v. Proctor, 37 M.J. 330, 336 (C.M.A. 1993).

[37] MCM, *supra* note 8, R.C.M. 909(e)(3).

[38] 10 U.S.C. § 876b (a)(1)–(2) (2006); United States v. Salahuddin, 54 M.J. 918, 920 (A.F. Ct. Crim. App. 2001) (finding that "the purpose of any hearing, under Article 76b, or the federal statute, 18 U.S.C. § 4241(d), is to determine capacity, not to determine the propriety of commitment to the Attorney General").

[39] *Salahuddin*, 54 M.J. at 920 (citing United States v. Filippi, 211 F.3d 649, 651 (1st Cir. 2000); United States v. Donofrio, 896 F.2d 1301 (11th Cir. 1990); United States v. Shawar, 865 F.2d 856, 863 (7th Cir. 1989)); *see also* United States v. Ferro, 321 F.3d 756, 761 (8th Cir. 2003).

[40] *Ferro*, 321 F.3d at 761.

[41] Bryon L. Hermel & Hans Stelmach, *Involuntary Medication Treatment for Competency Restoration of 22 Defendants with Delusional Disorder*, 35 J. AM. ACAD. PSYCHIATRY LAW. 47, 49–50 (2007).

[42] *Id.*

[43] *Id.*

[44] FEDERAL BUREAU OF PRISONS, FACILITY LOCATOR, http://www.bop.gov/DataSource/execute/dsFacilityLoc (last visited Jan. 1, 2013).

[45] 406 U.S. 715, 738–39 (1972).

[46] *See id.*

[47] *See id.*

[48] *Id.* at 739.

[49] *See* 10 U.S.C. § 876b (2006) (applying 18 U.S.C. § 4241(d) to UCMJ cases).

[50] United States v. Strong, 489 F.3d 1055, 1061 (9th Cir. 2007) ("it is significant to note that § 4241(d) was enacted in response to the *Jackson* decision and echoed it's language").

[51] 18 U.S.C. § 4241 (d)(1) (2006).

[52] *Id.*

[53] *Strong*, 489 F.3d at 1062.

require a more thorough examination than that seen in the RCM 706 inquiry.[54] The diagnosis and treatment will be based on a comprehensive clinical assessment that will involve:

> [A]n admission physical examination and laboratory studies to rule out underlying medical illness; individual forensic interviews; review of documents describing the defendant's arrest; past criminal history; and review of any available past medical and mental health records. Psychological testing is offered, although sometimes defendants refuse to participate. Incompetent defendants are usually encouraged to attend the weekly one-hour competency restoration group, which provides basic education on competency issues in a small group setting.[55]

While every effort should be made to complete the evaluation within four months, an accused may be held for "an additional reasonable period" if a court finds "there is a substantial probability" that the accused will regain capacity within the additional time period.[56] Federal courts have consistently agreed that 18 U.S.C. § 4241(d)(2) allows a defendant to be held for a period beyond the original four-month time period if the "substantial probability" standard is satisfied.[57] For military cases, the GCMCA serves as the court for the purposes of determining if the extension of temporary commitment should be granted.[58] To avoid potentially contentious issues, the GCMCA should ensure that any order to extend the accused's commitment pursuant to 18 U.S.C. § 4241(d)(2) is made prior to the expiration of the four-month time period.[59]

Defendants can challenge further commitment extensions under 18 U.S.C. § 4241(d)(2)(A).[60] If the accused opposes the extension, the Government should consider the use of an investigation under Army Regulation (AR) 15-6 in order to afford the accused an opportunity to be heard on the matter.[61] If the accused does not oppose the extension, trial counsel should consider the written reports provided by the FMC while also discussing the case with the accused's treating medical personnel prior to making a recommendation to the GCMCA regarding the extension.[62] The treating personnel should be able to render expert opinions regarding the likelihood and length of time that it generally takes to restore an individual with the accused's condition.[63] Trial counsel should also inquire about any observations which lead to the conclusion that the accused is presently improving while asking what future benchmarks would indicate progress towards restoration.[64]

Any order by the GCMCA for an extension of the accused's commitment under 18 U.S.C. § 4241(d)(2) should be in writing and state the specific facts which provided the basis for the belief that there is a substantial probability that the accused will regain competency within the time period which the GCMCA is providing for.[65] Trial counsel should

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[54] *See id.* (comparing the initial federal competency evaluation, which is the functional equivalent to a sanity board, to the 18 U.S.C. § 4241(d)(1) evaluation process).

[55] Hermel & Stelmach, *supra* note 41, at 50.

[56] 18 U.S.C. § 4241 (d)(2) (2006).

[57] *See* United States v. Magassouba, 544 F.3d 387, 409 (2d Cir. 2008) (citing United States v. Donofrio, 896 F.2d 1303 (11th Cir. 1990)).

[58] *See* 10 U.S.C. § 876b (2006). A general court-martial convening authority's (GCMCA) prerogative to function as the court for the purpose of these determinations comes from Article 76b, Uniform Code of Military Justice (UCMJ). *Id.* The federal insanity statutes explicitly state that certain provisions will not apply to UCMJ prosecutions. 18 U.S.C. § 4247 (j)(2006) ("[s]ections 4241, 4242, 4243, and 4244 do not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice"). But, Article 76b expressly reintegrates certain provisions. 10 U.S.C. § 876b (a)(1)-(5) (integrating 18 U.S.C. §§ 4241(d), 4246 (2006)). Via Article 76b, selective provisions are made applicable to the UCMJ, but the GCMCA is empowered to serve as the court for the purposes of these determinations, as opposed to a federal district court. *See* 10 U.S.C. § 876b (a)(1). For example, Article 76b grants the GCMCA the authority to order the commitment of an accused by placing him in "the custody of the Attorney General." *Id.* The statute is clear that the GCMCA will serve as the court during this stage of the process, stating that "references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person." 10 U.S.C. § 876b (a)(5). Only once attempts to restore competency have failed, or an accused's military status has ended, does the GCMCA stop acting as the court, and a federal district court would need to be involved for further action, like a civil commitment pursuant to 18 U.S.C. § 4246. 10 U.S.C. § 876b (a)(5).

[59] *Magassouba*, 544 F.3d at 408 (attorney general lacks authority to hold the defendant in further custodial hospitalization once the four-month time period expires and no § 4241(d)(2) order is entered).

[60] *Id.* at 406.

[61] *See* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARD OF OFFICERS (2 Oct. 2006) [hereinafter AR 15-6]. While no federal case law deals explicitly with a military accused challenging a GCMCA's 18 U.S.C. § 4241(d)(2) extension, federal case law is clear that service members who are deprived of a "liberty interest" by the military without the procedural protections of regulations, such as those used in AR 15-6, may resort to the federal courts for relief. Holley v. United States, 124 F.3d 1462, 1469 (Fed. Cir. 1997).

[62] *See* United States v. Weston, 326 F. Supp. 2d 64, 67 (D.D.C. 2004) (providing an example of a trial court order which sets forth the facts and applicable law considered by a federal district court in granting an 18 U.S.C. § 4241 (d)(2) extension).

[63] *See* Douglas Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, 35 J. AM. ACAD. PSYCHIATRY LAW. 34, 41 (2007); *see also* United States v. Loughner, 672 F.3d 731, 741 (9th Cir. 2012) (discussing expert's testimony regarding treatment benchmarks and restoration rates).

[64] *See* United States v. Loughner, 672 F.3d 731, 741 (9th Cir. 2012) (discussing expert's testimony regarding treatment benchmarks and restoration rates that supported the court's factual basis to grant a 18 U.S.C. § 4241(d)(2) extension).

avoid tacking on additional time to the order if the medical evidence suggests that competency may be restored within a shorter time period.[66] A GCMCA can grant further extensions if the requisite standard is met, but a time extension which is not tied specifically to the medical needs of the accused is unreasonable.[67] While it is unclear if an accused can challenge his continuing detention at an FMC in military courts, federal case law likely allows such a challenge via the writ of habeas corpus; accordingly, the government's records with regards to any extension must be legally sufficient.[68]

B. Medicating to Restore Capacity

An accused committed due to a lack of capacity likely can be restored to capacity with treatment at the FMC.[69] Treatment to restore an accused to capacity generally will involve the "administration of psychotropic medications."[70] In most situations, accused will voluntary take medication in order to restore competency.[71] In these voluntary treatment situations, the process will largely remain a matter between the treating medical personnel at the FMC and the accused.[72] However, situations inevitably arise where accused will refuse medication to restore competency.[73]

1. Forcibly Medicating for Dangerousness Under Harper

A GCMCA can order the forcible medicating of an accused in order to restore competency.[74] Before resorting to a GCMCA order to medicate, trial counsel should ensure that the FMC has determined that the accused cannot be medicated pursuant to what is commonly called a *Harper* hearing.[75] In *Washington v. Harper*, the Supreme Court held that the Due Process Clause allows a prison facility to forcibly medicate an inmate if the inmate "is dangerous to himself or others and the treatment is in the inmate's medical interest."[76] Relying on the fact that the decision to medicate is primarily a "medical judgment," the Court stated that an administrative hearing, conducted at the facility before an impartial medical professional that provides for "notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses" sufficiently protects the defendant's due process rights.[77]

Harper's holding has been incorporated into Code of Federal Regulations.[78] In order to forcibly medicate an accused under the applicable regulations, the accused must be given twenty-four hours' written notice, and "an explanation of the reasons for the psychiatric medication

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[65] *See* United States v. Green, 532 F.3d 538, 556 (6th Cir. 2008) (finding that a trial court properly considered pertinent factors regarding competency when its order failed to enumerate the factors because the trial courts record as a whole demonstrated proper consideration).

[66] *See Loughner*, 672 F.3d at 772 (finding that the trial court properly granted a narrowly tailored extension which was based on medical expert testimony, all case files, and the rebuttal evidence presented by the defendant).

[67] *See id.*

[68] 18 U.S.C. § 4247(g) (2006) ("[n]othing contained in section 4243, 4246, or 4248 precludes a person who is committed under either of such sections from establishing by writ of habeas corpus the illegality of his detention"); *see also* United States v. Salahuddin, 54 M.J. 918, 920–921 (A.F. Ct. Crim. App. 2001) (military court avoided ruling on whether it had justification to issue a writ of mandamus under the All Writs Act in response to GCMCA's commitment of the accused to the Attorney General by determining the commitment was a non-discretionary act); United States v. Magassouba, 544 F.3d 387, 411 (2d Cir. 2008) ("[a] defendant may also petition for a writ of habeas corpus to secure release from unlawful custody. Because habeas corpus originates in equity, it affords courts considerable flexibility to intervene to ensure that cases of confined incompetent defendants are not allowed to languish, whether the confinement is alleged to be unlawful under § 4241(d)").

[69] *See* Douglas R. Morris & George F. Parker, *Jackson's Indiana: State Hospital Competence Restoration in Indiana*, 36 J. AM. ACAD. PSYCHIATRY LAW. 522, 528 (2008) (a study of Indiana state hospitals that examined cases from 1988 to 2004 found that nearly eighty-four percent of individuals who lacked capacity were successfully restored within one year of treatment); *see also* U.S. Resp. Brief at 28–29, Sell v. United States, 539 U.S. 166 (2003), 2003 WL 193605 (a Bureau of Prison's study found that eighty-seven percent of defendants who voluntary submitted to treatment were restored to capacity, while seventy-six percent who were forcibly treated were restored to capacity); *see also* Patricia A. Zapf & Ronald Roesch, *Future Directions in the Restoration of Competency to Stand Trial*, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCI. 43, 43-45 (2011); *but see* Mossman, *supra* note 63, at 41 (showing that attempts at competency restoration are generally successful unless the accused suffers from a "long standing psychotic disorder that has resulted in lengthy periods of psychiatric hospitalization," or has an "irremediable cognitive disorder (e.g., mental retardation)").

[70] *See* Zapf & Roesch, *supra* note 69, at 45 (concluding that "[t]he most common form of treatment for the restoration of competency involves the administration of psychotropic medication").

[71] *See id.* (concluding that "[t]he majority of incompetent defendants consent to the use of medication").

[72] *See* U.S. DEP'T OF JUST., BUREAU OF PRISONS, LEGAL RESOURCE GUIDE TO FEDERAL BUREAU OF PRISONS 26–27 (2008) [hereinafter BOP LEGAL GUIDE]; *see also* Psychiatric Evaluation and Treatment, 76 Fed. Reg. 40229-02 ("[a]n inmate may also provide informed and voluntary consent to the administration of psychiatric medication that complies with the requirements of § 549.42 of this subpart").

[73] *See* U.S. Resp. Brief, *supra* note 69, at 27–28 (finding 59 of 285 patients had to be forcibly medicated to restore competency at the FMC); *see also* Zapf & Roesch, *supra* note 69, at 45.

[74] *See supra* note 58.

[75] Washington v. Harper, 494 U.S. 210 (1990).

[76] *Id.* at 227.

[77] *Id.* at 231–33, 235–36.

[78] *See* 28 C.F.R. § 549.46 (2012).

proposal."[79] During the hearing, the accused has the right to be present, have a representative from the facility's staff, present evidence, request reasonably available witnesses, and have the staff representative or the hearing officer question witnesses.[80] The hearing officer, who will be a psychiatrist who is not presently involved in the accused's treatment, must determine "whether involuntary administration of psychiatric medication is necessary because, as a result of the mental illness or disorder, the inmate is dangerous to self or others, poses a serious threat of damage to property affecting the security or orderly running of the institution, or is gravely disabled."[81] Once the hearing officer reaches a decision, the accused has the right to a written copy of the hearing officer's report, and the accused may appeal the decision to the hospital's mental health administrator within twenty-four hours of receiving the report.[82] Medication usually will not be dispensed while the appeal is pending, but ordinarily the appeal authority will act within twenty-four hours of receiving the appeal.[83] Once the appeal has been acted upon, medication may be forcibly given to the accused.[84]

Medicating an accused in order to restore capacity requires different justifications than medicating for dangerousness, even though medicating for dangerousness may restore capacity.[85] Nonetheless, when forcible medication is contemplated, it remains a good idea to inquire about a *Harper* justification because it not only avoids GCMCA action, but also because some federal circuits have required the government to consider or conduct a *Harper* hearing before attempting forcible medication for the purpose of restoring capacity.[86]

2. Forcibly Medicating for Capacity Under Sell

A defendant can be forcibly medicated solely to restore capacity under the Supreme Court's holding in *Sell v. United States*.[87] In *Sell*, the Court stated that forcibly medicating to restore capacity requires a court to consider whether the government has shown a "need for that treatment sufficiently important to overcome the individual's protected interest in refusing it."[88] The Court cautioned that forcibly medicating a defendant is an aberrant situation that requires a court to deeply consider "the side effects, the possible alternatives, and the medical appropriateness" of the proposed treatment.[89] To guide this analysis, the Court set forth four factors which must be established in order to forcibly medicate a defendant.[90]

First, the court must establish that "important governmental interests are at stake."[91] When an accused is charged with a serious offense which carries a protracted term of confinement, the government generally will have an important interest in protecting society.[92] Federal courts have generally agreed that "it is appropriate to focus on the maximum penalty authorized by statute in determining if a crime is 'serious' for involuntary medication purposes."[93] The alleged crime or crimes do not have to involve violence in order to be considered serious.[94] However, the Court cautioned that "special circumstances" such as the availability of a "civil commitment" process may mitigate the government's interest by providing an alternative means of protecting the public.[95]

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[79] *Id.* § 549.46(a).

[80] *Id.*

[81] *Id.* § 549.46(a)(4), (a)(7).

[82] *Id.* § 549.46(a)(4), (a)(8).

[83] *Id.* § 549.46(a)(9).

[84] *Id.*

[85] *See* Sell v. United States, 539 U.S. 166, 179 (2003); *see also* 28 C.F.R. § 549.46(b)(2) (2012) ("[a]bsent a psychiatric emergency as defined above, § 549.46(a) of this subpart does not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial").

[86] United States v. White, 431 F.3d 431, 434 (5th Cir. 2005) (government failed to "exhaust" remedies by not conducting a *Harper* hearing prior to seeking a court order to medicate); United States v. Morrison, 415 F.3d 1180, 1182 (10th Cir. 2005) (government should have conducted a *Harper* hearing or explained why it did not prior to seeking a court order to medicate); United States v. Gutierrez, 443 F. App'x 898, 903 (5th Cir. 2011) (government failed to "exhaust" remedies by not conducting a *Harper* hearing prior to seeking a court order to medicate). In response to these and similar holdings, the Bureau of Prisons approved in August of 2011 a regulation which clarified that the Code of Federal Regulations (CFR) hearing provisions do "not apply to the involuntary administration of psychiatric medication for the sole purpose of restoring a person's competency to stand trial." *See* Psychiatric Evaluation and Treatment, 76 Fed. Reg. 40,229–02, 31–33 (Aug. 12, 2011) (to be codified at 28 C.F.R. § 549.46(b)(2) (2012)). Because there still remains some question how the courts will respond to this rule, and because a *Harper* hearing provides a vetted mechanism for forcibly medicating, trial counsel should still discuss with Federal Medical Center (FMC) personnel whether the accused would qualify for forced medication under *Harper*. *See* Donna L. Elm & Douglas Passon, *Forced Medication After* United States v. Sell*: Fighting Your Client's War on Drugs*, CHAMPION, June 2008, at 28.

[87] 539 U.S. 166, 186 (2003).

[88] *Id.* at 183.

[89] *Id.*

[90] *Id.* at 180–81.

[91] *Id.* at 180.

[92] *Id.* The government's interest in a "timely prosecution" is also considered important due to concerns regarding the degradation of evidence and witnesses as a result of the passing of time. Finally, the Court noted that the Government has an important interest in ensuring the accused receives a "fair trial." *Id*.

[93] United States v. Green, 532 F.3d 538, 548 (6th Cir. 2008) (quoting United States v. Evans, 404 F.3d 227, 237 (4th Cir. 2005)).

[94] United States v. White, 620 F.3d 401, 410 (4th Cir. 2010) (fraud and theft were "serious crimes" because the statutory maximum for the alleged offenses was ten years of confinement).

[95] *Sell*, 539 U.S. at 180.

Second, the court must establish that forced medication will "significantly further" the government's interest.[96] This means that the court must establish that the proposed medication regiment is "substantially likely" to restore the accused to capacity; and the proposed medication is "substantially unlikely" to cause "side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense."[97] In order to satisfy this factor, the accused's doctors must apprise counsel of "the particular medication, including the dose range, it proposes to administer" to the accused.[98] While no precise definition of "substantially likely" has been agreed upon, a seventy percent chance of restoration has been deemed "substantially likely."[99] The second prong of this factor focuses exclusively on any side effects from the medication which may impact the accused's ability to cooperate in his defense.[100] While a competent expert from the FMC should again be able to spell out any obvious side effects which may cause other capacity concerns, counsel should be cautious to inquire whether the proposed medication will modify the accused's "attitude, appearance, and demeanor at trial" because courts have found that a visible modification of these traits may be unfairly prejudicial.[101]

Third, the court must find that forcible medication is "necessary to further" the government's important interests, namely that other "non-drug therapies" are "unlikely to achieve substantially the same result."[102] In order to satisfy this factor, counsel should inquire about what alternative treatments are generally available to individuals with the accused's medical condition, and why specifically those alternatives will not be as productive as medication in the accused's case.[103]

Fourth, the court must find that forcibly medicating the defendant is "medically appropriate," considering the overall "medical condition" of the defendant and the proposed slate of medications.[104] The focus here is whether the defendant, as a "patient," will suffer other side effects, not related to capacity, which make it improper to medicate.[105] This means that there may be a defendant who can be restored to capacity, but should not be restored to capacity because other specific medical concerns make the proposed treatment medically unsuitable for the defendant.[106] Counsel should not confuse this inquiry with the second factor's inquiry regarding capacity-related side effects.[107] Instead, counsel, under this factor, must ask the questions regarding short-and long term dangers that any reasonable patient would ask prior to accepting a proposed treatment.[108]

While the forcible medication of a defendant facing federal charges requires a hearing and court order, the forcible medication of a military accused can be ordered by the GCMCA or military judge.[109] However, the GCMCA or military judge must apply the *Sell* factors in arriving at the decision to forcibly medicate an accused.[110] Because of the complexities involved in applying the *Sell* factors, and the benefits of developing a written record, a GCMCA should consider appointing a formal AR 15-6 investigation if forcible medication to restore capacity is being considered and the matter is not before a military judge.[111] A formal AR 15-6 investigation provides the best opportunity to fully develop a record of the underlying reasons behind a GCMCA's decision to forcibly medicate or not, while providing the accused notice and an opportunity to be heard on the issue.[112] Case law is clear that each *Sell* factor must be established by "clear and convincing evidence."[113] Upon arriving at a decision to forcibly medicate, the GCMCA's order should make explicit findings on each of the *Sell*

[96] *Id.* at 181.

[97] *Id.*

[98] United States v. Evans, 404 F.3d 227, 241 (4th Cir. 2005).

[99] United States v. Nicklas, 623 F.3d 1175, 1180 (8th Cir. 2010); *but see* United States v. Ghane, 392 F.3d 317, 320 (8th Cir. 2004) (five percent to ten percent chance of restoration was not substantially likely); United States v. Moruzin, 583 F. Supp. 2d 535, 547 (D.N.J. 2008) (eighty-five percent success rate was not substantially likely when considered in conjunction with the individual defendant's mental health history); United States v. Rivera-Morales, 365 F. Supp. 2d 1139, 1140 (S.D. Cal. 2005) (fifty percent chance of restoration was not substantially likely).

[100] *See* Riggins v. Nevada, 504 U.S. 127, 142 (1992) (warning that "drugs can prejudice the accused in two principal way: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel").

[101] *Id.* at 131; *see* United States v. Moruzin, 583 F. Supp. 2d 535, 549–50 (D.N.J. 2008); United States v. Gomes, 387 F.3d 157, 162 (2d Cir. 2004).

[102] *Sell*, 539 U.S. at 181.

[103] *See* United States v. Ruiz-Gaxiola, 623 F.3d 684, 702–03 (9th Cir. 2010) (trial court properly considered "less intrusive" forms of treatment when it concluded that the defendant's "resistance to treatment and his conspiratorial delusions" made them less likely to restore the defendant than medication).

[104] *Sell*, 539 U.S. at 181.

