

# Army Lawyer

U.S. Army Judge Advocate General's Corps

September/October 2018



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Courts-Martial Revolution

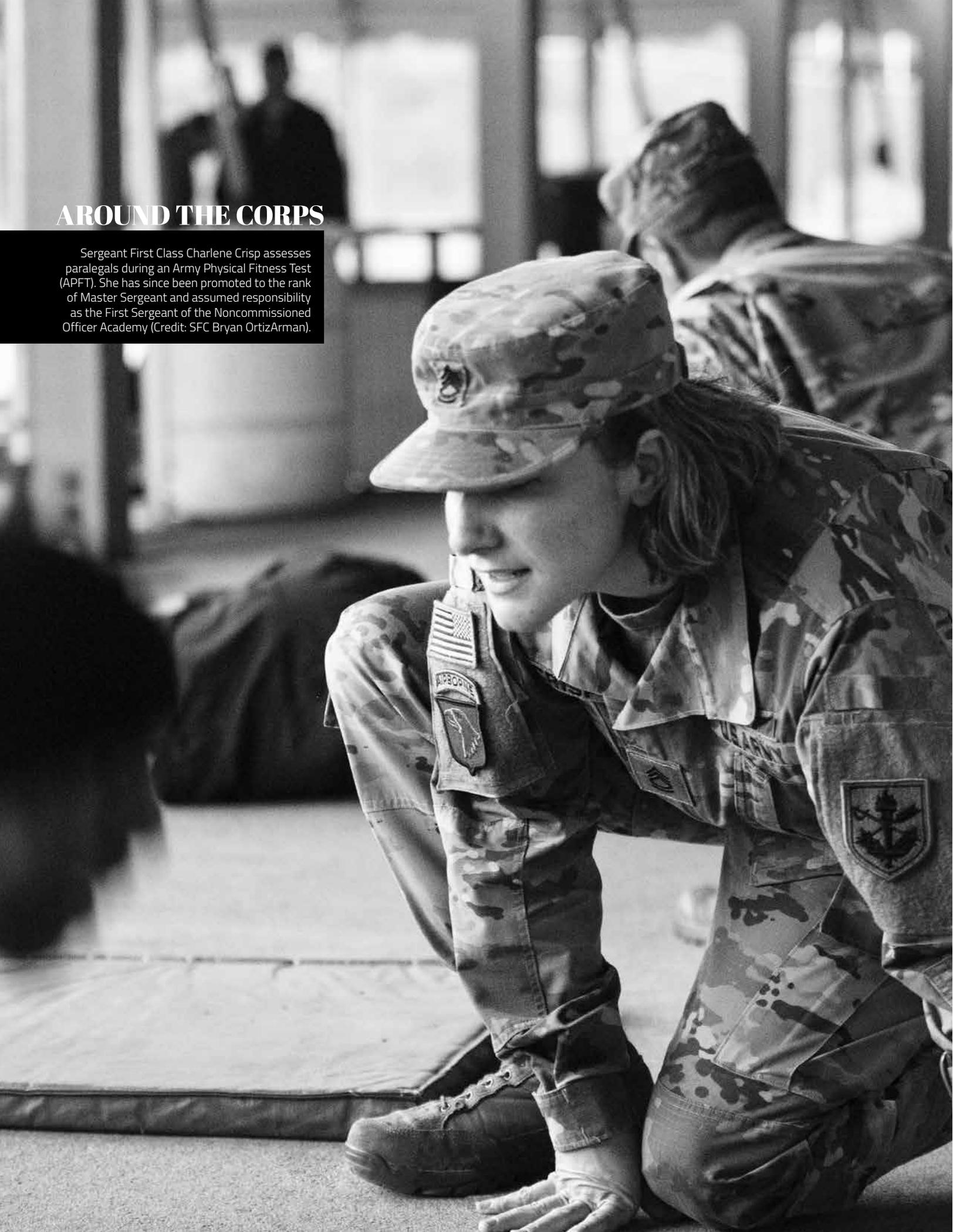
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## AROUND THE CORPS

Sergeant First Class Charlene Crisp assesses paralegals during an Army Physical Fitness Test (APFT). She has since been promoted to the rank of Master Sergeant and assumed responsibility as the First Sergeant of the Noncommissioned Officer Academy (Credit: SFC Bryan OrtizArman).



# Army Lawyer

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September/October 2018

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On the cover: Major Autumn Porter teaches Professional Responsibility to students in Decker Auditorium at The Judge Advocate General's Legal Center and School last April. (Credit: Chris Tyree).

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Lieutenant General Charles N. Pede, The Judge Advocate General, addresses an audience at Ft. Belvoir (Credit: SFC Bryan OrtizArman)



Marine Corps Gen. Joe Dunford, Chairman of the Joint Chiefs of Staff, talks to Soldiers while visiting Task Force Southwest at Camp Shorab in Helmand province, Afghanistan, 22 March 2018 (DoD photo by Navy Petty Officer 1st Class Dominique A. Pineiro).

# Court is Assembled

## The Wisdom of Courts-Martial in Combat

By Brigadier General Susan Escallier

*Knowledge is knowing a tomato is a fruit. Wisdom is not putting it in fruit salad.<sup>1</sup>*

**Just as a botanist should know that a tomato is a fruit, so too, must a lawyer know the law.** But once we master the knowledge of the law, we must know how to use it and employ it. We must be both a botanist and a chef. Premier lawyering and “right context” advice requires both knowledge and wisdom. The application of law in life, with its impact on human beings and military organizations, requires a judge advocate who is a subject matter expert in black letter law as well as a wise counselor

for the commanders we advise. Our unique practice of law requires a wisdom that understands military discipline and where it intersects with the application of military justice. Nowhere is that more true than in courts-martial in combat.

“These young [S]oldiers no doubt assumed that military justice matters would be postponed until combat operations ended. Holding a trial on the eve of battle, however, demonstrated to every division [S]oldier that the maintenance of discipline

was an integral part of preparing for the upcoming attack. High standards of military discipline would remain in place.”<sup>2</sup>

Military discipline is the touchstone for military justice. In most instances, military discipline works to ensure that Soldiers and leaders act lawfully and properly in the most exacting and dire situations. Military discipline is instilled in every recruit and encapsulated in the Army’s three general orders.<sup>3</sup> The first of which is wise advice in most life situations, “I will guard everything within the limits of my post and quit my post only when properly relieved.” In other words, “I will do my duty.” This ethos becomes part of you as you become a Soldier. All around this world, at the time of this writing, there are Soldiers’ guarding posts in the bitter cold, unyielding heat, darkness, and danger and they stand at that post, alert, until their relief comes. Our military is held in high regard because of this fact. It is not the threat of punishment that is foremost in most Soldier’s minds as they face the enemy, jump out of an airplane, pull a guard shift, or clear improvised explosive devices from a road. But it is crucial that all Soldiers know that there are serious consequences, and criminal consequences, that arise from a lapse in discipline.

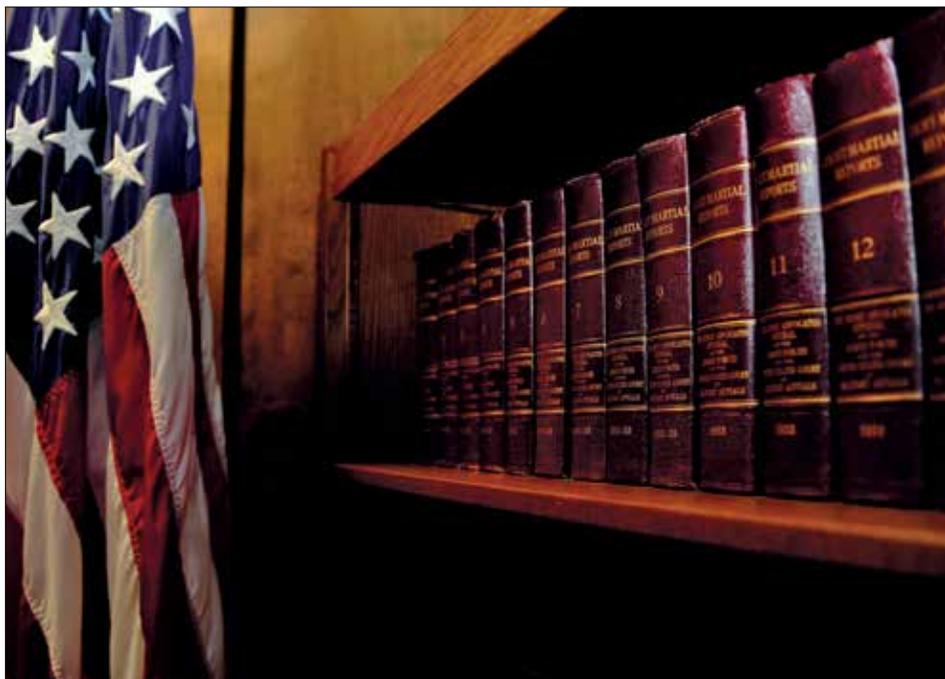
There certainly are times when criminal sanctions and adverse actions must be employed. A wise commander’s calculus begins with military discipline and how justice is employed to ensure we have disciplined Soldiers. In a commander, there is authority to mete out a wide spectrum of sanctions ranging from minor to serious administrative actions with an option of charging a Soldier with felony offenses at a General Court-Martial at the far end of that spectrum.

The leadership involved in weighing those decisions comes at echelons of growing responsibility, but also concomitant experience and judgment. The same is true for judge advocates. And, so how do judge advocates develop our own leadership, expertise, and judgment to be able to provide the right options and sage

legal advice to the officers vested with the responsibility for discipline, and, therefore, justice within their ranks? And, how do we ensure that we are always poised to be able to provide knowledge and wisdom to combat commanders in the middle of battlefield operations? It is easy to lapse into a garrison mindset and to forget that we may need to address combat-specific misconduct in a court-martial. Military discipline is paramount in combat. It allows for mission accomplishment, gives Soldiers confidence in their peers, subordinates, and superiors, it prevents fratricide, and allows commanders confidence in the fidelity of the information they are provided. It gives our operations legitimacy. In the rare instances where discipline lags, the battlefield judge advocate must be prepared to provide knowledge and wisdom to a commander.

Our history of judge advocates, as chronicled in *Judge Advocates in Combat* demonstrates that we will be called upon in short order to convene a court-martial in a deployed setting. The charges at these cases will almost certainly involve military discipline and may involve scenarios that are either unlikely or impossible to arise in a peacetime, garrison courtroom.<sup>4</sup> Our line officer counterparts engage in realistic training to test their combat systems and ability to command and control formations. We do not have that luxury. A warfighter exercise does not test our ability to investigate a crime, advise a commander, prefer charges, and conduct a court-martial in combat. Nevertheless, we must be able to accomplish that task and to do so without any formal additional training. We must ensure that we have the requisite knowledge of the law and the wisdom to know how to employ that knowledge.

Since the enactment of the Uniform Code of Military Justice (UCMJ) we have had episodic experience with courts-martial in combat situations. They were common in Vietnam but for many years after the withdrawal of U.S. forces from Vietnam, there were sections of the UCMJ and corresponding portions of the Manual for Courts-Martial that lay dormant. A large scale deployment made those dusty sections relevant quickly. Even in a highly disciplined and all volunteer force, there are situations that must be addressed to ensure discipline



Volumes of Court-Martial Reports line a bookshelf inside a military courtroom (Credit: Airman 1st Class Daniel Blackwell).

throughout the force. In 1990, during Desert Shield and Desert Storm, courts-martial were conducted near the front lines on the eve of the assault into Iraq.<sup>5</sup> Courts-martial also addressed criminal misconduct in Panama and Haiti for situations that undermined military command authority and the law of armed conflict.<sup>6</sup> In more recent years, courts-martial were routine in Iraq and Afghanistan and frequently involved either unique military offenses or scenarios that only arise in combat. Therefore, it is imperative that we can deploy fully formed military justice resources so that commanders have all options available when incidents of criminal misconduct occur.

Part of the wisdom for a judge advocate, and especially a staff judge advocate, is to realize how and where discipline, command authority, the warrior ethos, mission accomplishment, and military justice intersect. This unique practice of law is only accomplished by judge advocates—criminal trials during combat. As we contemplate the new National Defense Strategy and we train for potential confrontations between peer and near-peer opponents, we must ensure that we will always be ready to deliver premier military justice wherever we may be called upon to do our mission. **TAL**

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*BG Escallier is the Assistant Judge Advocate General for Military Law and Operations*

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## Notes

1. PHILIP SHELDRAKE, *THE BUSINESS OF INFLUENCE: REFRAMING MARKETING AND PR FOR THE DIGITAL AGE* 153 (Chichester: Wiley 2011) quoting Miles Kington.
2. FREDERIC L. BORCH, *JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 190* (2001) [hereinafter *JUDGE ADVOCATES IN COMBAT*]. Describing two courts-martial from 1st Armored Division. One involved the deliberate injury of a Soldier who shot himself to get returned to Germany; the other involved disobedience and other offenses by a Soldier who had claimed conscientious objector status.
3. U.S. DEP'T OF ARMY, PAM 600-4, *THE SOLDIER'S BLUE BOOK* para. 10-4 (23 June 2017).
4. *JUDGE ADVOCATES IN COMBAT*, *supra* note 2.
5. *Id.*
6. *Judge Advocates in Combat* is replete with stories and anecdotes of military discipline issues that arose quickly following deployment orders or the onset of the mission in theater. *Id.* Describing a court-martial for a Soldier who shot himself to avoid combat. *Id.* at 224. Describing the actions of Captain Rockwood and his defiance of orders. *Id.* at 247. Describing the court-martial of Captain David Wiggins for *inter alia* disobeying orders and conduct unbecoming an officer. Describing the court-martial of a specialist who publicly attempted to solicit Soldiers to go AWOL and avoid service after being activated out of the Louisiana National Guard. *Id.* at 190. Describing civilian deaths in Somalia that resulted in courts-martial. *Id.* at 212-214.



Members of the 66th Graduate Course stand during their commencement ceremony, which was held at the University of Virginia Law School's Caplin Auditorium in May (Courtesy LtCol Tony Burgos).

# News & Notes

## DJAG's Advice to the Newest LL.M Graduates

*Major General Stuart W. Risch, Deputy Judge Advocate of The Judge Advocate General's Corps (JAGC), delivered the commencement address to the 66th Graduate Course on 31 May 2018. Below are excerpts from his speech.*

In thinking about what to say to you today, that had some real meaning as you head out from the Legal Center and School to destinations far and wide, I discussed my comments with our Assistant Executive Officer, Lieutenant Colonel Toby Curto—a fairly recent graduate from the School and the Course—and I put the question to him: looking back, what did you want to hear?

What he liked most in the Graduate Course was when people talked about “How does Toby get from the lofty ideas to the nitty gritty,” and I believe that this is a great observation on his part.

So we developed the following four basic points, which I will briefly discuss: (1)

Know Your Craft; (2) Know Your Client; (3) Know Your Crew; and (4) Know Yourself.

### 1. Know Your Craft

As Lieutenant General Pedde and I have talked about since assuming our positions, you must be ready, personally and professionally, and ensure that those in your unit, office, and section are as well. That is, be the premier lawyer providing premier legal services that we talk about in our JAG Corps vision, a jack-of-all-trades and, quite honestly, a master of many.

What does this mean to me? As I have always said, and it's in my leadership philosophy, you/we must provide what those we advise expect: timely (Is it great advice that came too late?), relevant (Does it address the identified issue? Is it both legal and practical? Does it ensure that the action is both lawful and not awful?), comprehensive (Have you considered all aspects of the problem and all

potential solutions?), and legally-precise (Is it correct?) advice and counsel.

And the struggle to continue providing premier legal service is a never-ending one, which means the learning never stops. It is a constant focus to remain the subject matter expert (SME).

### 2. Know Your Client

Whether working for a Commander, Legal Assistance or Trial Defense Services client, or a Staff Judge Advocate (SJA) as an action attorney, you must know at least two things:

1. What that individual expects from you as the legal advisor/SME in their unit or office—and this includes your capacity as a lawyer and as an officer, staff or otherwise—and then ensure that they get it.
2. What are that individual's blind spots—that is, what is it that they don't know, and don't know that they don't know—which is the most dangerous area. Figure it out, and then train and educate them on what they need.

As a Corps SJA, I had five different Commanding Generals in four years, and they all had different methods of receiving and processing information, and making decisions, and they all came from different backgrounds with unique preconceptions and expectations, and it wasn't them who had to change to fit my style and methods, trust me.

### 3. Know Your Crew

Simply stated, you cannot take care of your people if you don't know them—what they are made of, what makes them tick, and what they want and need—and the same goes for their families as well.

### 4. Finally, Know Yourself, and Trust Yourself

I left the Graduate Course as a brand new major headed for our Litigation Division and 80 plus pending cases, undoubtedly wondering if I had what it takes. In two

short years, I was serving as a Deputy in a Combat Division with the 4th ID at Fort Hood, Texas, and I survived both assignments, and then some. How?

Because, first and foremost, our Regiment had properly prepared me, in prior assignments and through my prior leadership—and certainly in my year here in Charlottesville—for all that I was going to face. I wish someone had told me when I sat where you now sit—and maybe they did, and I just failed to listen—that I had an awesome set of tools that equipped me to succeed in all that I did and I was only going to add a lot more really cool equipment at each new assignment. So, trust yourself, trust your training, and trust your instincts. We have provided you, and will continue to provide you, a really gnarly set of gear. So you're ready for this, and you'll only get even more ready over time.

But know yourself as well, what you bring to the fight, your weaknesses, your blind spots, your comfort zones, and always remain a work in progress.

### Paralegal Warrior Competition

Specialist Anthony Cantini, 25 ID, 1 SBCT, Alaska, in the top left photo above with a rifle over his shoulders, is shown completing his 12-mile ruck march during the USARPAC Paralegal Warrior Competition. The 4-day competition, held 30 April through 3 May 2018, tests Soldier and paralegal tasks to determine the top paralegal NCO and Soldier in the USARPAC AOR.

### BG Huston Visits Illinois

Brigadier General R. Patrick Huston, above right, poses with Second Lieutenant Makiya Thomas at the Eastern Illinois University ROTC Commissioning Ceremony on 4 May 2018.

### Kids to Work

United States Army Legal Services Agency hosted a Take Our Daughters and Sons to Work Day on Thursday, 26 April 2018, at Fort Belvoir, Virginia. The children enjoyed a morning of physical training, visits from the base police and fire department, a water demonstration by the Environmental Law Division on how pollution and littering affect our waterways, and a mock trial of DAD vs. GAD.



Top left: Soldiers in the Paralegal Specialist Course stand huddled together as they simulate calling up an unexploded ordinance report during the Quartermaster Situational Training Exercise at U.S. Army Fort Lee, Virginia (Credit: SSG Carlos Graves). Top right: BG R. Patrick Huston poses with Second Lieutenant Makiya Thomas at the Eastern Illinois University ROTC Commissioning Ceremony on 4 May 2018. Bottom: U.S. Army Legal Services Agency families participate in games held during the Take Our Daughters and Sons to Work Day in April at Fort Belvoir, Virginia.

### TJAG Presents at MILOPS

Members of the Army JAG Corps senior leadership attended the 31st Annual Military Law and Operations (MILOPS) conference hosted by U.S. Indo-Pacific Command in Singapore from 23-26 April 2018. MILOPS offers a unique opportunity for strategic-level leaders in the

Asia-Pacific region to discuss current issues of significance in the areas of law, operations, and policy. Lieutenant General Pede, the senior Army representative at the conference, gave a presentation entitled "The Law of Armed Conflict from the Practitioners' Perspective."



Retired Colonel Dick Gordon, far right, honorary Colonel of the Corps, stands with judges of the Court of Appeals for the Armed Forces and members of III Corps during CAAF's visit to Fort Hood in April.



Retired Major General Michael J. Nardotti, left, with retired Major General Walter B. Huffman and Lieutenant General Charles Pede, the current Judge Advocate General.

### Paralegals Complete Situational Training

During every cycle of the Paralegal Specialist Course, Advanced Individual Training students participate in the Quartermaster Situational Training Exercise (QMSTX), at Fort Lee, Virginia. This rigorous and realistic exercise reinforces training of their skill level 1 Warrior Tasks and Battle Drills and evaluates their ability to react to a variety of scenarios in squad-sized elements to help them prepare for follow-on assignments and worldwide deployments.

For two days, Soldiers are given scenarios that test individual and collective tasks while exposing them to mission

planning and troop leading procedures. The tasks include: occupy an assembly area, conduct area defense, conduct tactical movement, react to ambush, react to indirect fire, react to possible improvised explosive device and react to unexploded ordnance (UXO).

They also operate in deployed BCT legal teams, addressing a variety of legal issues from operational law to foreign claims to military justice, in a full day field of military occupational specialty (MOS) training.

In the photo above, the Soldiers are huddled as they simulate calling up a UXO report during their tactical training exercise.

### Nardotti Named Distinguished Member of JAGC

On 28 April 2018, The Judge Advocate General, Lieutenant General Charles N. Pede, awarded the title of Distinguished Member of The Judge Advocate General's Corps to Major General (MG) (Retired) Michael J. Nardotti. Major General Nardotti is only the twenty-fifth person in our Corps' history to receive this honor.

Major General Nardotti began his life of service as a cadet at West Point. In 1970, while deployed to Vietnam, then Lieutenant Nardotti extracted a four-man Ranger recon element while under enemy fire. During the extraction, Nardotti received severe wounds to his neck that ultimately shattered his voice box. He was also hit in the shoulder by a tracer round. He recovered from his wounds and received the Silver Star for his gallantry.

In 1976, MG Nardotti earned his law degree from Fordham Law School. Shortly thereafter he began his career in the JAGC. Over the next twenty years, MG Nardotti served the Corps with honor and distinction. In 1993, he was selected to serve as The Judge Advocate General. He retired in 1997. He is the architect of the JAGC Operational Law Practice. His vision allowed judge advocates to serve at the brigade staff level.