[105] *Ruiz-Gaxiola*, 623 F.3d 703 (quoting *Sell*, 539 U.S. at 180–81) (noting that use of the term 'patient' in *Sell* "serves to emphasize that, in analyzing this factor, courts must consider the long-term medical interests of the individual rather than the short-term institutional interests of the justice system").

[106] *See id.*

[107] *See id.* at 703–04 (federal magistrate erred by conflating the fourth factor's analysis into the second factor's analysis).

[108] *See id.*

[109] *See supra* note 58.

[110] *See* Sell v. United States, 539 U.S. 166, 180–83 (2003).

[111] *See* United States v. Diaz, 630 F.3d 1314, 1331 (11th Cir. 2011) (*Sell* factor analysis necessarily implicates both factual and legal findings).

[112] *See* AR 15-6, *supra* note 61.

[113] *Diaz*, 630 F.3d at 1332 (citing United States v. Bush, 585 F.3d 806, 814 (4th Cir. 2009); United States v. Grape, 549 F.3d 591, 598 (3d Cir. 2008); United States v. Gomes, 387 F.3d 157, 160 (2d Cir. 2004)).

factors while directly citing the evidence that supports the finding.[114]

IV. Post–Restoration Issues

Because the government has only a limited amount of time to restore an accused to capacity, there are limitations on what treatments can be undertaken.[115] Ultimately these limitations exist because the government is using its coercive power to hold an individual, albeit in a clinical setting, who has yet to be convicted of any criminal offense.[116] Invariably, there will be cases where the government cannot restore the accused to capacity; in such cases a trial counsel's responsibilities will include assisting in the civil commitment process, while advising the command on issues related to the accused's military status.[117]

A. Managing the Restored Accused

If an accused is restored to capacity, the FMC will notify the GCMCA and the accused's attorney via a certificate of competency.[118] The certificate should state that the accused "has recovered to such an extent that the [accused] is able to understand the nature of the proceedings against the person and to conduct or cooperate intelligently in the defense of the case."[119] The FMC is permitted to hold the accused for 30 days from when the notification is made.[120] Once notified, the GCMCA must "promptly take custody" of the accused.[121]

Military courts have determined that it is not necessary to conduct another RCM 706 inquiry before trial unless new grounds arise to question the accused's capacity once the accused is back under military control because "the warden's certificate can be viewed as a proper substitute" for a sanity inquiry.[122] However, counsel should consider that an appellate court will look very closely at the capacity of a recently restored defendant; therefore, the best way to protect the record from appellate issues is to conduct a final sanity inquiry prior to trial.[123] Counsel should also anticipate that a recently restored accused may raise the lack of mental responsibility defense at trial.[124]

B. Managing the Unrestored Accused

If after a reasonable amount of time an accused cannot be restored to capacity, the government must either "release" the accused or initiate a "civil commitment."[125] Functionally, once the FMC determines that the accused cannot be restored, the government must move quickly because the underlying "statutory authority" to hold the accused for treatment no longer exists.[126] Upon receipt of the FMC report stating that the accused cannot be restored, trial counsel should promptly review the report and advise the GCMCA on whether to agree or disagree with the opinion.

1. The Civil Commitment Process

If the GCMCA agrees with the accused's treating personnel that he cannot be restored, the accused is subject to the civil commitment process of 18 U.S.C. § 4246.[127] To initiate the federal civil commitment process, the GCMCA should direct the FMC to conduct a risk assessment of the

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[114] *See* United States v. Decoteau, 857 F. Supp. 2d 295, 307 (E.D.N.Y. 2012) (providing an excellent trial court opinion regarding forcible medicating which coherently sets forth the applicable law and facts needed for this type of order).

[115] *See* Jackson v. Indiana, 406 U.S. 715, 738–39 (1972) (while not imposing "arbitrary time limits" the Court cautioned that "indefinite commitment" without progress toward restoration violates due process).

[116] *See* Cook v. Ciccone, 312 F. Supp. 822, 824 (W.D. Mo. 1970) ("such consideration is dictated by the inherent unfairness and substantial injustice in keeping an unconvicted person in federal custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time").

[117] *See* Major Jeff A. Bovarnick, *Trying to Remain Sane Trying an Insanity Case* United States v. Captain Thomas S. Payne, ARMY LAW., June 2002, at 23.

[118] 10 U.S.C. § 876b (a)(4)(A) (2006).

[119] *Id.*

[120] *Id.* § 876b (a)(4)(C).

[121] *Id.* § 876b (a)(4)(B).

[122] *See* United States v. Mancillas, NMCCA 200401950, 2006 WL 4573010 (N-M. Ct. Crim. App. Dec. 18, 2006) (citing United States v. Jancarek, 22 M.J. 600, 603 (A.C.M.R. 1986)).

[123] *See* United States v. Collins, 41 M.J. 610, 613 (A. Ct. Crim. App. 1994) (an ambiguous mental status report at the trial court caused the appeals court to remand for a rehearing on the accused's capacity at the time of trial); *see also* Captain Annamary Sullivan, *Insanity on Appeal*, ARMY LAW., Sept. 1987, at 41–45 (for an excellent discussion of how military appellate courts have reviewed capacity-related concerns).

[124] *See* UCMJ art. 50a (2012); 18 U.S.C. § 4241 (f) (2012) ("[a] finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged"). If the accused is found "not guilty by reason of lack of mental responsibility" the government will need to facilitate the civil commitment of the accused if he or she is a serious danger to the public. 10 U.S.C. § 876b (b)(4) (2006) (incorporating 18 U.S.C. § 4243 which provides for the civil commitment of an a dangerous accused post acquittal due to lack of mental responsibility).

[125] Jackson v. Indiana, 406 U.S. 715, 738 (1972); *see* 10 U.S.C. § 876b (a)(3) (2006).

[126] *See* United States v. Magassouba, 544 F.3d 387, 392, 410 (2d Cir. 2008) (finding that the BOP exceeded its authority to hold a defendant when it failed to seek a court order extending the four month evaluation period).

[127] 10 U.S.C. § 876b (a)(3) (2006); 18 U.S.C. § 4246 (2006).

accused.[128] The purpose of the risk assessment is to determine if the accused "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another."[129] Within a matter of weeks, the FMC should return a risk assessment report to the GCMCA which will cover the accused's history, course of treatment, and analysis of dangerousness.[130] If the accused is deemed to be dangerous by the evaluators, trial counsel should review the report and be prepared to advise the GCMCA on whether to agree with the report. If the GCMCA agrees, the FMC will first attempt to transfer the accused to a state mental health facility where the accused "is domiciled."[131]

If the FMC cannot convince a state facility to accept the accused, the FMC's warden will file a Certificate of Mental Disease or Defect and Dangerousness in the federal district court where the accused is being held, while also notifying the GCMCA of this action.[132] The district court will then conduct a hearing where it must determine by "clear and convincing evidence" that the accused is a danger.[133] The determination of dangerousness is based on multiple factors, but they may include "a history of dangerousness, a history of drug or alcohol use, identified potential targets, previous use of weapons, any recent incidents manifesting dangerousness, and a history of problems taking prescribed medicines."[134] If the court finds the accused to be a danger, the accused will be held at an FMC until either he is no longer a threat or a state facility will undertake his care.[135] It is at this point in the process that the appropriate convening authority can dismiss the charges against the accused because the long term care and custody of the accused will become the responsibility of the FMC.[136]

An accused subject to civil commitment due to an underlying criminal offense will likely remain in custody longer than an ordinary civil patient.[137] Military authorities will have very little ability to influence when the accused is released because the final decision will be made by the district court where the accused resides.[138] Ultimately, release will only be granted by the court if it finds by a "preponderance of evidence" that the accused has recovered from the condition that made him a danger, or that a proscribed treatment plan, which can be adjusted or revoked by the court, renders the accused no longer a danger.[139]

2. Administrative Concerns

A mentally incompetent accused who is committed for dangerousness will fail to meet the "medical fitness standards" for continued service.[140] Accordingly, a Medical Evaluation Board (MEB) must be initiated in these cases, with the added requirement that the board be conducted at the FMC where the accused resides.[141] Because the accused likely is located at an FMC which is some distance from the GCMCA who has been acting on the case, the GCMCA should transfer jurisdiction over the accused to the nearest military treatment facility that is capable of traveling to the accused in order to manage the MEB.[142] Counsel should

[128] *See* BOP LEGAL GUIDE, *supra* note 72, at 6-7.

[129] 18 U.S.C. § 4246 (a) (2006).

[130] *Id.* § 4247 (c).

[131] *See id.* § 4246 (a)–(d).

[132] *See id.* § 4246 (a) ("[t]he clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment"); UCMJ art. 76b (a)(5) (2012) ("references to the court that ordered the commitment of a person, and to the clerk of such court, shall be deemed to refer to the general court-martial convening authority for that person").

[133] 18 U.S.C. § 4246 (d) (2006); *see* Addington v. Texas, 441 U.S. 418, 419 (1979) (holding that a state law standard which was the equivalent of "clear and convincing" evidence protected the due process concerns implicated in the civil commitment of a defendant for dangerousness); *see also* United States v. S.A., 129 F.3d 995, 998 (8th Cir. 1997); United States v. Copley, 935 F.2d 669, 672 (4th Cir. 1991); United States v. Sahhar, 917 F.2d 1197, 1200 (9th Cir. 1990).

[134] United States v. Ecker, 30 F.3d 966, 970 (8th Cir. 1994).

[135] 18 U.S.C. § 4246 (d) (2006).

[136] *See* 10 U.S.C. § 876b (d)(2) (2006) (which makes it clear that a service member whose military status is terminated but who is in the custody of the attorney general remains subject to the federal civil commitment statutes).

[137] *See* Gwen A. Levitt et al., *Civil Commitment Outcomes of Incompetent Defendants*, 38 J. AM. ACAD. PSYCHIATRY LAW. 349, 356 (2010) (study of Arizona defendants finding that mentally incompetent non-restorable defendants spent "twice as long" in hospitals compared to civil patients).

[138] 18 U.S.C. § 4246 (e) (2006).

[139] *Id.*

[140] U.S. DEP'T OF ARMY, REG. 40-400, PATIENT ADMINISTRATION, USE OF MEDICAL EVALUATION BOARD para. 7-5b(7) (15 Sept. 2011) [hereinafter AR 40-400] (stating that a Medical Evaluation Board (MEB) is required in situations involving mental competency); *see* U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, ANXIETY, SOMATOFORM, OR DISSOCIATIVE DISORDERS para. 3-33 (23 Aug. 2010) [hereinafter AR 40-501] (dissociative disorders which cause "[p]ersistence or recurrence of symptoms sufficient to require extended or recurrent hospitalization" are medically disqualifying); *see also* Bovarnick, *supra* note 117, at 15 n.19 ("[s]ervice members diagnosed as suffering from a severe mental disease or defect are usually separated via a medical board. The military does not have any long-term in-patient psychiatric treatment facilities because contracting these services to civilian facilities is more cost effective").

[141] AR 40-400, *supra* note 140, para. 5-13g (stating that prisoner patient MEBs "will be convened at the place of confinement to consider disposition").

[142] *See id.* para. 5-15 (for a discussion of various procedural hurdles related to the handling of military psychiatric patients); *see also* Meredith L. Mona, *Update on the Disposition of Military Insanity Acquittees*, 34 J. AM. ACAD. PSYCHIATRY LAW. 538, 541 (2006) (for a thoughtful discussion of the

engage their GCMCAs early in the process as this action will likely require senior leader intervention in order to facilitate the jurisdictional transfer.[143] As this entire process will take a substantial amount of time to complete, potentially crossing over many counsel, each assigned counsel should keep "a running Memorandum for Record (MFR) containing all the facts, points of contact, and legal analysis that has already gone into the process" in order to "avoid the simple well-meaning but already considered solutions."[144]

V. Conclusion

Bringing an accused to trial can be a difficult proposition which is only made more difficult when mental capacity concerns arise.[145] At times the process may feel like counsel are "forcing a square peg into a round hole."[146] But the hybrid system offers some benefits, namely access to a federal system that routinely confronts these types of issues, thereby "conserving judicial and other resources."[147] With some forethought and understanding of the process, counsel will be better equipped to advise their commanders on the relative costs and benefits of various courses of action during the restoration process, while being able to honestly apprise commanders of the limitations that may exist. Restoring competency is not easy, and even the best results will often lead to dissatisfaction; however, by knowing how the system works, and focusing on due process concerns, judge advocates and their commanders can preserve the system's integrity while minimizing the friction that naturally occurs in these types of cases.[148]

limitations and challenges facing the military's management of mental illness).

[143] E-mail from Major Ryan Beery, Brigade Judge Advocate, 1st Brigade Combat Team, 1st Armored Div., to author (Feb. 17, 2013, 18:10 EST) (on file with author).

[144] E-mail from Major Ryan Beery, Brigade Judge Advocate, 1st Brigade Combat Team, 1st Armored Div., to author (Feb. 18, 2013, 02:06 EST) (on file with author).

[145] Bovarnick, *supra* note 117, at 14.

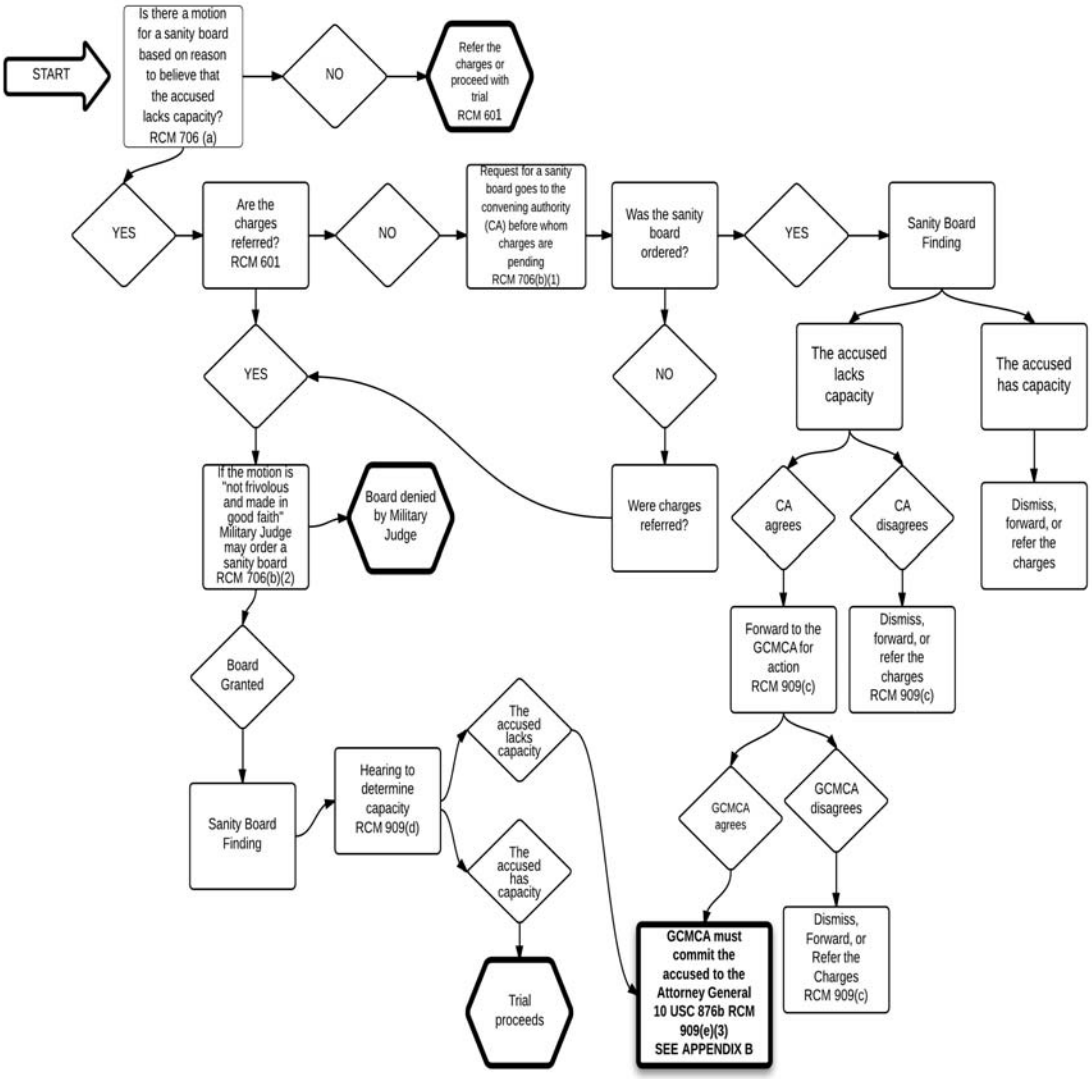
[146] EDWARD BULWER LYNTON, KENELM CHILLINGLY, HIS ADVENTURES AND OPINIONS BY THE . . . 352 (2d ed. 1873) (the origin of the phrase "square pegs into round holes").

[147] JSC Report, *supra* note 1, at 146.

[148] *See* Mona, *supra* note 142, at 544 (discussing the "significant burden" on "time, money, and resources" which criminal cases involving mental health concerns require).

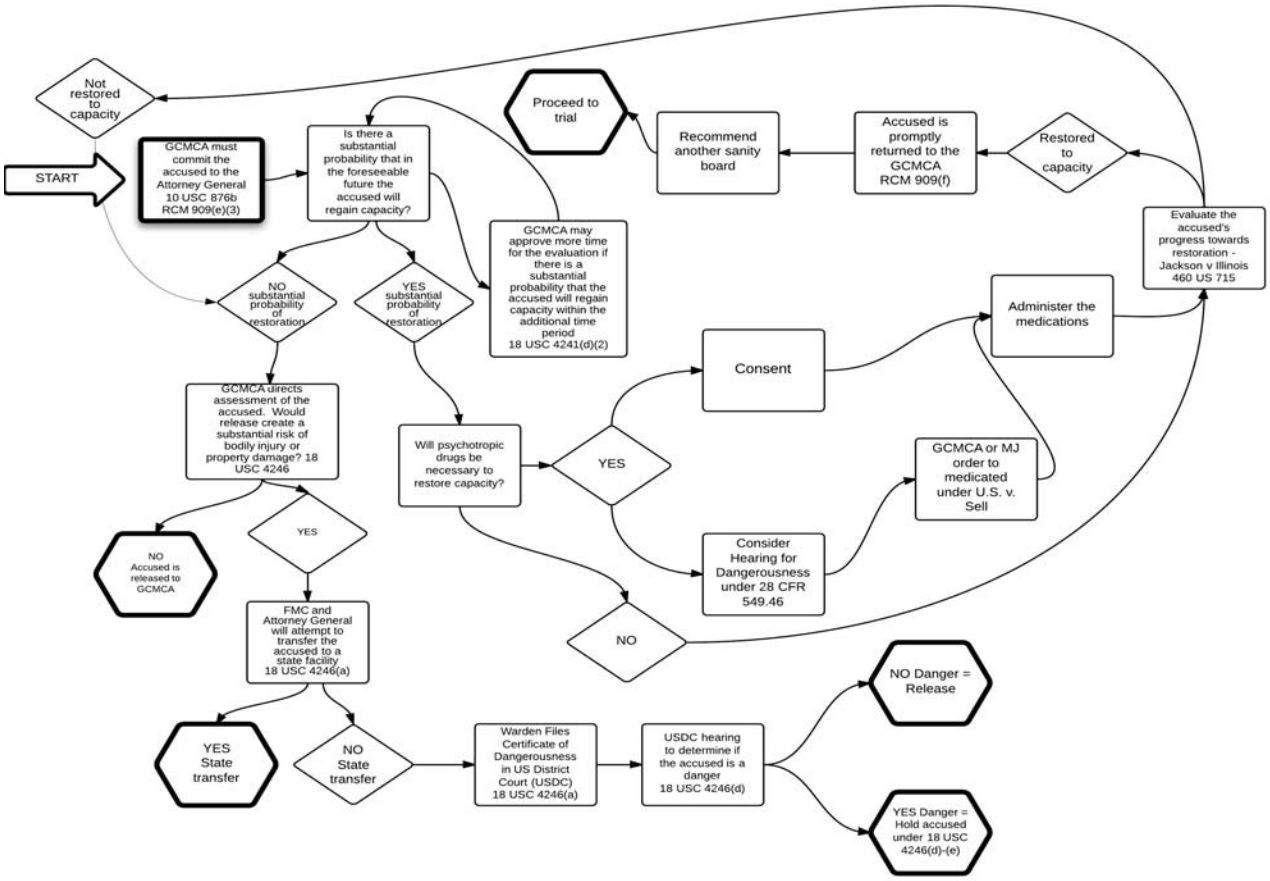
Appendix A

Arriving at Capacity Restoration



Appendix B

Restoring Capacity



Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel

Jeffrey Green[*]

I. Introduction

In 1787, the Founding Fathers, concerned about the possibility of "undue influence" caused by foreign governments providing gifts to United States ambassadors, included a provision in the U.S. Constitution that prohibits federal personnel from accepting compensated positions or any items of value—such as travel and gifts—from a foreign government, except as authorized by Congress.[1] This "little known" provision, the Emoluments Clause, is still in effect today and applies to federal civilian employees and active duty military personnel.[2] It also applies to retired military officers and enlisted personnel from the active and Reserve components. Accepting an emolument in violation of this clause may result in a retiree's (or servicemember's) incursion of a debt to the U.S. Government; hence, ethics counselors advising Department of Defense (DoD) personnel need to understand the Emoluments Clause, especially when advising retiring military personnel.

This article explains how the U.S. Constitution's Emoluments Clause applies to DoD personnel. First, it introduces the Emoluments Clause in general and the three congressional exceptions to the clause. Then, the article discusses the applicability of the clause by discussing the interpretation of the three operative terms in the clause: (1) "Office of Profit or Trust"; (2) "Emolument"; and (3) "foreign State." After addressing the clause's applicability, the article then outlines the process of obtaining advance approval for retiring and retired military personnel to accept foreign emoluments: it then describes the penalty for violating the Emoluments Clause, along with the debt collection procedures that are followed in situations of noncompliance. It describes the waiver process and appeal rights for situations where federal personnel may have unwittingly accepted an emolument without prior approval. Finally, the article explores several related issues that may arise once an employee obtains consent to receive an emolument.

II. The Emoluments Clause

The Emoluments Clause states:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.[3]

Without the consent of Congress, an individual who holds an "Office of Profit or Trust" in the government may not accept a compensated position (an "emolument") from a foreign state unless congressional consent is obtained.[4] When congressional consent is obtained, no violation of the Constitution occurs.

"Emolument" is defined as "the profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private," except as authorized by Congress.[5] Thus, compensation[6] in the form of honoraria, travel expenses, household goods shipments at employer's expense, housing allowances, and gifts from a foreign state are considered emoluments. As a result, most federal personnel, including retired military personnel, cannot accept outside compensated employment[7] with, or receive gifts in excess of the minimal value from, a foreign government.[8]

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[1] *See* The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause, 20 Op. O.L.C. 346 (1996), 1996 WL 33101198, at ∗2 (providing historical background of inclusion of the Emolument Clause due to the King of France giving Benjamin Franklin, then Ambassador to France, a snuff box); Gary J. Edles, *Service on Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1, 4–5 (2006).

[2] Edles, *supra* note 1.

[3] U.S. CONST. art. I § 9, cl. 8.

[4] *See* Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act, 6 Op. O.L.C. 156, 158 (1982) [hereinafter 1982 Office of the Legal Counsel (OLC) Opinion on Emoluments & Foreign Gifts Act]; *see infra* note 5.

[5] Apple v. Cnty. of Crawford, 105 Pa. 300, 303 (1884) (quoting definition of "emolument" from WEBSTER'S UNABRIDGED DICTIONARY (n.d.)).

[6] "Emolument" has been interpreted to include compensation for employment. *See, e.g.*, Compensation of Employees Detailed to Assist Foreign Governments, 40 Op. Atty. Gen. 513 (1947). U.S. DEP'T OF DEF., REG. 7000.14-R, FIN. MGMT. REG., vol. 7B, ch. 5, para. 050304, at 5–6 (2011) [hereinafter DoD FMR] (defining "compensation").

[7] *See* 18 U.S.C. § 219 (2011) (criminalizing federal employees to act as an agent or lobbyist for a foreign entity); *see also* Applicability of 18 U.S.C. § 219 to Retired Foreign Service Officers, 11 Op. O.L.C. 67, 68 n.2 (1987), 1987 WL 256396 [hereinafter 1987 OLC Opinion on § 219 Applicability] (discussing how § 219 criminalizes certain violations of Emoluments Clause but not in entirety).

[8] *See supra* note 4.

The Constitution provides an exception to this absolute ban by authorizing Congress to consent to federal employees accepting certain foreign gifts or honors through legislation. One such congressional consent is set forth in the Foreign Gifts and Decorations Act.[9] This statute permits all federal personnel[10] to accept certain gifts from a foreign government: (1) a gift of "minimal value" or less (as of publication date, minimal value is $350);[11] (2) travel paid for by a foreign government, provided that none of the travel takes place leaving from or coming back to the United States and is consistent with the employing agency regulations and rules;[12] (3) meals provided by a foreign government; and (4) lodging provided by a foreign government overseas.[13]

In addition to its consent for foreign gifts acceptance by federal employees, Congress also legislated a general consent in regards to retired military members employment with foreign governments: provided the affected military member seeks advance approval from both the employee's Service and the Secretary of State, retired members of the uniformed services and Reservists may accept compensated civil employment from a foreign government.[14] Congress also provided statutory consent for retired military members of the armed forces to accept employment by, or hold an office in, the military forces of a newly democratic nation[15] provided advance approval is obtained.[16]

To advise DoD employees on the applicability of this constitutional clause with congressional exceptions, ethics counselors should understand how the operative terms of the Clause are interpreted authoritatively. The next three parts explain each term and its application.

III. Office of Profit or Trust: Who Is Covered by the Emoluments Clause?

Only those persons holding an "Office of Profit or Trust" under the United States are subject to the Constitution's Emoluments Clause. The Department of Justice's Office of Legal Counsel (OLC), which advises the executive departments and agencies on constitutional matters,[17] has opined that the term "Office of Profit or Trust" includes all full-time federal employees, and is not limited to those who were appointed as "Officers" under the Appointment Clause under Article II of the Constitution.[18] It concluded that the Emoluments Clause, designed to curb foreign undue influence, would apply to both appointed officials as well as their subordinate employees because "[t]he problem of divided loyalties can arise at any level." Further, the OLC deduced its interpretation from the enactment of the Foreign Gifts and Decorations Act, which applies to all federal personnel, as congressional consent under the Emoluments Clause: Congress presumes that the Emoluments Clause applies to all federal personnel.[19] Hence, within the DoD, the Emoluments Clause applies to all civilian personnel, both political appointees as well as civilian employees.

Like their civilian counterparts, the application of this clause within the uniform personnel is not limited to the officers: active duty military personnel, both officer and enlisted members, hold an "Office of Profit or Trust" and are therefore subject to the Emoluments Clause.[20] This prohibition applies even after retirement: retired regular military officers and enlisted personnel are also subject to the Emoluments Clause because they are subject to recall, and, therefore, hold an "Office of Profit or Trust" under the Emoluments Clause.[21] Finally, Reservists are also subject to

[9] 5 U.S.C. § 7342 (2012).

[10] Note that 5 U.S.C. § 7342 covers all civilian appointees appointed under 5 U.S.C. § 2105 and all members of the uniformed services. *See* 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, 157–58 (accepting Congress's assumption that the Emoluments Clause applies to "any employee" who takes a gift from a foreign government). *See* discussion *supra* Part II.

[11] 5 U.S.C. § 7342(a)(5) (designating General Service Administration (GSA) to change the minimal value based on the change to the consumer price index in the preceding three year period); Federal Management Regulation; Change in Consumer Price Index Minimal Value, 76 Fed. Reg. 30,550 (May 26, 2011) (codified at 41 C.F.R. § 102-42.10 (2012)) (setting the minimal value at $350 for three-year period starting on 1 January 2011).

[12] In other words, travel expenses may be paid by a foreign state only for travel which originates and ends outside of the United States. 5 U.S.C. § 7342(c)(1)(B)(ii).

[13] *See id.* § 7342.

[14] 37 U.S.C. § 908 (2011).

[15] 10 U.S.C. § 1060(c) (2012) ("The [Service] Secretary . . . and the Secretary of State shall jointly determine whether a nation is a newly democratic nation for the purposes of this section.")

[16] *Id.* § 1060. *See infra* Part IV.B.4.

[17] *Office of Legal Counsel*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/olc/ (last visited May 31, 2013) ("The Office also is responsible for providing legal advice to the Executive Branch on all constitutional questions and reviewing pending legislation for constitutionality."); Edles, *supra* note 1, at 4.

[18] *See* 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, at 158.

[19] *Id.*

[20] *See generally* Applicability of the Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 18 (Mar. 1, 1994) [hereinafter 1994 OLC Opinion on Foreign Public Universities].

[21] *See* 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 68 n.5 (stating that retired military officers are regarded as holding an "Office of Profit and Trust," citing the following cases and a comptroller general's opinion: United States v. Tyler, 105 U.S. 244 (1881); Morgenthau v. Barrett, 108 F.2d 481 (D.C. Cir. 1939); To Breningstall, 53 Comp. Gen. 753 (1974), 1974 WL 8569; 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 69 n.6 (stating that the fact of being subject to recall to active duty makes retired officers still officers of the United States while in retirement) (citing *Tyler*, 105 U.S. at 246); Sec'y of the Navy, 44 Comp. Gen. 227 (1964), 1964 WL 1808 (stating that reserve or retired enlisted members who

the Emoluments Clause, even after completing the requisite number of years to be eligible for retired pay and having been transferred to inactive status.[22]

IV. Emolument: Traps for the Unwary

As noted above, an emolument includes compensation or other items of value. Whereas foreign governments' offers of employment, travel, meals, and lodging are straightforward, other situations are less obvious, especially where the retired military member has not personally provided representational services to a foreign government. There are several types of scenarios in which an employee will be deemed to have received an "emolument" where the payment is indirectly received from a foreign state. There are two types of employment that have the potential of violating the Emoluments Clause: partnership distributions for consulting firms or law firms, and payments (such as salary) from domestic professional corporations. Federal personnel, especially retired military personnel, need to be aware of these potential traps.

A. Partnership Distributions

According to the OLC, a retired military officer violates the Emoluments Clause by becoming a partner in a large U.S. law firm and accepting pro rata partnership profits that include representation of foreign government clients. Accepting a share of partnership profits is considered an emolument where some portion of the share is derived from the partnership's representation of a foreign government.[23] The OLC has determined that the partnership would "be a conduit" for that foreign government; therefore, a portion of the recipient's income could be attributed to a foreign government.[24] This is so even if the individual subject to the Emoluments Clause did not actually provide services to the foreign government. In other words, a distribution from a partnership that includes some proportionate share of revenues generated from the partnership's foreign government clients is an emolument.[25] The DoD Standards of Conduct Office (SOCO) believes that this same rationale applies to distributions from limited liability corporations, although this view has not been officially sanctioned by the Department of Justice.[26]

B. Payments from a Professional Corporation

The Emoluments Clause also applies to payments received by a professional corporation for services rendered to a foreign government. The U.S. Comptroller General found that retired Marine Corps lawyers, who were "of counsel" to a law firm that had been formed as a professional corporation (PC), were subject to the clause if the PC represented a foreign government.[27] The Comptroller General concluded that the law firm's incorporation did not shield these retired officers from the applicability of the clause. While the monies from the foreign government would be paid to the PC, these attorneys would benefit from the payments. The opinion states that "where equity dictates, the corporate entity will be disregarded, for example, where there is such interest and ownership that the separate personalities of the corporation and its shareholders no longer exist."[28] In addition, the Comptroller General pointed out that the attorneys' loyalty was to their client directly, so the structure of the PC did not shield the attorneys from the Emoluments Clause. Accordingly, the retired Marine Corps lawyers were required to obtain consent under 37 U.S.C. § 908 if they wanted to represent the foreign government.

V. Foreign State: What Is It?

In interpreting the applicability of Emoluments Clause, there is little doubt that "foreign State" includes foreign sovereign governments and their subdivisions. Both the OLC and the U.S. Comptroller General have opined that the term "foreign State" applies to both national governments and to sub-national governmental units, e.g., regional, provincial/state, and local level governments.[29] Again, the applicability of the clause is obvious when it comes to any emoluments from foreign government authorities; however, it is less clear when the entity offering the emolument is either funded or controlled by a foreign government

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are subject to recall to active duty hold "Office of Profit and Trust" under the Emoluments Clause).

[22] 37 U.S.C. § 908 (2011) (requiring advance approval before accepting an emolument from a foreign government "by members of a reserve component of the armed forces"). Other military members that may obtain advance approval under this statute include "retired members of the uniformed services." *Id.* Note that active duty military members may not obtain advance approval under this statute.

[23] Applicability of the Emoluments Clause to Non-Government Members of the Administrative Conference of the United States (ACUS), 17 Op. O.L.C. 114, 120 (1993) [hereinafter 1993 OLC Opinion on ACUS].

[24] *Id.* at 119.

[25] *Id.*

[26] This assertion is based on the author's current professional experience as a senior attorney at DoD SOCO [hereinafter Professional Experience].

[27] Matter of: Retired Marine Corps Officers, B-217096, 1985 WL 52377 (Comp. Gen. Mar. 11, 1985).

[28] *Id.*

[29] *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the Göteborg Award for Sustainable Development, 2010 WL 4963117, at *2 n.3 (O.L.C. Oct. 6, 2010) [hereinafter 2010 OLC Opinion on Göteborg Award], *available at* http://www.justice.gov/olc/2010/goteborg_award.pdf; 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at 19 (noting that "foreign state" should include any political governing entity within that foreign state); Major James D. Dunn, B-251084, 1993 WL 426335, at *3 (Comp. Gen. Oct. 12, 1993).

authority but is seemingly unrelated to the foreign sovereign's function, e.g., commercial activities or educational institutions. In 1993, the OLC opined that, though a foreign government may not be exercising "powers peculiar to sovereigns" through its business or educational instrumentalities, "nothing in the text of the Emoluments Clause limits its application solely to foreign governments acting *as sovereigns*."[30] Thus, foreign governmental entities, such as commercial entities owned or controlled by a foreign government and foreign public universities controlled by a foreign government, can be considered instrumentalities of "foreign states" for purposes of the Emoluments Clause.

Instead of making a blanket ruling that all entities owned or controlled by a foreign government are foreign States under the Clause, however, the OLC focused on foreign control[31]—the level of control that foreign government exerts to the affected officer through such entity. The OLC has articulated several factors to consider when assessing whether a foreign entity should be deemed a "foreign State" for purposes of the Emoluments Clause.[32] These factors include: (1) whether a foreign government has an active role in the management of the decision-making entity; (2) whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and (3) whether a foreign government is a substantial source of funding for the entity.[33]

1. Foreign Corporation

In general, business corporations owned or controlled by foreign governments are considered part of a foreign state for purposes of the Emoluments Clause.[34] The OLC rationalized that corporations are susceptible to becoming agents of the foreign sovereign because the corporate leadership are typically selected by the foreign government.[35] In the *Matter of: Lieutenant Colonel Marvin S. Shaffer, USAF, Retired*, however, the Comptroller General has ruled that a retiree does not trigger the Emoluments Clause when a U.S domestic corporation that is majority-owned by a foreign government's instrumentality employs him, provided "the corporation maintains a separate identity and does not become a mere agent or instrumentality of a foreign government."[36] The ruling relied on the general rule that "a corporation is a legal entity separate and distinct from its shareholders" unless "there is such unity of interests and ownership that the separate personalities of the corporation and its shareholders no longer exist."[37] Because the domestic corporation "appear[ed] to be a separate legal entity from its dominant shareholder, and the power to control and direct his employment is with the domestic corporation," it ruled that the retiree did not violate the Emoluments Clause. Hence, the applicability of the clause to foreign corporations depends on the degree of foreign instrumentalities' control over the corporation.

2. *Foreign Public University*

Payments from a foreign public university influenced or controlled by a foreign government may be a prohibited emolument.[38] There is a presumption that foreign public universities are foreign States under the Clause.[39] The OLC opinions addressing whether the Emolument Clause extends to foreign public universities have come to contrary conclusions depending on the facts. The key for OLC has been the extent of influence or control by the foreign government. The OLC reasoned that improper influence occurs when the foreign government, and not the university, is making the payment.[40] The OLC explained that "control"

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[30] 1993 OLC Opinion on ACUS, *supra* note 23, at 120 (emphasis in original).

[31] One way to show foreign control is through an employer-employee relationship. To determine whether an employer-employee relationship exists between the retired military member and a foreign government in violation of the Clause, DoD relies on DoD FMR which implements the Clause. It provides that the employment analysis will follow the common law rules of agency evaluating the following five factors: "1. The selection and engagement of the employee. 2. The payment of wages. 3. The power to discharge. 4. The power to control the employee's conduct. 5. The relationship of the work to the employer's business, whether the work is a part of the regular business of the employer." DoD FMR, *supra* note 6, vol. 7B, ch. 5, subpara. 050302C. The regulation further provides that the "decisive test" is whether the employer has "the right to control and direct the employee in the performance of his or her work and in the manner in which the work is to be done." *Id.* subpara. 050302D.

[32] *See* 2010 OLC Opinion on Göteborg Award, *supra* note 28, at *4 (neither the Emoluments Clause nor the Foreign Gifts and Decorations Act barred an employee of NOAA from accepting the 2010 Göteborg Award on Sustainable Development because the award was not from a king, prince, or foreign state).

[33] *Id.*

[34] 1993 OLC Opinion on ACUS, *supra* note 23, at 121.

[35] *Id.* ("We believe that Emoluments Clause should be interpreted to guard against the risk that occupants of Federal office will be paid by corporations that are, or are susceptible of becoming, agents of foreign States, or that are typically administered by boards selected by foreign States. Accordingly, we think that, in general, business corporations owned or controlled by foreign governments will fall within the Clause.").

[36] *In re* Shaffer, 62 Comp. Gen. 432, 432 (1983) (holding that a retired Air Force officer did not violate the Emoluments Clause when he was employed by a U.S. corporation whose 46.9 percent (majority) of it stocks were owned by a French government-owned corporation, sharing common directors).

[37] *Id*. at 434 (citing FMC Corp. v. Murpheree, 632 F.2d 413 (1980)).

[38] *Id.* at 121–22.

[39] 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at 15.

[40] *See id.* at 17-19; *see also* 1993 OLC Opinion on ACUS, *supra* note 23, at 122 ("*Any* emoluments from a foreign State, whether dispensed through its political or diplomatic arms or through other agencies, are forbidden to Federal office-holders . . . . Further, it serves the policy behind the Emoluments Clause to construe it to apply to foreign States even when they act through instrumentalities which, like universities, do not perform political or diplomatic functions. Those who hold offices under the United

is based on whether the foreign government selects the faculty members.[41] The OLC enumerated two factors to be considered in determining when a foreign government influences or controls a university: 1) whether a foreign government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument; and 2) whether a foreign government has an active role in the management of the entity, such as choosing the faculty or the Board of Governors.[42]

For example, the OLC opined that two NASA scientists could teach at the University of Victoria, a Canadian provincial university, without violating the Emoluments Clause.[43] It concluded that the university acted independently from the British Columbia's provincial government and the university selected its own faculty members independent of the government.[44] Similarly, the OLC concluded that a federal officer serving as a consultant at Harvard University on a project funded by the government of Indonesia did not violate the clause because the Indonesian government had no veto power over Harvard's selection of consultants. In other words, Indonesia funded a Harvard study; Harvard University determined which consultant would participate in the project and selected a federal employee to participate in its study for Indonesia; the Indonesian government never took part in the selection or rejection of the consultant. Because Harvard University selected the federal employee and the Indonesian government did not select or reject whom Harvard offered, the federal employee was not considered to have violated the Emoluments Clause.[45] In sum, foreign public universities are generally considered part of a foreign state unless there is evidence that the university is independent of the foreign government on decisions regarding the terms and conditions of faculty appointments, and it is clear that the gift given is from the university and not from the foreign government.

3. Consultant to a Foreign Government

The OLC also focuses on control for purposes of determining if an employee is subject to the clause when he consults for a foreign government: The consultant violates the Clause when the foreign government has the authority to select the consultant. For example, the Government of Mexico specifically wanted a Nuclear Regulatory Commission (NRC) employee to serve as a consultant on a project.[46] The Mexican government hired a consulting firm and requested that the particular federal employee be hired by the consulting firm to provide consulting services to the Mexican government. The OLC noted that the principal reason for the Mexican government hiring the consulting firm was the selection of the Nuclear Regulatory Commission's employee; hence, it concluded that, in this instance, the "ultimate control, including selection of personnel, remains with the Mexican government."[47] Therefore, the OLC concluded that the NRC employee would violate the Emoluments Clause if he served as a consultant in this circumstance.[48] Note that Congress has not provided the option of advance approval for the career NRC employee.

By contrast, as discussed above, the Indonesian government paid Harvard University for consulting services without selecting or rejecting any consultant the university assigned to the project. Harvard assigned the project to the federal employee who happened also to be a consultant to Harvard. Because the Indonesian government did not select or reject the consultant who provided consulting services to Harvard, the OLC concluded that the federal employee did not violate the clause because the Indonesian government had no veto power over Harvard's selection of consultants.[49]

4. International Organizations

The OLC has concluded that the Emoluments Clause does not apply to emoluments from international organizations such as the World Bank, the United Nations, and other entities in which the United States is a member because those organizations are not deemed to be a "foreign State."[50] The OLC reached that conclusion by making four points: First, the United States could not be a member of a "foreign State"; second the organization in which the United States is a member plays an important role in carrying out United States foreign policy; third, the United States actually

States must give the government their unclouded judgment and their uncompromised loyalty. . . . That judgment might be biased, and that loyalty divided, if they received financial benefits from a foreign government, even when those benefits took the form of remuneration for academic work or research.") (emphasis in original) (citation omitted).

[41] Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 2009 WL 6365082, at *8 (O.L.C. Dec. 7, 2009) [hereinafter 2009 OLC Opinion on Nobel Peace Prize], *available at* http://www.justice.gov/olc/2009/emoluments-nobel-peace.pdf.

[42] *Id.*

[43] 1994 OLC Opinion on Foreign Public Universities, *supra* note 20, at *22.

[44] *Id.*

[45] 2009 OLC Opinion on Nobel Peace Prize, *supra* note 41, at *8 (discussing Memorandum from Deputy Assist. Att'y Gen., OLC, to Gen. Counsel, Commodity Futures Trading Comm'n, re: Expense Reimbursement in Connection with Trip to Indonesia (Aug. 11, 1980)).

[46] 1982 OLC Opinion on Emoluments & Foreign Gifts Act, *supra* note 4, at 158.

[47] *Id.*

[48] *Id.*

[49] 2009 OLC Opinion on Nobel Peace Prize, *supra* note 41, at *8.

[50] Emoluments Clause and World Bank, 2001 WL 34610590, at *1 (O.L.C. May 24, 2001).

participates in the governance of the organization and undertakes a leadership role in its decision-making; and finally, the OLC reasoned that because Congress approved participation by the United States in the World Bank, employment of government employees by the organization would not directly raise the concerns about divided loyalty that the Emoluments Clause was designed to address.[51] By contrast, the OLC advised that the Emoluments Clause would prohibit employees from receiving a salary or a gift from an international organization in which the United States is not a member because that organization could be considered a foreign state when none of the four points above would be applicable and there is evidence of foreign government control.[52]

VI. Getting Advance Approval for an Emolument from a Foreign Government

Congress has consented to retired and Reserve military personnel accepting foreign state salary, payment, or gifts in excess of the minimal value, provided that advance approval is obtained from the relevant military secretary and the Department of State.[53] There is no corresponding consent for current members to accept foreign governmental emoluments while on active duty except as authorized by the Foreign Gifts and Decorations Act.[54] The process for obtaining advance approval is slightly different for each of the services and requires contacting specific components within each service as follows:

A. Air Force

Air Force Instruction 36-2913, *Request for Approval of Foreign Government Employment of Air Force Members*, provides guidance and explicitly requires advance approval from the Secretary of the Air Force and the Secretary of State for military retirees to accept an emolument.[55] To request advance approval, contact:

AFPC/DPSOR
550 C Street West
Joint Base San Antonio-Randolph, Texas 78150-4739
Telephone: Commercial 210-565-2461 or Defense Switch Network 665-2461

B. Army

Army Regulation (AR) 600-291 governs the need for and process by which a retiring Soldier or a military retiree should obtain advance approval before working for a foreign government.[56] To request advance approval, contact:

U.S. Army Human Resources Command
ATTN: AHRC-PDR
1600 Spearhead Division Avenue
Department 420
Fort Knox, KY 40122-5402
Telephone: 502-613-8980

C. Navy

The Department of the Navy has no pertinent instruction. However, in 1981, then-Navy Secretary Lehman delegated authority to the Chief of Naval Personnel (CNP) to act on requests from Navy retirees to accept emoluments from foreign governments. The delegation letter provides some guidance on how the Navy will process requests. When the Navy receives an inquiry, it provides a questionnaire to the requesting individual. Then, after reviewing the request, Navy counsel makes a recommendation to CNP. If CNP approves, the Navy transmits the matter to the State Department (Political/Military) for a final determination. To seek advance approval, a retired Navy member should submit a written request to:

Navy Personnel Command, Office of Legal Counsel (Pers-OOL)
Naval Support Facility Arlington
701 South Courthouse Road, Room 4T035
Arlington, VA 22204
703-604-0443

The request should contain a full description of the contemplated employment and the nature and extent of the involvement of the foreign government.