Even in retirement, MG Nardotti continues to serve both the Corps and the nation. In 2001, he testified before Congress regarding the 9/11 attacks and the role of courts and commissions. He served on several blue ribbon panels in order to assist the Air Force with ending sexual assaults at the United States Air Force Academy. He continues to help recruit the best and brightest to our Corps by attending outreaches at schools such as Fordham. MG Nardotti's selfless service serves as an example that all members of the JAG Corps can strive to emulate.



A judge advocate captain serves as a military judge at a special court-martial, Vietnam, circa 1969-70. The Army tried more than 59,000 courts-martial in 1969 (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

# Lore of the Corps

## A Courts-Martial Revolution

### How the Military Justice Act of 1968 Turned Military Criminal Law Upside Down

By Fred L. Borch III

On 24 October 1968, President Lyndon B. Johnson (LBJ) signed the Military Justice Act of 1968 into law. The legislation was the culmination of efforts to amend the Uniform Code of Military Justice (UCMJ) that had been underway almost as soon as the code was enacted in 1950. Now, with the reforms ushered in by President Johnson's signature, courts-martial were about to experience a second revolution in less than twenty years. The first revolution

had been the creation of a single military criminal code in 1950, that was uniformly applicable to all the services; a remarkable achievement in every respect.<sup>1</sup> This second revolution in 1968 was no less remarkable and, as it occurred fifty years ago when LBJ put pen to paper, now is the time to tell the story of how it happened and how it turned military criminal law upside down.

Starting in the early 1960s, Senator Sam Ervin<sup>2</sup> of North Carolina, head of the

Subcommittee on Constitutional Rights (part of the Senate Judiciary Committee), began hearing complaints from Soldiers about injustices they had suffered under the UCMJ. At the time, there was no judge advocate involvement at special courts-martial (line officers served as trial and defense counsel in the proceedings) and more than a few Soldiers complained about arbitrary and capricious treatment at this level of courts-martial. Even at general courts-martial, non-lawyer decision-making dominated the process and, while legally qualified counsel prosecuted and defended at this level of the process, the law officer (the forerunner of today's military judge) had only limited powers.<sup>3</sup> There was, for example, no option for a trial by judge alone; all courts-martial were tried by panels. This meant that there could be no judge alone sentencing either; all punishments were imposed by panels.

Senator Ervin became convinced that courts-martial would be fairer if they were more like civilian courts. Prior to 1966, he introduced eighteen separate pieces of legislation that would have amended the UCMJ. Most of these bills had the goal of reducing, if not eliminating, the role of non-lawyers in the military justice system. In Senator Ervin's opinion, the court-martial process would be better if administered by uniformed lawyers.<sup>4</sup>

At the beginning of the ninetieth Congress, which was in session from 1967 to 1969, Senator Ervin combined all previous UCMJ legislation into a single bill, which he introduced into the Senate. Since the Department of Defense (DoD) opposed most of the changes in Ervin's single bill, their supporters on the Senate Armed Services Committee blocked action on the bill.<sup>5</sup>

Ervin's allies in the House of Representatives now took a new approach: They introduced legislation in the House containing only those reforms in Ervin's Senate legislation that were acceptable to the DoD. As most of these reforms were "designed principally to increase the participation of military lawyers in [special]



Major General Kenneth J. Hodson served as The Judge Advocate General from 1967 to 1971 (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

courts-martial," there was little objection to them. After all, since special courts-martial had no lawyer involvement, it was hard to argue against injecting at least some judge advocate involvement in the process, especially when a Soldier might be sentenced to six months confinement by a special court.<sup>6</sup>

When this House legislation reached the Senate in June 1968, Senator Ervin immediately began amending the House-passed bill so that the bill would have "the minimum reforms necessary to any meaningful legislation."<sup>7</sup>

At this point in the process, Senator Ervin was aided by a fortuitous event: Major General Kenneth J. Hodson, who had only recently become The Judge Advocate General of the Army, was the DoD's representative in negotiations on Ervin's Senate reforms. General Hodson, who had a strong background in military criminal law, agreed with most of Ervin's reforms, and he seems to have convinced other DoD officials to accept the legislation.<sup>8</sup> As General Hodson later recalled, the final bill was "the best bill we could get at the time . . . but [it] was worth the effort, because without it, we would have had an extremely difficult time handling the sophisticated problems that came to us in the My Lai cases."<sup>9</sup>

The end result was that the Senate Armed Services Committee accepted the amended legislation. After the bill was reported out of committee, both the House of Representative and the Senate adopted it on a voice vote (without any dissent) in early October 1968. President Johnson signed the Military Justice Act in a White House ceremony on 24 October 1968.

The new legislation was a revolution in courts-martial practice and procedure. The law officer—the quasi-judge official created by the original UCMJ in 1950—was now renamed the "military judge," and he was given new authority that made him comparable to a civilian judge. The most remarkable change was that the new military judge, who presided over all general and special courts-martial, had the authority to try the case by himself. No longer would guilt or innocence be determined exclusively by a panel of non-lawyers. Rather, if the accused, knowing the identity of the judge (and after consultation with defense counsel), requested in writing that the court be composed of military judge alone, then both findings and sentence would be decided solely by that judge.<sup>10</sup>

But the Military Justice Act also gave the judge other powers that previously had been performed by the court-martial panel. For the first time, the judge had the power to call the court into session without the attendance of the panel members, for the purpose of deciding interlocutory motions, and motions raising defenses and objections. The judge also could arraign the accused and receive his plea. Also for the first time, the judge was given the authority to decide challenges for cause against panel members; previously, the court itself had voted on challenges to its own membership.<sup>11</sup>

Another provision of the Act required that The Judge Advocate General of each service create a field judiciary from which military judges would be assigned to courts-martial. Prior to this time, all judge advocates serving as law officers had been part of the convening authority's command (and assigned to the staff judge advocate's office). Requiring a field judiciary meant that judges were now truly independent from the local command, as they were not rated by a commander or convening

authority. While the Army and the Navy had already established field judiciaries prior to October 1968, the new legislation guaranteed that military judges from all the services would be independent of the convening authority. Finally, in the Army at least, military judges began wearing black robes and were addressed as "Your Honor."<sup>12</sup>

Special courts-martial also underwent additional unprecedented changes. While Senator Ervin's legislation did not require that the trial and defense counsel at special courts-martial be licensed attorneys, the new law provided that the accused "shall be afforded an opportunity to be represented" by a lawyer at a trial by special court-martial. There was only one exception: if "physical conditions" or "military exigencies" meant that counsel "having such qualifications" could not be obtained, then a non-lawyer might represent the accused. As a practical matter, however, this exception has rarely been used.<sup>13</sup>

Just as the law officer was upgraded to the new position of military judge, the Act also upgraded the existing Boards of Review. They were re-designated as Courts of Review and their members were now called judges. These appellate courts remained under the authority of The Judge Advocate General, but the new legislation meant that there was a chief judge who could now divide the other judges into panels of not less than three, and who also appointed a senior judge to preside over each panel. Under the original UCMJ, there were separate boards of review; after the Military Justice Act of 1968, there was only one court with a number of panels. The idea behind this change was that a single court would ensure greater consistency in decision-making and a higher quality of legal decision than could separate review panels.<sup>14</sup>

Even the Court of Military Appeals (COMA) (today's Court of Appeals for the Armed Forces) saw some change. For the first time, an accused could petition COMA for a new trial on the basis of newly discovered evidence or fraud; previously, an accused could petition COMA only if sentenced to death, dismissal, punitive discharge, or a year or more confinement. The new Act also extended the time an accused could petition COMA from one year to two years.<sup>15</sup>

One more significant change in the Act is worth examining: a provision for post-conviction release. The convening authority now had the power to defer the serving of confinement until completion of appeal. Additionally, The Judge Advocate General of each service was now authorized to vacate or modify the findings and sentence in any court-martial that had been through the appellate process in four circumstances: newly discovered evidence; fraud on the court; lack of personal or subject matter jurisdiction; or error prejudicial to the substantive rights of the accused. This last provision was a major change because it meant that, for the first time in history, a Soldier convicted by a special court who did not receive a punitive discharge could obtain review of prejudicial errors by someone other than the officer who convened the case and his staff judge advocate.<sup>16</sup> Since the Army alone was trying thousands and thousands of special courts-martial every year in the late 1960s (59,500 in calendar year 1969 alone), this change to the UCMJ was a major benefit to more than a few Soldiers.<sup>17</sup>

While the Military Justice Act of 1968 was a revolution, it was a second revolution in the sense that it completed the process that had begun with the creation of the UCMJ. Prior to 1950, the role of lawyers in the military justice system was minimal. Consequently, it was a clear break with the past when, in enacting the new UCMJ, lawyers were accepted as part of military criminal law, and were given defined powers to make legally binding decisions at the trial level. The changes that were made to the UCMJ in 1968 were a fulfillment of the initiatives started in 1950; the Military Justice Act signed by LBJ completed the revolution started in 1950. When the 1968 legislation went into effect on 1 August 1969 (accompanied by a new Manual for Courts-Martial, United States, 1969), uniformed lawyers had the additional tools that would, in a short time, transform courts-martial into fuller and fairer proceedings—with due process akin to that exercised by defendants in U.S. District Court.

Aspects of the UCMJ that we take for granted today did not exist prior to 1968—like Article 39a sessions outside the hearing of the members, judge alone trials,

and lawyers at special courts-martial. But these changes did not end all complaints about the system. Books published in the 1970s, like Robert Sherrill's unflattering *Military Justice is to Justice as Military Music is to Music*<sup>18</sup> and Luther West's highly critical *They Call It Justice*<sup>19</sup> convinced more than a few observers that additional reforms were needed if military criminal law was to provide the same due process for Soldiers that civilians enjoyed. Even authors who recognized that the Military Justice Act of 1968 had ushered in considerable reforms remained unsatisfied. In *Justice Under Fire*, for example, Yale professor Joseph Bishop argued that additional reforms should be made to the UCMJ. "Civilians," he wrote, "should be employed as military judges" at both the trial and appellate level. As for substantive law, Bishop argued that Articles 88, 133, and 134 "should be repealed."<sup>20</sup>

Regardless of what reforms may occur in the future, however, it is unlikely that any changes to court-martial practice will turn military justice upside down to the extent that occurred with the enactment of the Military Justice Act of 1968. **TAL**

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## Notes

1. Prior to 1950, the Army conducted courts-martial under the Articles of War while courts-martial in the Navy were governed by the Articles for the Government of the Navy. The new UCMJ created a single criminal code and greatly increased lawyer participation in the court-martial process. While there had been limited lawyer involvement under the Articles of War (a judge advocate served as a law member at general courts-martial in the Army after 1920), there was no requirement, much less any role, for legally qualified counsel at Navy courts-martial until the enactment of the UCMJ. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, *THE ARMY LAWYER* 136 (1975) [hereinafter *THE ARMY LAWYER*]. Line officer opposition to lawyer participation at Navy courts-martial meant that the Navy resisted the creation of a separate corps for lawyers until 1967, when Congress finally passed legislation creating a Navy Judge Advocate General's Corps. JAY M. SIEGEL, *ORIGINS OF THE UNITED STATES NAVY JUDGE ADVOCATE GENERAL'S CORPS* 617-86 (1997).

2. Samuel James "Sam" Ervin, Jr. (1895-1985) served in the U.S. Senate from 1954 to 1974. While his efforts in shaping the Military Justice Act of 1968 were important, Senator Ervin is probably best known for his work as the chairman of the Senate Select Committee to Investigate Campaign Practices. This committee

investigated the break-in at the Watergate complex and played a major role in President Richard Nixon's downfall. For more on Ervin, see KARL E. CAMPBELL, SENATOR SAM ERVIN, *LAST OF THE FOUNDING FATHERS* (2007).

3. The law officer (who was present only at a general court) ruled on all interlocutory questions except challenges for cause; the panel members themselves decided whether to sustain or overrule a challenge for cause against a member. The law officer's rulings were final except that the court-martial panel could overrule him on a motion for a finding of not guilty. The court also could overrule the law officer on the question of the accused's sanity. While the law officer was an important part of the process, it was the president of the panel who was in charge of the court-martial. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1951)*, para. 39

4. *THE ARMY LAWYER*, *supra* note 1, 243-44 (1975).

5. *Id.*

6. Until the UCMJ was amended in 1999, the maximum confinement that could be imposed at a special court was six months. National Defense Authorization Act for Fiscal Year 2000, Pub.L. No. 106-65, § 577, 113 Stat. 512 (1999), increased that six month jurisdictional limit to one year.

7. *THE ARMY LAWYER*, *supra* note 1, at 245.

8. *Id.*

9. Kenneth J. Hodson, *The Manual for Courts-Martial—1969*, 57 MIL. L. REV. 1, 8 (Summer 1972). Hodson was referring to the general courts-martial arising out of the March 16, 1968 murders of unarmed and unresisting Vietnamese civilians by Lieutenant William L. "Rusty" Calley and his platoon.

10. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

11. UCMJ, art. 41(1968).

12. UCMJ, art. 26; *THE ARMY LAWYER supra* note 1, at 247.

13. UCMJ, art. 19 (1968).

14. For more on the new Army Court of Military Review, see Fred L. Borch, *The Army Court of Military Review: The First Year (1969-1970)*, *ARMY LAW.* (Mar. 2016), 1-2

15. UCMJ, art. 73 (1968). The new Military Justice Act of 2016 extends this two year time limit to three years. National Defense Authorization Act for fiscal Year 2017, Pub. L. No. 114-328, § 5001, 130 Stat. 2022 (2016).

16. *Id.*

17. Williams C. Westmoreland and George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 32 (1980).

18. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970).

19. LUTHER WEST, *THEY CALL IT JUSTICE* (1977).

20. JOSEPH W. BISHOP, JR., *MILITARY JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 301, 302-303 (1974).



(Credit: iStock.com/GummyBone)

# Life Hack

## Your Commute is Stealing Your Life Cutting Down Travel to Work Saves Money, Time, and Even Your Health

By Kyle C. Barrentine

*10.8 million Americans travel more than an hour each way to work. And 600,000 endure 'megacommuters' of at least 90 minutes and 50 miles each way, according to the Census Bureau. This was not what was supposed to happen.<sup>1</sup>*

**You know it, and I know it:** The work commute is a look in the mirror that we try to avoid. Yet, we end up listening to podcasts, sports radio, or digital tunes during the commute and rationalize that it is not that bad, attempting to justify our housing location choice. Service members and government Civilian employees know all too well the problems with military installation housing. Since living very near the gates is usually not a desirable option either, we seek that perfect home community that

generates commute times well-above the 27.9 minute one-way national average.<sup>2</sup> Our kids are in "great" schools, and there are lots of restaurants, shopping, and nighttime entertainment near home.

Outside of the D.C. area, most service members and Civilians working on military installations do not have the option of utilizing public transportation. Thus, this note focuses upon an individual's automobile commute, given that eighty-six percent of Americans drive to work.<sup>3</sup> Fort Hood in

Killeen, Texas, presents just one example of installation commuting. Based on my discussions with some who have worked there,<sup>4</sup> a large number of Fort Hood personnel choose to live around Georgetown, Texas, which is at best forty-one miles south of Fort Hood. Many others choose to live about twenty-seven miles further south in Austin, Texas, which provides all the great things for which they are looking, except a simple commute.

Approaching this conservatively, perhaps your average work day looks something like this:

- 0500 – Awake and run or go to the gym (good luck doing this in an hour)
- 0600 – Shower, dress, and grab your coffee and hopefully breakfast
- 0700 – Commute to work
- 0745 – Arrive at work
- 1700 – Commute home
- 1745 – Arrive at home, help kids with homework, prepare, & eat dinner
- 1945 – Take care of household business (such as paying bills, cleaning, and kids' baths)
- 2100 – Family, TV, and personal enrichment time
- 2230 – Go to bed for, at most, 6.5 hours of sleep (do you go to sleep immediately?)

Adjust the timetable above a few minutes either way. Even with a favorable adjustment, where is your time for the kids' ballgames or other activities, perhaps a local restaurant dinner, or your hobby? A quick analysis of the above and other data demonstrates that the commute monster is absconding with your money, time, relationships, and health.

### Analysis

**1. Commuting Steals Your Money.** Assuming you are looking for extra money to put in your retirement account or savings, assessing your commuting costs is likely a good place to find it. Look at the difference between just a fifteen and thirty mile one-way commute, as seen in the example given in Table 1 on the opposite page (I'm assuming there that a commuter can complete the drive averaging one mile per minute, and I use some rounding off in the numbers).

**Table 1.**

<b>30 minute/30 mile Commute each way</b>	<b>Effective Annual Work Hours<sup>5</sup></b>	<b>Effective Annual Salary</b>	<b>Effective Hourly Rate</b>
Standard	2,080	\$83,480	\$40
1 hour X 220 commute days per year	2,300 including commute	\$83,480	\$36.296
Commute Cost @ \$.545 mile <sup>6</sup> X 60 miles = \$7,194	2,300 including commute	\$76,286	\$33.168
<b>15 minute/15 mile Commute each way</b>	<b>Effective Annual Work Hours</b>	<b>Effective Annual Salary</b>	<b>Effective Hourly Rate</b>
Standard	2,080	\$83,480	\$40
+ .5 hour X 220 commute days per year	2,190 including commute	\$83,480	\$38.12
Commute Cost @ \$.545 mile X 30 miles = \$16.35 X 220 = \$3,597	2,190 including commute	\$83,480 - \$3,597 = \$79,883	\$36.476

The table demonstrates that \$3,597 of after-tax money can be saved from just a fifteen minute/fifteen mile commute reduction.

Implementing these commuting savings would be quite a nice addition to your estate plan. Assuming zero inflation or increase of any kind for the commuting expenses, if you contributed \$3,597 annually for twenty years to a Roth individual retirement account (Roth IRA) invested in an index fund achieving a modest four percent annual return, you would accumulate \$111,396.<sup>7</sup> If, unlike me, you think the IRS mileage rate is too high upon which to base your savings, because you own a hybrid or other high-efficiency automobile, cut the numbers in half. That still results in \$1,799 savings per year, which if invested the same way would accumulate \$55,714 in twenty years. Moreover, your Roth IRA earnings are generally not taxable if withdrawal or distribution occurs after you reach age fifty-nine and a half.<sup>8</sup>

**2. Commuting Steals Your Time.** How much more relaxed would you be with an extra hour per day by decreasing your commute from forty-five to fifteen minutes each way?<sup>9</sup> That is 220 hours a year assuming 260 work days a year reduced by forty total personal leave and holidays a year. You could get another half-hour of sleep plus thirty more minutes talking to your spouse or reading a book. Even if your commute-time reduction is by just thirty minutes total per work day, you would save yourself 110 hours per year—almost three work weeks. But you had to live close to all the action and conveniences that you do not have time to attend more than about once a week, if then.

**3. Long Commutes Jeopardize Your Health.**

As commuting is a time vacuum, you necessarily have less available opportunity for daily exercise. So, if you make time for your exercise, as you should, you naturally have less time for something else—such as sleep or personal hobbies. Moreover, research indicates that “the longer the commute, the higher the levels of one’s obesity, cholesterol, pain, fatigue and anxiety.”<sup>10</sup> Another research study further reveals that “longer commutes appeared to have a negative impact on mental health too, with longer-commuting workers 33 percent more likely to suffer from depression, 37 percent more likely to have financial worries and 12 percent more likely to report multiple aspects of work-related stress.”<sup>11</sup>

**4. Internal Solutions.** The first one is easy. Live closer to work. You drive there five days a week. You can drive a bit further to the entertainment that you enjoy once or twice a week, and that drive will not likely be during rush hour. You can find another school system that works for your family. If not, you will have more time to work with your children on their studies, or the money saved by living closer could be applied toward a private school or tutor. Another solution would be to live against the flow of rush-hour traffic. Even if that location is just as far, you could save valuable minutes on each end of your commute and some gasoline expense.

**5. External Solutions.** Three potential ways to reduce your commuting costs or time as a government civilian employee include Alternative Work Schedules (AWS), telecommuting, and the Public Transportation Subsidy Program (PTSP)<sup>12</sup> or Federal Workforce Transportation Executive Order 13150 (EO 13150).<sup>13</sup>

Alternate work schedules in the federal government can take many forms such as a flexible work schedule (FWS) or a compressed work scheduled (CWS). A FWS is authorized under 5 U.S.C. § 6122 and is one where the employee works core hours and has flexible hours for arrival and departure. While a FWS does not reduce your mileage each day, it certainly can serve to take your commute out of the rush hour, saving you valuable time and some amount of gasoline consumed in idle traffic.

A CWS authorized under 5 U.S.C. § 6127 is one where the employee works eighty hours bi-weekly over less than ten days such as nine hours for eight days and eight hours for one day (5/4/9) or ten-hour days for four days per week (4/10s).<sup>14</sup> Thus, you could reduce your commuting by twenty-six to fifty-two days per year, if your agency so allows.

Most of us have certainly become familiar with telework or telecommuting, and that option may or may not be available. If it is, good for you. However, the odds are that, for most of us, any telework beyond a day here or there is not an option. The Office of Personnel Management reported last year that while forty-two percent of federal employees are eligible to telework, only twenty-two percent of all employees have, and most of that is situational or sporadic days.<sup>15</sup> Moreover, that number is remarkably less for the Navy, Army, and Air Force at just twenty percent, ten percent, and five percent of employees, respectively.<sup>16</sup>

The Public Transportation Subsidy Program and Executive Order 13150 provide untaxed transportation subsidies for federal employees in agencies that have implemented the program. Qualified vanpools are part of those authorizations. There are



several requirements to receive and maintain vanpool subsidies, but in general, an eligible employee participating in a qualified vanpool can receive up to \$255 per month in benefits.<sup>17</sup> Assuming you have a sufficient number of vanpool riders, you may be able to eliminate a substantial part of your commuting expenses. Of course, there is a tradeoff in your travel independence and you will likely spend more time commuting because of coordination, meeting, pickup, and dropping off riders.

## Conclusion

The data makes clear that one should do everything within reason to reduce the length and time of workplace commuting. If the money savings and potential health benefits do not convince you, remember that your time is finite—you cannot create more time. Your family, wallet, health, and inner-self will thank you. **TAL**

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## Notes

1. Chris Taylor, *Your Commute is Costing You More than You Realize*, REUTERS (May 27, 2014), <https://www.reuters.com/article/us-usa-commute-costs/your-commute-is-costing-you-more-than-you-realize-idUSKB-N0E721M20140527>.

2. See [https://www.washingtonpost.com/news/wonk/wp/2015/08/14/the-lonely-american-commute/?utm\\_term=.3847bb589543](https://www.washingtonpost.com/news/wonk/wp/2015/08/14/the-lonely-american-commute/?utm_term=.3847bb589543). One verified study for the Hampton Roads, Virginia area found that, among 11,000 survey respondents, the average one-way commute was 37.9 minutes; [https://pilotonline.com/news/military/article\\_d86ef9f7-b131-5609-8fbb-771844f45736.html](https://pilotonline.com/news/military/article_d86ef9f7-b131-5609-8fbb-771844f45736.html).

3. <https://www.census.gov/content/dam/Census/library/publications/2015/acs/acs-32.pdf>.

4. I acknowledge this Fort Hood information is not based on a scientific survey, but it is not unrealistic. I presently live about twenty-three miles from where I work, and my commute is about thirty minutes one-way against the flow of traffic. In any event, do some of your own analysis and apply the miles and minutes to your commute.

5. Federal civilian employee pay is actually based upon 2,087 work hours per year. <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor> (last visited Apr. 11, 2018).

6. The 2018 IRS business mileage deduction rate is \$.545, and it is based on an annual study of the fixed and variable costs of operating an automobile. IRS, *Standard Mileage Rates for 2018 up from Rates for 2017*, <https://www.irs.gov/newsroom/standard-mileage-rates-for-2018-up-from-rates-for-2017> (Dec. 14, 2017).

7. I used an online savings calculator to compute this total based upon a zero starting amount with annual contributions compounded annually. If you changed

the variable to being compounded monthly, the total after twenty years would equal \$112,337. See <https://www.dinkytown.net/java/CompoundSavings.html>.

8. See *The Five Year Rule for Roth IRA Withdrawals*, <https://www.rothira.com/blog/the-five-year-rule-with-roth-ira-withdrawals> (last visited Apr. 1, 2018) (“[T]o withdraw your earnings from a Roth IRA tax and penalty free, not only must you be over 59½ years-old, but your initial contributions must also have been made to your Roth IRA five years before the date when you start withdrawing funds.”).

9. <https://www.strongtowns.org/journal/2016/3/29/the-cost-of-commuting-vs-living-close>.

10. Taylor, *supra* note 1 (based on a Gallup-Healthways Well-Being Index survey).

11. Rebecca Smith, *Here’s the Impact Long Commutes Have on Your Health and Productivity*, Business Insider (May 22, 2017), <http://www.businessinsider.com/long-commutes-have-an-impact-on-health-and-productivity-2017-5> (based on a study conducted in the United Kingdom by VitalityHealth, the University of Cambridge, RAND Europe and Mercer).

12. 5 U.S.C. § 7905.

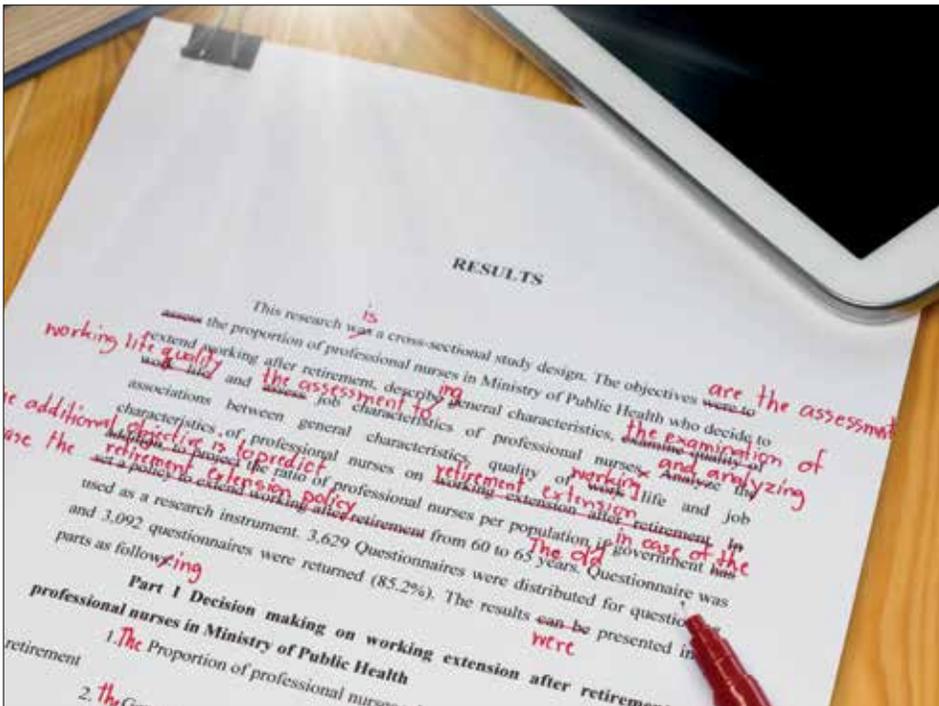
13. President Clinton executed Executive Order 13150 on April 21, 2000.

14. <https://www.opm.gov/policy-data-oversight/pay-leave/reference-materials/handbooks/alternative-work-schedules> (last visited Apr. 1, 2018).

15. <https://www.telework.gov/reports-studies/reports-to-congress/2017-report-to-congress.pdf>.

16. *Id.* at 96, app. 9.

17. <https://ask.fedweek.com/federal-government-policies/commuter-benefits-transit-subsidies/> (last visited Apr. 1, 2018).



(Credit: iStock.com/Lamaip)

how you feel about writing. I am here to tell you writing is fun and one of the most worthwhile things you can do as a professional in your community of practice. Here are the smaller steps to take to accomplish your goal of writing and sharing that product with fellow JAGC members.

### 1. Identify a Topic

Motivation to write stems from an idea, perhaps a particular issue you encountered (a) that you didn't know how to deal with; (b) when you learned about the laws/regulations/policies, you were dissatisfied with the rules regarding that issue; or (c) that you had never seen in practice before. These are the three most common ways in which scholars in a professional field publish their writing:

- a. This is how to do [BLANK]—these include the instructive articles common in *The Army Lawyer*, information papers saved in various repositories on JAGCNet or MilSuite, or less scholarly (more practice-oriented) publications like *Operational Law Quarterly* or even After-Action Reports.
- b. This should change—these writings include big ideas for changes in the law or policy that the *Military Law Review* usually publishes; those articles usually begin by describing the state of the law (or regulation/policy) as it is now, the problem with that, and then the author's proposal to improve the law (usually solving the problem if that change is implemented). Because you are not simply outlining how to do something you just recently did (as in the first type of publication), this type of academic writing is usually more time-consuming and research-heavy than your primer on, for example, how to prosecute DUIs.

And the last type of writing commonly seen is:

- c. Isn't this interesting?—this type of article can be historical pieces (think Mr. Fred Borch's terrific "Lore of the Corps" articles in *The Army Lawyer*) or book reviews; frequently, this third category ends up being a combination of how to do something and a description of something pretty cool.

# WRITECOM

## Start Writing Already Take Small Steps to Write More Often

By Lieutenant Colonel Keirsten Kennedy

"Get it down. Take chances. It may be bad, but it's the only way you can do anything really good."<sup>1</sup>

**When The Judge Advocate General** (TJAG) of the U.S. Army Judge Advocate General's Corps (JAGC) encourages you to write<sup>2</sup>—and says it more than once or twice—we should all be thinking about how to get on board with that directive. If you are still struggling with identifying a gerund,<sup>3</sup> if you find yourself using your pen to tap out morse code SOS signals on your blank pad of paper when embarking on writing, and if you view writing and

publishing articles for "those other people," then this article is for you. You must change your mindset about writing, and view it as the most efficient process to help members in your group understand something you have already learned, to effect changes in the law and policy, and to share interesting things you know. Now, changing your attitude about writing—if you believe this is not something for you—is no easy feat: you must take a few small steps in adjusting

As a last resort, if nothing you have done lately has grabbed your attention enough to write about, request a scholarly paper topic list from the Director of the Professional Communications Program or from the Associate Dean for Students, The Judge Advocate General's Legal Center and

vice versa for the best results. Because we rarely work alone in our JAGC practice of law and leadership, you will usually have your pick of co-authors to choose from right on the same installation as you, especially if you are writing about a recent experience, a lesson you just learned, or an

instilling a love of writing in young you. If you do not get it at that point in your life, you will always feel vaguely behind everyone on grammar knowledge and writing, like there is a secret language you will just never master. It is not true: you can become a grammarian, which helps you develop your writing skills. Sign up for writing classes, get the Grammar Girl Hot and Dirty Tips,<sup>7</sup> buy the excellent workbook *Bluebook of Grammar and Punctuation*<sup>8</sup>—spend your Friday nights doing those worksheets to attain expertise (and finally know exactly what a gerund is). Become your own editor, in other words. If you can not be your own editor, though, find one who reacts to poor grammar like nails on a chalkboard; or you can always use me. I like to use my (grammar) power for good.

## **[M]ost of us are spurred into action when we lag behind or fail to do something we have promised to do; having a partner keeps you accountable.**

School. Either of those officers will likely be willing to share that list with you so you can start brainstorming about what to write about. Once you have identified a topic, it will be time to get started with the actual writing—or rather, the outlining.

### **2. Outline and Fill in—Voila**

For those of you lucky enough to have been taught Criminal Law by LTC Megan Wakefield between 2011 and 2014, you may be familiar with her practical approach to getting work done. She would tell those students whom she was advising as they embarked on their academic papers for the Graduate Course the following genius advice: make an outline of what you will write about; research and work exclusively on that outline, making it as robust as possible; then fill it in with a few sentences under the headers/sub-headers—now you have got the first draft of your paper. Every student who followed this advice—no matter the writing experience or skill level—aced the writing requirement in attaining an LL.M. Your initial small goal (after choosing a topic) is to be excited about that topic (even just lukewarm-excited); research it and fill in your outline as you tab sources and start to synthesize ideas, getting deep into parenthetical Roman numerals as your outline gets more and more detailed. If you do this, you can easily beef up the paragraphs by adding a couple sentences and filling in some transition sentences here and there to get close to a final product, ready for editing.

### **3. Make Writing a Team Sport**

You need not go this alone; you can co-author an article to publish. Find someone whose weaknesses are your strengths and

event that just happened on your post. Also, most of us are spurred into action when we lag behind or fail to do something we have promised to do; having a partner keeps you accountable. It has the added benefit of broadening your perspective in whatever it is you write and publish. And if you are lucky, the co-author you hitch your star to/settle for might have a talent for editing—this makes fine-tuning and polishing your final draft a breeze, thus becoming an easy selection for a journal editor to publish.

### **4. Locate an Editor**

Similar to finding a co-author, you may actually just need an editor to help you along. This person can share the by-line or not, but here is how you zero in on an editor: identify the person you see cringing when someone says “between you and I”<sup>4</sup> or use the phrase “I could care less” and then scan the crowd to locate the person clearly trying to decide if correcting you<sup>5</sup> in front of all these people is in poor form—and appearing to struggle with this decision. Lining up a colleague or friend as an editor is important because your ideas could be fantastic, but if they are buried in terrible writing and poor grammar, those ideas may be too hidden for a publication's decision-maker to want to take on the task of publishing your writing. It can be time-consuming fixing up someone's writing so the brilliant ideas can shine through. My friends and colleagues know—despite my exasperated-sounding tone in the previous few footnotes (that truly is for entertaining you, my reader)—I am not judgey<sup>6</sup> about anyone's poor grammar and weak writing skills; I firmly believe it has everything to do with whether or not your elementary school teacher felt like teaching you grammar and

### **5. Have a Writing Mentor**

Different from a co-author, different from an editor you frequently call on to proof your work—this person is someone whose writing you admire. Figuring out who your writing mentor is requires you to do quite a bit of reading<sup>9</sup> to figure out whom you should pick. When you read and enjoy an article in one of our JAGC publications or online in one of our repositories, take a moment to tell the author you appreciated the article. You may just want to keep authors as writing heroes whom<sup>10</sup> you admire from afar, but I am telling you: not many people contact authors to tell them they enjoyed their published piece. Writing is an entirely thankless job, in fact. Contact an author you would like to write like, give him or her a compliment, and—waiting a gracious amount of time—then send the author all your articles for feedback. Kidding on the last part—but do ask if you can send the author/writing mentor a pretty-much-final draft of whatever you are writing and ask for tips or input. This way, you would not be burdening the author, but you still get valuable advice from someone you consider a mentor. Once again, just as in the case where you cannot find an editor, I will be your writing friend if you need one. Not a writing mentor; reserve that spot for a true academic who writes well, publishes frequently, and has genius thoughts to share with you: I have none of that to share with you, but I will give you what I have and we will struggle through the writing process together.



## Conclusion

If you would like to write and publish, but you have not learned how to do anything in your JAGC career, you have not encountered obstacles in the law to helping your client achieve a goal, or you have not seen anything interesting, then you have bigger problems than not writing and publishing articles. My point is, if you are in the JAGC, you have experiences and ideas to share. I believe TJAG's point is, do it by writing about them (and publishing) for the benefit of our military legal community. **TAL**

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*LTC Kennedy is the Regional Defense Counsel for the Southwest Region, based out of Fort Hood, Texas. LTC Kennedy is a former director of the Professional Communication Program at TJAGLCS.*

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## Notes

1. William Faulkner, <https://www.goodreads.com/quotes/177078-get-it-down-take-chances-it-may-be-bad-but>.
2. Brigadier General Charles N. Pedo, *Communication Is the Key—Tips for the Judge Advocate, Staff Officer, and Leader*, *ARMY LAW.*, June 2016, 6-7.
3. <http://www.chompchomp.com/terms/gerund.htm>. This is basically a party trick—learn one difficult grammatical term, explain it whenever you are in large crowds, and watch your reputation as grammarian extraordinaire take off as part of your JAG Corps “third file,” in a positive way.
4. Never correct. Always wrong. It will always be “between you and me” because “between” calls for an object (me), not a subject (I). I cannot emphasize this enough: nothing is ever between “I” and something else. <https://www.quickanddirtytips.com/education/grammar/between-you-and-me>.
5. The phrase is “I could NOT care less.” Stating you could care less about something says nothing at all to the listener (except that you do not love the English language): it means you are somewhere on the care spectrum, not specifying exactly where. But if you say you could not care less about something, that is saying you are at the bottom of the care spectrum: there are zero things you care less about than [whatever it is you are talking about]. It is truly insulting, as opposed to saying you could care less. Why are you saying

- you could care less? Ho hum. Just go ahead and care less about it until you get to the point where you could NOT care less. Then you'll be communicating what you thought you were communicating. <https://www.quickanddirtytips.com/education/grammar/could-care-less-versus-couldnt-care-less> <http://www.dictionary.com/e/could-care-less/>.
6. Not a word; you are correct. You're already becoming a promising Grammar King/Queen.
7. Grammar Girl. <https://www.quickanddirtytips.com/grammar-girl>.
8. Jane Straus, *THE BLUEBOOK OF GRAMMAR AND PUNCTUATION* (2011). For the book's helpful, interactive website to brush up on grammar rules, see <https://www.grammarbook.com/>.
9. Stephen King has said, “If you don't have time to read, you don't have the time (or tools) to write. Simple as that.” <https://www.inc.com/glenn-leibowitz/50-quotes-from-famous-authors-that-will-inspire-you.html>.
10. You might have noticed, I have used “whom” a few times in this article. If you want to master its use, ensure you can insert “him” for “whom.” [http://theoatmeal.com/comics/who\\_vs\\_whom](http://theoatmeal.com/comics/who_vs_whom).



Then Captain Corey in Somalia with the 10th Mountain Division in January, 1993 (Photo courtesy COL Corey).

# Up Close

## Be an Honest Broker

Colonel Ian Corey Reflects on a 30-Year Career

By Major John Goodell

**You have had a varied career, including your last assignment at Army Cyber Command. As the Army places an ever-growing emphasis on the role of cyber—and therefore cyber law—what do you think the future holds for cyber law and the Judge Advocate General Corps?**

It has been a great last assignment because cyber warfare is still relatively nascent. The challenge currently is trying to figure out exactly what law applies and how, as cyber becomes increasingly operationalized. At this point, there are no cyber-specific

treaties, and very little customary international law is being created because states are secretive about the cyber capabilities they have and the operations they are conducting, and what law they believe applies. Accordingly, cyber is currently a very exciting space within which to be a judge advocate.

**How do you see the practice of law in an enemy-forced (cyber threat) analog environment?**

It will be more challenging because we tend to do a lot of our research online.

Fortunately, we continue to print great resources like the Operational Law Handbook and Law of Armed Conflict Documentary Supplement. Even when we were first issued the original “JAG in a Bag” kits in the 1990s, we continued to bring hard copies of important publications to the field, and we need to continue to do that.

**Moving from your current and final assignment in the Army to how you began your career, you commissioned into the Quartermaster Branch (QM) out of Georgetown University’s Army Reserve Officer Training Corps (ROTC) Program. Why did you select QM and why did you ultimately decide to go Funded Legal Education Program (FLEP)?**

In my freshman year at Georgetown University, I joined ROTC because my father, a retired Army officer, had done ROTC and I thought it was a patriotic thing to do.

**Your father was an Army officer?**

Yes, after ROTC he commissioned Infantry and then ended up in the artillery, when artillery was still horse-drawn. After college graduation, he served in the National Guard but after earning a Master’s in Public Administration, he was called onto active duty in July 1941 and branched AG (Adjutant General’s Corps); then eventually detailed IG (Inspector General’s Corps). He served in World War II and the Korean War, and was eventually stationed in France in the early 1960s, where he met my mother. My mother was a French local national legal assistance attorney at the U.S. Army base in Orléans. My father retired shortly before I was born, and we lived in France until I was about seven years old.

**I have to interrupt and ask you, is this why you pronounce your name Jan?**

Yes. While my parents named me “Ian,” it is hard for the French to pronounce. The way my name is pronounced is the Americanized

version of the French name “Yann” (think of the French tennis player Yannick Noah, though, today folks are probably more familiar with his son Joakim). When we moved to the states, I hadn’t even heard the traditional pronunciation of “Ian” so it stayed “Yann,” albeit Americanized.

We then lived in New Orleans for three years before moving to San Diego at age ten; San Diego is where I consider home. I attended a magnet high school for science, math, and computers. In eleventh grade, I decided that I wanted to be a diplomat—maybe in part because my mother had worked at the UN—rather than focus on the science/math/computers, so I enrolled at Georgetown in its aptly-named School of Foreign Service because they had highest undergraduate placement rate into Foreign Service.

As I said, I enrolled in ROTC because I thought it was patriotic and could see myself doing reserve duty. It turned out that all but two of us in my class were there on a scholarship—I had no idea going in that there was such a thing as an ROTC scholarship, and eventually got one. I took and passed the written and oral Foreign Service exams, was placed on the Foreign Service register, and shortly before the winter break of my senior year was offered a position in the equivalent of their basic course following graduation. I was elated. I then returned from winter break to see the ROTC accessions list posted and was shocked to see I had been branched active duty field artillery, because this was a time when there were relatively few active duty commissions and I had requested a reserve commission. Even some of my friends with four-year ROTC scholarships did not serve on active duty. I asked for reconsideration but was unsuccessful. I was honestly very upset at the time. Once reality set in, I decided that I didn’t want to be an artilleryman seven days a week, so I asked to be branched Quartermaster instead so I could stay close to my future wife, Karen, who was a year behind me at Georgetown, by attending the Quartermaster Officer Basic Course at Fort Lee. It seems pretty shallow, I know, but I had the mindset of a college student and I’d have to say that the decision to keep dating Karen has worked out pretty well!

### **How did you end up doing thirty years in the Army after initially being upset about being put on active duty out of ROTC?**

I had a four-year active duty commitment, and placement on the Foreign Service (FS) register was only good for two years. I didn’t want to take the FS exam again because until I took the bar exam, this was the most grueling experience I had encountered. My first duty station was with the 10th Mountain Division, and despite four long Fort Drum winters I had come to love the Army. I became interested in serving as an attorney and remembered a legal brief I had during the Basic Course, which included a brief comment about the opportunity to attend law school under the Funded Legal Education Program. From there, it was really a simple math problem (five years active duty before law school plus three years of law school took me to fourteen years after the FLEP commitment), so twenty seemed very logical. I also set a goal to become an O-6, the rank my father had achieved. He was my hero.

### **After thirty years, where do you fall on the question of “broadly skilled” or “versatile experts?”**

As a Staff Judge Advocate (SJA), you have to rely on your people who possess the expertise to answer difficult questions of law, but in the end, you are the one “the boss” is looking to for answers. In truth, however, the branding of our profession is cyclical in my opinion. The expression used to be “JAG Corps Pentathletes”; today, it’s “versatile.” The bottom line is that we still want folks who can respond to a variety of questions in a variety of situations.

Senior officers, our leaders and commanders, are also looking for an honest broker in their judge advocate. They want someone who will give them a straight answer. We have to tell them what they need to hear, not what they want to hear. As an honest broker, we exist to protect the command. It’s that simple.

### **What was your least favorite JAGC assignment you’ve had?**

To quote my good friend LTC(R) Ray Jackson, who was the former Chief of the Judge Advocate Recruiting Office: “There are no bad assignments; only bad attitudes!”

### **Fair enough, sir. What was your favorite assignment?**

I’ve been blessed to have a lot of what I consider to be great assignments, but I’d have to say that my favorite was as Staff Judge Advocate of 1st Armored Division, in Wiesbaden, Germany. Division SJA is the only job I aspired to do, and I felt honored to have the opportunity to achieve that goal. I knew I wanted to do it since my first JAG assignment at Fort Stewart in the 3d Infantry Division. I was so impressed by the stature of Colonel Fran Moulin, who sadly died shortly after retiring, at the age of 48. He was my first SJA; I had scheduled an office call when I first arrived and was just struck by his big/charismatic personality. Everyday his presence was inspiring, and that made me want to be a Division SJA. Divisions were the building block of the Army at that time. One of the things I really enjoyed about the assignment was that the size of office was perfect, so you could get to know everyone.