[51] *Id.* at *3.

[52] Professional Experience, *supra* note 26.

[53] 37 U.S.C. § 908 (2011).

[54] 5 U.S.C. § 7342 (2012) (permitting active duty members to accept gifts of minimal value).

[55] U.S. DEP'T OF AIR FORCE, INSTR. 36-2913, REQUEST FOR APPROVAL OF FOREIGN GOVERNMENT EMPLOYMENT OF AIR FORCE MEMBERS (19 Nov. 2003), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2913/afi36-2913.pdf.

[56] U.S. DEP'T OF ARMY, REG. 600-291, FOREIGN GOVERNMENT EMPLOYMENT (1 July 1978), *available at* http://www.apd.army.mil/pdffiles/r600_291.pdf.

D. Marine Corps

Like the Navy, the Marine Corps has no specific instruction providing guidance on receipt of emoluments from foreign governments, but in keeping with the Navy guidance, the retired Marine is well-served by providing a full description of the contemplated employment and the nature and extent of the involvement of the foreign government. A retired Marine Corps member seeking advance approval for a payment from a foreign government should write to:

Judge Advocate Division (JAR)
Headquarters, U.S. Marine Corps
3000 Marine Corps Pentagon
Washington, DC 20350-3000
Telephone: 703-614-2510

VII. Government Remedy for Failure to Obtain Advance Consent

The government's remedy when an employee accepts an emolument from a foreign state without consent varies depending upon the circumstances.[57] This part will focus on government's remedy when retired servicemembers fail to obtain advance approval for accepting foreign emoluments.

A. Remedies

Generally, a retired pay received while receiving an emolument from a foreign government without advance approval is deemed an "erroneous payment," a payment that is not in compliance with applicable laws and regulations.[58] The rationale is that the retired member is accepting a foreign government's emolument on behalf of the United States and receives overpayment of retired pay equal to the amount of the emolument.[59] Such an erroneous payment creates a debt in favor of the government. Specifically, the DoD Financial Management Regulation (FMR) explains how the Emoluments Clause applies to retired military personnel.[60] If "[t]he compensation received from the foreign government without approval is considered received by the retired member for the United States . . . a debt in favor of the [U.S.] government is created which is to be collected by withholding from retired pay."[61]

The Comptroller General has issued opinions regarding debt collection when an employee accepts an emolument from a foreign government. For example, if a retired military member accepts an emolument from a foreign government without consent, the Comptroller found that the government can suspend the member's retirement pay up to the amount of the foreign salary (or other emoluments) received if the foreign salary is less than or equal to his retirement pay.[62] By contrast, when the compensation earned during the period of unauthorized employment with a foreign state exceeds the amount of retired pay accrued during the same period, only the retired pay paid during the period of the violation may be collected or withheld.[63]

In one particular case, a retired Marine major went to work for an American corporation, Frank E. Basil, Inc., where he served as an instructor for the Royal Saudi Naval Forces by way of an employment agreement with Frank E. Basil, Inc. Even though the retired officer was working for an American corporation, and had an employment agreement with the corporation, the Marine Corps found that

[57] A DoD personnel's acceptance of an improper emolument violates the Constitution and may violate the federal criminal code, such as 18 U.S.C. § 219 (2011) ("Officers and employees acting as agents of foreign principals") and other regulations prohibiting current members to be employed be a foreign government. *See, e.g.*, U.S. DEP'T OF DEF., REG. 5500.07, JOINT ETHICS REG. paras. 2-206, 2-303 (30 Aug. 1993) (C7, 17 Nov. 2011) [hereinafter JER] (regulating current DoD employees' outside employments and activities). *See generally In re* Dunn, B-251084, 1993 WL 426335, at *4 (Comp. Gen. Oct. 12, 1993) (holding that two Air Force personnel's acceptance of foreign emoluments while on terminal leave without prior congressional consent created debt in favor of the U.S. Government as erroneous payment). This article will not cover other administrative actions to enforce the Emoluments Clause.

[58] *In re* Dep't of Def. Military Pay & Allowance Comm. Action No. 538, B-178538, 1977 WL 12064, para. 1 (Comp. Gen. Oct. 13, 1977) ("When a retired military member violates [Emoluments Clause] . . . substantial effect may be given to the prohibition by withholding retired pay in an amount equal to the amount received from the foreign government."); *Dunn*, 1993 WL 426335, at *4; *see* U.S. DEP'T OF DEF., INSTR. 1340.23, WAIVER PROCEDURES FOR DEBTS RESULTING FROM ERRONEOUS PAY AND ALLOWANCE subpara. E2.1.5 (14 Feb. 2006) [hereinafter DoDI 1340.23] (defining "erroneous payment").

[59] *Dep't of Def. Military Pay & Allowance Comm. Action No. 538*, 1997 WL 12064, at *3 ("We have previously stated in the applicable rule in terms of withholding retired pay in amounts equal to those received from the foreign government. The basis for such rule is that the emoluments are accepted on behalf of the United States.").

[60] DOD FMR, *supra* note 6, vol. 7B, ch. 5, sec. 0503.

[61] *Id*. para. 050301B2.

[62] *In re* Hartnett, 65 Comp. Gen. 382 (1986); *see also Dep't of Def. Military Pay & Allowance Comm. Action No. 538*, 1977 WL 12064, at *4 ("[I]f the gross retired pay of the member subject to the provision exceeds that which is given by the foreign government, the retired member may be paid the difference.").

[63] *In re* Friedman, 61 Comp. Gen. 306 (1982) (affirming its prior decision that Air Force should withhold current retired pay of retired Air Force officer, who started his foreign employment prior to Secretary of State's approval, in the amount equal to his "retired pay received during the period of foreign employment, if the emolument exceed his retired pay entitlement"); *see also In re* Dunn, B-251084, 1993 WL 426335 (Comp. Gen. Oct. 12, 1993) (holding that retired pay of retired Air Force noncommissioned officer should be withheld in the amount equal to the foreign emolument received from the start of his employment until the secretarial approval was final); DoD FMR, *supra* note 6, vol. 7B, ch. 13, para. 130202 ("A retiree's pay is suspended . . . if he or she . . . [i]s employed by a foreign government (to include local government units within a foreign country, as well as the national government itself) without applicable congressional or secretarial approvals.").

the Saudi Arabian government could control and direct him and then pay him for his services. The agreement specifically stated that the Saudi Arabian government may direct the employee. The Marine Corps suspended the retired member's retirement pay. The Comptroller General agreed with the Marine Corps view that the American corporation was just a shell or sham, and that the Saudi government's payments to the shell corporation went directly to the former retiree for work he performed on behalf of the Saudis. The Comptroller General advised the retired member to seek approval under 37 U.S.C. § 908 if he desired to have his retirement pay resumed.[64]

Similarly, in another case, a regular retired officer was employed and paid by a U.S. corporation, which then assigned him to work for Israeli Aircraft Industries (IAI), an instrumentality of the government of Israel. It was shown that the U.S. corporation was, in effect, merely an employment agency that procured personnel for IAI. The Comptroller General concluded that the officer and IAI had an employee-employer relationship and that IAI had the right to exercise supervision and control over the retired military officer. The Comptroller General opined that the retired officer's retired pay should be withheld until such time as the withholdings equaled the amount of foreign salary received since the foreign salary was less than the retired military pay.[65]

B. DoD Debt Collection Procedures

Despite the requirement that the service secretary and Secretary of State approve requests for advance consent to retirees' acceptance of foreign emoluments, each Service does not have separate instructions or regulations for debt collection against retirees accepting emoluments without congressional consent. Rather, they follow the debt collection procedures in the DoD FMR, volume 7B, chapter 28.[66] Any debt collection of up to $10,000 is handled by the Defense Finance and Accounting Service (DFAS).[67] Any debts in excess of $10,000 (up to any amount) are handled by the Defense Office of Hearings and Appeals (DOHA). Regardless of the amount of the debt, all cases must go through DFAS because DFAS prepares information that DOHA would need if the debt is in excess of $10,000.[68] Defense Finance and Accounting Service must receive notice of the debt, which would be the obligation incurred for violating the Clause. To establish the retiree's employer-employee relationship with a foreign instrumentality, the debt submission to DFAS should include, in practice, the elements for determining if a violation has occurred: selection and engagement of the employee, payment of wages, power to discharge, power to control the employee's conduct and the relationship of the work to the employer's business.[69] After it receives information about the debt, DFAS has five days to notify the debtor about the debt.[70] The debtor then becomes subject to the due process procedures set forth at section 2805 of the DoD FMR.[71] The collection procedures for DFAS are set forth in sections 2806 and 2807.[72]

VIII. Waiver or Appeal of the Debt Collection Decision

A. Waivers

What if a retired military member did not know about the Emoluments Clause and has already accepted post-government employment with a foreign-owned company? What if a retired military member asked for advice about an upcoming foreign trip but was misinformed by his ethics official? In these types of scenarios, an individual may seek a waiver of the debt resulting from the erroneous payment and, in some circumstances, a waiver may be granted. Good faith and ignorance of the law are not defenses.[73] However, equitable waiver of indebtedness may be granted in certain circumstances.

For example, the Comptroller General waived a debt where the retired military officer asked for prior approval to work for a foreign company that was an instrumentality of the foreign government, but he did not receive approval in a timely manner from the Air Force. In this case, a retired Air Force major worked for an independent oil company, ARAMCO, in Saudi Arabia. When the major learned that the Saudi Arabian government was preparing to nationalize his employer, ARAMCO, the Air Force major requested advance approval from the Air Force to perform work for the nationalized ARAMCO. At the time the major submitted his advance approval request, ARAMCO was yet to be nationalized.[74]

[64] *In re* Hartnett, 65 Comp. Gen. 382 (1986).

[65] Breningstall,53 Comp. Gen. 753 (1974).

[66] DoD FMR, *supra* note 6, vol. 7B, ch. 28. This process applies also to current active duty members. Professional Experience, *supra* note 26.

[67] U.S. DEP'T OF DEF., DIR. 5118.05, DEFENSE FINANCE AND ACCOUNTING SERVICE (DFAS) para. 6m (20 Apr. 2012) [hereinafter DoDD 5118.05] (referencing service secretary's waiver authority under 10 U.S.C. § 2774(a)(2) (2012)).

[68] Professional Experience, *supra* note 26.

[69] *See supra* note 33 and accompanying text.

[70] DoD FMR, *supra* note 6, vol. 7B, para. 280502.

[71] *Id*. sec. 2805.

[72] *Id*. secs. 2806, 2807.

[73] To Ward, B-154213, 1964 WL 1865, at *1 (Comp. Gen. Dec. 28, 1964) (rejecting reconsideration request on the basis of acting in good faith and having no knowledge of the Emoluments Clause prohibition)

[74] *In re* Sanders, B-231498, 1989 WL 240844, at *1 (Comp. Gen. June 21, 1989).

Ultimately, while the major was waiting to hear from the Air Force, the government of Saudi Arabia took over control of ARAMCO. The major then worked for the nationalized entity, ARAMCO. The major subsequently passed away, and the question was whether the estate was responsible for the Emoluments Clause debt. While the major never received advance approval during his lifetime to work for the nationalized ARAMCO, the major had responded each time the Air Force had questions about his application for advance approval. The Comptroller General held that the retired major had acted in good faith by seeking advance approval—the Air Force had not given approval, but was not withholding its approval. Concluding that the retiree acted in good faith and attributing the delay to the Air Force, the Comptroller General waived the debt pursuant to 10 U.S.C. § 2774 and the estate did not have to pay.[75]

At DoD, DFAS has authority to grant waivers for all or a portion of an individual's debt, including Emolument Clause debt, of $10,000 or less as part of the debt collection procedures.[76] As such, DFAS may grant waivers of the debt incurred because of the Emoluments Clause violation, especially where the employee did not know about the Emoluments Clause or did not know he had a debt. Section 2810 includes instructions on how to apply for a waiver, as well as a link to DD Form 2789, which is a form that must be completed to begin seeking the waiver.[77]

B. Appeals

A current or former DoD employee who wants to challenge the initial determination denying all or part of a waiver application may appeal the decision. Appeals for waivers of a debt created by receiving an emolument are governed by DoD Instruction 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowance*.[78] Final administrative appeals, pursuant to 31 U.S.C. § 3702, may be made to DOHA under its Claims Division.[79] Detailed procedures for the settlement of claims are set forth in DoD Instruction 1340.21, *Procedures for Settling Personnel and General Claims and Processing Advance Decision Requests*.[80]

[75] *Id*. at **2–3.

[76] DoD FMR, *supra* note 6, vol. 7B, sec. 2810; DoDD 5118.05, *supra* note 67, para. 6m; Professional Experience, *supra* note 26.

[77] DoD FMR, *supra* note 6, vol. 7B, sec. 2810.

[78] *See* DoDI 1340.23, *supra* note 58, encl E8.

[79] U.S. DEP'T OF DEF., INSTR. 1340.21, PROCEDURE FOR SETTLING PERSONNEL AND GENERAL CLAIMS AND PROCESSING ADVANCE DECISION REQUESTS para. 5.2.1. (12 May 2004).

[80] *See id*.

IX. Other Issues Related to Accepting Foreign Government Emoluments

There are several restrictions that a military retiree may face if he or she decides to do work for a foreign entity. These restrictions are not born out of the Emoluments Clause but might be helpful to be shared during the post-government employment briefing. Such constraints include: registering as a foreign agent; representing a foreign government concerning an ongoing trade or treaty negotiation; enhanced representational restrictions for political appointees; and receiving representational funds earned from Government contracts by his or her new private employer.

A. Prohibition Against Acting as Agents of Foreign Principals (18 U.S.C. § 219)

Section 219 of Title 18 of the U.S. Code criminalizes[81] acts of U.S. public official serving as an "agent of a foreign principal"[82] as defined by the Foreign Agents Registration Act or as a "lobbyist"[83] for a foreign entity required to

[81] 18 U.S.C. § 219(c) (2011) ("For the purpose of this section 'public official' means . . . an officer or employee or person acting for or on behalf of the United States, or any department, agency, or branch of Government thereof . . . in any official function, under or by authority of any such department, agency, or branch of Government.").

[82] 22 U.S.C. § 611(c) (2011) ("[T]he term . . . means—(1) any person who acts as an agent, representative, employee, or servant, or any person who acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal, and who directly or through any other person—(i) engages within the United States in political activities for or in the interests of such foreign principal; (ii) acts within the United States as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (iii) within the United States solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (iv) within the United States represents the interests of such foreign principal before any agency or official of the Government of the United States; and (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1) of this subsection.").

[83] 2 U.S.C. § 1602 (2012) ("The term 'lobbyist' means any individual who is employed or retained by a client for financial or other compensation for services that include more than one *lobbying contact*, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.") (emphasis added). "Lobbying contact" is defined as:

> [A]ny oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals); (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government; (iii) the administration or execution of a

register under the Lobbying Disclosure Act.[84] In other words, a DoD employee may not represent a foreign government or foreign political party before the U.S. Government as well as other activities conducted on behalf of foreign entities with respect to influencing the U.S. Government. Theoretically, this prohibition applies to retired military officers and enlisted personnel as they are subject to recall to active duty, making them a "public official" of the United States.[85] Retired officers who represent a foreign government or foreign entity are required to register as foreign agents under Foreign Agents Registration Act (FARA).[86]

B. One-year Restrictions on Aiding or Advising Trade or Treaty Negotiation (18 U.S.C. § 207(b))

For a period of one year after leaving government service, former employees or officers may not knowingly represent, aid, or advise someone other than the United States concerning any ongoing trade or treaty negotiation in which the employee participated personally and substantially in his last year of government service.[87]

C. One-year Restrictions for Senior Officers Relating to Foreign Entities (18 U.S.C. § 207(f))

Retired general or flag officers[88] and senior executive service (SES) employees who represent a foreign government or government-controlled entity may face post-employment restrictions under 18 U.S.C. § 207(f) because they cannot represent those entities before the federal government during their first year after retirement if the entity at issue is either a foreign government or it exercises control and sovereignty like a foreign government.[89]

D. Compensation from Representational Entity (18 U.S.C. § 203)

Non-career SES members and presidential appointees confirmed by the Senate have enhanced representational restrictions that prohibit them from representing another before the Defense Department for two years after leaving service.[90] Retired military officers who are employed by a representational entity (e.g., law, public relations, lobbying, advertising firms) that represents clients before the executive or judicial branches of the federal government and who are paid in the form of partnership shares based on those representations may violate 18 U.S.C. § 203 unless they accept their first year's compensation in the form of a straight salary.[91]

X. Conclusion

The Emoluments Clause to the Constitution applies to all federal personnel. The clause prohibits receipt of foreign gifts unless Congress consents such as in the Foreign Gifts and Decorations Act. For retired military personnel, the Emoluments Clause continues to apply to them because they are subject to recall. The OLC construes the Emoluments Clause broadly. Specifically, the Justice Department construes the Clause to include not only gifts of travel and food, but also payments such as proportionate profit-sharing. To avoid an Emoluments Clause problem resulting in suspension of retired pay, retired military personnel should seek advance consent through their respective Service. It is prudent for retired military personnel to obtain advance approval even when there is uncertainty about the clause's applicability. Finally, if a retired military member suspects that he has violated the clause, but wants to continue to perform compensated work for a foreign state, he should expeditiously seek advance consent for future compensated work, and terminate current compensated employment with the foreign government until such approval is granted. This would be done to avoid increasing the amount of an erroneous payment.

> Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

Id.

[84] 18 U.S.C. § 219.

[85] *See* 1987 OLC Opinion on § 219 Applicability, *supra* note 7, at 68–69, nn.5–6 (citing United States v. Tyler, 105 U.S. 244 (1881) (holding that retired military officer is "still a member of the armed forces for the purpose of a statutory pay increase") and Morgenthau v. Barrett, 108 F.2d 481 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 672 (1940) (holding that "retired military officers are officers of the United States and subject to all conflict of interest laws form which they have not been exempted")); *see also* Lieutenant David M. Irwin, *Retired Military Personnel—New Restrictions on Foreign Employment*, 21 JAG J. 83, 83, 85–90 (1967) (analyzing the applicability of section 8(b) of Pub. L. No. 89-486, 80 Stat. 244 (1966), later codified at 18 U.S.C. § 219, to retired servicemembers). *See generally* Major Joseph P. Creekmore, *Acceptance of Foreign Employment by Retired Military Personnel*, 42 MIL. L. REV. 111 (1969).

[86] 28 C.F.R. § 5.2 (2013) (designating Assistant Attorney General for National Security to respond to inquiries regarding the application of the Foreign Agents Registration Act (FARA)). The FARA Registration Unit, Criminal Division, Department of Justice, fara.public@usdoj.gov can provide further information.

[87] 18 U.S.C. § 207(b).

[88] *Id*. § 207(f)(1) (subjecting individuals restricted under, *id.* § 207(c)(2)(iv), which applies to active duty officers in the grade of O-7 and above).

[89] *See* Applicability of 18 U.S.C. 207(f) to Public Relations Activities Undertaken by a Foreign Corporation Controlled by a Foreign Government, 2008 WL 6760171 (O.L.C. Aug. 13, 2008).

[90] Exec. Order No. 13,490, 74 Fed. Reg. 4673, 4673–4678 (Jan. 21, 2009); 5 C.F.R. pt. 2641 (2013).

[91] 18 U.S.C. § 203.

Rules and Law Governing Flyers, Cleansed Charge Sheets, and Flimsies

Danielle Tarin[*]

Introduction

"Flyers" (also spelled "fliers"[1]), "cleansed charge sheets," and "flimsies"[2] are terms military law practitioners use to describe the plain sheet of paper that trial counsel give to the court members listing the final form of the charges and specifications upon which the members will determine the guilt or innocence, and/or the sentence, of the accused.[3] Case law indicates that generally U.S. Army courts-martial refer to these documents as "flyers" or "fliers"; U.S. Navy and Marine Corps courts-martial refer to them as "cleansed charge sheets"; and U.S. Air Force courts-martial refer to them as "flimsies." In this article, I refer to these documents generally as "flyers."

Flyers play a critical role in the military justice system. As explained below, counsel and the military judge use the flyer during voir dire to question the members; the flyer serves as a guide for members in determining whether trial counsel have met their burden of proof and thus identifies the offenses of which the members will ultimately acquit or convict the accused; and the flyer aids the members during their deliberations as they identify which portions of the offenses, if any, to except or substitute. Because of their critical role at trial and sentencing, improper use of flyers can generate significant appellate risk, leading courts to set aside convictions and sentences alike.[4] Over time, rules and law governing flyers have developed to provide practitioners several guideposts to mitigate this risk. This article summarizes those guideposts for military law practitioners, distilling the rules and law regarding the timing, functions, contents, and form of flyers. These rules and law evince that, to mitigate appellate risk, counsel must ensure flyers' contents are accurate, complete, and final before ultimately presenting it to the members.

Timing

Before the military judge calls the members, trial counsel must prepare the flyer and present it to defense counsel to resolve any objections defense counsel might have to the flyer.[5] Then, trial counsel presents the flyer to the military judge, who will review it and ask defense counsel whether they object to the flyer.[6] If defense counsel has no objections, trial counsel should ensure that defense counsel states—on the record—that it has no objections.[7] If defense counsel has objections, the military judge will rule on those objections, and trial counsel should ensure that both the objections and the rulings are on the record to preserve the record for appeal.[8]

Once the military judge approves the flyer, trial counsel must mark the flyer as an appellate exhibit and include the flyer in each court member's packet or, if the military judge so instructs, distribute the flyer directly to the court members.[9] To avoid potential appellate issues, trial counsel

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[1] *See, e.g.*, United States v. Keenan, 39 M.J. 1050, 1051 (A.C.M.R. 1994).