### **On your most recent deployment as the SJA with the with III Corps you encountered a number of difficult legal issues in the fight to defeat ISIS. Perhaps most noteworthy, your unit engineered a well-documented leaflet drop prior to bombing ISIS fuel trucks, which began the steady and ultimately successful attack on ISIS funding. How did the leaflet/messaging drop for Operation Tidal Wave II come about?**

At one time, ISIS was characterized as the wealthiest terrorist organization in history, and much of its revenue came from illicit oil and gas revenues. One of the significant enablers of this income source were thousands of trucks that transported the oil from ISIS-controlled sites, enabling its sale. Early in our deployment as the headquarters for CJTF-OIR, the commander, LTG Sean MacFarland, recognized that disrupting the transportation of oil could have a significant effect on ISIS revenue generation. The planners at CJTF-OIR told LTG MacFarland that “the lawyers” (not our team!) had shot down a previous plan to strike oil tankers.



Then Captain Ian Corey served with 3ID during Operation Desert Thunder in February 1998 (Photo courtesy COL Ian Corey).

I asked my Air Force chief of operational law, who had been deployed for several months prior to the arrival of III Corps, what legal objections had previously been raised. I didn't see them as insurmountable, so I got our team working with the J-3 section to devise a legally supportable plan. I also made it a point to involve the French member of our legal team, as even a modest amount of coalition support would be a good thing.

Because our legal opinion viewed the truck drivers as civilians—it would be virtually impossible to positively identify them as members of ISIS and we did not view driving ISIS oil as directly participating in hostilities—we knew that the possibility of civilian casualties existed and, therefore, we needed CENTCOM's buy-in. The CENTCOM SJA at the time, then-Colonel Pat Huston, reviewed our work and entertained some concerns raised by the Combined Air Operations Center (CAOC) legal staff, and eventually sided with us. CJTF-OIR then began execution of Operation Tidal Wave II.

Lieutenant General MacFarland recognized that the truck drivers were just trying to make a living; his intent was not to kill them, but rather to dissuade them from trucking oil for ISIS. Prior to strikes, therefore, we warned the drivers through a variety of means including leaflets. One of

my operational law attorneys, CPT Mary Beth Webb, supported our military information support operations (MISO) clients and reviewed those leaflets, among others. It was pretty cool to see one of the very leaflets she had reviewed reprinted in USA Today after one of the first strikes.

Operation Tidal Wave II was a huge success. Coupled with strikes on ISIS bulk cash sites, it dealt a severe blow to ISIS financing and, I think, helped expedite the counter-ISIS campaign significantly. Judge advocates were a huge part of that.

**If you were given a “do over,” what would you change about your career?**

I wish I had not fretted over assignments. It can be hard not to sweat the assignment cycle, but everything will work out; unfortunately I was a mid-grade major before I finally figured that out. I have rarely gotten the assignment I asked for, but I have always appreciated and enjoyed each assignment—honestly!

**Do you have any other advice for young judge advocates, perhaps beginning their own march toward thirty years in the Army?**

It's an exciting time to be a judge advocate. Our young attorneys are as capable as we were decades ago, but they have somewhat

different strengths. They are growing up in a more operationally-focused and less trial-focused Army. Aside from not sweating assignments, don't fall into the trap of only answering the question that is asked. There is a tendency to be too quick to answer the question asked—and only the question asked—and move on. But sometimes our clients don't ask the right question. Young attorneys need to ask themselves, “What is my client's intent?” Once you understand your client's intent, you should give a range of options that are legally and ethically supportable, and provide an assessment of those options including the risk associated with each. Sometimes that means explaining that something may be lawful, but for policy or other reasons is not a good idea. Also, if you know you are right, stand your ground. I've had clients, including general officers, try to bully me into changing an opinion they didn't like. When I was a major, a three-star general once called to tell me he had just read my “asinine legal opinion.” I respectfully recommended he take it up with my four-star; he didn't. The point is, we should work hard to find ways to enable our clients to achieve their intent, but again, in ways that are legally and ethically supportable.

**What does “retirement” look like for the Coreys?**

We are going back to San Diego where I'll probably look for legal work. I am going to explore the landscape and see if there is some way I can continue to contribute.

**OK, Sir, the floor is yours. What do you have to say in closing?**

I came to love the Army and really appreciate the contributions judge advocates make toward accomplishing the mission; I feel incredibly lucky to have had the opportunity to serve as one. I know it's cliché, but it's true what they say: “it's the people.” That is why I have loved serving. I have loved what I have done and love the Army JAG Corps; frankly, it was easy to draw my career out to thirty years. **TAL**

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*MAJ Goodell is a former administrative law professor at TJAGLCS. He is currently a student at the Command and General Staff College at Fort Leavenworth, Kansas.*

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(Credit: iStock.com/flavijus)

# Practice Notes

## New Year, New Laws

### What the Military Justice Act's Changes Will Mean for Judge Advocates

By Colonel Sara Root

On 23 December 2016, the President signed the National Defense Authorization Act for Fiscal Year 2017, which included numerous military justice changes contained in the Military Justice Act of 2016 (MJA16). On 1 March 2018, the President

signed Executive Order 13825 prescribing implementing regulations, to include establishing the MJA16 effective date as 1 January 2019. Intended to strengthen the structure of the military justice system, the MJA16 represents the most significant

changes to the Uniform Code of Military Justice (UCMJ) since the UCMJ was first enacted in 1950.

Why the changes? First, although amendments to our military justice system occur regularly, the last holistic review and reform of the UCMJ was in 1983. Second, over the past decade, Congress has initiated many of those changes, in part because of an increased public interest in aspects of our military justice system. Consequently, in August 2013, then-Chairman of the Joint Chiefs of Staff General Martin E. Dempsey recommended that the Secretary of Defense order a thorough review of the UCMJ to ensure it “effectively and efficiently achieves justice consistent with due process and good order and discipline.” In October 2013, Department of Defense Secretary Charles Hagel directed the Department of Defense General Counsel (DoD OGC) to review both the UCMJ and its implementation through the Manual for Courts-Martial. The Department of Defense’s Office of the General Counsel formed the Military Justice Review Group (MJRG) to complete this monumental task, and the MJRG provided Congress with a 1,300 page report including extensive recommendations in December 2015. Ultimately, Congress passed into law many but not all of the MJRG’s recommendations.

The major themes of the changes include implementing features of the civilian criminal justice system where appropriate, such as increased judicial authorities pre-referral, statutory authority for a more robust military magistrate program, a new misdemeanor-level court-martial intended for petty crimes, set panel sizes, and the authorization for minimum sentences in plea agreements. Additional themes include a modernization of punitive articles and increasing overall efficiency to include changes in post-trial processing. Provided below are summaries of some of the most significant MJA16 changes.

#### Increased Pre-Referral Judicial Authorities

Unlike our civilian counterparts, military judges are not involved in courts-martial until referral of charges. To increase both efficiency and the authority of military judges, the MJA16 provides statutory



From 10–12 April 2018, the Military Justice Legislation Training Team trained over 90 personnel at Ft. Knox, Kentucky from Cadet Command, Recruiting Command, Human Resources Command, the 1st TSC (two traveling all the way from Egypt), as well as TDS. Also in attendance were several Reserve Component personnel from the 84th Training Command and the 244th Expeditionary Combat Aviation Brigade, Kentucky National Guardsmen, and three Navy attorneys (Photo courtesy COL Sara Root).

authority for judges to review matters prior to referral, to include requests for investigative subpoenas, pre-referral warrants or orders regarding electronic communications, and pre-referral matters referred by an appellate court. Article 46(e) permits judges to hear requests to quash or modify subpoenas or other process, and the National Defense Authorization Act 2018 permits judges to hear pre-referral matters under Article 6b(c) (appointment of individuals to assume rights for certain victims) and Article 6b(e) (victim writ of mandamus alleging violation of victim rights under Article 32 or Military Rules of Evidence 412, 513, 514 or 615).

### **A New Military Magistrate Program**

The MJA16 provides authority to service secretaries to establish a more expansive military magistrate program. Military judges detailed under Article 30a may designate military magistrates to preside over pre-referral proceedings, except those regarding warrants and orders for electronic communications. Further, with the consent of both parties, the detailed military judge may designate a military magistrate to preside over the new judge-alone special court-martial. If the Army establishes such a program, magistrates will likely be field grade officers, will require judicial training, and may be assigned other duties of

a non-judicial nature as prescribed by the service regulation.

### **New Judge-Alone Special Court-Martial**

The MJA16 creates a new special court-martial consisting of a military judge alone. A punitive discharge is not authorized, and confinement and forfeiture of pay are limited to six months or less. Any UCMJ specification other than those under Articles 120(a) or (b), 120b(a) or (b), or attempts to commit such offenses may be referred to this forum. However, the accused may object to a specification being tried at this forum on two bases: (1) where, except for specifications alleging a violation of Article 112a, the maximum confinement per specification would be greater than two years if referred to a general court-martial (GCM), and (2) if the specification alleges an offense for which sex offender notification is required under Secretary of Defense regulations.

### **Plea Agreements**

Currently called pre-trial agreements and implemented by the convening authority's Article 60 powers, the MJA16 now provides statutory authority for plea agreements through Article 53a. There will no longer be two-part agreements, both the military judge and the panel will know the sentence

limitations prior to sentencing. The most significant change in plea agreements is the authorization to contain a limit not only on a maximum punishment, but also on the minimum punishment, or both.

### **Restructured Punitive Articles**

The MJA16 reorganized many of the punitive articles, and many forms of misconduct currently listed under Article 134 have been re-designated enumerated articles or made subparagraphs of already existing enumerated articles. Further, there are four new punitive articles: Article 93a—Prohibited activities with military recruit or trainee by person in position of special trust; Article 121a—Fraudulent use of credit cards, debit cards, and other access devices; Article 123—Offenses concerning Government computers; and Article 132—Retaliation.

### **Panels and Sentencing**

To provide more consistency in the percentages required for convictions and sentences, the MJA16 fixes the number of panel members at twelve for a capital GCM, eight at a non-capital GCM, and four at a special court-martial. After challenges for cause, the military judge or his designee will assign members random numbers, and those with the lowest random numbers will be empaneled first to meet the fixed panel size. By default, the

military judge will do all sentencing, unless the accused specifically elects to have the panel adjudge the sentence. The military judge will segment confinement and fines, but panels will continue to conduct unitary sentencing. Except for capital cases, three-fourths of the members must agree on findings and the sentence.

### Streamlining Post-Trial Process

The new process requires the judge to enter into the record the statement of trial results, as well as the entry of judgment to mark the completion of the court-martial. Verbatim, written transcripts are still prepared when the sentence includes death, a dismissal or punitive discharge, or confinement for more than six months, however, the transcript is an attachment to the record of trial. Court reporters are required to certify the record of trial, and as per *Army Regulation 27-10*, military judges will review the certification of the record of trial.

### Prepare

Overall, the MJA16 changes are positive and will strengthen our military justice system. The Army's Military Justice Legislation Training Team is providing in-person training to all members of the Army Judge Advocate General's Corps. To be ready for the 1 January 2019 implementation, every Staff Judge Advocate must also conduct regular unit training. Leaders should include all sections on an installation (TDS, SVC, LAO, ADLAW, Brigade and other subordinate legal offices, part-time military magistrates, Reserve Component and National Guard personnel, and law enforcement personnel) in the training. Not exhaustive, the following is a Top Ten list to help legal offices get started on MJA16 training:

1. Check the MJA16 Milsuite site regularly, review the materials (especially Annex 2 and the Line In Line Out), ask questions, and share ideas. <https://www.milsuite.mil/book/groups/jagconnect-mja16-mtt>.
2. Train your Command Teams! You can start using the Non-Binding Disposition Guidance now.
3. Practice how counsel and law enforcement personnel will request

CY 18 MJA 16 MTT Schedule			
Locations	Dates	Visiting Team	POC
Hawaii	5-7 Sep	COL Root/LTC Shaha MSG Lyons	LTC Treb Courie III, DSJA, USARPAC O: 808-438-6017
WWCLE	17-21 Sep	Requirements TBD	SJAs and Key Leaders
Fulton Conf.	19-Sep	2 x Instructors	Maj Holtshirley O: 202-685-8384; C: 312-545-7677 Attendees – only appellate judges and clerks from military service courts
Stewart	25-27 Sep	COL Root/LTC Shaha MAJ Hynes/MSG Lyons	CPT Tyler Gattermeyer O: 912-767-8451
Meade	2-3 Oct	3 x Instructors	CPT Jesse Cornett, CoJ (301) 677-9780
Kuwait	10-11 Oct	COL Root/LTC Shaha MSG Lyons	CPT Justin Talley, FWD CoJ for 1st TSC 318-430-6090
Wiesbaden	15-17 Oct	COL Root/LTC Shaha MSG Lyons	MAJ Mike Scaletty DSN: 314-537-0625
Ktown	17-19 Oct	COL Root/LTC Shaha MSG Lyons	CW2 John Sosebee DSN 314-523-0459 john.m.sosebee.mil@mail.mil
Graf	22-24 Oct	COL Root/LTC Shaha MSG Lyons	MAJ John Caulwell, 7th ATC DSN: 314-475-9042
Italy	25-26 Oct	COL Root/LTC Shaha MSG Lyons	MSG Jamal Owens DSN: 314-637-8803
Korea	14-16 Nov	COL Root/LTC Shaha MSG Lyons	LTC James Hill DSN: 315-755-8303
Okinawa	19-20 Nov	2 x Instructors	CPT Jennifer Bromm (315) 263-7233 jennifer.m.bromm.mil@mail.mil
Camp Zama	19-20 Nov	2 x Instructors	CPT Juan Mejia 315-644-5348 juan.d.mejia.mil@mail.mil
Best Practices	3-7 Dec	Requirements TBD	Attendees – Army SJAs only
Rock Island	4-5 Dec	LTC Shaha/MSG Lyons	COL Danyele Jordan (309) 782-8010

- investigative subpoenas and warrants and orders for electronic communications. Draft examples are available on the MJA Milsuite site.
4. Develop a schedule to train on a few new changes to the punitive articles regularly.
5. Create new court-martial convening orders. Discuss with the convening authority if he/she wants to include alternates, and if so, develop draft language to implement.
6. Practice empanelment.
7. Create new plea agreement templates and rehearse with them.
8. Establish post-trial processing TTPs between judges, court reporters, post-trial personnel, the military justice section, and the leadership.
9. Update practice and trial checklists. Review the draft AR 27-10.
10. Understand how you will proceed with straddling cases for cases not referred by 31 December 2018. **TAL**

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*COL Root is the Chief of the Military Justice Legislation Training Team with the Criminal Law Division at the Office of The Judge Advocate General.*

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A U.S. Army AH-64 helicopter crew, assigned to 12th Combat Aviation Brigade, provides over watch for a Danish Leopard 2 battle tank moving into initial battle position on the live-fire range during Operation White Sword at the Oksbol Training Area, Denmark. (Photo courtesy of Rune Dyrholm, Danish Royal Army).

No. 1

# Back to Basics

## The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience

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*By Colonel Gail A. Curley and Lieutenant Colonel Paul E. Golden, Jr.*

Over the past several years, U.S. Army Europe (USAREUR) judge advocates and paralegals have participated in exercises that tested the ability of combatant commands and service component commands to respond to crisis scenarios in the U.S. European Command Area of Responsibility (EUCOM AOR). These exercises have been illuminating in many respects, but particularly demonstrative of how a counter terrorism (CT) mindset continues to dominate many aspects of relevant U.S. policies and practices and the outlook of many commanders, staff, and legal advisors charged with planning and executing operations. This has significant implications when encountered in a decisive action, high intensity conflict scenario (HIC) because many relevant policies and the concrete CT experiences most service members are laden with are based on assumptions that do not exist in a highly contested environment, such as conflict with a peer or near peer enemy in densely populated Europe. This article will discuss lessons learned in navigating through CT-centric policies and practices in a HIC environment and will highlight how senior commanders and policy makers need to recognize the problem and become more comfortable with assuming higher risk to effectively execute HIC operations.

The CT mindset is based on the operational realities of nearly two decades of counter-insurgency operations in Iraq

and Afghanistan. It assumes U.S. forces own the skies and have perfect situational awareness of activities on the ground. It also assumes commanders are able to precisely control the manner in which targets are engaged and the timing of those engagements. Moreover, it assumes it is feasible to delay engagement against high value targets until, in many cases, approval is received from the highest levels of government. It is reliant on an assumption of unlimited supply of precision munitions and delivery platforms, and on complete dominance of the electromagnetic spectrum and cyber domains. Finally, the CT mindset assumes that the area of operations is tightly controlled and that most detainees would not qualify for Enemy Prisoner of War (EPW) status.

The USAREUR legal team has found the CT mindset prevalent in three major areas: rules of engagement (RoE) and targeting guidance; munitions shortfalls and policy restrictions; and detainee policies. There are serious implications for mission accomplishment and compliance with the laws of armed conflict (LOAC) when CT-based policies and practices are applied in a decisive action offensive environment, where the primary tasks are to seize the initiative and dominate the enemy.



A U.S. Army armored element from Company A, 1st Battalion, 63rd Armor Regiment "Dragons", 2nd Armored Brigade Combat Team, 1st Infantry Division, Fort Riley, Kansas, performs a strategic convoy maneuver during Combined Resolve X at the Hohenfels Training Area, Germany, 2 May 2018. Exercise Combined Resolve is a U.S. Army Europe exercise series held twice a year in southeastern Germany and provides the Joint Modernization Command an opportunity to assess multiple concepts and capabilities (Credit: U.S. Army photo by SPC Andrew McNeil/22nd Mobile Public Affairs Detachment).

## I. ROE & Targeting Guidance.

### A. Positive Identification (PID).

1. Judge advocates have repeatedly encountered the use of restrictive positive identification requirements, applied by commanders, operators, and lawyers, based on their CT experiences in Iraq and Afghanistan, even when exercise targeting guidance had no constraints or restraints other than baseline positive identification requirements contained in the notional ROE.<sup>1</sup> This was particularly the case for targets that needed to be engaged by the Joint Force Air Component Commander (JFACC). The experience of restrictive positive identification was so ingrained in Air Force operators and lawyers that, in some cases, they refused to engage multiple targets for fear of violating the ROE or the

LOAC. This resulted in unnecessary delays in engaging lawful targets and required extensive coordination to overcome.

2. Restrictive positive identification policies assumes U.S. forces own the sky, which is not realistic in a HIC, particularly against a peer or near peer enemy that possesses credible offensive air, defensive air, space, and cyber capabilities. Positive identification is not defined in the U.S. Standing Rules of Engagement,<sup>2</sup> but does relate directly to the LOAC requirement to target only legitimate "military objectives."<sup>3</sup> Laws of armed conflict do not impose a requirement for 100 percent certainty before engaging a target nor does U.S. policy, which has generally, with some limited exceptions, clung to the "reasonable certainty" standard.<sup>4</sup> While judge advocates at USAREUR have yet to completely flush out appropriate thresholds for determining

positive identification, and whether it is even necessary beyond a baseline "reasonable certainty" standard, one thing is clear—that commanders, operators, and legal advisors need a mindset change to become more comfortable with the concept of employing force when they do not possess perfect or near perfect information about a target which would most certainly be the predominant scenario in a HIC.

### B. Noncombatant Casualty Cut-Off Values (NCV).

1. In past exercises, other CT peculiarities, like low-tolerance NCV, have also been an issue when applied in a HIC environment. The term has recently been removed from doctrine and eliminated from the collateral damage methodology process, but engagement authority is still

ted to tolerances for civilian and noncombatant casualties built into the respective ROE.<sup>5</sup> Rather than relying on LOAC principles—Military Objective, Proportionality, Distinction, and Unnecessary Suffering—there seems to be an instinctive desire to apply extremely low civilian casualty values, which impacts Collateral Damage Estimates (CDE) and results in elevating engagement authority to unworkable levels when applied to a HIC scenario.

2. During discussions with other operational law attorneys, USAREUR's judge advocates learned that many legal advisors and operators believe that low tolerances and high approval levels, rather than responsible commanders applying LOAC principles, are the only way to ensure protection against excessive civilian casualties and collateral damage. These are desirable goals, in any manner of conflict, but in a HIC, low-tolerance for civilian casualties would greatly limit a tactical and operational level commander's ability to strike legitimate military objectives, and, in effect, fight. There is, and must be, a balance. The starting point in HIC, particularly in urban areas, cannot be anchored in the CT experience of the last several years, but rather basic LOAC and the principle of distinction requiring U.S. forces to balance the military advantage and likely collateral effects and to minimize civilian casualties to the greatest extent possible. Over the span of conflict, authorities and approvals adjust, but commanders and operators need the flexibility to act decisively, within LOAC parameters, as conditions require.

3. Exceedingly low tolerances for civilian casualties are a feature of CT operations and stem from the CT-mindset—i.e. that the U.S. owns the skies and can engage targets on its own timeline using unlimited precision munitions—but the fact is it remains a critical factor in the CDE methodology and determining the appropriate engagement authority.<sup>6</sup> Aside from working to get doctrine changed, USAREUR's judge advocates found that asking for a high civilian casualty estimate cut-off value, and delegation for exceeding those limits to the lowest possible level, was adequate short-term mitigation. The bottom line, however, is that commanders, operators, and legal advisors have to be cognizant of the fact



From left, U.S. Army PFC Jerry Cleveland and SPC Brett Mitchell, both from Alpha Company, 1st Battalion, 4th Infantry International Security Assistance Force (ISAF), fire a 120mm mortar during a combat operation in the Da'udzay Valley in the Zabol province of Afghanistan (Credit: U.S. Army photo by Sgt. 1st Class Jim Downen).

that in a HIC, the consistent elevation of engagement authority based on casualty estimates could have catastrophic consequences for the U.S. formations involved, particularly at the start of Phase III offensive operations.

## II. Munitions Shortfalls and Policy Restrictions.

In a HIC, large numbers of artillery systems will likely be employed and there will be a need to extensively use cluster munitions (CMs) in the engagement of large



U.S. Army Soldiers, assigned to 11th Armored Cavalry Regiment-Blackhorse, defend their position while firing a simulated missile at a 1st Armored Brigade Combat Team, 1st Infantry Division, M1A1 Abrams Main Battle Tank, during a training rotation at the National Training Center/Fort Irwin, Calif. (Credit: PVT Austin Anyzeski).

formations. Further, in a clash of large ground armies, the use of mines will be needed to counter enemy movements. Most European nations are signatories to the *Convention on Cluster Munitions* and the *Ottawa Convention* on anti-personnel mines, and the United States has, by policy, also regulated employment of CMs and mines in ways that appear completely detached from the likely realities of conflict with a peer or near peer enemy in Europe.<sup>7</sup>

#### **A. Cluster Munitions.**

Given the immense role that artillery has played in the conflict in the Donbas region of Ukraine, it is very likely in a HIC scenario that U.S. land forces would be embroiled in a very tough artillery fight, and will need to use CMs that do not comply with the 2017 Department of Defense (DoD) Policy on Cluster Munitions<sup>8</sup>—which requires Combatant Commander approval for employment

of all cluster munitions that exceed a one percent dud rate, and for all future procurements of CMs in the U.S. arsenal to have no more than a one percent dud rate or “that possess advanced features to minimize the risks posed by unexploded submunitions.”<sup>9</sup> Given the likely intensity of a conventional fight, and the volume of CMs that would be needed in a HIC, policy regarding dud rates or self-destruction features should be flexible until sufficient stockpiles of compliant CMs are procured by DoD. Additionally, release authority for non-compliant CMs with a greater than one percent dud rate should be delegated to the lowest possible levels so the land component commander has the ready ability to effectively prosecute targets.

#### **B. Mines.**

The United States has also adopted stringent rules for the employment of anti-personnel and persistent mines, in general.<sup>10</sup>

In a ground fight with massed armor, anti-tank mines can be decisive area denial, counter-mobility tools, and effective in channelizing enemy forces. As with the PID practices discussed above, judge advocates have experienced situations where some commanders, aircrews, and legal advisors were reluctant to employ mines for fear of violating LOAC. In fact, in one scenario, the hesitation remained even after USAREUR operational law attorneys provided a favorable legal review for the proposed emplacements. Moreover, there seems to be consistent confusion and a general lack of knowledge about U.S. mine capabilities and their various delivery mechanisms. Many have assumed it is impossible to deliver anti-tank mines via a Volcano or Gator system without also delivering anti-personnel mines. The Army, however, is currently retrofitting Volcanos and Gators to deliver only “smart” (i.e. self-deactivating) anti-tank mines when

circumstances require.<sup>11</sup> As with PID, the lesson learned is that commanders, staff, operators, and legal advisors will need to change their mindset when it comes to employment of mines if the United States engages in a HIC ground fight. They will also need to re-familiarize themselves with the capabilities of mine delivery systems.

### III. Detainee Policies.

During a HIC in Europe, United States and Allied forces would likely capture large numbers of EPW. In accordance with the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), the U.S. and Allies would be required to protect and safeguard these EPWs by expeditiously evacuating them from the battlefield.<sup>12</sup> While commanders, staff, operators and legal advisors have been clear on the rules and obligations in GPW, they have been hampered by current DoD detention policies that remain heavily skewed toward a CT environment. The policies, found in DoD Directive 2310.01E, if followed to the letter, could undermine U.S. obligations under GPW. For example, DoD policy restricts transfer of detainees over international borders without prior coordination with the Office of the Undersecretary of Defense for Policy—a potentially time-consuming endeavor and unworkable in an HIC environment where detainees could easily number in the thousands. Likewise, U.S. forces could be hampered in the transfer of detainees to or from an Allied force, Allied personnel, or even another United States agency.<sup>13</sup> In a HIC scenario in Europe, it will likely be necessary to move EPWs expeditiously across international boundaries in order to ensure their safety. Likewise, U.S. forces, particularly those fighting in combined NATO formations, will need the ready flexibility to accept EPWs from Allied forces.

While it is possible, and quite likely, that DoD would waive the most restrictive portions of the detention policies in a HIC scenario, the Joint Force Land Component Command legal team would have to actively pursue those exceptions to policy. In fact, the term “detainee,” which the DoD policy uses to encompass all captured persons, evoked apprehension on the part of the United States’s notional Allies

during exercises. After initially referring to captured enemy soldiers as “detainees,” USAREUR judge advocates soon decided to refer to them as EPWs instead, because it allayed Allied concerns about past U.S. treatment of detainees. Since U.S. policy is to initially afford EPW treatment to all captured persons, judge advocates also found it to be a more accurate description of the initial status of captured personnel. The use of the term EPW also reassured allies that the United States would not seek to impose the death penalty, which is an issue of great concern to European Allies because of their national constitutions and the right to life provision of Article 2 of the *European Convention on Human Rights*.<sup>14</sup> For the legal advisor, the clash of policy and law presents a quandary of sorts, settled, hopefully, in favor of international law. It may not be intuitive to policy-makers, but U.S. obligations under law would, in effect, render some of these DoD policy restrictions meaningless.

As United States forces continue to engage in operations along the spectrum of conflict, it is important to recognize the critical value of exercises to legal practitioners, lessons learned, and the CT stain impacting many U.S. and DoD policies, including doctrine, since 2001. For an HIC, it is imperative for policy makers and commanders to delegate more authorities to the lowest possible level and be comfortable with taking decisive action without perfect knowledge of the enemy’s activities. We are living in times that present great opportunity for legal leadership. Judge advocates obviously play an important role in helping commanders and policy makers—by identifying unrealistic policy expectations and by setting conditions for change where change is required.

Staff judge advocates and senior judge advocates also have a great responsibility in ensuring legal advisors have the tools and training they need to succeed in less regulated environments. The CT experience, and the heavy regulation of most activities, creates a certain intuitive comfort level for legal advisors—i.e. there is an answer for every problem and plenty of levels of review. In a twenty-first century HIC environment against a peer or near peer competitor, where the speed of combat and

levels of violence will likely exceed anything since World War II, legal advisors will need to be comfortable in the void. So, for all leaders in the Judge Advocate General’s Corps, some reflection is in order. **TAL**

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*COL Curley and LTC Golden are currently assigned as the Judge Advocate and Deputy Judge Advocate, respectively, at Headquarters, U.S. Army Europe, in Wiesbaden, Germany.*

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### Notes

1. See generally: [www.pbs.org/wgbh/pages/frontline/haditha/themes/roe.html](http://www.pbs.org/wgbh/pages/frontline/haditha/themes/roe.html).
2. See generally CHAIRMAN, JOINT CHIEFS OF STAFF, INST. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (18 June 2008).
3. See generally CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01C, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY (8 April 2018) [hereinafter CJCSI 3160.01C].
4. See <https://www.justsecurity.org/52343/reasonable-certainty-vs-near-certainty-military-targeting-what-law-requires/>.
5. CJCSI 3160.01C, *supra* note 3, Appendices E and F to Enclosure E.
6. *Id.*
7. Memorandum from Deputy Sec’y of Defense to Secretaries for the Mil. Departments et al., subject: DoD POLICY ON CLUSTER MUNITIONS, (30 Nov. 2017) [hereinafter DoD POLICY ON CLUSTER MUNITIONS]; G.A. Res. 52/38, (Jan. 8, 1998); PRESIDENTIAL POLICY DIRECTIVE 37, subject: U.S. LANDMINE POLICY (27 JAN 2016) [hereinafter PPD 37].
8. See <https://prodev2go.files.wordpress.com/2015/10/rus-ukr-lessons-draft.pdf>.
9. PPD 37, *supra* note 7, at 2.
10. *Id.*
11. <https://www.defensenews.com/land/2016/12/21/us-army-dusting-off-volcano-mine-dispensers/>.
12. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
13. U.S. DEP’T OF DEF., DIR. 2310.01E, DoD DETAINEE PROGRAM (19 Aug. 2014, Incorporating Change 1, 24 May 2017).
14. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by protocols Nos. 11 and 14.



U.S. Army judge advocate CPT Catharine Parnell, right, flies to Tarin Kowt, Afghanistan, from Kandahar Airfield in 2013 as part of a joint U.S. Australian investigative team looking into a civilian casualty incident. She was deployed as an administrative law attorney with CJTF-3, working for the 31D Headquarters under now retired COL Randy Bagwell and LTC Nancy Alouise (Photo courtesy of CPT Catharine Parnell)

## No. 2

# A Day in the Life

What follows are two stories of life as a deployed judge advocate—told fifty years and nearly 3,000 miles apart

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*By Major Eddie Gonzalez, Major Ernie Reguly, Captain Jack Gibson, and Captain Kyle Hoffmann*

### Afghanistan 2018

In today's combat environment, it is rare that a fellow military member would wonder about the need for a lawyer supporting a combat mission. Our intent is to show how, during a single twenty-four-hour period, military lawyers have become integral with modern combat deployments.

We constitute just four of the fifty-eight lawyers—U.S. and Coalition—currently serving in the Combined Joint Operations Area—Afghanistan, or CJOA-A. All support, at some level, both the NATO Resolute Support (RS) Mission and the U.S. Operation Freedom's Sentinel (OFS). While we each deployed from different home units, we all are assigned to United States Forces-Afghanistan (USFOR-A). Our Staff Judge Advocate (SJA) is COL Eric Young, who advises the four-star general USFOR-A Commander. He is also dual-hatted as the NATO Senior Legal Advisor (LEGAD), advising the NATO RS Commander.

Between the four of us, we represent the Bars of California, Georgia, Texas, and Virginia, as well as several federal courts. We received our law training at Loyola Law School in Los Angeles, University of Georgia, Tulane, and Washington and Lee. Three of us were directly commissioned into the JAG Corps, two active duty and one U.S. Army Reserves, with the fourth receiving his commission from West Point. Two of us have prior military

service: one serving for fourteen years in the U.S. Air Force and Air National Guard as a C-130/HC-130P crewmember, the other serving for three and a half years as a Medical Service Corps Officer. Three of us are married with a combined total of four children. Three of us are on our first deployment as judge advocates, and for two of us this is our first combat deployment.

While all of us perform duties outside our assigned portfolios, MAJ Eddie Gonzalez is assigned as Chief of Intelligence Law in the USFOR-A/RS legal office in Kabul; CPT Kyle Hoffmann is an Operational Law Attorney with the Special Operations Joint Task Force—Afghanistan (SOJTF-A), based out of Bagram Airfield; MAJ Ernie Reguly is the Command Judge Advocate for the Train, Advise, and Assist Command—South (TAAC-S) at Kandahar Airfield; and CPT Jack Gibson is an Operational Law Attorney in the USFOR-A/RS legal office at Bagram Airfield.

As combat deployments go, there are no off days. However, Mondays somehow still carry the same feel of the start of a new week as they do stateside. Interestingly, the day we chose for this article ultimately had several issues and incidents that crossed the path of more than one of us, as readers will discover. This was our “day in the life” in Afghanistan—Monday, 30 April 2018.



A Legal Assistance team poses for a photo in Kandahar, Afghanistan (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

### Chief of Intelligence Law

MAJ Eddie Gonzalez's day began like most others by attending the daily morning intelligence brief to the USFOR-A J2/NATO RS Deputy Chief of Staff—Intelligence (a Rear Admiral, U.S. Navy). MAJ Gonzalez does not have a speaking role during this brief, he merely attends for situational awareness or to respond to any legal questions based on updates provided. The first half of this morning's update progressed as normal, but half way through, a loud boom silenced the room and then the silence was broken by a blaring alarm notifying the USFOR-A / NATO RS Headquarters (RS HQ) that the camp was immediately locked down. The lockdown resulted from a personnel borne improvised explosive device (PBIED) detonation approximately 100 meters from the camp's outer fence. The assessed target was an Afghan National Defense Service checkpoint—one of the many checkpoints charged with keeping Afghans and Coalition Forces, like those at RS HQ, within the Kabul green zone safe.

The incident triggered MAJ Gonzalez to depart the intelligence brief early and head to the RS HQ Strategic Operations Center (SOC). Along with his Intelligence Law portfolio, in the latter half of his

yearlong deployment, MAJ Gonzalez also assumed Operational Law portfolio duties. One of those duties was to immediately seek information on significant incidents like that morning's explosion and advise the SOC Director regarding force protection matters, as well as keeping the operational law attorneys at Bagram informed. His presence in the SOC was also to be available should the incident involve U.S. or Coalition Forces, whether as a direct result of the attack or in a base defense response. MAJ Gonzalez quickly learned that this incident was fully in the hands of Afghan authorities, so he would simply be in an observer capacity. However, within an hour of the first PBIED, a second PBIED was detonated within a few hundred yards from the first. This second explosion was further from RS HQ, but tragically it was in the middle of dozens of local journalist who had gathered to report on the first suicide attack.

While in the SOC, MAJ Gonzalez received word of a second significant incident in Afghanistan. A U.S. Soldier with the SOJTF-A had just been killed during a combat operation and another was severely wounded. MAJ Gonzalez reported the information to the SJA and coordinated with the operational law attorneys

at Bagram. From his vantage at RS HQ, he was ultimately limited to supporting the subordinate legal staff at SOJTF-A as they were involved supporting this engagement and making sure the higher headquarters legal office at U.S. Central Command (USCENTCOM) was aware.

By a little after 1000, just three hours into his morning, MAJ Gonzalez made his way to his desk for the first time that day. He had just a few minutes to check emails before attending the weekly SVTC involving the USFOR-A OSJA / RS LEGAD office and all of the subordinate legal offices in the CJOA-A. In all, fifteen different offices join in the meeting, with multiple attorneys and paralegals attending at each location. The SJA, COL Young, chairs the meeting and all outstations provide a weekly update on anything relevant for the group. It is an opportunity for everyone to get at least a brief weekly understanding of legal issues impacting the various commands across Afghanistan.

After the SVTC ended at 1100, MAJ Gonzalez headed to the Combined Joint Intelligence Operations Center (CJIOC) to follow up with a request from a Signals Intelligence (SIGINT) analyst who wanted advice on how to best present, from a legal perspective, several products that support target validation nomination packets. MAJ Gonzalez is one of the attorneys that advises the USFOR-A Target Validation Authority (TVA). The TVA reviews proposed targets for possible future kinetic engagement. The judge advocate's role on the board is to advise the validation authority on whether the proposed target complies with the Laws of Armed Conflict (LOAC) and Rules of Engagement (ROE). That these CJIOC analysts reached out for legal support in advance was a welcome opportunity for MAJ Gonzalez to help shape targeting products on which he would eventually advise the TVA. The conversation was a fruitful one, and MAJ Gonzalez left hopeful that his job was made a little easier by these forward leaning intelligence analysts.

On his way out of the CJIOC, MAJ Gonzalez was stopped by a Joint Targeting Cell analyst, who wanted to provide him with a pre-look at one of the target packets that would be presented at that day's TVB. MAJ Gonzalez noticed a discrepancy in

some of the imaging supporting the nomination. Several Geospatial Intelligence (GEOINT) analysts were brought into the discussion, and through a collaborative effort, the cause was identified and resolved. Again, the efforts of the analysts to reach out early for legal support saved them from having that discussion in front of the two general officers during the TVB.

After lunch, MAJ Gonzalez called the legal office at Bagram to speak to Capt Mitch Altman. Capt Altman is a Marine Corps judge advocate and the USFOR-A Chief of Operational Law. MAJ Gonzalez and Capt Altman share the TVB advising duties, so MAJ Gonzalez wanted to make sure Capt Altman was informed of the two separate targeting conversations MAJ Gonzalez had prior to lunch with the intelligence analysts. They also discussed the two Kabul city PBIED attacks from that morning and the U.S. Soldier who had been killed in action. Although neither the Bagram nor Kabul legal offices had a direct role in responding to the attacks, keeping each other informed helps to provide accurate and timely advice should a response become necessary.

Following the conversation with Capt Altman, MAJ Gonzalez had a short window before a scheduled brief on the RS and OFS ROE to the Personal Security Detachment for the incoming 9th Air and Space Expeditionary Task Force—Afghanistan (9th AETF-A). A more detailed ROE brief would follow shortly after he assumes command. During the time before he provided this ROE briefing, MAJ Gonzalez reviewed a proposed Military Deception (MILDEC) Concept of Operations (CONOP) for the USFOR-A J-39. As there was not enough time to draft a written review, MAJ Gonzalez gave it an initial read and was prepared to contact the CONOP's drafting action officer to get clarification or suggest edits. Luckily, the CONOP was relatively straightforward and no phone call was necessary.

MAJ Gonzalez then departed the OSJA and walked to the 9th AETF-A area to provide the requested ROE brief. As he had provided similar briefings for over ten months, this ROE brief went relatively smoothly. The recipients were attentive and asked plenty of thoughtful questions—about all you can ask for an audience required

to attend and receive these mandatory briefings. Once complete, MAJ Gonzalez returned to his office at 1500 to make final preparations for the TVB he was about to attend. He reviewed the proposed target packets that he had earlier discussed with the JIOC intelligence analysts and Capt Altman one last time, then he made his way to the TVB. During the TVB, the attorney on the board will focus on whether the proposed targets are valid military objectives under LOAC and ROE. Thanks in part to the changes the JIOC intelligence analysts made earlier in the day, the TVB went without incident and all proposed targets were approved. The TVB lasted about an hour, then MAJ Gonzalez met up with several other members of the OSJA for dinner at the RS dining facility.

After dinner, MAJ Gonzalez called the USCENTCOM Chief of Intelligence Law. USCENTCOM is USFOR-A's higher headquarters and is nine and a half hours behind Kabul, so most calls to counterparts in the U.S. occur in the evening. This call was driven by a discussion with CPT Hoffmann at SOJTF-A. CPT Hoffmann was dealing with an information sharing issue where guidance from CENTCOM was conflicting with guidance he was receiving internally at SOJTF-A. Because of the subject matter, MAJ Gonzalez offered to call his counterpart at USCENTCOM to clear up the discrepancy. A brief discussion on authorities gave MAJ Gonzalez the information he believed CPT Hoffmann was seeking; he relayed the information back to the SOJTF-A legal office and crossed another task off his list.

MAJ Gonzalez's day ended with reviewing several documents that had arrived on his desk early in the day. Because of the operational tempo, routine tasks like reviewing drafts of U.S. or NATO RS Standard Operating Procedures, and drafting legal reviews of investigations or MILDEC products, are usually reserved for the late evenings when phone calls and meetings are fewer and far between. After completing enough tasks to feel that tomorrow's leftovers would be manageable, MAJ Gonzalez was able to get on to his favorite part of his day, video calling home to his wife Megan and watching his two boys, Joey and Luke, play for a little while without a care in the world.

## **Special Operations Operational Law Attorney**

At SOJTF-A, the Joint Operations Center (JOC) operates twenty-four hours per day, seven days per week—so the operational law judge advocates work in twelve-hour shifts. As one of nine judge advocates serving in a special operations legal advisor billet in Afghanistan, CPT Kyle Hoffmann takes the “day” shift, covering operational law requirements from noon until midnight. However, by 1030 on a daily basis SOJTF-A forces are usually kinetic somewhere in Afghanistan, so CPT Hoffmann arrives early to review the previous night's operations, the upcoming day's operational priorities, and get up to speed on what has occurred in the few hours since he last left the JOC. Today, since his last shift ended, he learns that one U.S. Soldier supporting the SOJTF-A was killed and one severely wounded during a combat operation with Afghan special operations forces, and two ISIS-K insurgents wearing suicide vests had detonated themselves, killing scores of civilians.

All U.S. forces in Afghanistan are authorized to defend themselves and their unit, so judge advocates always ensure they understand when and how U.S. forces can use indirect or air delivered strikes against enemy forces located in built-up or populated areas. In this case, the U.S. and Afghan forces were taking effective small arms fire from Taliban insurgents located in adjacent buildings, and there were no assessed civilians anywhere near the structure. Both CPT Hoffmann and the subordinate Task Force judge advocate believed the air strikes were appropriate, advised their commands as such, and the buildings were destroyed.

During a break for a brief lunch, CPT Hoffmann received word that the Taliban exploded a vehicle-borne improvised explosive device (VBIED) outside of Kandahar airfield in TAAC-S's area of operations. Later reporting indicated eleven Afghan children were killed in that attack.

After lunch, CPT Hoffmann conducted a positive hand-off with the “night” operational law attorney and officially took over the “Op Law” seat in the JOC. The JOC is comprised of four rows of tiered seating facing CineMassive screens displaying information from across the country. The



Major Eddie Gonzalez



Captain Jack Gibson



Major Ernie Reguly



Captain Kyle Hoffmann

operational law judge advocate has a permanent desk in the JOC, seated next to the intelligence officer for current operations, the chief of operations, and the fires officer. This team, along with the Deputy Director for Operations and the Director for Current Operations, oversees the day-to-day activities of Special Operations Forces (SOF) across Afghanistan.

Following the handoff, CPT Hoffmann met for an hour with the Director of Psychological Operations (PSYOP) to discuss whether their upcoming operations were within the current authorities. These discussions are steeped in military history, as the psychological operations officer tries to use historic precedent to justify his plans.

Once the PSYOP director left, a warrant officer knocked on the door requesting

a power of attorney so his wife in Florida could get their son a military dependent identification card. In between his operational duties, CPT Hoffmann wrote the power of attorney and notarized it for the warrant officer.

By early afternoon, a CONOP arrives in CPT Hoffmann's inbox for legal review. Each time a SOF unit conducts an operation, a judge advocate reviews the intelligence to ensure it is current, and reviews the scheme of maneuver to ensure that Coalition Forces (CF) are aware of potential protected objects and places during the operation and plan to act appropriately, and that the CF are authorized to conduct this particular operation. This CONOP involved a helicopter assault force clearing a known ISIS-K stronghold, with Afghan military forces leading the effort.

After the CONOP review, there are two lingering emails requiring immediate attention. The first is a request by the SOJTF-A Director of Future Operations asking CPT Hoffmann to review a Fragmentary Order prior to the CG signing it. This is more of an editing assignment than a legal one, but the staff trusts their judge advocates, so these quick tasks are not uncommon.