[2] In *United States v. Brooks*, No. 27957, 1990 WL 8416, at *1 n.1 (A.F.C.M.R. Jan. 19, 1990), the Air Force Court of Military Review explained the origin of "flimsy."

> In the days before typewriters or reproduction machines, preparing the paperwork necessary for a court-martial was an onerous task; it included laborious copying of originals of Charge Sheets, orders, and records of trial. Inventive soldier-scribes soon discovered that when the original was written using excellent ink on fine paper, other very thin sheets could be laid over the original and a small amount of moisture carefully applied. With a certain amount of good luck, several copies might be secured—a primitive form of a "copying machine." Since these copies were created on very flimsy onionskin, they became known as "flimsies."

[3] United States v. Parker, 59 M.J. 195, 199 (C.A.A.F. 2003) (describing the "flyer" as "the document that would be presented to the members summarizing the charges and specifications"); United States v. Jefferson, 44 M.J. 312, 314 n.1 (C.A.A.F. 1996) ("The flyer is a plain sheet of paper listing the Charges and specifications without giving the personal data or the preferral/referral data of the charge sheet."); United States v. Glenn, 29 M.J. 696, 698 n.1 (A.C.M.R. 1989) (describing the flyer as a document that "is presented to the members and sets forth the final form of the charges and specifications upon which the accused is to be tried"); *Brooks*, 1990 WL 8416, at *1 n.1; WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 163 (rev. 2d ed. 1920).

[4] *See, e.g.*, United States v. Kaiser, 58 M.J. 146, 148–49 (C.A.A.F. 2003) (setting aside findings of guilt and the sentence because the military judge erred in providing a flyer to the panel that included specifications to which the accused plead guilty, "in the absence of any specific request to that effect made by [the accused] on the record").

[5] *See* U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK 13, 28, 39, 57, 84, 1027, 1042, 1111–14, 1120, 1130–38 (1 Jan. 2010) [hereinafter BENCHBOOK]; NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE 59 (May 2, 2012) [hereinafter NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE] ("Before calling the members, the military judge should discuss with counsel any preliminary matters, trial procedures, and evidentiary issues that can be considered prior to assembly," including "[c]leansed charge sheet (any defense objection?)[.]").

[6] BENCHBOOK, *supra* note 5, at 13, 28, 39, 57, 84, 1027, 1042, 1111–14, 1120, 1130–38.

[7] Interview with Colonel Francis Gilligan, Judge Advocate Gen., U.S. Army (Retired), in McLean, Va. (Mar. 21, 2013).

[8] *Id.*

[9] *See* NAVY-MARINE CORPS TRIAL JUDICIARY TRIAL GUIDE, *supra* note 5, at 66 ("MJ: [If the cleansed charge sheet has not already been provided to the members] (Trial counsel), please distribute a copy of the charge sheet to the members."); BENCHBOOK, *supra* note 5, at 13, 1027; AIR FORCE TRIAL GUIDE 6 (Jan. 27, 2011) [hereinafter AIR FORCE TRIAL GUIDE].

should ensure that each court member—and defense counsel—have the same flyer and that the flyer is the final flyer approved by the military judge.[10] After the parties and the military judge finalize the flyer, the military judge will call the members and begin voir dire.

A 2000 decision by the Army Court of Criminal Appeals (ACCA) demonstrates why trial counsel should ensure that each court member and defense counsel have the same flyer and that the flyer is the final flyer approved by the military judge. In *United States v. Norton*, the military judge merged two specifications for sentencing and excepted certain language from the charge sheet.[11] Before sentencing, the finalized flyer was marked as an appellate exhibit and placed at each member's seat. The members then adjudged the sentence. While appealing the sentence, defense counsel discovered that, in its copy of the flyer, the two specifications were not merged and the excepted language had not been removed.[12] The ACCA ordered a rehearing on the sentence, reasoning that it could not "rule out the possibility that the erroneous version of the Flyer was placed before at least one member of the sentencing court."[13] Trial counsel can avoid similar appellate issues by focusing on the details at even the flyer stage of the trial.[14]

Functions

The flyer serves three critical functions at trial and sentencing.

First, trial counsel, defense counsel, and the military judge may use the flyer during voir dire to question the members. In questioning the members, they may seek to determine, for example, whether any member has an "inelastic attitude" toward the accused, the charges against the accused, or, in the case of sentencing, the convictions of the accused and the potential penalties he faces for those convictions.[15]

Second, the flyer lists the charges and specifications the accused contests, so it identifies for the members the elements that trial counsel must prove before the members may find the accused guilty. The flyer thus not only serves as a guide for the members in determining whether trial counsel has met its burden of proof, but also identifies the offenses of which the members will ultimately acquit or convict the accused—even if the charge sheet differs.[16] Thus, in *United States v. Lucas*, language from the charge sheet had been omitted from the final flyer given to the members. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) treated the omitted language "as if the members had excepted it from the specification" and entered "a finding of 'not guilty' to those words."[17] As another court has explained, members convict the accused "of the offense described in the flyer"—not the offense described on the charge sheet.[18] And where the members must determine the accused's sentence, the flyer likewise identifies for the members the only offenses for which they may punish the accused.

Third, the flyer also aids the members as they identify what parts of the offenses to except or substitute, if any, in accordance with Rule for Courts-Martial (RCM) 918(a)(1) and Rule for Military Commissions (RMC) 918(a)(1). Rule for Courts-Martial 918(a)(1) and RMC 918(a)(1) permit the members to find the accused "guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any."[19] Thus, members may take the flyer with them into the deliberating room and physically mark the flyer to indicate which portions, if any, of the offenses they have decided to except or substitute.

These functions of the flyer demonstrate its critical role in the military justice system. Given this critical role and to

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[10] *See* United States v. Norton, No. 9801832, 2000 WL 35801727 (A. Ct. Crim. App. May 31, 2000) (remanding case for resentencing and new action because the court could not rule out the possibility that an erroneous version of the flyer was placed before at least one member of the sentencing court, where defense counsel discovered after trial that its copy of the flyer differed from trial counsel's copy).

[11] *Id*. at *1–3.

[12] *Id*. at *5.

[13] *Id*.

[14] *See* Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4, 9.

[15] *See, e.g.*, United States v. Keenan, 39 M.J. 1050, 1051–52 (A.C.M.R. 1994) (noting that, during voir dire, defense counsel referred to the flyer and asked the members whether anyone had an "inelastic attitude that feels that all soldiers who are convicted of negligent homicide in which alcohol is a factor should be punitively discharged"); *see also* BENCHBOOK, *supra* note 5, at 84, 1042 ("MJ: . . . Please take a moment to read the charges on the flyer provided to you and to ensure that your name is correctly reflected on (one of) the convening order(s)."); AIR FORCE TRIAL GUIDE, *supra* note 9, at 24, 59 (same).

[16] *See* United States v. Lucas, No. 200600564, 2007 WL 1704184, at *7 (N-M. Ct. Crim. App. May 15, 2007) (treating language alleged in the original charge sheet but not in the cleansed charge sheet "as if the members had excepted it from the specification" and entering "a finding of 'not guilty' to those words"); *see also* BENCHBOOK, *supra* note 5, at 1132 ("MJ: Your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer . . . .").

[17] *Lucas*, 2007 WL 1704184, at *7.

[18] United States v. Lane, No. 20031033, 2005 WL 6520481, at *1 (A. Ct. Crim. App. Oct. 27, 2005) (explaining that the members convict the accused "of the offense described in the flyer"—not the offense described on the charge sheet).

[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES R.C.M. 918(a)(1) (2012) ("General findings as to a specification may be: guilty; not guilty of an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; not guilty only by reason of lack of mental responsibility; or, not guilty. Exceptions and substitutions may not be used to substantially change the nature of the offense or to increase the seriousness of the offense or the maximum punishment for it."); MANUAL FOR MILITARY COMMISSIONS, UNITED STATES R.M.C. 918(a)(1) (2012) [hereinafter MMC].

mitigate appellate risk, trial counsel must strive to ensure that each flyer's contents are accurate, complete, and final before ultimately presenting it to the members.

Contents

The flyer lists the charges and specifications (or, for sentencing, the offenses for which the accused was convicted) in their "cleansed," or final, form. Trial counsel must present a flyer that includes only those specifications for which trial counsel has evidentiary support.[20]

Trial

The Accused Pleads Not Guilty to All Charges and Specifications

If the accused contests all the charges and specifications, trial counsel should copy the charges and specifications—in their final form—exactly as they exist on the charge sheet. If trial counsel fails to include any language on the flyer that existed in the final charge sheet, an appellate court could enter a finding of not guilty as to the omitted language. In *Lucas*, for example, the flyer omitted the words "and MCO P1100.72C (Military Personnel Procurement Manual), dated 10 February 2004" in Specification 1 under Charge III.[21] That language was part of the charge against the accused; it had not been withdrawn by trial counsel or dismissed by the military judge. But because "it was not before the members when they deliberated and rendered their verdict," the U.S. Navy-Marine Corps Court of Criminal Appeals treated that language "as if the members had excepted it" and "enter[ed] a finding of 'not guilty' to those words."[22] To avoid a similar result, trial counsel must ensure that the flyer lists the charges and specifications as they exist on the final charge sheet.

Because the flyer must list the charges and specifications as they exist in their final form, trial counsel should omit from the flyer any charges or specifications that the military judge dismissed.[23] Similarly, if (after defense counsel moves for a finding of not guilty when the government or the defense rests) the military judge finds the accused not guilty in part, trial counsel should prepare a new flyer to avoid confusing the members.[24] And if a court authorized a rehearing for certain offenses, trial counsel likewise should list only the offenses for which the court authorized rehearing, plus new charges and specifications, if any.[25]

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[20] United States v. Hall, 29 M.J. 786, 792 (A.C.M.R. 1989) (holding "it was error for the trial counsel to present a flyer to the court-martial which contained specifications for which he did not have evidence to introduce to support those specifications"); *see* United States v. Parker, 59 M.J. 195, 199–201 (C.A.A.F. 2003). In *Parker*, the flyer included a specification alleging that the accused raped Ms. AL in 1995. According to the Court of Appeals for the Armed Forces (CAAF), this inclusion obligated the Government to prove the offenses occurred in 1995. Because the Government failed to fulfill this obligation, the CAAF concluded that the military judge erred in failing to grant the motion to dismiss this specification.

[21] No. 200600564, 2007 WL 1704184, at *7 (N-M. Ct. Crim. App. May 15, 2007); *see Lane*, 2005 WL 6520481, at *1 (concluding that the members convicted the accused of the offense described in the flyer—not the charge sheet—where the flyer omitted the allegation in the charge sheet that the accused's "service was terminated by apprehension").

[22] *Lucas*, 2007 WL 1704184, at *7; *see* BENCHBOOK, *supra* note 5, at 1109 ("Regardless of the forum, the fact finder will likely not know anything about the offenses except what is on the flyer.").

[23] United States v. Norton, No. 9801832, 2000 WL 35801727, at *2–5 (A. Ct. Crim. App. May 31, 2000) (The military judge merged two specifications for sentencing and excepted certain language from the charge sheet. Before sentencing, the finalized flyer was marked as an appellate exhibit and placed at each member's seat. The members then adjudged the sentence. While appealing the sentence, defense counsel discovered that, in its copy of the flyer, the two specifications were not merged and the excepted language had not been removed. The Army Court of Criminal Appeals could not "rule out the possibility that the erroneous version of the Flyer was placed before at least one member of the sentencing court" and thus ordered a rehearing on the sentence.); United States v. Williams, No. 9700228, 1999 WL 35021386, at *5 n.5 (A. Ct. Crim. App. July 6, 1999) ("The flyer that went to the court members, Appellate Exhibit I, appropriately deleted the dismissed specifications and renumbered the remaining offenses."); United States v. Glenn, 29 M.J. 696, 697–98 (A.C.M.R. 1989) (noting that the military judge required a new flyer where he dismissed Charge II and its specification but permitted the Government to proceed on the lesser included offense of assault consummated by a battery); *cf.* United States v. Ezell, 24 M.J. 690, 692–93 (A.C.M.R. 1987) (The Government charged the accused with rape and aggravated assault. The military judge dismissed the aggravated assault charge. After trial, the parties learned that a flyer with the dismissed offense "was inadvertently distributed to three of the court members." Relying on affidavits of the members indicating that they did not consider the aggravated assault charge, the court concluded that the flyer did not affect the members' deliberations and affirmed the findings of guilt and the sentence.).

[24] *See* BENCHBOOK, *supra* note 5, at 129 ("Depending upon the complexity of the changes resulting from a partial finding of not guilty, the MJ should direct the members to amend their copies of the flyer or direct preparation of a new flyer."); COAST GUARD TRIAL GUIDE 166–67 (10 Jan. 2013) (recommending that the military judge direct trial counsel to prepare a new cleansed charge sheet if the military judge found the accused not guilty in part); AIR FORCE TRIAL GUIDE, *supra* note 9, at 95; *cf.* United States v. Seymore, 19 M.J. 608, 608–09 (A.C.M.R. 1984) ("Unbeknownst to the parties and the military judge, a flyer had been distributed to the court members [that] reflected an assault and battery charge of which appellant had been acquitted." The accused moved for a mistrial. The military judge instructed the members to disregard the charge and denied the defense motion. On appeal, the Army Court of Military Review concluded that the military judge did not abuse his discretion in denying the defense motion, reasoning that the military judge noted the misconduct was "uncharged," "involved a relatively minor offense," and "instructed the members to disregard it.").

[25] BENCHBOOK, *supra* note 5, at 1120 ("MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized?"); *id*. at 1122 ("There may be references to a 'prior trial' or 'first trial.' . . . You will not be told of the results of that prior trial; your duty as court members is to determine whether the accused is guilty of any of the offenses on the flyer, and if guilty, adjudge an appropriate sentence, based only on what legal and competent evidence is presented for your consideration in this trial."); *id*. at 1130 ("MJ: Trial Counsel, does the flyer reflect only the offenses for which a full rehearing has been authorized and the new charge(s) and specification(s)? NOTE 52: If the rehearing involves matters reheard for sentence only, those matters should not be disclosed until completion of findings. Accordingly, those matters should not be listed on the flyer until sentencing.").

The Accused Enters Mixed Pleas of Not Guilty and Guilty

Generally, the flyer should exclude any charges or specifications that "reflect provident guilty pleas if" the accused contests other offenses.[26] Two exceptions to this general rule exist. The flyer may include charges or specifications reflecting provident guilty pleas only if (1) the accused requests it *on the record* or (2) the guilty plea was to a lesser included offense and the prosecution intends to prove the greater offense.[27]

If the accused asks the military judge to include on the flyer the charges and specifications to which he plead guilty, trial counsel should ensure this request is on the record. In *United States v. Hamilton*, the accused was tried by special court-martial composed of officer and enlisted members.[28] He pleaded (1) guilty to, and was convicted of, aggravated assault and (2) not guilty to, and was convicted of, failure to obey a lawful general regulation.[29] On appeal, the accused challenged the second conviction, arguing that the military judge erred in informing the members of his guilty plea. The record did not indicate whether the accused asked the military judge to inform the members of his guilty plea. The Army Court of Military Review found that if the accused did ask the military judge, he must have done so off the record in the RCM 802 session.[30] Deciding not to "guess the contents of the RCM 802 session" and noting that the two offenses were closely related, the Court set aside the finding of guilty on the second offense.[31] To avoid similar error, trial counsel should preserve on the record a defense request to inform the members of a guilty plea.

Sentencing

Trial counsel must also prepare a flyer for sentencing. This flyer includes only those offenses for which the accused was convicted and for which the members will determine the sentence.[32] So, if the accused did not ask the military judge to inform the members of guilty-plea convictions, trial counsel should amend the flyer to include those convictions for sentencing.[33] Also, if a court referred any charges for sentence rehearing, trial counsel should include those charges.[34]

A properly drafted flyer and appropriate sentencing instructions could prevent prejudicial error where trial counsel misrepresents the accused's conviction during sentencing arguments. In *United States v. Juhl*, a general court-martial convicted the accused, pursuant to his pleas, of wrongfully using ecstasy, desertion, and breaking restriction.[35] Then a panel of enlisted and officer members tried and acquitted the accused of sexual assault. This same panel later determined the accused's sentence after hearing arguments during the presentencing phase of the proceedings. On appeal, the accused challenged his sentence, arguing (in relevant part) that the trial counsel told the members he pleaded guilty to failing a urinalysis when,

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[26] BENCHBOOK, *supra* note 5, at 28, 1037; *accord* AIR FORCE TRIAL GUIDE, *supra* note 9, at 6; United States v. Kaiser, 58 M.J. 146, 148–49 (C.A.A.F. 2003); *see* BENCHBOOK, *supra* note 5, at 1132 ("Because charges referred for a sentence rehearing only are not to be brought to the attention of the members prior to sentencing, a new flyer must be prepared to include those charges.").

[27] MCM, *supra* note 19, R.C.M. 913(a) (providing that if the accused enters mixed pleas, "the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty until after the findings on the remaining contested offenses have been entered"); MMC, *supra* note 19, R..M.C. 913(a); MCM, *supra* note 19, R.C.M. 913(a) Discussion ("Exceptions to the rule requiring the military judge to defer informing the members of an accused's prior pleas of guilty include cases in which the accused has specifically requested, on the record, that the military judge instruct the members of the prior pleas of guilty" and cases involving guilty pleas to a lesser included offense.); *accord* BENCHBOOK, *supra* note 5, at 28, 1037; AIR FORCE TRIAL GUIDE, *supra* note 9, at 6; *see* MCM, *supra* note 19, R.C.M. 910(g) Discussion (advising that the military judge should ordinarily defer informing members of guilty pleas in mixed plea cases); R.M.C. 910(g) Discussion (same); *Kaiser*, 58 M.J. at 148–49 ("The law in this area is clear—in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-martial should not be informed of any prior pleas of guilty until after findings on the remaining contested offenses are made."); United States v. Davis, 26 M.J. 445 (C.M.A. 1988) (concluding that the practice of informing members of guilty pleas provides fertile ground for asserting errors on appeal and serves no useful purpose); United States v. Rivera, 23 M.J. 80 (C.M.A. 1986) (holding that the military judge erred in advising the members at the outset of the trial that the accused pleaded guilty to certain of the charged offenses); United States v. Smith, 23 M.J. 118 (C.M.A. 1986) (reasoning that no lawful purpose is served by informing members before findings of any charges to which the accused pleaded guilty); United States v. Hamilton, 36 M.J. 723 (A.C.M.R. 1992) ("It is inappropriate for the military judge to inform the members that the accused has pleaded guilty to some offenses before trial on the merits of other offenses. . . . Where the members are erroneously informed, the error must be tested for prejudice.").

[28] 36 M.J. at 724.

[29] *Id*.

[30] *Id*. at 730.

[31] *Id*.

[32] BENCHBOOK, *supra* note 5, at 1112 ("MJ: Trial Counsel, does the flyer reflect only the offenses for which the accused stands convicted?"); *id*. at 1114 ("MJ: The accused stands convicted of, but unsentenced for, the offenses listed on the flyer. These proceedings are being held so that you may determine an appropriate sentence for the accused for the commission of such offense(s).").

[33] *Id.* at 57 ("If there were findings of guilty of which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate."); *id*. at 1063, 1137; AIR FORCE TRIAL GUIDE, *supra* note 9, at 47 ("If there were findings of guilty which the members had not previously been informed, they should be advised of such now. An amended flyer containing the other offenses is appropriate.").

[34] BENCHBOOK, *supra* note 9, at 1132–34 ("Because charges referred for a sentence rehearing only are not to be brought to the attention of the members prior to sentencing, a new flyer must be prepared to include those charges [for sentencing]. . . . MJ: . . . . Trial Counsel has the sentencing flyer, which reflects the court's findings of guilty and those charges referred for a sentence rehearing, been marked as an appellate exhibit?").

[35] No. 20100836, 2012 WL 5522457, at *1 (A. Ct. Crim. App. Oct. 31, 2012).

in fact, he pleaded guilty to wrongfully using ecstasy.[36]

The ACCA concluded that although trial counsel did misspeak, his misstatement did not materially prejudice the accused's substantial rights. The Court reasoned that (1) the sentencing flyer "reflected [only] the offenses" the accused was convicted of; (2) the military judge instructed the panel to sentence the accused only for those offenses he was convicted of; and (3) before he misspoke, trial counsel accurately stated that the accused pleaded guilty to wrongfully using ecstasy.[37] The Court accordingly affirmed the accused's conviction and sentence. Guided by this case, trial counsel could similarly avoid prejudicial error by properly drafting sentencing flyers and encouraging the military judge to instruct the jury to sentence the accused only for those offenses listed on the flyer.

Form

Once trial counsel identifies the charges and specifications it should include on the flyer, trial counsel should renumber those charges and specifications to avoid alerting the members that other charges and specifications exist.[38] In *United States v. Irons*, the Government charged the accused with eighty-six specifications of wrongfully and unlawfully making and uttering checks with the intent to defraud and for procuring unlawful currency or items of value—all violations of Article 123a, Uniform Code of Military Justice (UCMJ).[39] The accused pleaded not guilty, and was acquitted, of the first fourteen specifications. For the remaining specifications, he pleaded not guilty to those offenses, but rather guilty to the lesser included offense of dishonorable failure to maintain funds in his account in violation of Article 134, UCMJ.[40] Pursuant to his plea, he was convicted of the lesser included offense.