The second is an email from a Coalition Special Forces commander asking whether an operation he would like to conduct is allowed by his country's national caveats. Special Operations Joint Task Force-Afghanistan is part of a "dual-hatted" command: it also serves as the NATO Special Operations Component Command—Afghanistan (NSOCC-A). As such, the judge advocates must be well-versed in both U.S. and NATO authorities. Each of the RS troop contributing countries release their respective "national caveats" to the overall RS mission (a list of what they are willing and unwilling to do). Each time an NSOCC-A unit plans an operation, the plan must be considered against the respective national caveats. Although the particular Coalition country of which the Coalition SOF commander was inquiring has a caveat related to this issue, they are still authorized to conduct the operation and CPT Hoffmann advises as such.

By mid-afternoon a kinetic strike request arrives on CPT Hoffmann's desk. CPT Hoffmann quickly reviews the request, there are no LOAC or ROE concerns, so he forwards his review to the commander.

At this point in the late afternoon, the U.S. Soldier who had been killed in action that morning and the wounded service member, were medically evacuated from the firefight. To do so, the supporting U.S. aircraft and ground force commander wanted to deny the enemy the ability to fire on the approaching MEDEVAC helicopter by firing at the ground near the enemy's location, known as a terrain denial strike, as they were still present in the village. Due to the highly restrictive ROE and concerns for civilian casualties and damage to civilian property, such strikes require judge advocate review. Quickly assessing the tactical situation, CPT Hoffmann reviewed the plan and found it legally sufficient.

Since there are two U.S. Army attorneys billeted as operational law attorneys for NSOCC-A/SOJTF-A, they split other judge advocate responsibilities—CPT Hoffmann is also the Chief of Administrative Law, and his counterpart is the Chief of Military Justice. Once per week, CPT Hoffmann provides an update on administrative investigations to the USFOR-A higher headquarters. Thankfully, there was recent progress on a lingering investigation into a Coalition Force member's death, and two other investigations were approved by the SOJTF-A commander, so CPT Hoffmann submits those updates to the USFOR-A administrative law attorneys.

Nearing dinner time, CPT Hoffmann—who attended a class to become a military mail handler—retrieves the SOJTF-A SJA's mail from the mailroom. It is, without doubt, his most important duty.

The NSOCC-A/SOJTF-A judge advocates—the U.S. Army SJA, the on-shift U.S. Army operational law attorney, and the U.S. Air Force fiscal law attorney—eat dinner together every night at 1800. Eating a family-style dinner with the SJA and the two on-shift captains provides a semblance of normalcy.

Following dinner, the Special Forces team that suffered the U.S. Soldier killed in action is in the process of being exfiltrated from the objective area when one of the subordinate special operations units calls to discuss whether a structure from which U.S. helicopters had received effective fire earlier in the morning could be destroyed. In the end, the Special Forces team is able to be successfully recovered from the objective location without the Afghan building being destroyed.

CPT Hoffmann then discussed an ongoing issue with the Chief of Intelligence Law at USFOR-A, MAJ Eddie Gonzalez, to determine whether one of the SOJTF-A's units could share a PSYOP product with an Intelligence Community organization. MAJ Gonzalez had previously discussed the question with USCENTCOM, which allowed both he and CPT Hoffmann to collectively determine it was legal to do so. CPT Hoffmann passed this information on to the requesting intelligence officer.

As CPT Hoffmann also serves as the SOJTF-A Chief of Administrative Law, he

is then required to draft an appointment memorandum for the required investigation into today's combat death. This is the sixth death investigation appointment memorandum that he has written in his ten months in Afghanistan. He completes it, and sends it to the SOJTF-A SJA for his review.

Once per month, the operational law attorneys at NSOCC-A/SOJTF-A conduct an informational brief to the SOJTF-A Joint Operations Center (JOC) personnel on the current U.S. and NATO operational authorities. This is intended to ensure everyone who works on operations understands and is current on the authorities and ROE. Today's briefing covers the RS ROE and NATO self-defense.

At 2100, the rest of the "day" shift personnel change over with the "night" shift, and there are few legal requirements as SOJTF-A waits for night operations to begin. CPT Hoffmann passes the next few hours researching and writing a "white paper" on the difference between covert action and traditional military activities to aid the command with operational decision-making.

At midnight, CPT Hoffmann's day ends as the night shift judge advocate arrives to sit in the JOC until the morning, until CPT Hoffmann's return.

### **Command Judge Advocate**

The morning started for MAJ Reguly at around 0700 with the best part of every day, a video call to his wife Cecilia and children, Isabel and Anthony, to talk about how their day had gone and to say goodnight before they went to bed. At 0830, he walked to the TAAC-S compound and started reviewing emails that had come in overnight. The morning's emails included one from his regular National Guard office at the division regarding a judge advocate's annual evaluation. As an Active Guard and Reserve (AGR) member in the California Army National Guard, MAJ Reguly is the active duty Command Judge Advocate (CJA) for his installation, and the single full-time judge advocate at the division. Active Guard and Reserves are part of the organizational personnel structure that operate National Guard units between weekend drills. In Afghanistan, like at home, MAJ Reguly's

function as the CJA is to serve as the legal advisor to the division commander. However, some of the subjects that he advises on in Afghanistan are quite different.

After addressing the Soldier's evaluation issue, MAJ Reguly moved to addressing the rest of his emails, as well as reviewing the TAAC-S situation report (SITREP) from the night prior and the daily Combined Joint Operations Center (CJOC) update. Once finished, he reviewed an updated Information Operations (IO) CONOP before it was time for the weekly LEGAD SVTC at 1030, which is attended by all U.S. and Coalition LEGAD offices throughout Afghanistan. Following the SVTC, MAJ Reguly's office held a quick staff meeting since it is one of the few times during the week that the five attorneys and one paralegal that make up the TAAC-S legal office are together at the same time. Three of the attorneys work in different locations on TAAC-S. The OPLAW attorney, CPT Frank Bittar, works in the CJOC, and the Police Advising Team (PAT) and Military Advising Team (MAT) advisors, CPTs Donato Clay and Julian Kisner respectively, work in the main headquarters building with their respective advising teams.

At 1120, following the office staff meeting, MAJ Reguly contacted the Commanding General's (CG) aide to confirm time on his calendar to brief the findings of an Army Regulation (AR) 15-6 investigation involving officer misconduct and the appointment of an investigating officer in another matter. After the phone call, he went to the CJ39 to discuss questions regarding the IO CONOP he had reviewed earlier. With the answers in hand, MAJ Reguly went back to his office, completed the CONOP legal review and sent it to the CJ39. While drafting the legal review, MAJ John Olson, the 2nd BCT, 4th Infantry Division judge advocate returned to the office from briefing some newly arrived Soldiers at the Joint Defense Operating Center (JDOC). At the JDOC, MAJ Olson had been advised of a Vehicle Born Improvised Explosive Device (VBIED) attack that had just struck one of TAAC-S's Ground Defense Area's (GDA) patrols. The VBIED driver had rammed the GDA patrol vehicles before detonating. The attack injured several



Chief Warrent Officer Joshua Kinnee, brigade safety officer and AH-64 pilot for Task Force Iron Eagle 4th Combat Aviation Brigade, 4th Infantry Division, shows judge advocate and paralegal servicemembers a UH60 Apache helicopter during a professional development class at Bagram Airfield, Afghanistan (Credit: SFC Nathan Hutchison).

Romanian soldiers, who are part of the NATO RS Coalition, killed eleven civilians and injured several others, most of whom were children. Acts like that definitely have an effect on the day, and as a parent it was difficult for MAJ Reguly not to stop and wonder what the families of those children must be going through.

Around noon, MAJ Reguly had lunch at the DFAC with a couple members of his office, a short but welcomed break from the bad news that morning. After lunch, he began preparing for a 1530 meeting with the CG, to discuss the officer misconduct investigation and separately, the appointment of an investigating officer into a potential LOAC violation.

Before his meeting with the CG, MAJ Reguly had to draft the appointment order for the investigating officer in the investigation of the potential LOAC violation. Once he finished the appointment order, MAJ Reguly had time to review the supplemental information provided by an individual who had filed a claim against the U.S. Government relating to the use of land in Afghanistan by U.S. and Coalition forces, land which he claimed to own. Much of the approximately 200 pages of information that had been provided by the claimant had previously been received, and none of the information overcame the fact that the land in question was provided by

the Government of the Islamic Republic of Afghanistan (GIROA) for use by the U.S. Government and Coalition forces. Further, any claim by the claimant would have to be presented to GIROA for resolution. With nothing new or relevant to consider, MAJ Reguly would be able to draft a Notice of Final Action after returning from his meeting with the CG.

At the meeting with the CG, MAJ Reguly first briefed on the officer misconduct report, not a quick task as the report was about two or three inches thick. MAJ Reguly discussed his recommendations with the CG, which he took under consideration pending his review of the investigation report. Next was the appointment order for the potential LOAC violation. The CG provided some additional guidance on the matter, which would require a revised appointment order. After the meeting, MAJ Reguly returned to the office to revise the appointment order and draft the notice of final action for the land claim.

On Monday afternoons, one of the busiest Soldiers on TAAC-S is the legal office's paralegal, SSG Andrew Marshall, who is the Soldier to see if you need a power of attorney or a document notarized. TAAC-S seems to have a never ending supply of personnel in need of those services, so the office can get busy on Monday afternoons. Unfortunately, so does MAJ Reguly's

telephone because someone listed his direct line all throughout Kandahar Airfield (KAF) as the number to call if you need these services. So between the phone calls and the constant flow of Soldiers, Sailors, Airmen, and contractors through the legal office, it takes a little extra time to get things done on a Monday afternoon.

Finally, it was time to go to the DFAC for dinner. After dinner, MAJ Reguly and MAJ Olson discussed a number of issues relating to the potential LOAC violation and the information collected regarding the incident. The unit involved had already returned to the United States so they contacted the unit's Brigade Judge Advocate, MAJ Olson's predecessor, to discuss the matter. After the long call to the States ended, it was time for MAJ Reguly to complete some administrative work, which included updating the weekly investigations tracker, compiling the end of month legal report that gets sent up to the RS HQ LEGAD/OSJA, and clearing out the last batch of emails that had come in. Like most U.S. personnel in Afghanistan, TAAC-S uses three different email domains and three different telephone domains to communicate, so there is a never ending supply of information to manage and things to do that fill in the gaps of each day. By about 2250, MAJ Reguly was at that point where he could start something new or go to the gym. The gym won out and then he called it a night.

### **USFOR-A / NATO RS Operational Law Attorney**

At 0728, the USFOR-A/RS Combined Joint Operations Center (CJOC) Director contacted the USFOR-A operational law section with a request for legal advice about a tactical situation involving U.S. Forces. CPT Gibson, along with Capt Mitch Altman (JA, USMC) discussed the details of the initial report. A group of SOJTF-A Soldiers, while conducting a pre-approved partnered mission with Afghan Special Security Forces, came into contact with a group of Taliban fighters in eastern Afghanistan. The initial report indicated that the partnered forces might be receiving fire from a mosque, creating a potential tactical dilemma between the right to exercise self-defense and the protected status mosques receive under the ROE and LOAC.

While SOJTF-A retained operational control of the U.S. Forces on the ground and all supporting combat enablers, the USFOR-A/RS CJOC is responsible for overseeing all current operations in Afghanistan and facilitating the reallocation of assets when necessary. As such, the CJOC Director needed CPT Gibson to remain on standby to advise on the application of the ROE and LOAC in the event SOJTF-A requested assistance. After finishing his discussion with the CJOC Director, CPT Gibson manned his permanent desk in the CJOC.

CPT Gibson left the CJOC later that morning to meet with MAJ Davis, the Operations Officer for Task Force 3 Geronimo (TF 3G). TF 3G's mission is to provide force protection for Bagram Airfield (BAF), the largest military installation in Afghanistan. In the four days since the Taliban announced its annual spring offensive on 25 April 2018, BAF received indirect fire (IDF) on three separate occasions. MAJ Davis wanted to discuss TF 3G's available options to mitigate the IDF threat. They considered both non-lethal solutions, such as meeting with Afghan district or provincial level civic leaders and asking our Afghan military partners to conduct more frequent patrols in areas associated with IDF launch areas, and more lethal alternatives, e.g. the employment of terrain denial fires against historic rocket and mortar point of origin sites. Based on the applicable authorities, CPT Gibson advised MAJ Davis on which commanders could exercise approval authority for the potential solutions, and they also discussed the second and third order effects that each course of action might carry with it.

Immediately upon returning to the CJOC, CPT Gibson learned of a separate ongoing and fatal situation. Two, possibly linked, IED attacks had just taken place in Kabul, and the CJOC had already received reports of several civilian casualties. One of the attacks occurred just a few hundred meters away from the NATO Headquarters in Kabul (HQ RS). The CJOC was actively coordinating assets to respond to the situation, if necessary. The CJOC Director again directed CPT Gibson to remain on standby to provide operational legal advice should the circumstances evolve to require CJOC action.

During the lunch hour, CPT Gibson delivered a training presentation to approximately 100 Soldiers from 1st Stryker Brigade Combat Team, 4th Infantry Division (1/4ID), who recently arrived in Afghanistan, as part of the Joint Reception, Staging, Onward Movement, and Integration (JRSOI) training program. Over the course of a six to eight week period, which began in early April and will run through May, over 2,000 Soldiers from 1/4ID will deploy to Afghanistan. Each of these Soldiers will participate in mandatory JRSOI training to prepare them for operations in Afghanistan. The USFOR-A/RS operational law team conducts a class as a part of the JRSOI curriculum. The class covers general LOAC principles, both the NATO and U.S. specific ROE and authorities governing operations in Afghanistan, the application of and limits on self-defense, and vignettes highlighting lessons learned from recent engagements in theater. The classes are designed to be interactive in nature and provide all Soldiers an opportunity to alleviate any confusion about authorities prior to conducting any operations.

After concluding the training session, CPT Gibson returned to the CJOC to begin preparing for the daily Concept of Operations (CONOP) meeting that afternoon at 1600. The meeting, attended by a representative from every staff section, provides a forum for all subordinate commands and task forces to present their planned missions, often referred to as CONOPs, for approval. The headquarters for both RS and USFOR-A have published CONOP approval matrices, prescribing the CONOP approval authorities based on the level of risk associated with the CONOP. For every CONOP being presented, the operational law team provides a written legal review in order to confirm the correct approval authority, identify potential LOAC, ROE, or authorities concerns, and determine whether the CONOP is supportable under the existing authorities framework.

Today, five CONOPs, from four different subordinate units, were being presented. CPT Gibson conducted written legal reviews for each. One contained significant legal concerns so CPT Gibson forwarded the written legal review to the appropriate subordinate unit liaison officer

(LNO) and followed up in person with the LNO to address.

LTC Pat Bryan, the USFOR-A Deputy Staff Judge Advocate and RS Deputy LEGAD, serves as the legal advisor for the CONOP meetings. After the afternoon CONOP meeting concluded, CPT Gibson briefed LTC Bryan on the three CONOPs requiring approval in preparation for their presentation that evening.

As the day began winding down, a subordinate unit judge advocate called Capt Altman and CPT Gibson to seek advice on an engagement their commander authorized that may have inadvertently caused collateral damage. The unit was still in the process of gathering details to determine whether a formal report was required based on the established information reporting requirements. However, given the significant emphasis on collateral damage and civilian casualty mitigation from the highest levels of leadership, the subordinate unit judge advocate deemed it prudent to discuss any concerns stemming from the potential incident with Capt Altman and CPT Gibson as early as possible.

Following the conversation, CPT Gibson wrapped up his work day by responding to a few outstanding emails. He then headed back to his room to speak via FaceTime with his wife, Meredith, before getting some sleep in preparation for the next day.

### **Another Day Done— and Closer to Home**

This was our day, 30 April 2018. It was colored, as many other days have been during the seventeen years of U.S. military operations in Afghanistan, with news of a U.S. Soldier killed in action, Coalition soldiers wounded, and many more Afghan lives taken through terror and violence. As lawyers, we did our best that day to support our fellow service members, Coalition partners, civilian teammates, and Afghan hosts. We do this all with the conviction that every effort toward a just and successful mission in Afghanistan is an effort toward not letting those lives lost that day having been in vain. Every day we complete, like this one, is one day closer to a fulfilled mission and return home to our families and loved ones. **TAL**



Captain Thomas Strassburg, a judge advocate serving with the 101st Airborne Division, steps off a helicopter in Vietnam circa 1971 (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

# A Lawyer's Day in Vietnam

*By Irvin M. Kent, Jon N. Kulisli, Ned E. Felder, and Herbert Green*

## Vietnam 1968

*Does the military need lawyers in Vietnam? Repeatedly asked this question by their fellow lawyers in the United States, the authors, who comprise the legal staff of an Army headquarters in Vietnam, determined to let American lawyers decide for themselves. The authors selected in advance a day on which each would keep notes on his activities. This article, which first appeared more than 50 years ago in the American Bar Association Journal, is a description of that day—March 11, 1968.<sup>1</sup>*

### **Do Judge Advocates practice law? Why do we need lawyers in Vietnam?**

These are two questions all four of us have frequently heard from fellow lawyers in the states. Perhaps this, the outline of one of our days in Vietnam, may provide an answer.

We constitute the lawyer complement of the Office of the Staff Judge Advocate, Headquarters, II Field Force, and Vietnam. This is a corps-level headquarters that has

operational control of several United States divisions and many nondivisional units and is responsible for military operations in the Vietnamese III Corps Tactical Zone, which includes the most heavily populated areas of the country and surrounds its capital city. We are authorized six lawyers, but only four are assigned. The office is also staffed by a warrant officer for office administration, a sergeant major as chief legal clerk, a sergeant first class as claims clerk, and

three specialists who are, respectively, our court reporter, stenographer, and clerk typist. The enlisted men also take their share of duty on perimeter guard and must be as handy with their rifles as with their typewriters. The captain and our warrant officer also take their turns as officer of the guard for the headquarters area.

We represent the Bars of California, Colorado, Massachusetts, South Carolina, and Texas as well as of several federal courts. We received our law training at Georgetown, Harvard, South Carolina State, and Texas. Three of us are career military men and one is fulfilling his military obligation. The three career officers, all ROTC graduates, have all had military service in other branches—Armor, Finance, Infantry, or Ordnance—before becoming judge advocates. Two of us are married with a combined total of six children. While all of us perform other duties, as required, Lieutenant Colonel Kent is assigned as staff judge advocate, Major Kulish as deputy and also as chief, international affairs, and legal adviser to the units located in and around the headquarters company, Major Felder as trial counsel (prosecutor) of the general court and also as claims officer, and Captain Green as defense counsel and legal assistance officer.

For this description of one of our days in Vietnam, we chose in advance a day that turned out to be neither our lightest nor our heaviest. We deliberately picked a day on which no general court-martial was scheduled since we suspect that everyone will acknowledge that the prosecution or defense of a felony is the practice of law. It was just one of the 365 days of our tour here—the office is open and manned seven days a week from 7:30 A.M. to 6 P.M. Our mission is to provide total legal services for the commanding general, his staff and subordinate commanders and all other members of this command.

This was the day—Monday, March 11, 1968.

### **The Staff Judge Advocate.**

After a quick check of the office and a short conference with his deputy, the staff judge advocate, Colonel Kent, accompanied by the chief legal clerk, left by helicopter for the base camp of one of the

II Field Force artillery groups and elements of two of its battalions. They had been alerted to notify all personnel that a legal assistance officer would be available. Every trip away from the headquarters is also a legal assistance trip. We have a one briefcase legal assistance kit which contains interview cards, form clauses for wills and powers of attorney, income tax forms and instructions, and applications for military ballots.

### **A Question of Prompt Justice.**

This visit was based on a complaint by a Soldier of an apparently undue delay in the disposition of charges against him. These allegations, if substantiated, would raise the issue of the right of speedy trial.<sup>2</sup> Colonel Kent wished to discuss this with the group commander and to indicate that if investigation revealed that these allegations were true, the best interests of justice might be served by a dismissal of the charges. Further, as on all such trips, he wanted to reemphasize some of the rules concerning the imposition of nonjudicial punishment<sup>3</sup> and to emphasize the Army claims program, particularly with regard to losses of personal property caused by hostile action.<sup>4</sup> A supply of claims forms was taken along and distributed to the units with instructions for their use. The staff judge advocate has authority for the approval of such claims up to \$1,000. By 11 A.M., these matters accomplished, Colonel Kent set up shop for legal assistance. In the meantime the chief legal clerk was providing instruction on the administrative processing of courts-martial papers, nonjudicial punishment actions, and claims investigations for the clerical personnel of group headquarters. Except for a thirty-minute lunch break the legal assistance program continued until 3 P.M. During this time there were five requests for assistance on federal income tax problems. Four of these were relatively simple inquiries pertaining to combat zone pay exclusions, but the fifth came from a [S]oldier who wanted to complete his return for 1967. Rapid calculations revealed that he was due a substantial refund, and therefore he was advised to file immediately. There were two requests for powers of attorney, one in connection with settlement of an insurance

claim and the other for a real estate transaction. A judge advocate has the powers of a notary.<sup>5</sup>

One Soldier wanted information on the legality of his becoming a candidate for public office while still in the military service. The aspiring young politician was assured that “greetings from his friends and neighbors” did not deprive him of his civic rights in this regard.

Finally, two men with serious marital problems sought help. The apparent solution was the institution of divorce proceedings. One of them knew a lawyer in his home town and was helped with the drafting of a letter to that lawyer. The other man’s case was complicated by a matter of choice of forum. His home was in one state and his wife had since moved elsewhere. The facts were noted, and arrangements were made to provide him with information on the grounds for divorce in each of the two states and then, if he wished, to work with bar referral agencies to obtain counsel in the better forum.

By 4 P.M., the circuit riders were home. A problem had arisen under the provisions of Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War<sup>6</sup> and the Regulations of the Military Assistance Command, Vietnam, promulgated to implement this convention. A wounded Vietnamese had been brought into a United States military medical facility under obscure circumstances, he had no identification papers, denied being a Viet Cong, and had admitted to being a draft dodger from the Vietnamese Armed Forces. There was no indication that he had committed a hostile act. The problem at hand was to determine whether he was to be declared an innocent civilian and released, a civil defendant and turned over to the Vietnamese police *or* a prisoner of war. Such cases require the decision of the staff judge advocate of the command which has custody of the individual. In the light of the evidence, Colonel Kent determined that he was a civil defendant to be turned to the Vietnamese police.

By this time it was almost 5 P.M. and time for the staff judge advocate to attend the daily intelligence and operations briefing.



Then Major John Fugh sitting inside the Foreign Claims Office in Saigon in 1969. Fugh went on to serve as The Judge Advocate General from 1991 to 1993 (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

### The Defense Counsel/Legal Assistance Officer.

The defense counsel/ legal assistance officer, Captain Green, as usual, saw the greatest variety of clients. The combination of these positions in one officer saves many possible conflicts of interests. In an overseas command where civilian counsel are unavailable, legal advice on the broadest possible variety of matters must be provided if the individual [S]oldier is to receive total legal service.<sup>7</sup>

Captain Green's first client was awaiting trial by summary court martial. He had heard that, since he had not been offered nonjudicial punishment under Article 15 of the Code, he could refuse trial by summary court martial.<sup>8</sup> Captain Green corroborated this, explained the alternatives, including the much wider range of punishments imposable by a special court martial,<sup>9</sup> and advised him to accept trial by summary court martial, outlining for him an appropriate line of defense.

A newly promoted major had just been appointed a summary court-martial officer. No advice had been provided about the disposition of any specific sets of charges or about the accused. Captain Green gave the

major a copy of the "Guide for Summary Court-Martial Trial Procedure"<sup>10</sup>, which is comparable to the guides for justices of the peace published in several states. Then he gave him a thorough briefing on procedure, rights of the accused, the doctrine of reasonable doubt and his sentencing powers.

The next clients were two [S]oldiers recently transferred to Vietnam from Thailand. While there, both had fallen in love with Thai girls, and they wanted advice on marriage procedures. The Army's requirements and methods of submitting applications to marry aliens residing outside of CONUS were explained.<sup>11</sup> Both [S]oldiers decided to await completion of their overseas tours and then invite their fiancées to come to the United States as "tourists" and proceed from there.

Another pair of [S]oldiers walked in as our lovelorn swains left. They were seeking advice on application for early discharge to attend college. The provisions of the regulations<sup>12</sup> were explained, and they were referred to their unit commanders.

Mail call presented a welcome break as well as some news for clients. A few weeks earlier two [S]oldiers involved in divorce proceedings had asked for legal advice. In

both cases they had no objection to a divorce but wanted to ensure that they would not have heavy financial burdens imposed upon them for life. Correspondence with the attorneys for their spouses brought replies that fully met the desires of these two men. Documents were included for them to execute. Telephone calls were made to their units asking that they be sent to the legal assistance office.

Another letter was a response to an earlier motion for a stay of proceedings in a civil suit under the Soldiers' and Sailors' Civil Relief Act.<sup>13</sup> The attorney for the plaintiff wrote that his client had agreed to drop the [S]oldier as a party to the action.

About this time Major Kulish handed Captain Green a copy of the staff judge advocate's review of a general court-martial case which had been tried two weeks before. This written review is required by Article 61 of the Code<sup>14</sup> in each general court-martial case for consideration by the convening authority prior to his action on the case. It provides a complete written summary of all of the evidence adduced at the trial and of the applicable law as well as a personal history of the accused based on the official records concerning him and a personal post trial interview with him. The convening authority has plenary power to set aside or reduce the findings of guilty and the sentence.<sup>15</sup> The accused and his counsel are given the opportunity to see the review prior to the submission to the convening authority and to submit matter in rebuttal.<sup>16</sup> Captain Green felt that certain additional facts about the accused's military record should be brought out. After lunch, Captain Green accompanied Major Kulish to the stockade, where the latter served a copy of the review on the accused. While the Major interviewed another man, Captain Green conferred with the accused, explained his rights and reached agreement with him that a particular rebuttal should be submitted. Captain Green prepared the rebuttal, obtained the signature of the accused and delivered it for attachment to the review. The Captain then conferred with an upset young officer who was afraid that he might owe several hundred dollars on his 1967 income tax. He has used the standard deduction. After re-computing his return with proper deductions for interest, state and local taxes and charitable

contributions, it appeared that he had a refund of nearly \$100 coming to him.

Captain Green had been told earlier by the staff judge advocate that he was assigned to defend a suspected homosexual who was being brought before a board of officers that would consider discharging him from the military service.<sup>17</sup> The initial interview with this respondent took the better part of an hour, as the man denied any such tendencies and wanted to fight the allegation. Captain Green made an outline of the interview, prepared requests for witnesses on the accused's behalf and made appointments to interview them.

### Advice for Counsel for a Special Court.

The next visitor was a young officer who had been appointed defense counsel for a special court martial. The Army did not then have enough judge advocates to provide them as trial and defense counsel in most special courts martial, but did provide technical assistance to the officers so appointed. It has a military justice handbook called "The Trial Counsel and The Defense Counsel".<sup>18</sup> Captain Green gave a copy of this book to this officer, showed him how to use it as a procedural guide and then analyzed with him the evidence and probable questions of law in three cases then pending. Military law requires that an accused and his counsel be given copies of all statements made by the witnesses and of reports of investigation that are available to the prosecution.<sup>19</sup> This occupied most of the remainder of the afternoon.

Before Captain Green could leave, he found two more clients waiting. One had been offered nonjudicial punishment but was uncertain whether to accept it or to demand trial by court-martial. Captain Green outlined the law pertaining to the alleged offense and his rights under the code. After this discussion the client felt that he would be far better off to accept nonjudicial punishment than to demand trial. The other client had been tried by a summary court-martial and wanted to know how to file an appeal. Captain Green explained that the officer who appointed the court-martial had to review the case before the sentence could be ordered into execution<sup>20</sup> and that after this review the case would automatically be reviewed again by our office.<sup>21</sup>



Judge advocates lived in this Blue Villa near Long Binh, Vietnam. This photo was taken circa 1966 (Photo courtesy of JAGC's Regimental Historian & Archivist's office).

He also advised the client that anything he wished to have considered by the reviewing authorities should be attached to the record of trial,<sup>22</sup> outlined for him an approach and provided citations of law which tended to support his position and technical assistance in the preparation of his appeal.

### The Trial Counsel/Claims Officer.

Captain (now Major) Felder's day started earliest of all. He was our "on call" lawyer and was awakened by the military police at 2:10 A.M. They had a suspect in an aggravated assault case who, after being warned under Article 31 of the code,<sup>23</sup> had requested counsel prior to interrogation.<sup>24</sup> At the military police station, Captain Felder consulted privately with the suspect and advised him to make no statement and to refuse any further interrogation in the absence of counsel. The client wanted advice as to the legality of the seizure by the military police of his wristwatch. Captain Felder advised him that a search and seizure made in connection with a lawful arrest was proper<sup>25</sup> but that he would inquire as to the seizure of the watch. After a short discussion, the military police agreed to return the watch if the client would sign a receipt for it. At 4 A.M. Captain Felder returned to bed.

Captain Felder arrived at the office at 9 A.M. He informed Captain Green of his attorney-client relationship with this suspect—then to work on a revision of the II Field Force, Vietnam, Military

Justice Circular. Command circulars direct compliance with the rulings of the United States Court of Military Appeals by means of clear, simple and direct language which unit commanders and military policemen can understand and follow. On March 11, Captain Felder worked on the following:

(1) The problem of having a suspect utter words for voice identification. While this has the approval of the United States Supreme Court,<sup>26</sup> the United States Court of Military Appeals has held that the protections afforded to military personnel by Article 31 of the code are broader than those accorded to the remainder of the population by the Fifth Amendment,<sup>27</sup> and military suspects may not be legally ordered to utter words for this purpose.

(2) The problem of "speedy trial", a difficult one in a theater of operations. Recent decisions of the Court of Military Appeals<sup>28</sup> indicate that restriction to the limits of a military installation imposes upon the Government a duty to proceed with due dispatch.

(3) Additional guidance required for the omnipresent problem of nonjudicial punishment under Article 15 of the code. We want to ensure that everyone understands that the acceptance of Article 15 by an accused is not the equivalent of a plea of guilty but merely an acceptance of the forum and that commanders must still have proof of an offense cognizable by the code before they may administer punishment.



Captain Norman Cooper stands outside the 173d Airborne Brigade's Staff Judge Advocate office circa 1969 (Photo courtesy of JAGC's Regimental Historian and Archivist's office).

At 10:30 A.M. two criminal investigation agents came in for guidance. Since he had no attorney-client relationship with the suspect they had under surveillance, Captain Felder proceeded to examine the file and consider a proposed search. In this case, an order from an appropriate commander takes the place of a civilian search warrant<sup>29</sup> and must be obtained prior to a search. Captain Felder drafted a document for the signature of the company commander. He advised the agents that they must provide the commander with sufficient information for probable cause to order such a search. Otherwise his order, and hence the search, would be unlawful.<sup>30</sup>

After lunch, a helicopter pilot wanted information about a claim. The same enemy shell that had sent him to a hospital had also ruined his camera. Captain Felder explained the operations of the Military Personnel and Civilian Employees Claims Act of 1964<sup>31</sup> and Army Regulation 27-29 which implements it. Captain Felder provided the forms and indicated the evidence necessary to support the claim.

A sergeant arrived for help with his income tax.

A [S]oldier interested in acquiring United States citizenship came in. He had read about a new "law" which would make it easier for those on active duty to acquire citizenship. The new "law" was H.R. 15147 which passed the House of Representatives on March 4, 1968, and which would amend the present Immigration and Nationality Act.<sup>32</sup> After explaining the current status of the bill, Captain Felder gave him the necessary forms and told him to return when he had gathered the information required.

The mail contained three records of trial by special courts-martial in our units. These had already been approved by the respective convening authorities and had arrived for the required review.<sup>33</sup> One of the cases involved the offense of sleeping on post while on duty as a sentinel.<sup>34</sup> As the offense had occurred in an area subject to "hostile fire", the maximum punishment was a dishonorable discharge and confinement at hard labor for ten years.<sup>35</sup> Most such cases, however, are disposed of by special courts-martial, in which the maximum punishment is limited to confinement at hard labor and a forfeiture of two thirds' pay for six months. The other two cases both involved vehicles—one charge was "joy riding" in a government vehicle<sup>36</sup> and the other reckless driving.<sup>37</sup> In each case Captain Felder determined that the evidence of record supported the finding of guilty, that the sentence was within legal limits and that there were no grounds for further clemency action. He recommended to Major Kulish that the cases be stamped "legally sufficient". While the law merely requires review by "a judge advocate", in this office all such records of trial are reviewed by at least two judge advocates, and if they disagree the matter is determined by the staff judge advocate. It was now 4 P.M. and Captain Felder was able to return to work on his circular.

### **The Deputy Staff Judge Advocate.**

Major Kulish, the deputy staff judge advocate, came in early to finish his draft review of a general court-martial case. He wanted to discuss the recommendation on approval of the sentence with the staff judge advocate prior to his projected departure. This case involved two counts of aggravated assault under Article 128 of the code.<sup>38</sup> By the time Colonel Kent left, the draft was completed,

approved and in the hands of the typist. As the staff judge advocate departed, an artillery battery commander walked in. His unit, an automatic weapons battery, would soon be fragmented into sections to provide protection for several fire support bases of heavy artillery in widely separated areas. The previous night there had been an assault with a deadly weapon involving two of his men. Major Kulish advised him to secure detailed written statements at once from each witness and pointed out that despite the use of a deadly weapon there had apparently been no real intent to inflict serious injury. The battery commander decided to recommend trial by a special court martial. Major Kulish received a telephone call from the legal clerk of one of the battalions asking for help in phrasing an order vacating a suspension of a sentence to confinement. The battalion commander had ordered into execution only a forfeiture of pay and had suspended execution of the confinement since the accused was a first offender. The current misbehavior was a repetition of disrespect to a noncommissioned officer.<sup>39</sup> The clerk was guided to Appendix 15e of the *Manual for Courts-Martial*.

### **An Affidavit Needed at Home.**

The next client was a [S]oldier who, while on his pre-embarkation leave, had witnessed a conversation between his father and a forest ranger regarding the appropriate time for trash burning. Now his mother had been cited for improper burning during those hours. An affidavit concerning the conversation which he had heard was executed for mailing to this [S]oldier's parents.

While this affidavit was being typed, another client came in who needed a special power of attorney for his wife so that she could settle with his automobile insurance company.

The remainder of the morning was occupied by proofreading the final draft of the general court-martial review, and a copy was given to Captain Green so that he could read it before it was served on the accused. The telephone rang. A battalion legal clerk needed reassurance. He had drafted some court martial charges and wanted Major Kulish's approval. This particular clerk happened to be the most competent but least self-assured on the base. Major Kulish gave

him a verbal pat on the back, a mental kick in the pants, and went off to lunch.

Upon his return to the office, Major Kulish skimmed the daily reading file to look at changes in regulations and to see from the serious incident reports what sort of military justice “business” might be in the wind. Then off to the stockade with Captain Green. While the defense counsel was interviewing his client, Major Kulish conducted a post-trial interview with another accused whose general court martial had been completed recently. Prior to this case, the man had had no serious trouble but it was obvious that he had a quick temper that he had not learned to control. Major Kulish checked with the confinement facility personnel to determine the man’s behavior in the stockade. Major Kulish concluded that rehabilitation was possible and decided to recommend that the punitive discharge imposed by the court-martial be suspended.

The Major returned to the office at 2:30 P.M. to find a unit commander waiting for assistance in the drafting of charges. One [S]oldier in this commander’s unit decided to supplement his income by engaging in private enterprise—i.e., the cigarette business. Unfortunately, regulations already promulgated made his efforts illegal. Cigarettes are rationed items in the post exchanges and may not be resold or bartered lawfully. The [S]oldier had cajoled his nonsmoking friends into buying their rations for him. He also had discovered a means of erasing the check mark on his own ration card so that he was able to reuse each ration block several times. As the man had no history of prior offenses, the unit commander was interested only in a special court martial. Therefore, it was decided to ignore the more sophisticated offenses involving falsification of a government document, which would have been tried under Article 134 of the code,<sup>40</sup> and charges dealing with the violation of a lawful general regulation under Article 92 of the code<sup>41</sup> were drafted.

Major Kulish started to arrange his post-trial interview notes but was interrupted by a sergeant who had signed an option to purchase a home in a new development in his native Louisiana. His wife was to complete the deal armed with a special power of attorney which had been

prepared by the attorney for the financing institution. The sergeant had this instrument and wanted it notarized. Asked if he had read it, he said no because he wouldn’t understand it anyway, but he knew he had to sign it to get the house. After a careful reading of the document and inquiry of the sergeant as to the state of title and financial responsibility of the developer, Major Kulish suggested that he retain an attorney in Louisiana to represent him. The sergeant replied that he did not need a lawyer—and that he wanted to execute this document now. Since the power was a very restrictive one and only allowed the wife to sign for the amount and rate of interest to which the sergeant had already agreed, Major Kulish notarized his signature.

It was about 3:40 P.M. when a corps intelligence agent arrived with a file for examination. Major Kulish was preparing a memorandum analyzing the evidence in the file when Colonel Kent walked in. Major Kulish gave him the memorandum and the file and sat in on the discussion. After that, the trial counsel of one of the special courts-martial came in for consultation on the method of submission of an official document into evidence as an exception to the hearsay rule. Major Kulish explained the law on the subject and the manner in which the trial counsel should submit the document and prove its official nature and authenticity. Finally, back to the interview notes until time to close the office for another day.

This, then, was our day. Other days would have shown other problems, some similar and some different. There might well have been a contract to draft or review and probably a great deal more claims business. But we chose this day in advance, not knowing what it would bring, and determined to report it without embellishment. We consider ourselves to be part of what Mr. Justice Brennan has called the “public bar”<sup>42</sup> but we shall leave to our civilian colleagues the answers to our original questions. In turn, however, we would ask two: (1) If we are not practicing law, what are we doing? (2) If they don’t need lawyers in Vietnam, what do you suggest they replace us with?

#### Notes

1. Reprinted with permission of the American Bar Association Journal, Irvin M. Kent et. al., *A Lawyer’s Day in Vietnam*, 54 AM. B. ASS’N J. 1177 (1968).

2. *United States v. Brown*, 10 U.S.C.M.A. 498, 28 C.M.R. 64 (1959).
3. Art. 15, Uniform Code of Military Justice (hereinafter referred to as U.C.M.J.). 10 U.S.C. § 815.
4. 31 U.S.C. §§ 240-243; Army Regulations (hereinafter referred to as A.R. 27-29).
5. Art. 136, U.C.M.J., 10 U.S.C. § 936.
6. July 14, 1955. 6 U.S.T. 3316, T.I.A.S. No. 3364.
7. Cf. A.R. 608-50.
8. Art. 20, U.C.M.J., 10 U.S.C. § 820.
9. Art. 19, U.C.M.J., 10 U.S.C. § 819.
10. Dep’t. of the Army Pamphlet No. 27-7.
11. A.R. 608-61.
12. A.R. 635-200.
13. 50 U.S.C. App § 521.
14. 10 U.S.C. § 861.
15. Art. 64, U.C.M.J., 10 U.S.C. § 864.
16. *United States v. Griffin*, 8 U.S.C.M.A. 206, 24 C.M.R. 16 (1956).
17. A.R. 635-89.
18. Dep’t. of the Army Pamphlet No. 27-10.
19. MANUAL FOR COURTS-MARTIAL, 1951 ¶ 44h; see also Kent, *The Jencks Case: The Viewpoint of a Military Lawyer*, 45 A.B.A.J. 819 (1959).
20. Art. 64, U.C.M.J., 10 U.S.C. § 864.
21. Art. 65, U.C.M.J., 10 U.S.C. § 865(c).
22. MANUAL FOR COURTS-MARTIAL, 1951, ¶ 48j (2).
23. *Miranda v. Arizona*, 384 U.S. 436 (1966), was declared applicable to military law in *United States v. Tempia*, 16 U.S.C.M.A. 629m, 37 C.M.R. 249 (1967).
24. C.M.R. 249 (1967).
25. MANUAL FOR COURTS-MARTIAL, 1951, ¶ 152.
26. *United States v. Wade*, 388 U.S. 218 (1967).
27. *United States v. Newborn*, 17 U.S.C.M.A. 431 (1968), of which we were informed by cable from the Office of The Judge Advocate General.
28. *United States v. Smith*, 17 U.S.C.M.A. 427 (1968) and *United States v. Parish*, 17 U.S.C.M.A. 411 (1968).
29. MANUAL FOR COURTS-MARTIAL, 1951, ¶ 152.
30. *United States v. Brown*, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959).
31. 31 U.S.C. §§ 240-243 (1965 Supp.).
32. 8 U.S.C. § 1440.
33. Art. 65, U.C.M.J., 10 U.S.C. § 865(c).
34. Art. 113, U.C.M.J.
35. Exec. Order No. 11,317.3 C.F.R. § 913.
36. Art. 121, U.C.M.J., 10 U.S.C. § 921a (2).
37. Art. 111, U.C.M.J., 10 U.S.C. § 911.
38. 10 U.S.C. § 928.
39. Art. 91, U.C.M.J., 10 U.S.C. § 891.
40. 10 U.S.C. § 934.
41. 10 U.S.C. § 892.
42. Brennan, *The Responsibilities of the Legal Profession*, 54 A.B.A.J. 121, at 123 (1968).



## No. 3

# Getting a Grip on Strangulation

## Enumerating Strangulation in the UCMJ Will Help the Fight Against Domestic Abuse

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*By Captain Kaley S. Chan*

*He had even pulled a gun on me once, slapped me black and blue, but nothing felt as scary as this. There was that first part of the attack that so utterly terrified me as I anticipated my imminent death, panicking with what I could do. The fighting for freedom, the pain of his hands around my neck. Then as I began to suffocate, I could feel myself dying. Gasping for breath, desperate for air. Feeling myself slipping away, so fully conscious and hyper aware. And watching him—how personal the rage was. How he was using his bare hands to kill me—it was so intimate, he was so close to me. His skin on my skin. Like drowning, trapped in the water beneath the ice, the panic, the desperation to breathe, yet not being able to.<sup>1</sup>*

### **I. Introduction**

One in four women and one in seven men in the U.S. have been a victim of severe physical violence at the hands of an intimate partner.<sup>2</sup> In fact, between 2003 and 2012, fifteen percent of all violent victimizations were attributed to an intimate partner.<sup>3</sup> Although domestic and intimate partner violence is not gender-specific, women are the victims in a vast majority of cases.<sup>4</sup> In the United States, women are killed by a current or former intimate partner “more often than by any other type of perpetrator.”<sup>5</sup>

Research into domestic-violence-related homicides shows that a history of non-fatal strangulation is “one of the most accurate predictors for the subsequent homicide of victims of domestic violence.”<sup>6</sup> One such study found that women who have been subject to a non-fatal strangulation incident were approximately 700 percent more likely to be the victim of homicide than other domestic violence victims.<sup>7</sup> And non-fatal strangulation events are not a rare occurrence. A 2010 Center for Disease Control and Prevention (CDC) study estimated that 1.1 million women were strangled or suffocated in the preceding twelve months, and more than 11.6 million women who participated in the survey had been strangled or suffocated in their lifetime.<sup>8</sup>

Growing recognition of the life-threatening nature of strangulation and the difficulty in prosecuting these offenses as felonies has led jurisdictions across the country and the globe to enact strangulation-specific statutes or include strangulation-specific language in existing statutes.<sup>9</sup> As of today, fifty-two states and United States territories have enacted some form of legislation acknowledging the impact of strangulation.<sup>10</sup> Following their lead, Congress passed the Violence Against Women Reauthorization

Act of 2013, adding language to address strangulation in the federal assault statute (18 U.S.C. §113).<sup>11</sup>

These legislative additions and amendments have improved both of offender accountability and awareness of the gravity of strangulation offenses.<sup>12</sup> And yet, the Uniform Code of Military Justice (UCMJ)—which governs approximately 2.1 million service members<sup>13</sup>—is devoid of any strangulation-specific offense, even though research confirms that military families are at high risk for severe domestic violence.<sup>14</sup> Accordingly, Congress should enact legislation to specifically enumerate a strangulation offense in the UCMJ and include commission of the offense against specific classes of victims as an aggravating element to the crime. The recent enactment of The Military Justice Act of 2016 and the coming changes to Article 128 intensify this concern.<sup>15</sup>

The Department of Defense's (DoD) Family Advocacy Program (FAP) statistics show that in Fiscal Year 2017 (FY17) there were 7,153 incidents that met a threshold criteria for spousal abuse, among 5,781 unique victims.<sup>16</sup> This correlates to a victim of spousal abuse in approximately nine of every 1,000 married military couples.<sup>17</sup> In contrast, the DoD reports that in FY17 there were 6,769 reports of sexual assault—nearly four hundred fewer reports than reports of spousal abuse that met FAP's threshold criteria for abuse.<sup>18</sup> These incidents of spousal abuse led to nine fatalities in FY17, which were amongst the ninety-four intimate-partner-related fatalities between Fiscal Years 2011 and 2017.<sup>19</sup> Although these figures do not specify how many incidents included allegations of strangulation, a study conducted on an Army installation between 1997 and 2005 showed that in 1,681 instances of spousal abuse occurring in on-base housing, thirty-eight percent of victims of physical abuse and nineteen percent of victims of verbal abuse reported a history of being “choked” by their spouse.<sup>20</sup>

These harrowing statistics make clear what fifty-three U.S. jurisdictions and various countries have already accepted: Legislation is needed to address intimate partner violence, and, given the lethal nature of the act, a strangulation-specific offense is necessary to ensure victim safety and offender accountability.<sup>21</sup> This article

will first explore the historical treatment of strangulation offenses. It will then address the current status of strangulation legislation and its impact on awareness and prosecution of these offenses. Finally, it will explore current options for prosecuting strangulation offenses under the UCMJ and propose a new enumerated offense.