On appeal, the accused argued the military judge "erred by failing to require the use of a cleansed charge sheet where the charge sheet before the members set forth unrenumbered specifications which contained language of the greater offense (Article 123a) to which [the accused pleaded] not guilty."[41] The U.S. Navy-Marine Corps Court of Military Review agreed. It reasoned that the flyer "not only alerted the court members to the greater offense to which the [accused pleaded] not guilty and on which the Government did not intend to proceed, *but also alerted the court members that there were fourteen specifications that had disappeared from the charge sheet with no explanation*."[42] The Court added that although the military judge intended to explain the "'apparent abnormality in the numbers,'" he failed to do so.[43] The Court accordingly ordered a rehearing on the sentence. To avoid a similar result, trial counsel should renumber the offenses on the flyer and, at the very least, request an instruction that the members disregard any offenses not on the flyer and any numbering abnormalities.[44]

Omission of the Flyer as an Appellate Exhibit

The UCMJ requires a complete record of proceedings for every general court-martial in which the sentence includes death, dismissal, discharge, or any other punishment exceeding that which a special court-martial may adjudge.[45] This requirement "is one of jurisdictional proportion that cannot be waived."[46] The U.S. Court of Appeals for the Armed Forces has cautioned—albeit in dictum[47]—that an alleged failure to include an exhibit from the record of trial could render the record of trial incomplete and thus incapable of supporting a sentence that includes a punitive discharge or confinement exceeding six months.[48] A substantial omission raises a presumption of prejudice to the accused that the Government must rebut.[49] An insubstantial omission does not.[50] Military courts have routinely held that omitting the flyer as an appellate exhibit from the record of trial constitutes an *insubstantial* omission and thus does not render the record of trial incomplete and does not render a

[36] *Id*. at *4.

[37] *Id*.

[38] *See generally* United States v. Simpson, 55 M.J. 674, 679 n.3 (A. Ct. Crim. App. 2001) (noting that the flyer "reflected properly numbered charges and additional charges"); *but see* United States v. Brooks, No. 27957, 1990 WL 8416, at *1 n.2. In *Brooks*, the Government charged the accused with four specifications, two of which the accused contested. The accused pleaded guilty to the other two. The flyer listed only the two charges the accused contested but left the numbers "three" and "four" on the flyer. The defense asked the military judge to delete the numbers "three" and "four" from the flyer, but the military judge refused. On appeal, the accused argued that the military judge erred because the members "must have divined the existence" of the two specifications to which he pleaded guilty. The Air Force Court of Military Review rejected the argument, reasoning that the accused's concern was "pure speculation."

[39] 34 M.J. 807, 809 (N-M.C.M.R. 1992).

[40] *Id*.

[41] *Id*.

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

[43] *Id*.

[44] United States v. Irons, 34 M.J. 807 (N.M.C.M.R. 1992); *but see Brooks*, 1990 WL 8416, at *1.

[45] UCMJ art. 54 (c)(1)(A), 10 U.S.C. § 854(c)(1)(A) (2013).

[46] United States v. Henry, 53 M.J. 108, 110–11 (C.A.A.F. 2000).

[47] United States v. Gaskins, 72 M.J. 225, 230 (C.A.A.F. 2013) (characterizing the statement as "not necessary to the holding" in *Henry*, 53 M.J. at 111, and distinguishing a complete record from a verbatim record).

[48] *Henry*, 53 M.J. at 111; *Gaskins*, 72 M.J. at 230 (calling the *Henry* court's caution into question by noting that an incomplete record and the lack of a verbatim transcript are "separate and distinct errors"); United States v. Cudini, 36 M.J. 572, 573 (A.C.M.R. 1992) (citing United States v. McCullah, 11 M.J. 234, 236 (C.M.A. 1981)).

[49] *Cudini*, 36 M.J. at 573 (citing United States v. Gray, 7 M.J. 296 (C.M.A. 1979)).

[50] *Cudini*, 36 M.J. at 573 (citing *McCullah*, 11 M.J. at 237).

sentence vulnerable on appeal.[51]

Conclusion

The rules and law governing flyers provide important guideposts to military practitioners to mitigate appellate risks that arise when using flyers at trial and sentencing. Those guideposts can be reduced to the following general practice points.

- Defense counsel should state their objections, or lack thereof, to the flyer on the record. If defense counsel has objections, counsel should ensure the military judge's ruling is on the record.

- Trial counsel should ensure that each court member—and defense counsel—has the same flyer and that the flyer is the final flyer approved by the military judge.

- Trial counsel should present a flyer that includes only those specifications for which trial counsel has evidentiary support.

- Once the military judge approves the flyer, trial counsel should mark it as an appellate exhibit for inclusion in the record of trial.

- If the accused contests all the charges and specifications, trial counsel should copy the charges and specifications—in their final form—exactly as they exist on the charge sheet and omit any charges or specifications the military judge dismissed or acquitted the accused of. If a court authorized a rehearing for certain offenses, trial counsel should list only the offenses for which the court authorized rehearing, plus new charges and specifications, if any.

- Trial counsel may include charges or specifications reflecting provident guilty pleas only if (1) the accused requests it on the record or (2) the guilty plea was to a lesser included offense and the prosecution intends to prove the greater offense.

- Counsel should ensure the flyer at sentencing includes only those offenses for which the accused was convicted and for which the members will determine the sentence.

- At sentencing, counsel should ask the military judge to instruct the jury to sentence the accused only for those offenses listed on the sentencing flyer.

- Once trial counsel identifies the charges and specifications it should include on the flyer, trial counsel should renumber those charges and specifications to avoid alerting the members that other charges and specifications currently exist or previously existed in the case.

[51] *Henry*, 53 M.J. at 111 (citing United States v. Johnson, 33 M.J. 1017 (A.C.M.R. 1991)); United States v. Joseph, 36 M.J. 846, 849 (A.C.M.R. 1993); United States v. Williams, 36 M.J. 785, 789–90 (A.C.M.R. 1993); *Cudini*, 36 M.J. at 573.

Saturday Night Jurisdiction Over Reserve Soldiers

Major T. Scott Randall[*]

I. Introduction

Certain members of the Selected Reserve (called troop program unit (TPU) Soldiers in the Army Reserve) attend inactive duty training (IDT) one weekend per month.[1] During this weekend, Reserve Soldiers typically report to their units in the morning ("sign-in") and report out at the end of the duty day ("sign-out"). The issue arises as to whether these Soldiers remain subject to the Uniform Code of Military Justice (UCMJ) between sign-out at the end of the duty day and sign-in the following morning.

In order to illustrate this issue consider the following hypothetical. Members of Headquarters and Headquarters Company (HHC), 7th Civil Support Command arrive for training at Daenner Kaserne, Kaiserslautern, Germany, at 0630, Saturday morning for their monthly battle assembly (BA).[2] The HHC holds formation and conducts the morning sign-in at 0700. The HHC proceeds to conduct training throughout the day according to its training schedule. There is no order associated with the BA weekend other than the aforementioned training schedule. At the conclusion of the duty day, at 1730, the HHC holds a final formation and conducts sign-out. Those who have signed up for lodging-in-kind proceed to their lodging on Vogelweh Air Base in Kaiserslautern.[3] The remaining Soldiers return to their homes or other accommodations for the evening. All Soldiers of the HHC are expected to return for formation and sign-in on Sunday morning at 0700. However, two of the HHC's Soldiers decide to experience Kaiserslautern's vibrant night life and go to several night clubs on Saturday evening. On their way back to their lodging-in-kind accommodations, they are arrested by local Polizei for driving under the influence (DUI) of alcohol. Instead of taking the Soldiers to the local clink, the Polizei turn them over to the U.S. military police station located on Vogelweh Air Base for further disposition. At 0330, you receive a call from the HHC commander informing you of the situation and asking you his options under the UCMJ.

This article analyzes the attachment of UCMJ jurisdiction over Reserve Soldier misconduct during the gap period between two IDT periods. It first explains the mechanics of how UCMJ jurisdiction over Reserve Soldiers attaches by looking at the applicable statute, case law, and regulations. Then, it analyzes how UCMJ jurisdiction attaches for incidents that occur between IDT periods. This article concludes that a Reserve Soldier remains under UCMJ jurisdiction between IDT periods if such Soldier voluntarily submits to military authority and receives additional military benefits.

II. Mechanics of UCMJ Jurisdiction and Reserve Soldiers

Jurisdiction is the power of a court to try and determine a case and to render a valid judgment.[4] Court-martial jurisdiction is dependent upon both personal and subject matter jurisdiction, in addition to a properly constituted court martial.[5] Subject matter jurisdiction is concerned with violations of the UCMJ committed by persons subject to the Code.[6] Thus, a court-martial has subject matter jurisdiction only over those violations of the UCMJ, which are committed by persons who are subject to the Code at the time of the offense.[7]

In contrast, personal jurisdiction looks at both military control over the individual at the time of trial and at the time of the offense.[8] As stated by the Court of Appeals for the Armed Forces, "the only difference [between subject matter and personal jurisdiction] is that jurisdiction over the person depends on the person's status as a 'person subject to the Code' both at the time of the offense and at the time of trial."[9] Consequently, a court-martial may have subject matter jurisdiction because a Soldier committed an offense, yet lack personal jurisdiction because the Soldier who committed the crime has been fully discharged from service.[10] Conversely, a court-martial may have personal jurisdiction over an accused because of his service status, yet

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[1] *See* U.S. DEP'T OF ARMY, REG. 140-1, ARMY RESERVE MISSION, ORGANIZATION, AND TRAINING para. 2-1 (20 Jan. 2004) [hereinafter AR 140-1]. The Selected Reserve is part of the Ready Reserve of each Reserve component consisting of units and individuals who training participate and serve on paid active duty for training each year. USAR Selected Reserve units include individuals classified as troop program units (TPUs), Individual Mobilization Augmentees (IMA), and Active Guard Reserve (AGR) personnel. *See id.* sec. II, at 91.

[2] *See* AR 140-1, *supra* note 1, para. 3-4b. A multiple unit training assembly (MUTA) weekend is typically referred to as a battle assembly (BA) weekend. *Id.*

[3] *See* U.S. DEP'T OF DEF., INSTR. 1225.9, 17, BILLETING FOR RESERVE COMPONENT MEMBERS (Dec. 01) [hereinafter DoDI 1225.9]. Lodging-in-kind is commercial lodging of like kind and quality as transient Government housing found on military installations. *See id.*

[4] *See* United States v. Ali, 71 M.J. 256, 261 (C.A.A.F. 2012).

[5] *See* United States v. Oliver, 57 M.J. 170, 172 (C.A.A.F. 2002).

[6] *See* United States v. Chodara, 29 M.J. 943, 944 (A.C.M.R. 1990).

[7] *Id.*

[8] *See Oliver*, 57 M.J. at 172.

[9] *See Ali*, 71 M.J. at 265.

[10] *See Chodara*, 29 M.J. at 944 (citing United States v. Howard, 20 M.J. 353, 354 (C.M.A.1985)).

lack subject matter jurisdiction because the offense charged was committed at a time when the accused was not a member of the armed services and thus not a person subject to the Code.[11]

Personal jurisdiction (and to a large extent subject matter jurisdiction) is governed by Article 2 of the UCMJ.[12] Members of the armed forces that are called or ordered to duty "from the dates" when they are required by the terms of the order to obey are subject to the UCMJ.[13] Further, pursuant to Article 2(a)(3) of the UCMJ, "members of the reserve component *while on* inactive-duty training" are subject to the UCMJ.[14] Finally, under Article 2(c) of the UCMJ, a person serving with an armed force who submits voluntarily to military authority, meets minimum competency and age standards, receives military pay and allowances, and performs military duties is also subject to UCMJ jurisdiction.[15]

In determining when UCMJ jurisdiction attaches to a Reserve servicemember for active duty (as opposed to "inactive-duty"), the courts have ruled that UCMJ jurisdiction attaches either on the day when the servicemember reports for duty regardless of the report time, or on the day when she starts travel to report for duty.[16] In *United States v. Cline*, an Air Force noncommissioned officer (NCO) argued that the court lacked personal jurisdiction over his case because his distribution of marijuana occurred prior to the reporting time for his annual training order.[17] The NCO sold marijuana on Norton Air Force Base on the date his annual training order was to begin, but prior to his reporting time.[18] In deciding the case, the court first looked at the exact language of Article 2(a)(1).[19] The court found the NCO was not a "volunteer" or "inductee" within the meaning of Article 2(a)(1), which calls for a time-based analysis for UCMJ jurisdiction.[20] The court further found that the NCO was among the last class of persons indicated in Article 2(a)(1) as one who was called or ordered to duty and, therefore, subject to the UCMJ "*from the dates*" when he was required by the terms of the call or order to obey it.[21] Therefore, the court reasoned that the NCO was subject to the UCMJ from one minute past midnight on the report *date* indicated on his annual training order.[22]

The court addressed the NCO's argument that reservists are equivalent to the militia and are subject to a departure for duty standard exercised in the National Guard.[23] The court found the Air Force Reserve was clearly a federal entity that is not subject to prior practices of the militia.[24] The court further found that certain statutes and regulations covering travel of reservists that arguably created a departure for duty rule for travel benefits were unrelated to the issue of UCMJ jurisdiction.[25] Therefore, the Air Force NCO was subject to the UCMJ for the entire twenty-four hours with respect to the report date of his annual training order regardless of the specific reporting time indicated on the order.[26]

In *United States v. Phillips*, an Air Force Reserve lieutenant colonel admittedly ingested marijuana laced brownies while in a travel status the night before her annual training order was to begin.[27] The Reserve lieutenant colonel

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[11] *See id.* (citing United States v. Jordan, 29 M.J. 177, 184–85 (C.M.A. 1989)).

[12] *See* UCMJ art. 2 (2012); *see also Ali*, 71 M.J. at 265.

[13] *See* UCMJ art. 2(a)(1). The provision reads:

> Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers *from the time* of their muster or acceptance into the armed forces; inductees *from the time* of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, *from the dates* when they are required by the terms of the call or order to obey it.

Id. (emphasis added). This means that Reserve component Soldiers ordered to annual training (AT), active duty for training (ADT), or other forms of active duty are subject to the Uniform Code of Military Justice (UCMJ). *See id. See also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202 discussion (2)(A)(i) (2012) [hereinafter MCM].

[14] *See* UCMJ art. 2(a)(3) ("[m]embers of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service."); *see also* MCM, *supra* note 13, R.C.M. 204.

[15] *See* UCMJ art. 2(c). Article 2(c) indicates in full that:

> Notwithstanding any other provision of law, a person serving with an armed force who (1) submitted voluntarily to military authority; (2) met the mental competence and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority; (3) received military pay or allowances; and (4) performed military duties; is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

Id.

[16] *See* United States v. Cline, 29 M.J. 83 (C.M.A. 1989); United States v. Phillips, 56 M.J. 843 (A.F. Ct. Crim. App. 2002).

[17] *See* United States v. Cline, 29 M.J. 83 (C.M.A. 1989).

[18] *See id.* at 84.

[19] *See id.* at 85.

[20] *Id.* Article 2(a)(1) covers volunteers from the time of their muster or acceptance into the armed forces, and inductees from the time of their actual induction are subject to the UCMJ. *See supra* note 13.

[21] *See Cline*, 29 M.J. at 85–86.

[22] *See id.* at 86.

[23] *See id.* at 85.

[24] *Id.*

[25] *Id.*

[26] *See id.* at 86.

[27] *See* United States v. Phillips, 56 M.J. 843 (A.F. Ct. Crim. App. 2002).

argued that the Air Force lacked jurisdiction over her use of marijuana because her active duty tour did not begin until 0001 hours on the report date indicated in her order.[28] The officer's order required her to report for duty at 0730 on 12 July and be released from duty on 23 July with an optional one day of travel on 11 July.[29] The court found that the officer was subject to UCMJ jurisdiction on 11 July under Article 2(a)(1) because she was a person "lawfully called or ordered into . . . duty in or for training . . . from the dates when [she was] required by the terms of the call or order to obey it."[30] The court stated that the officer could have been called to duty on the date she was required to start her training, 12 July, or she could have exercised her option to take a day of travel and be called to duty on 11 July.[31] Because the officer chose the latter option, personal jurisdiction attached on 11 July.[32]

Most interestingly, the court also found the officer subject to the jurisdiction of the court under Article 2(c).[33] The court reasoned the officer had submitted to military authority by voluntarily traveling on 11 July and accepting the military conditions of her travel to use government quarters.[34] Further, the officer clearly met age and mental requirements for active service and received pay and allowances for the day of travel.[35] The court also found the officer performed military duties on her travel day.[36] It stated, "Travel is a normal part of military duty. In the discharge of that duty, it was incumbent upon the appellant to adhere to military standards and to the UCMJ."[37] Therefore, the court also maintained personal jurisdiction over the case pursuant to Article 2(c) of the UCMJ.[38]

Aside from the statutory language of Article 2 of the UCMJ and the case law interpreting its application, one must look to the governing regulations regarding IDT. Two regulations are relevant to this issue: Army Regulation (AR) 27-10, *Military Justice*, and AR 140-1, *Army Reserve Mission, Organization, and Training*.

Army Regulation 27-10 states that Reserve Soldiers in Title 10, U.S. Code (so called "Title 10") status are subject to the UCMJ.[39] Typical Title 10 duty statuses are the following: active duty (AD), active duty for training (ADT), annual training (AT), active guard reserve duty, and IDT.[40] "Inactive duty training normally consists of weekend drills by TPUs, but may also include any training authorized by appropriate authority."[41] Most importantly, AR 27-10 states that "All . . . [U.S. Army Reserve] Soldiers are subject to the provisions of the UCMJ *from the date* scheduled to report to AD, ADT, AT, or IDT until *the date* the Soldier is released from that status."[42]

Army Regulation 140-1, *Army Reserve Mission, Organization, and Training*, mandates TPUs conduct IDT in the form of unit training assemblies (UTAs).[43] It defines a UTA as "an authorized and scheduled training assembly of at least [four] hours, including roll call and rest periods."[44] A TPU Soldier who satisfactorily completes an entire UTA may earn at least one day's pay or one retirement point or both.[45] A TPU may not conduct more than two UTAs of equal duration per day regardless of the number of hours of training actually conducted.[46] Therefore, each UTA period is a minimum of four hours in duration and a maximum of twelve hours in duration.[47]

III. Analysis of UCMJ Jurisdiction and IDT

A commander may only exercise UCMJ jurisdiction over a Reserve Soldier between IDT periods if such periods are covered by Article 2.[48] Article 2(a)(1) is only applicable

[28] *See id.* at 845.

[29] *Id.*

[30] *See id.*

[31] *Id.*

[32] *Id. But see* United States v. Phillips, 58 M.J. 217 (C.A.A.F. 2003) (finding jurisdiction over the accused under Article 2(c) without addressing Article 2(a)(1)).

[33] *See id.* at 846–47.

[34] *Id.* at 846. In affirming the lower court's holding, the Court of Appeals for the Armed Forces also emphasized that the officer must be "serving with an armed force" as a pre-requisite to finding jurisdiction under Article 2(c). *Phillips*, 58 M.J. at 220. The court easily found that the officer was serving with an armed force on the 11 July due to her pay status, receipt of retirement points, and receipt of military benefits such as lodging. *See id.*

[35] *Phillips*, 56 M.J. at 846.

[36] *Id.* at 847.

[37] *Id.*

[38] *Id.*

[39] *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 20-2a (3 Oct. 2011) [hereinafter AR 27-10] ("Army Reserve Soldiers will be subject to the UCMJ whenever they are in a . . . [Title 10, U.S. Code] (Title 10) duty status.").

[40] *Id.* ("Examples of . . . [Title 10] duty status are active duty (AD); active duty for training (ADT); annual training (AT); active guard reserve (AGR) duty; inactive duty training (IDT).").

[41] *Id.*

[42] *Id.* para. 20-2a.

[43] *See* AR 140-1, *supra* note 1, para. 3-4b.

[44] *Id.*

[45] *Id.*

[46] *See id.* para. 3-4c.

[47] *See id.* para. 3-4.

[48] *See* UCMJ art. 2 (2012).

to Reserve Soldiers "called or ordered" to duty pursuant to active duty orders.[49] Therefore, Article 2(a)(1) is inapplicable to IDT.[50] Article 2(a)(3) states that Reserve Soldiers are covered by the UCMJ while "on inactive duty training."[51] The UCMJ does not define when a Reserve Soldier is on IDT.[52] However, AR 27-10 appears to fill this gap when it states that the UCMJ applies to all U.S. Army Reserve Soldiers from the date scheduled to report to IDT until the date the Soldier is released from that status.[53] Army Regulation 27-10 places IDT in parity with a call or order to active duty with respect to UCMJ jurisdiction, applying Article 2(a)(1)'s date-based, and not time-based, approach in determining UCMJ jurisdiction.[54] Therefore, following the holding in *United States v. Cline*, UCMJ jurisdiction would presumably attach at one minute after midnight on the date scheduled for IDT.[55]

But, there are several issues associated with equating IDT with active duty service. First, IDT periods are for a minimum of four hours (maximum of twelve hours), not twenty-four hours as is applicable to active duty service.[56] Second, IDT periods are marked by the discrete acts of "sign-in" and "sign-out" at unit battle assemblies, which are inapplicable to active duty service.[57] Finally, and most fundamentally, the express language of Article 2(a)(3) does not support this parity.[58]

The court in *United States v. Cline* placed great emphasis on the language of Article 2(a)(1) differentiating between different categories of individuals subject to UCMJ jurisdiction.[59] Applying the same analysis, one finds that Article 2 also distinguishes between members performing IDT ("while on inactive duty training") and members performing active duty ("from the dates when they are required by the terms of the call or order to obey it") regarding personal jurisdiction.[60] Article 2(a)(3) does not define the period of UCMJ jurisdiction for IDT by use of the term date, it uses the non-defined term "while on" IDT.[61] In the absence of statutory specificity, one can only evaluate the period of IDT jurisdiction with time in accordance with AR 140-1.[62] Army Regulation 27-10 fails to capture this distinction by conflating IDT with Reserve active duty service (i.e., ADT and AT) and applying the Article 2(a)(1)'s date-based approach[63] to determine UCMJ jurisdiction for IDT.[64] Hence, AR 27-10 appears to improperly expand the express language of Article 2(a)(3).[65]

By regulation, IDT is governed by minimum time standards in its performance.[66] A Reserve unit commander has the discretion to schedule UTAs for a minimum of four hours or a maximum of twelve hours based upon the needs of the unit.[67] Reserve Soldiers are clearly "on inactive-duty training" from the time they are scheduled to report to the Reserve unit for training until the Soldiers are released from such unit at the end of the duty day. During this period, they are in a pay status and receiving retirement points.[68] Any expansion of UCMJ jurisdiction under Article 2(a)(3) beyond this minimum standard is problematic. In fact, the court in *Cline* expressly rejected applying any "departure-for-duty" standard as the inception of UCMJ jurisdiction over Reserve Soldiers performing active duty training.[69] Given that Congress did not include Reserve Soldiers on "inactive duty training" in Article 2(a)(1) but instead differentiated them by creating Article 2(a)(3), the date standard to jurisdiction should not be applied to IDT. Therefore, a time-based approach to defining "while on inactive-duty training" appears appropriate.

If a Soldier, however, remains under some military authority upon release from his Reserve unit at the end of the training day, then such Soldier may remain under UCMJ jurisdiction pursuant to Article 2(c).[70] This is especially the case if the Soldier is offered on-post billeting or lodging-in-kind. In that case, the Soldier would be voluntarily submitting to military authority by billeting in a location chosen by the Soldier's unit. Further, the Soldier would

[49] *See id.* art. 2(a)(1).

[50] *Id.*

[51] *See id.* art. 2(a)(3).

[52] *See id.* art. 2.

[53] *See* AR 27-10, *supra* note 39, para. 20-2a.

[54] *Id.*

[55] *See* United States v. Cline, 29 M.J. 83, 85 (C.M.A. 1989).

[56] *See* AR 140-1, *supra* note 1, para. 3-4.

[57] *See id.* para. 3-9g.

[58] *See* UCMJ art. 2 (2012).

[59] *See Cline*, 29 M.J. at 83–85.

[60] *See* UCMJ art. 2.

[61] *Id*. art. 2(a)(3).

[62] *Id*.; *cf. id*. art. 2(a)(1); *see also* AR 140-1, *supra* note 1, para. 3-4.

[63] Article 2(a)(1) only applies UCMJ jurisdiction "from the dates" a member is called or ordered to duty with respect to active duty orders. *See* UCMJ art. 2(a)(1).

[64] AR 27-10, *supra* note 39, para. 20-2a.

[65] *See* AR 27-10, *supra* note 39, para. 20-2.

[66] *See* AR 140-1, *supra* note 1, para. 3-4.

[67] *Id*.

[68] *Id*.

[69] *See* United States v. Cline, 29 M.J. 83, 86 (C.M.A. 1989) ("[T]he Senate eventually imposed the more particular time requirement for jurisdiction only on inductees, volunteers, and members of the National Guard. Applying the principle of statutory construction, "*expressio unius est exclusio alterius*" [("[a] canon of construction holding that to express or include one thing implies the exclusion of the other," BLACK'S LAW DICTIONARY 661 (9th ed. 2009))], members of the Reserves do not gain the benefit Congress intended these other special groups to have.").

[70] *See* UCMJ art. 2(c).

continue to meet age and mental capacity qualifications and be receiving military pay and allowances. Although the Soldier would not receive any additional salary after sign-out at the end of the duty day, the Soldier would be receiving an additional benefit from the Government, i.e., free billeting, which would likely be construed as form of compensation. The Soldier would also be performing military duties. As noted by the court in *United States v. Phillips*, travel related activities such as billeting are part of a Soldier's normal military duties.[71]

IV. Conclusion

The jurisdiction of the UCMJ applies to Reserve Soldiers from the time scheduled to report to their Reserve unit for IDT until released by such unit at the conclusion of the duty day. Jurisdiction may further apply to Reserve Soldiers after they sign-out of their Reserve units at the end of the duty day if they voluntarily submit to military authority and receive a further benefit from the Government.

Under the hypothetical presented in the introduction, the Soldiers arrested for DUI would not be subject to the UCMJ with regard to Article 2(a)(3). Upon release from their unit at sign-out, these Soldiers were no longer "on inactive duty training" within the meaning of Article 2(a)(3). However, they would likely remain subject to the UCMJ during Saturday night under Article 2(c) because they voluntarily submitted to military authority for the evening via their receiving lodging-in-kind. This voluntary receipt of benefits from their unit would be a form of compensation and subject them to additional military duties associated with their lodging in the form of conducting themselves in accordance with military rules and discipline.

Although not presented in the hypothetical, it would be a good practice to reiterate to all Soldiers accepting lodging-in-kind that they remain subject to the jurisdiction of the military during their stay and to conduct themselves in accordance with such jurisdiction. This reiteration could take the form of an additional sign-in and sign-out for the evenings where lodging-in-kind is applicable. Units could also delay the evening sign-out for all those Soldiers accepting lodging-in-kind until the following morning. The intent of these actions would be to make clear that accepting lodging-in-kind will subject Soldiers to military discipline between IDT periods.

[71] *See* United States v. Phillips, 56 M.J. 843, 847 (A.F. Ct. Crim. App. 2002). *Contra id*. at 849 (Pecinovsky, J., concurring in part, dissenting in part) (rejecting the court's determination that accused's transportation to and lodging at duty station prior to report date as performing military duty under Article 2(c), UCMJ).

Lincoln on Leadership: Executive Strategies for Tough Times[1]

Reviewed by *Major Aaron L. Lykling*[*]

Abraham Lincoln was the essence of leadership.[2]

I. Introduction

Abraham Lincoln became president during the darkest hour of the nation's history. Seven states had already seceded from the Union when Lincoln took office on March 4, 1861.[3] Just six weeks later, the Confederates fired the first shot of the Civil War at Fort Sumter.[4] Lincoln inherited a political nightmare from his feckless predecessor, James Buchanan, and public confidence in the new president was low.[5] Although Lincoln's legacy of leadership is firmly cemented today, his contemporaries widely regarded him as a "second-rate country lawyer."[6] In the end, of course, Lincoln silenced his critics by saving the Union and paving the way for the abolition of slavery. What lessons can today's leaders learn from our sixteenth president?

In Lincoln on Leadership: Executive Strategies for Tough Times, Donald T. Phillips asserts that "Lincoln can be looked to as the ideal model for desirable, effective leadership."[7] Phillips validates this claim by skillfully extracting Lincoln's enduring leadership principles for the benefit of today's leaders.[8]

At the outset, Phillips identifies a recurring problem in leadership literature: "Since leadership principles are usually expressed rather abstractly, there is a great need for simple, concrete illustrations. Tangible examples make the difference; people relate to them."[9] Phillips succeeds in avoiding the abstract, illuminating Lincoln's leadership genius through the lens of the president's own words and experiences in office.[10] Phillips ultimately distills fifteen leadership lessons from his exhaustive survey of Lincoln. He logically organizes the lessons into four categories: People, Character, Endeavor, and Communication.[11] Fortunately, Lincoln on Leadership is more than just a laundry list of platitudes.[12] The book is a captivating account of the timeless leadership principles of our greatest president. The only significant flaw is Phillips's apparent inability to criticize Lincoln.

Although Phillips targets his message toward business leaders,[13] he delivers invaluable insights for military leaders as well. The Army's current leadership doctrine, set forth in Army Doctrine Reference Publication (ADRP) 6-22, states that "an ideal Army leader has strong intellect, physical presence, professional competence, high moral character, and serves as a role model."[14] Remarkably, Lincoln displayed all these qualities as commander-in-chief, despite having no prior military or executive experience.[15] Military

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[1] DONALD T. PHILLIPS, LINCOLN ON LEADERSHIP: EXECUTIVE STRATEGIES FOR TOUGH TIMES (1992).

[2] *Id.* at 173.

[3] *Id.* at 7.

[4] Mark Collins Jenkins, *Fort Sumter: How the Civil War Began With a Bloodless Battle*, NAT'L GEOGRAPHIC DAILY NEWS (Apr. 12, 2011), http://news.nationalgeographic.com/news/2011/04/110412-fort-sumter-civil-war-nation-150th-anniversary-first-battle/ (last visited May 17, 2013).

[5] PHILLIPS, *supra* note 1, at 7–8.

[6] *Id.* at 8.

[7] *Id.* at 172.

[8] Incidentally, Phillips's book apparently ignited the genre of historical leadership. These books draw on examples from the past to identify leadership lessons for the present reader. Even the titles usually mimic Phillips's format. *See, e.g.*, ALAN AXELROD, EISENHOWER ON LEADERSHIP: IKE'S ENDURING LESSONS IN TOTAL VICTORY MANAGEMENT (2006); STEVEN HAYWARD, CHURCHILL ON LEADERSHIP: EXECUTIVE SUCCESS IN THE FACE OF ADVERSITY (1998); STEWARD HUSTED, GEORGE C. MARSHALL: THE RUBRICS OF LEADERSHIP (2006); JAMES REES, GEORGE WASHINGTON'S LEADERSHIP LESSONS: WHAT THE FATHER OF OUR COUNTRY CAN TEACH US ABOUT EFFECTIVE LEADERSHIP AND CHARACTER (2007); JAMES STROCK, THEODORE ROOSEVELT ON LEADERSHIP: EXECUTIVE LESSONS FROM THE BULLY PULPIT (2003).

[9] PHILLIPS, *supra* note 1, at xii. Phillips's assessment is accurate. A recent example from this genre that effectively employs tangible examples to illustrate leadership principles is General (Retired) Colin Powell's book, *It Worked for Me: In Life and Leadership*.

[10] *Id.* at xii. Phillips relies on primary sources when possible, such as Lincoln's personal writings. Although he frequently cites secondary sources, he acknowledges the inherent limitations they present in regards to the authenticity of Lincoln's quotations. *Id.*

[11] Here is the complete list: Part I—People: Get Out of the Office and Circulate Among the Troops; Build Strong Alliances; and Persuade Rather Than Coerce. Part II—Character: Honesty and Integrity Are the Best Policies; Never Act Out of Vengeance or Spite; Have the Courage to Handle Unjust Criticism; and Be a Master of Paradox. Part III—Endeavor: Exercise a Strong Hand—Be Decisive; Lead by Being Led; Set Goals and Be Results Oriented; Keep Searching Until You Find Your Grant; and Encourage Innovation. Part IV—Communication: Master the Art of Public Speaking; Influence People Through Convention and Storytelling; and Preach a Vision and Continually Reaffirm It.

[12] *See, e.g.*, KEVIN EIKENBERRY, REMARKABLE LEADERSHIP: UNLEASHING YOUR LEADERSHIP POTENTIAL ONE SKILL AT A TIME (2007); JOHN MAXWELL, LEADERSHIP 101: WHAT EVERY LEADER NEEDS TO KNOW (2002).

[13] *See* PHILLIPS, *supra* note 1, at 9.

[14] U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP, at v (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter ADRP 6-22]. Two of Lincoln's leadership principles, "Get Out of the Office and Circulate Among the Troops" and "Honesty and Integrity Are the Best Policies," mirror the Army ideals of "physical presence" and "high moral character."

[15] PHILLIPS, *supra* note 1, at 8.

leaders will undoubtedly further their quest for self-improvement[16] by studying Lincoln's leadership principles.

While all of the principles are noteworthy, two of them stand out. The first principle, "Get Out of the Office and Circulate Among the Troops," is more of a reminder than a revelation. Nevertheless, through Lincoln's actions, Phillips usefully reiterates the importance of a practice to which military leaders sometimes only pay lip service. The second principle, "Encourage Innovation," offers an intriguing parallel to the burgeoning concept of "adaptive leadership."[17] Former Secretary of the Army Francis Harvey described the necessity of adaptive leaders as follows: \

> Army leaders in this century need to be pentathletes, multi-skilled leaders who can thrive in uncertain and complex operating environments . . . innovative and adaptive leaders who are expert in the art and science of the profession of arms. The Army needs leaders who are decisive, innovative, adaptive, culturally astute, effective communicators, and dedicated to life-long learning.[18]

Although Phillips never explicitly refers to Lincoln as an "adaptive" leader, he communicates the same idea throughout the book. Indeed, the ability to adapt is the defining characteristic of Lincoln's leadership. He thrived on chaos.[19]

II. Face Time Matters

Phillips does not rank order Lincoln's leadership principles, but he unwittingly begins the book with one of the most vital principles for military leaders: "Get Out of the Office and Circulate Among the Troops."[20] While the importance of this command should be self-evident, military leaders often neglect to interact with their subordinates, a phenomenon that tends to increase with rank. Phillips shows how Lincoln's regular practice of visiting the troops paid enormous dividends.

During the Civil War, Lincoln spent much of his time away from the White House visiting troops.[21] Simply put, he went where they were—no matter how dangerous the location.[22] Lincoln's "roving leadership style"[23] served multiple purposes. First, he used the visits to show the troops that he valued their sacrifice for shouldering "the hardest work in support of the government."[24] Second, the trips allowed Lincoln to check the pulse of the troops and to hear their unvarnished opinions.[25] By soliciting the Soldiers' feedback, Lincoln showed his commitment to them and gained their trust. Finally, Lincoln used the visits to gather facts and to educate himself about military operations.[26] As a Washington outsider with no prior military experience, Lincoln "realized that people were a major source of information and that to be a good leader he had to stay close to them."[27]

Lincoln demanded that his generals stay close to their subordinates as well. General John Fremont learned this lesson the hard way when Lincoln relieved him of command in October 1861. Although Fremont had many flaws, Lincoln believed that "[h]is cardinal mistake is that he isolates himself, and allows nobody to see him; and by which he does not know what is going on in the very manner he is dealing with."[28]

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[16] *See, e.g.*, ARDP 6-22, *supra* note 14, para. 7-4 ("Self-improvement requires self-awareness and leads to new skills necessary to adapt to changes in the leadership environment."). Lincoln always sought improvement. His contemporary, Horace Greeley, described the result of his efforts as follows: "There was probably no year of his life when he was not a wiser, cooler, and better man than he had been the year preceding." PHILLIPS, *supra* note 1, at 171.

[17] As one commentator recently observed: "Today's Army leaders have accepted adaptive leadership as a practice and a methodology, integrating it into the way we train leaders to meet the challenges of the contemporary operating environment." William J. Cojocar, *Adaptive Leadership in the Military Decision Making Process*, MIL. REV., Nov.–Dec. 2011, at 29, *available at* http://usacac.army.mi./CAC2/MilitaryReviewe/Archives/English/MilitaryReview_20111231_art008.pdf. *See also* Major Sonise Lumbaca, *AWG Program Reinforces Adaptive Mindsets, Builds Adaptive Army Leaders*, U.S. ARMY HOMEPAGE (Mar. 2, 2012), http://www.army.mil/article/74951/ (last visited May 17, 2013) (describing the Asymmetric Warfare Group's Asymmetric Warfare Adaptive Leader Program, a ten-day course "designed to enhance adaptability in leaders and promote innovative solutions in training").

[18] PHILLIPS, *supra* note 1, at 23. The inglorious end of Secretary Harvey's career does not diminish the force of this quotation. *See, e.g.*, Thomas E. Ricks & Ann Scott Tyson, *Defense Secretary Sends Stern Message About Accountability*, WASH. POST, Mar. 3 2007, at A8, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/02/AR2007030201432.html (discussing the firing of Secretary Harvey in relation to the scandal over the poor treatment of outpatient Soldiers at Walter Reed Army Medical Center).

[19] *See, e.g.*, PHILLIPS, *supra* note 1, at 139 (noting how Lincoln's leadership philosophy dovetails with the innovative and adaptive leadership model propounded by Tom Peters in his 1987 book, *Thriving on Chaos*).

[20] *Id.* at 13.

[21] *Id.* at 22. Phillips includes a chart that depicts, by month, the staggering number of days that Lincoln was away from the White House during his first term. *Id.* at 23. In 1861, he actually "spent more time out of the White House than he did in it." *Id.* at 19. When Lincoln was in Washington, he followed an unprecedented "open-door" policy, regularly meeting with virtually anyone that came to the White House. *Id.* at 15–18.

[22] *Id.* at 14. Lincoln occasionally "went to the field to observe or take charge of several battle situations himself, coming under fire at least once (one of the few American presidents to do so while in office)." *Id.*; *see also id.* at 120 (describing Lincoln's personal direction of the attack on Norfolk, Virginia, in early May 1862).

[23] *Id.* at 22.

[24] *Id.* at 19–20.

[25] *Id.* at 21. As Phillips put it, Lincoln wanted "honest talk with honest people." *Id.*

[26] *Id.* at 13–15.

[27] *Id.* at 15.

[28] *Id.* at 14.

Lincoln's habit of spending time with the troops directly applies to contemporary military leaders at all echelons. This principle is enshrined in Army leadership doctrine, albeit imperfectly. Army Doctrine Reference Publication 6-22, Army Leadership, outlines three levels of leadership: "direct, organizational, and strategic."[29] Direct leadership is "face-to-face or first-line leadership" that generally occurs at the company level and below.[30] Organizational leadership occurs "at the battalion through corps levels."[31] Finally, strategic leaders "are responsible for large organizations and influence several thousand to hundreds of thousands of people. They establish force structure, allocate resources, communicate strategic vision, and prepare their commands and the Army as a whole for their future roles."[32]

Surprisingly, the organizational level of leadership is the only one that stresses Lincoln's practice of circulating among the troops.[33] Army Doctrine Reference Publication 6-22 states that "[g]etting out of the office and visiting remote parts of their organizations is important for organizational leaders."[34] However, the Army's rationale for this practice is incomplete. The publication advises that organizational leaders should observe their subordinates "to verify if their staff's reports and briefings match their own perceptions of the organization's progress toward mission accomplishment."[35] Thus, Army doctrine largely regards troop visits as a means to verify processes rather than to understand people.

Lincoln's approach provides a stark contrast. He had several reasons for visiting the troops, but one reason was paramount: to motivate them and express his appreciation for their hard work.[36] Army doctrine defines leadership as "the process of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization."[37] Lincoln recognized that to influence people, a leader must first understand them. He had little formal education, but he had a lot of common sense.

Strategic leaders will benefit most from applying this principle, since they are most prone to violate it. These leaders "have very few opportunities to visit the lowest-level organizations of their commands."[38] However, Lincoln created opportunities. He showed that "by entering your subordinate's environment . . . you create a sense of commitment, collaboration, and community."[39] Leaders at all levels need to make time for this endeavor, but it is especially important for strategic leaders, since their decisions impact so many people.[40] Lincoln validated the utility of "roving leadership"[41] at the highest level of command. His example is a strong reminder of the importance of circulating among the troops.

III. Lincoln on Adaptive Leadership

Lincoln on Leadership also provides food for thought in regards to "adaptive leadership,"[42] an increasingly significant component of Army leadership and operational doctrine.[43] Chairman of the Joint Chiefs of Staff, General Martin Dempsey, considers the development of adaptive and agile leaders "the number-one imperative for the continued health of our profession."[44] During his tenure as TRADOC commander, General Dempsey "launched a campaign of learning for our Army to consider how we learn and adapt to meet the challenges of the 21st century security environment."[45] He explained, "It should be clear to all after more than nine years of conflict that the development of adaptive leaders who are comfortable operating in ambiguity and complexity will increasingly be our competitive advantage against future threats to our nation."[46] Amazingly,

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[29] ADRP 6-22, *supra* note 14, para. 2-24.

[30] *Id.* para 2-28.

[31] *Id.* para 2-32.

[32] *Id.* para 2-35.

[33] In fairness, the definition of "direct leadership" in ADRP 6-22 implies that direct leaders will necessarily abide by this principle because of the relatively small size of their units. *See id.* para. 2-28.

[34] *Id.* para. 2-34.

[35] *Id.*

[36] *See* PHILLIPS, *supra* note 1, at 19–20.

[37] ADRP 6-22, *supra* note 14, para. 1-1.

[38] U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE para. 3-47 (12 Oct. 2006).

[39] PHILLIPS, *supra* note 1, at 25.

[40] ADRP 6-22, *supra* note 14, para. 2-38.

[41] PHILLIPS, *supra* note 1, at 22.

[42] Harvard lecturer Ronald Heifetz conceived the theory of adaptive leadership in the early 1990s. *See* RONALD A. HEIFETZ, LEADERSHIP WITHOUT EASY ANSWERS (1994).

[43] *See generally* ADRP 6-22, *supra* note 14, para. 8-11 (underscoring the importance of adaptability); General Martin K. Dempsey, *Driving Change Through a Campaign of Learning*, ARMY MAG., Oct. 2010, at 68, *available at* http://www.ausa.org/publications/armymagazine/archive/2010/10/Documents/Dempsey_1010.pdf (discussing the "major shift in how to develop adaptive leaders through the introduction of design" into Field Manual 5-0, *The Operations Process*). This article is one of six that General Dempsey authored in his "Campaign of Learning" series in *Army Magazine*.

[44] General Martin K. Dempsey, *Leader Development*, ARMY MAG., Feb. 2001, at 28, *available at* http://www.ausa.org/publications/armymagazine/archive/2011/2/Documents/Dempsey_0211.pdf .

[45] General Martin K. Dempsey, *A Dialogue About Our Army: A Campaign of Learning to Achieve Institutional Adaptation*, ARMY MAG., Nov. 2010, at 34, *available at* http://www.ausa.org/publications/armymagazine/archive/2010/11/Documents/Dempsey_1110.pdf.

[46] Dempsey, *supra* note 45, at 26. *Cf.* Lieutenant Colonel Paul Yingling, *A Failure of Generalship*, ARMED FORCES J., May 2007, *available at* http://www.armedforcesjournal.com/2007/05/2635198/ (arguing that "America's generals failed to adapt to the demands of counterinsurgency" in Iraq, and calling for Congress to "change the officer promotion system in ways that reward adaptation and intellectual achievement.").

Lincoln echoed this strategic imperative 150 years earlier: "The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew."[47] Although Phillips never attempts to articulate a unifying theme to Lincoln's leadership, one theme does resonate throughout the book: Lincoln was adaptive. The book is replete with examples of this trait.

To illustrate, in the chapter, "Encourage Innovation," Phillips discusses how the nation's military was completely unprepared to suppress an insurrection at the outset of the Civil War.[48] Lincoln had to adapt the force quickly to modernize its weaponry, so he embraced "an atmosphere of entrepreneurship that fostered innovative techniques."[49] Lincoln was essentially a "one-man research and development department," personally reviewing dozens of technology demonstrations.[50] The project paid off, resulting in the development of hot-air reconnaissance balloons, pontoon bridges, ironclad ships, and, most importantly, reliable breech-loading rifles.[51]

Lincoln's leadership style was fundamentally agile and adaptive.[52] He described his philosophy to Horace Greeley in 1862:

> I shall do less whenever I shall believe what I am doing hurts the cause, and I shall do more whenever I shall believe doing more will help the cause. I shall try to correct errors when shown to be errors; and I shall adopt new views so fast as they shall appear to be true views.[53]

Phillips ably demonstrates how Lincoln was "consistent yet flexible"[54]—he was consistent in his treatment of subordinates and management of government, but he always left "an opportunity for a change of mind" in other respects.[55] In short, when the situation demanded it, Lincoln adapted.[56] He personified agile and adaptive leadership.

IV. No One Is Perfect

One of the book's few shortcomings involves Phillips's inability to find fault in his subject. Ironically, Phillips himself succumbs to the "Lincoln Myth"—the notion that Lincoln's extraordinary exploits, and eventual assassination, "bestowed on him a certain amount of saintly virtue."[57] The tendency to view Lincoln through rose-colored glasses is understandable, but even Lincoln had flaws. The most glaring example is his weakness as a talent evaluator; specifically, his protracted failure to appoint an effective commander during the Civil War. Lincoln famously fired several inept generals before finally settling on Ulysses S. Grant.[58] Phillips casts this debacle as a success, suggesting that Lincoln's perseverance in finding the right commander is a virtue.[59] The better conclusion is that Lincoln lacked military experience and struggled mightily to find the right person for the job. Theodore Roosevelt said, "The best executive is the one who has sense enough to pick good men to do what he wants done, and self-restraint enough to keep from meddling with them while they do it."[60] Lincoln fell short in this regard, and Phillips does the reader a disservice by glossing over this flaw.

V. Concluding Thoughts

Lincoln on Leadership ultimately succeeds in its aim to harvest the leadership lessons of Lincoln's past for present-day executives and officers. Phillips is an able storyteller, and his book is succinct and easy to read. Twenty years after its release, Lincoln on Leadership still stands out from the pack in the popular historical leadership genre. Military, business, and political leaders would be wise to read this book and apply Lincoln's strategies for success. For, as Phillips observes, "it is only by examining individuals such as Abraham Lincoln that we can ever hope to understand how effective leadership works."[61]

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[47] PHILLIPS, *supra* note 1, at 7, 137.

[48] *See id.* at 137.

[49] *Id.*

[50] *Id.* at 140.

[51] *Id.* at 140–41.

[52] *See generally id.* at 87–92 (providing numerous examples of Lincoln's adaptive leadership, including his unprecedented expansion of presidential war power, enactment of conscription, wholesale reorganization of the military command system, and issuance of the Emancipation Proclamation).

[53] *Id.* at 78–79.

[54] *Id.* at 79.

[55] *Id.* at 78.

[56] *See, e.g.*, ADRP 6-22, *supra* note 14, para. 8-11 ("The leader must be prepared to replace portions of the original plan with new ideas and initiatives. Leaders must have the confidence and resilience to fight through setbacks, staying focused on the mission and the intent two levels up. Leaders preserve freedom of action by adapting to changing situations.").

[57] PHILLIPS, *supra* note 1, at 76.

[58] *See id.* at 115–23 (describing Lincoln's legendary struggles with his commanders).

[59] *See id.* at 130–35.

[60] ROY B. ZUCK, THE SPEAKER'S QUOTE BOOK 295 (2009). Phillips lauds President Lincoln as a "hands-on" leader. PHILLIPS, *supra* note 1, at 24. However, Lincoln also had a penchant for micromanaging his generals. *See id.* at 31–32 (describing Lincoln's "fatherly advice" and frequent visits to General George McClellan).

[61] PHILLIPS, *supra* note 1, at 4.

Secret and Sanctioned: Covert Operations and the American Presidency[1]

Reviewed by *Major Meghan M. Poirier*[*]

The Committee has found that certain covert operations have been incompatible with American principles and ideals and, when exposed, have resulted in damaging this nation's ability to exercise moral and ethical leadership throughout the world.[2]

I. Introduction

In 1976, the Senate Select Committee on Intelligence Activities[3] published a multi-volume report examining America's Cold War secret intelligence operations and offering conclusions about what it termed the "basic issue": whether secret operations under the exclusive control of the Executive Branch can be reconciled with a democratic system of government.[4] Secrecy, the Committee found, had encouraged the Executive Branch to use covert operations as a means of bypassing the legislative process and forestalling public debate on potentially unpopular initiatives.[5] The Committee ultimately made several recommendations designed to limit the Executive's use of covert action and increase congressional oversight of future operations, emphasizing that "covert action must in no case be a vehicle for clandestinely undertaking actions incompatible with American principles."[6]

In his 1996 book, *Secret and Sanctioned*, author Stephen Knott identifies the Select Committee investigation as the beginning of a long, concerted congressional effort to interfere with the President's exercise of authority over clandestine operations.[7] He traces this struggle for control over covert operations through the Iran-Contra scandal and up to the first Bush administration, when President George H.W. Bush yielded to congressional calls for appointment of an independent inspector general within the Central Intelligence Agency (CIA).[8] The final chapter of his book is dedicated to Knott's central thesis: that the growth of congressional oversight is not only unwise, but predicated on the faulty assumption that the CIA's Cold War activities are inconsistent with American principles and values.

As Knott explains in his introduction, he embarked on his research to correct the popular misconception that covert operations only began in the modern era and to "restore a sense of historical perspective" to modern debates over the roles of the legislative and executive branches.[9] He is only partially successful. While his primary sources do establish that the founding generation carried on certain military and diplomatic missions in secret, these early activities are fundamentally dissimilar from the complex operations undertaken by the CIA in modern times. The historical value of Knott's work is undermined by his persistency in overlooking these differences and his insistence that the Founding Fathers would have endorsed a system they could scarcely have imagined. Like a well researched editorial, *Secret and Sanctioned* presents historical facts in support of the author's political opinions; those expecting a balanced approach to this topic will be disappointed.

II. The Executive Branch's Use of "Clandestine Operations" in Foreign Affairs, 1775–1947

The bulk of Knott's work is dedicated to scrutinizing the Executive Branch's early involvement in foreign affairs and wartime intelligence operations for activities that can be equated, however tenuously, to campaigns later undertaken by the CIA. The goal of this early history is not to trace the development of American covert operations, but to vindicate the actions of the Cold War administrations.[10] Consistent with that aim, Knott identifies a litany of secret operations that can be compared to the CIA's endeavors during the Cold War: George Washington's efforts to infiltrate the British headquarters in New York City during the Revolutionary War; the pervasive use of spies posing as diplomats; Thomas Jefferson's support of a coup attempt during the war with Tripoli; James Madison's support for

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[1] STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY (1996).

[2] FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: FOREIGN AND MILITARY INTELLIGENCE, S. Rep. 94-755, 94th Cong., 2d sess., 1976, bk. 1, 156 [hereinafter CHURCH COMMITTEE FINAL REPORT].

[3] Widely referred to as the "Church Committee" after its chairman, Senator Frank Church.

[4] *Id*. at 16.

[5] *Id.* at 156.

[6] The Committee was particularly concerned with "U.S. involvement in assassination plots against foreign leaders and the attempt to foment a military coup in Chile in 1970 against a democratically elected government," characterizing these operations as "failures in purposes and ideals." *Id*.

[7] KNOTT, *supra* note 1, at 167.

[8] *Id*. at 183.

[9] *Id.* at 4.

[10] *See, e.g., id.* at 187 (predicting that the day will come "when the covert operations of America's presidents from Truman to Bush will be seen as reasonable actions well within the bounds of traditional American practice").

pro-American rebels in West and East Florida; and repeated presidential meddling in Mexico.[11]

In addition to documenting these initiatives, Knott cites the writings of George Washington, Alexander Hamilton, John Jay, and Thomas Jefferson as evidence that the founding generation viewed covert operations as the exclusive purview of the Executive Branch.[12] A representative quotation from Alexander Hamilton bemoans Congress's inability to act decisively:

> Congress have kept the power too much into their own hands and have meddled too much with details of every sort. Congress is properly a deliberative corps and it forgets itself when it attempts to play the executive. It is impossible such a body, numerous as it is, constantly fluctuating, can ever act with sufficient decision, or with system.[13]

Knott's treatment of Alexander Hamilton indicates his overly simplistic approach. He characterizes Hamilton as a vigorous advocate of "the unrestricted use of executive power to direct secret initiatives" based primarily on Hamilton's involvement with intelligence operations during the Revolutionary War and his request for a secret service fund in 1798.[14] In doing so, Knott means to suggest that Hamilton, along with the other Founding Fathers, would have objected to Congress's future attempts to reign in the CIA.[15] This unsupported interpretation of Hamilton's writings is entirely speculative and, as a result, of limited usefulness. In addition to advocating for an energetic executive, Hamilton adhered to the principle of prudence in foreign affairs and repeatedly argued against becoming involved with other nations.[16] In fact, his initial draft of Washington's *Farewell Address* included the admonition that "the great rule of conduct for us in regard to foreign Nations ought to be to have as little political connection with them as possible."[17] As one scholar of Hamilton's work concludes:

> By the mid-twentieth century, the centralization of government had evolved beyond anything Hamilton could have imagined . . . Hamilton wanted the nation to be strong enough to make its debt payments, create a currency and banking system, and build a standing army large enough to deter European powers from encroaching on American interests. These policy objectives are hardly the stuff of modern nationalism.[18]

It is impossible to guess what Hamilton would have thought of two hundred years of history, two World Wars, and the bureaucracy that has evolved into the modern CIA.

The effectiveness of Knott's historical survey is further blunted by his determination to present every episode as a vindication of the CIA's Cold War efforts. For example, Knott meticulously documents the development of President Washington's Contingency Fund, an appropriation intended to finance the President's diplomatic and intelligence operations overseas.[19] Washington was granted the latitude of accounting for only those expenditures that he deemed necessary to make public; in this area, he enjoyed almost complete discretion.[20] Knott concludes that this practice reflects an early consensus "that the president was the appropriate administrator of the instruments of American policy,"[21] an observation that, even if true, has little to do with the concerns of the Church Committee.[22]

Washington used the Contingency Fund to finance the efforts of two men dispatched to gather information about the intentions of Great Britain, Portugal, and Spain.[23] The differences between these "operations" and the paramilitary coups attempted by the CIA in Central America are legion. If some members of Congress were disturbed by the actions of two spies in 1790, as Knott acknowledges, why should it be surprising that the CIA's participation in domestic spying, assassination attempts, and fascist regimes would come under intense Congressional scrutiny?[24] Knott's thesis is predicated on the belief that policies adopted in 1790 should shape the relationship between the executive and legislative branches in 1980. His failure to address significant developments in the intervening period does little to help his cause.

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[11] *Id.* at 72–79 (Jefferson's war with Tripoli); 88–104 (Madison's operations in Florida); and 112–20, 127–35 (Presidents Monroe, Jackson and Polk all sponsored various attempts to influence Mexico, culminating in the Mexican war).

[12] *Id*. at 24–48, 79–84.

[13] *Id.* at 42 (quoting from Hamilton to James Duane, September 3, 1780, HAMILTON'S PAPERS, 2:404).

[14] *Id.* at 39–42.

[15] *See, e.g., id.* at 187 (arguing that "the truth is, that from Truman to Bush, America's presidents conducted their clandestine foreign policy in a manner than remained faithful to the practices and beliefs of their revered predecessors.").

[16] MICHAEL P. FREDERICI, THE POLITICAL PHILOSOPHY OF ALEXANDER HAMILTON 149 (2012).

[17] *Id.* at 181.

[18] *Id*. at 185–86.

[19] KNOTT, *supra* note 1, at 54.

[20] *Id*.

[21] *Id.* at 160.

[22] *See supra* note 3.

[23] KNOTT, *supra* note 1, at 55–56.

[24] *Id*. at 55, 59.

III. The Unforeseeable Growth of America's Clandestine Capabilities

Portions of *Secret and Sanctioned* suggest the work it could have been; Knott's description of the American effort to expand into Florida and Texas is interesting enough to warrant its own book, and his analysis of the extent to which European politics played out on the American continent is equally well written and researched. Unfortunately, these high points are almost completely overshadowed by the claims Knott makes in the last chapter of his book.

Clearly incensed over what he views as an unprecedented degree of Congressional meddling in the work of the CIA, Knott makes the outlandish claim that "the major Cold War alteration in regard to clandestine operations occurred in Congress, where a tradition of deference to the executive was discarded."[25] Even a casual student of American history could identify several "alterations" that had a more significant impact on clandestine operations: the founding of the CIA;[26] the growth of an intelligence bureaucracy and the accompanying escalation of interagency rivalries;[27] the Vietnam and Korean Wars, both of which were conducted by the Executive Branch without a declaration of war from Congress;[28] and the clandestine support of regimes engaged in wide-spread human rights abuses that are absolutely antithetical to American values.[29] Knott's willingness to overlook the ramifications of the CIA's involvement in the latter reflects an "ends justify the means" worldview that is as dangerous to the American way of life as the principles he claims to deplore.

Two recent books refute Knott's portrait of the CIA as an organization with no need of legislative oversight. In *Legacy of Ashes: The History of the CIA*, author Tim Weiner describes the establishment of the CIA with an attention to detail that is missing from *Secret and Sanctioned*.[30] From the outset, *Legacy of Ashes* documents the extent to which the CIA represented an entirely new development in the history of American intelligence. General William Donovan, the head of the Office of Strategic Services (OSS), reported to President Truman in 1945 that the United States lagged woefully behind other countries in the realm of intelligence systems:

> All major powers except the United States have had for a long time past permanent worldwide intelligence services, reporting directly to the highest echelons of their Government. Prior to the present war, the United States had no foreign secret intelligence service. It never has had and does not now have a coordinated intelligence system.[31]

President Truman was so unimpressed with the idea that he fired General Donovan and disbanded the OSS.[32] The Pentagon and the State Department vehemently opposed the formation of a new agency; when the CIA was finally stood up, it had no charter and no appropriated funding for the first two years of its existence.[33] Dean Acheson warned the President that "as set up neither he, the National Security Council, nor anyone else would be in a position to know what it was doing or to control it."[34]

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[25] *Id.* at 186.

[26] *See* MICHAEL WARNER, ED., CENTRAL INTELLIGENCE: ORIGIN AND EVOLUTION—HISTORICAL PERSPECTIVE, https://www.cia.gov/library/PUBLI https://www.cia.gov/library/publications/historical-collection-publications/creation-of-ic-founding-documents; *see also* WILLIAM M. LEARY, ED., THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS, (1984)(noting that the United States "came late to defining the need for an intelligence insituttion as an arm of foreign policy. Secretary of State Henry Stimon's alleged statement, 'Gentlemen do not read each other's mail' reflected the United States' rejection of ongoing espionage activities).

[27] The tension between the CIA and armed forces, in particular,date back to the formation of the agency. Ironically, "the feuding between the State, War, and Navy departments over controlling intelligence was what strengthened the arguments for a new, independent, civilian agency with presidential backing so that it could centralize information." JON RANELAGH, THE AGENCY, 103 (1986). In addition to establishing the CIA, the National Security Act of 1947 reorganized the Department of Defense, "shift[ing] responsibility away from individual service secretaries and [giving the Office of the Secretary of Defense] authority over the 'national military establishment.'" H.R. MCMASTER, DERELICTION OF DUTY, 13 (1997). This dynamic forced all the services to compete for scarce resources by expanding their "roles and missions," some of which were impacted by the new intelligence agency's ability to carry out covert action operations. *Id*. at 14; *see also* CHURCH COMMITTEE FINAL REPORT, *supra* note 2, at 98 ("[T]he CIA assumed functions very different from its principal missison, becoming a competing producer of current intelligence and a covert operational instrument in the American cold war offensive.").

[28] *See* CLAY BLAIR, THE FORGOTTEN WAR: AMERICA IN KOREA 1950-1953, 72-73 (1987)(noting that the armed forces entered Korea under the "'guise of aid' to the U.N." and that "the White House announcements of these decisions were deliberately understated. There was no indication or implication that Amercia was embarked on the road to war. America was merely humanely responding to a United Nations request for limited assistance to South Korea."); *see also* STANLEY KARNOW, VIETNAM: A HISTORY, 320-21 (1983)(observing that President Lyndon Johnson "balked at mobilizing public support for the war in Vietnam. Instead, he manipulated the news media, evidently presuming that his measures would not be noticed . . . Whatever his motives, he refused to admit that he was going to war, yet he would never disavow his commitment.").

[29] The Church Committee Report argues that "[t]he U.S. involvement in assassination plots against foreign leaders and the attempt to foment a military coup in Chile in 1970 against a democratically elected government were two examples of such failures in purposes and ideals." CHURCH COMMITTEE FINAL REPORT, *supra* note 2, at 156. The abandonment of CIA-backed forces at the Bay of Pigs to death and imprisonment at the hands of Fidel Castro surely counts as a third. *See* JOHN PRADOS, PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF, 201-207 (1996).

[30] TIM WEINER, LEGACY OF ASHES: THE HISTORY OF THE CIA (2007).

[31] *Id*. at xviii.

[32] *Id*. at 8.

[33] *Id*. at 28.

[34] *Id*.

Oversight of the CIA's activities became an ongoing and pervasive problem for every administration. In 1960 and 1961, President Eisenhower commissioned two reports on the CIA, both of which concluded that the CIA's preoccupation with planning and conducting covert operations had handicapped its ability to gather useful intelligence.[35] President Eisenhower left office believing that "the structure of our intelligence organization is faulty . . . it makes no sense, it has to be reorganized, and we should have done it a long time ago."[36] He characterized his efforts as an "eight-year defeat" that would be left for his successor, President Kennedy, to sort out.[37]

In *Privileged and Confidential: The Secret History of the President's Intelligence Advisory Board*, the authors discuss the findings of each administration's board of intelligence advisors.[38] Although this book's tone is not as conversational as that of *Legacy of Ashes*, the former book reaches many of the same conclusions. Foremost among these is the challenge each administration faced in overseeing the CIA. As already discussed, President Eisenhower's board discovered significant problems within the agency and felt that they were "unable to conclude that, on balance, all of the covert action programs undertaken by the CIA . . . have been worth the risk or the great expenditure of manpower, money and other resources involved."[39] Eisenhower's successor, President Kennedy, inherited a deeply flawed intelligence network as well as a tentative plan for the invasion of Cuba.[40]

The Bay of Pigs disaster made President Kennedy determined to avoid another "failure of intelligence."[41] He elected to rely not on the CIA, but on a separate group of advisors.[42] President Kennedy also decided that "the Pentagon, and not the CIA, should have primary responsibility for future paramilitary actions and that the CIA and its unbudgeted funds needed better oversight."[43] This distrust survived into the Nixon administration, when an internal study concluded that "the operations of the intelligence community have produced two disturbing phenomena. The first is an impressive rise in their size and cost. The second is an apparent inability to achieve a commensurate improvement in its scope and overall quality of intelligence products."[44]

To the authors of *Legacy of Ashes* and *Privileged and Confidential*, the Church Committee reforms were the foreseeable outcome of an agency left to its own devices or the particular habits of the administration in power.[45] In 1975, President Ford first learned in a five-page memo from Secretary of State Henry Kissinger that his agency had been conducting a campaign of domestic spying and assassination attempts.[46] Some of these activities had begun in the Eisenhower administration and simply continued, unchecked, until a *New York Times* reporter broke the story in December of 1974.[47] In 1981, when Congress began to oversee the CIA, the agency's director simply resolved to work around the committees.[48] The determination to circumvent Congress was so pervasive that it divided the CIA's own personnel; the agency's deputy director resigned after being lied to by the director on several occasions.[49]

Knott never reconciles this view of the agency with his call for exclusive executive oversight. He simply assumes, without discussion, that the Cold War presidents were willing and able to oversee a complex bureaucracy in the same way George Washington managed military intelligence efforts during the Revolutionary War. Although *Secret and Sanctioned* was apparently intended to support that analogy, it never does so convincingly.

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[35] *Id.* at 193.

[36] *Id.* at 194.

[37] *Id.*

[38] KENNETH MICHAEL ABSHER ET AL., PRIVILEGED AND CONFIDENTIAL: THE SECRET HISTORY OF THE PRESIDENT'S INTELLIGENCE ADVISORY BOARD (2012).

[39] *Id.* at 45.

[40] *Id.* at 53.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 173.

[45] John Prados reaches a similar conclusion in his book on the CIA's covert operations. In *Presidents' Secret Wars*, he argues that "the record on presidential control of covert actions is that these have never been under complete *control*, although the White House has total authority to order them. The problem with this authority is that *it may not exist* . . . This legal conundrum would not exist if there were a detailed charter that specified permissible missions and methods for the intelligence agencies; but initiatives for charter reform were headed off by the Carter administration in 1978 and 1980. Presidents as politically diverse as Eisenhower and Johnson have consistently opposed intelligence reform. The device of issuing executive orders to regulate intelligence is precisely aimed at avoiding charter revision by law." JOHN PRADOS, PRESIDENTS' SECRET WARS: CIA AND PENTAGON COVERT OPERATIONS FROM WORLD WAR II THROUGH THE PERSIAN GULF, 473 (1996).

[46] WEINER, *supra* note 24, at 390.

[47] *Id* at 389. *See* SEYMOUR HERSCH, *Huge CIA Operation Reported in U.S. Against Anti-War Forces; Other Dissidents in Nixon Years*, NEW YORK TIMES, Dec. 22, 1974; *see also CIA's Chief Historian Gives Perspective on Newly Released Documents*, June 29, 2007, available from https://www.cia.gov/news-information/featured-story-archive/2007-featured-story-archive/. The "Family Jewels" documents detailing the CIA's Vietnam-era domestic activities are available on the CIA's website under its Open Government Initiative at https://www.cia.gov/open/index.html. These documents describe "the use of a member of the Mafia in an attempt to assassinate Fidel Castro," the imprisonment of KGB defector for a period of two years "in a cell behind bars with nothing but a cot in it," and the surveillance and wiretapping of newspaper reporters "who were suspected of disclosing classified information." "*Family Jewels*," Attachment A, page 5, https://www.cia.gov/open/index.html.

[48] *Id.* at 442.

[49] *Id.*

The United States did not have a standing intelligence organization until after World War II. The founding of the CIA was by no means certain and represented a fundamental change in America's intelligence gathering and covert action capabilities. Knott has not produced a shred of evidence to suggest that the founding generation could have conceived of such an organization, much less formed an opinion as to the propriety of legislative oversight.

IV. Conclusion

Those looking for an opinion piece on the appropriate balance of power between the legislative and executive branches will find a good deal to consider in *Secret and Sanctioned*. Knott raises several interesting questions concerning the role of American values and principles in clandestine operations, the compatibility of secret initiatives and domestic spying with democracy, and the degree to which foreign policy ends justify unsavory means. Unfortunately, Knott is as determined to answer those questions as he is to raise them. His willingness to cast his opinions as scholarship is both distracting and disappointing to those seeking a history of early American clandestine operations.

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

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

2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

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

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

3. Civilian-Sponsored CLE Institutions

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

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

FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000

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

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

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

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

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

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

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

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

5. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

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

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

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

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

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

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

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

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

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

4. The Army Law Library Service

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

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

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