## II. Background

Strangulation is a type of asphyxia caused by external pressure to the neck, which impedes blood flow, and thus, oxygen to the brain.<sup>22</sup> A mere eleven pounds of pressure on the carotid artery for approximately ten seconds is sufficient to render a person unconscious, and continued pressure leads to brain death after just four to five minutes.<sup>23</sup> More disturbingly, internal injuries caused by a lack of oxygen to the brain can cause delayed death days or even weeks following a strangulation incident.<sup>24</sup> Common internal and neurological injuries associated with strangulation include: fracture of the hyoid bone; internal tears and bleeding; subcutaneous emphysema, the leaking of air into soft tissue; blood clots; stroke; pulmonary edema resulting from excess fluid in the lungs; and anoxic encephalopathy, caused by lack of oxygen to brain tissue.<sup>25</sup> Victims may also experience psychological disorders, behavioral changes, and loss of memory.<sup>26</sup>

Despite the risk of fatality, this offense is commonly misunderstood, mistaken, or minimized as something less than lethal.<sup>27</sup> Today, many experts agree “unequivocally that strangulation is one of the most lethal forms of domestic violence” and that strangulation offenses should be treated as presumptive felonies.<sup>28</sup> Prior to 2001, however, this was not the case.<sup>29</sup> Due to a lack of physical evidence, recantation or minimization by victims, and the inadequacy of training and education on the long-term effects of strangulation, cases were generally treated as “minor incidents” garnering misdemeanor-level attention and punishment, except in the most severe cases.<sup>30</sup>

The publication of a 2001 study of 300 cases submitted for misdemeanor prosecution to the Office of the San Diego City Attorney “launched the most comprehensive effort in the United States to educate criminal and civil justice professionals about strangulation . . . [and] spawned research,

protocols, policies, and laws across the country and around the world.”<sup>31</sup> The study found that in eighty-five percent of the cases, there was a lack of visible injury of strangulation sufficient to sustain a conviction.<sup>32</sup> The lack of visible injuries, coupled with the lack of understanding among law enforcement regarding the consequences of strangulation, meant investigations lacked the detailed documentation and evidence necessary to hold offenders accountable.<sup>33</sup>

In 2008, *The Journal of Emergency Medicine* published a study evaluating homicide and attempted homicide cases involving strangulation across eleven cities to “identify risk factors for intimate partner homicide and attempted homicide.”<sup>34</sup> The study found that strangulation was “a significant predictor for future lethal violence.”<sup>35</sup> Specifically, the study found that once a woman had been subject to a non-fatal strangulation event, she was approximately 600 percent more likely to be the victim of attempted homicide, and approximately 700 percent more likely to be the victim of homicide, than other domestic violence victims.<sup>36</sup>

Prior to the publication of these studies, most states' laws required a showing of something akin to “grievous bodily injury” in order to charge strangulation under a felony assault theory.<sup>37</sup> Experts today, however, know that strangulation often results in long-term internal and emotional injuries, rather than acute, visible injuries.<sup>38</sup> In fact, even fatal cases often lack external evidence of strangulation.<sup>39</sup> These facts, coupled with victim minimization of both the conduct and their injuries, historically resulted in law enforcement and medical personnel failing to thoroughly investigate and document other signs and symptoms of strangulation.<sup>40</sup> Many prosecutors, in turn, failed to appreciate the level of violence, ultimately resulting in misdemeanor treatment of these offenses.<sup>41</sup>

Conversely, prosecutors who wanted to charge attempted homicide were deterred by a stringent specific intent element that could only be met in the most grievous cases.<sup>42</sup> It was not until the destructive nature of non-fatal strangulation came to light in the early 2000s that jurisdictions across the country began to recognize that their criminal codes were inadequate for holding offenders accountable.<sup>43</sup>

Even in light of the recent shift toward creating or amending legislation and prosecuting strangulation offenses as felonies, the DoD has done little to address strangulation offenses among its ranks. In 2000, at the direction of Congress, the DoD established the Defense Task Force on Domestic Violence (Task Force) for the purpose of assessing and making recommendations to improve the DoD's response to domestic violence.<sup>44</sup> In its 2001 report to Congress, the Task Force explained that "[a]ggressive prosecution is one important way of holding offenders accountable and may deter future recidivism while potentially enhancing victim safety."<sup>45</sup>

In keeping with the Task Force's recommendation, Congressional action to make the UCMJ consistent with the federal assault statute and the fifty-two other states and territories recognizing strangulation-specific crimes would better ensure offender accountability and victim safety in a community at high risk for domestic violence.<sup>46</sup>

### III. Current Status of Strangulation Legislation

In a 2009 review of strangulation laws across the country, experts in intimate partner violence recommended "that all states develop policies to improve prosecution of strangulation, include strangulation in their criminal codes, and use language that includes all potential victims."<sup>47</sup> Similarly, as of 2011, every state prosecutor's association that has studied strangulation offenses has supported strangulation-specific legislation.<sup>48</sup> Even the United Nations has encouraged member-states to address strangulation in their criminal codes.<sup>49</sup> Although there is work to be done to achieve the full breadth of these recommendations, there has already been a visible shift to address strangulation offenses through legislation across the country.<sup>50</sup>

#### A. U.S. Jurisdictions Addressing Strangulation

Currently, forty-nine states, the District of Columbia, Guam, and the Virgin Islands have statutes that specifically address strangulation in some form.<sup>51</sup> Although the application varies widely—from consideration at a bail hearing, to an element in aggravation, to its own offense—the mere

fact that legislatures across the country are taking the results of strangulation research seriously is encouraging and telling.<sup>52</sup>

Congress demonstrated its support when it passed The Violence Against Women Reauthorization Act of 2013 and specifically added a provision for "strangling, suffocating, or attempting to strangle or suffocate" one's "spouse, intimate partner, or dating partner" to the federal assault statute.<sup>53</sup> Congress's imposition of a ten-year maximum punishment serves as further appreciation for the lethal effects of strangulation.<sup>54</sup> However, at the time of enactment, this amendment was seen as primarily granting jurisdiction over offenses in Indian Territory and between same sex couples, not members of the armed forces.<sup>55</sup>

#### B. Making an Impact

The evolution in the landscape of domestic violence and strangulation offenses with recent legislation has positively impacted not only punitive disposition, but also awareness and training dedicated to investigating and prosecuting these offenses.<sup>56</sup> For instance, New York police arrested 2,003 offenders under the state's new strangulation offenses in the first thirteen weeks following enactment in 2010.<sup>57</sup> After eighteen months, police had made 17,171 arrests for strangulation across the state—more than 3,200 of which were felony-level.<sup>58</sup> As of 2015, New York has seen the lowest domestic and intimate partner homicide rates since 2007.<sup>59</sup>

Similarly, within thirteen months of enactment of a new strangulation offense, 1,107 charges for felony strangulation were filed in Minnesota.<sup>60</sup> One county saw twenty-four cases charged under the newly enacted statute, with a forty-two percent conviction rate in the first six months.<sup>61</sup> After seventeen months, "there was a [sixty-one percent] increase in cases charged" and "the conviction rate for any felony increased from [seventeen] percent to [thirty-eight] percent" because prosecutors were able to use the strangulation charge to leverage a plea bargain for other felonies.<sup>62</sup> Advocates noted that "the law helped to bring some dangerous first-time domestic abusers to the system's attention sooner than if they had been charged with misdemeanors for strangling their victims."<sup>63</sup>

New legislation has also had an impact on police departments, prosecutor's offices, and medical providers, who have increased training on strangulation investigations and prosecution, to include recognizing signs and symptoms.<sup>64</sup> In fact, at least five states now statutorily require training on strangulation for law enforcement.<sup>65</sup>

In Arizona, the Maricopa County Attorney's Office established a program to work with local law enforcement and medical providers in an effort to coordinate a community response to strangulation offenses.<sup>66</sup> Since implementation in December 2011, cases in which felony charges were filed increased from less than fifteen percent to more than sixty percent of cases submitted by law enforcement.<sup>67</sup> The county also saw a corresponding twenty-four percent decrease in domestic violence-related fatalities from 2012 to 2014.<sup>68</sup>

Researchers in Minnesota noticed that "the increased awareness and training received by law enforcement officers, investigators, and prosecutors has resulted in a significant decrease in the number of cases being dismissed when strangulation cases are charged as felonies compared to when they are charged as misdemeanors."<sup>69</sup> Local judges even "commented that they had observed law enforcement officers conducting more thorough investigations by taking more pictures and better documenting the crime scene."<sup>70</sup>

These results demonstrate the impact enumerating an offense can have and are indicative of how a specific offense can help establish a coordinated effort between law enforcement, medical personnel, and prosecutors. By breaking ground in felony-level strangulation legislation, these jurisdictions have paved the way for an offense in the UCMJ.

### IV. Enumerating an Offense Under the Uniform Code of Military Justice

Military prosecutors generally have three existing options for charging strangulation offenses, and with these options come the same criminal element and punishment-related hurdles that civilian prosecutors faced before strangulation-specific offenses were enacted.<sup>71</sup> Military prosecutors, however, are also responsible for ensuring the



conviction is both clear to, and translates to a felony in, civilian jurisdictions. Enactment of an enumerated offense will address each of these issues, while still answering common counter-arguments.

#### **A. Misdemeanors v. Felonies**

It is vital that the civilian criminal justice system be able to assess the nature of a court-martial conviction. Prior convictions are often used in bail determinations, trials for similar offenses, and in imposing sentencing enhancements.<sup>72</sup> The classification of a court-martial conviction as a felony or misdemeanor, however, is generally up to the discretion of the state because the military does not define its offenses in terms of misdemeanors or felonies.<sup>73</sup> States often assign those labels by looking to the maximum possible punishment.<sup>74</sup> Generally, offenses that have a maximum punishment of twelve months in confinement, regardless of forum, will translate

to a misdemeanor in the civilian criminal justice system.<sup>75</sup>

In addition to a felony classification, the need to ensure the civilian criminal justice system is adequately informed of the offender's criminal history and potential for future lethal violence requires clarity and specificity regarding the nature of the crime.<sup>76</sup> This is particularly important in strangulation cases because many jurisdictions have enacted provisions that increase either the level of offense or the punishment, or both, where the offender has committed the same or similar offense in the past.<sup>77</sup> If a charging scheme leaves it unclear that an offender has previously committed a strangulation offense, it may be difficult, if not impossible, for another jurisdiction to impose sentence enhancements if the offender strikes again.<sup>78</sup> A lack of clarity could also impede a civilian prosecutor's ability to use the court-martial conviction to argue against bail for victim

safety, or introduce the prior strangulation conviction as evidence at trial.

The most effective way for the military to ensure clarity on this matter is to enumerate a specific offense for strangulation with a maximum possible punishment exceeding twelve months in confinement. Under the current construct of the UCMJ, aggravated assault and attempted murder are the two most plausible offenses that could render such a punishment.

#### **B. Current UCMJ Charging Options**

##### *1. Aggravated Assault*

Aggravated assault under Article 128, was once the government's most logical charging theory and the only assault charge that could render a punishment in excess of twelve months in confinement.<sup>79</sup> However, Article 128 falls short in three respects: its required elements fail to appreciate the harm non-fatal strangulation can impose without visible injury, it lacks consideration of a consensual-touching defense, and a conviction for aggravated assault is not specific enough to provide clarity to the civilian criminal justice system about the nature of the offense.

Currently, aggravated assault can be charged under one of two theories, either: (1) "Assault with a dangerous weapon or means or force likely to produce death or grievous bodily harm[,]" or (2) "[a]ssault in which grievous bodily harm is inflicted."<sup>80</sup> For cases lacking grievous bodily harm, the former theory is often used as an avenue for prosecution of strangulation cases. Until recently, "means or force likely to produce death or grievous bodily harm" required that "the risk of harm [was] 'more than merely a fanciful, speculative, or remote possibility.'"<sup>81</sup> In 2015, The United States Court of Appeals for the Armed Forces (CAAF) overruled this precedent in *United States v. Gutierrez*, stating that the appropriate standard for whether or not death or grievous bodily harm was "likely" is whether it is the "natural and probable consequence of the action."<sup>82</sup>

This heightened standard, which relies on probabilities of harm,<sup>83</sup> is problematic for prosecuting strangulation cases, because the statistical likelihood that a strangulation event would end in death or grievous bodily harm may not reach the military judge's or

members' threshold probability, due to their own lack of knowledge of the offense.<sup>84</sup> However, with the recent passage of the Military Justice Act of 2016, this issue is soon to become moot.<sup>85</sup>

Under the newly drafted version of Article 128, the two charging theories have been amended to read: "(1) who, with the intent to do bodily harm, offers to do bodily harm with a dangerous weapon; or (2) who, in committing an assault, inflicts substantial bodily harm, or grievous bodily harm on another person; is guilty of aggravated assault."<sup>86</sup> Based on these revisions, the government would only be able to charge strangulation as aggravated assault in cases where a "dangerous weapon" is used or where there is an infliction of substantial or grievous bodily harm.<sup>87</sup> Although the intent of the change may have been to mirror the federal assault statute, it expressly failed to account for strangulation offenses.<sup>88</sup> Thus, given the statistical unlikelihood of evidence of physical harm, there are few circumstances where the government would be able to prove a non-fatal strangulation as an aggravated assault unless the offender's hands were considered a "dangerous weapon."<sup>89</sup>

These amendments also fail to address the possibility of a defense under a theory of consensual touching. Although one can generally consent to an assault, the same is not true for aggravated assault.<sup>90</sup> This would unnecessarily create defenseless culpability in instances of consensual sexual activity, martial arts, and emergency medical procedures.

Even were a conviction under this revised statute possible, it would also fail to provide adequate notice to the civilian criminal justice system that the accused had a history of non-fatal strangulation, thereby impacting criminal history assessments and potentially evidence in future prosecutions for similar offenses. Where aggravated assault does not fit, prosecutors may look to charging attempted murder.

### *II. Attempted Murder*

While a conviction for attempted murder or manslaughter would arguably convey the magnitude of the offense, the likelihood of conviction is slim. The UCMJ's murder and manslaughter statutes, similar to civilian statutes, require the government to prove the offender's specific intent to kill.<sup>91</sup> While general intent to harm can be

inferred from the conduct itself, specific intent requires diving into the accused's mind at the moment of the offense.<sup>92</sup> Absent a statement of intent from the accused, the government will generally be forced to rely on circumstantial evidence.<sup>93</sup>

Most offenders, however, do not actually intend to kill their victims; strangulation is a form of control, rather than a mechanism for death.<sup>94</sup> And even if the government provided evidence of specific intent, domestic violence stereotypes are difficult to overcome.<sup>95</sup> Until members and military judges are familiarized with the gravity and lethality of non-fatal strangulation offenses, it is unlikely that members would be willing to convict on attempted murder absent particularly egregious facts or injuries.<sup>96</sup> Where neither aggravated assault, nor attempted murder theories are viable, military prosecutors may also have the ability to charge under an Article 134 theory.<sup>97</sup>

### *III. Crimes Not Capital—Article 134*

Article 134 of the UCMJ provides the government with a unique vehicle to charge non-capital offenses that are in violation of federal law, to include state laws made applicable through the Assimilative Crimes Act (18 U.S.C. § 13), provided the same offense is not enumerated elsewhere in the UCMJ.<sup>98</sup> The doctrine of pre-emption also prohibits the assimilation of state laws where the same crime is already "made punishable by an enactment of Congress."<sup>99</sup> Additionally, state and federal offenses may only be charged under this theory if the offense occurred within the jurisdiction of the enactment.<sup>100</sup> While federal offenses may have either unlimited or local application,<sup>101</sup> assimilating a state offense requires that the crime be committed in that state and within an area of exclusive or concurrent federal jurisdiction.<sup>102</sup>

However, using Article 134 to charge a strangulation offense under state or federal law in lieu of an enumerated UCMJ offense is problematic. Provided the federal assault statute is not pre-empted by Article 128, it is limited to a domestic violence context, and is presently only applicable to crimes occurring within the "special maritime and territorial jurisdiction of the United States," which generally does not include those stationed abroad.<sup>103</sup> Moreover, where a state statute is not already pre-empted by the

federal offense because it covers non-domestic offenses, it will invariably lead to the unequal application of law between service members in different states.<sup>104</sup>

Finally, and of greatest importance, is what enumerating an offense advertises to the military community. By creating a separate offense, offenders are put on notice, victims are told they matter, and commanders, investigators, and prosecutors are more likely to take strangulation seriously.

### *C. Proposed Offense*

To be clear, the addition of an enumerated offense for strangulation does not make strangulation a new crime—strangulation is already a crime.<sup>105</sup> However, creating a separate offense will provide clarity, encourage better investigations and felony-level prosecution, promote offender accountability, and send a message to the military community about the gravity of this offense.<sup>106</sup>

In drafting a new offense, it is important to keep in mind that while a common fact pattern, strangulation is not limited to the domestic violence context, nor to women. Therefore, it is important to draft the statute broadly enough to cover non-domestic violence scenarios. Experts in the field generally consider the statutes passed by Texas and Idaho to be among the best strangulation laws in the country, because they "focus on impeding breathing and blood flow to the brain."<sup>107</sup> Experts specifically endorse the Texas model because "it includes a 'reckless' mental state . . . makes strangulation an automatic felony . . . [and] enables the state to increase the penalty for repeat offenders[,]" acknowledging the lethal implications of this conduct.<sup>108</sup>

With these factors in mind, Congress should consider the following offense:

**Article 128b Strangulation:** Any person subject to this chapter who intentionally, knowingly, or recklessly impedes the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth, is guilty of strangulation and shall be punished as a court-martial may direct.

**Aggravating Element:** The person is a current or former family member, co-habitant, or intimate partner.<sup>109</sup>



This proposed language expressly provides for a reckless mental state, does not require any showing of bodily harm, and yet still allows for a defense based on a theory of consent. Additionally, it identifies classes of victims in need of special protection—family members, which in today's society take many forms, co-habitants, and intimate partners.<sup>110</sup> In the alternative, Congress could address the issue by amending the current assault statute to include strangulation offenses. However, drafting this amendment to account for a consent-based defense could be unnecessarily

complex.<sup>111</sup> Moreover, this alternative option fails to address the messaging effect a separate offense provides.<sup>112</sup>

Regardless of the mechanism for identifying strangulation offenses in the UCMJ, the associated punishment should be commensurate with the gravity of the offense. The maximum punishment for a strangulation offense should be a dishonorable discharge or dismissal and five years' confinement.<sup>113</sup> Where the offense is committed against a family member, co-habitant, or intimate partner, the maximum punishment should increase to ten

years' confinement, to be consistent with its federal statutory counterpart.<sup>114</sup>

#### ***D. Opposition and Counter Arguments***

The best argument in opposition is that military prosecutors do not need a separate offense, because they have the ability to assimilate state or federal statutes. However, as previously discussed, the pre-emption doctrine and unequal application of laws pose undesirable challenges.<sup>115</sup> Additionally, this course of action fails to send a message to offenders, victims, investigators, commanders, and prosecutors alike, and raises the possibility that a serious offender will not be held accountable if the complexities of Article 134 are not thoroughly understood by the trial counsel.

Opponents may also argue that historically the military does not have enough strangulation cases to warrant a specific statute. Not only is this inaccurate,<sup>116</sup> it avoids the crux of the problem: that when it *does* happen, the DoD needs a way to ensure the offense is prosecuted, the offender is held accountable, and the civilian criminal justice system is aware of the offender's potential for future lethal violence.

Another opposing viewpoint is that the government should have to prove either intent or grievous bodily harm for strangulation to warrant felony-like punishment. The available studies do not question the harm and potential lethality of strangulation—in fact, the evidence supports it—even absent acute, visible injuries.<sup>117</sup> The difficulty in diagnosing internal, neurological, or psychological injuries unique to this crime, and the potential for delayed onset of these symptoms, should not alleviate a violent offender from being held accountable. Ensuring felony-level accountability addresses the seriousness of the offense and identifies potentially-lethal offenders early.

Ultimately, to have the intended impact, the punishment must fit the crime. Currently, fraudulent enlistment has a maximum punishment of two years' confinement; effecting an unlawful enlistment carries a five-year maximum; willfully disobeying a commissioned officer could land an offender up to five years in confinement; failure to obey a lawful order carries a two-year maximum sentence; and intentionally failing to comply with procedural rules has

a five-year maximum sentence.<sup>118</sup> The fact that these offenses carry more weight in the military justice system than the near-fatal strangulation of another person is cause enough for its own felony-level offense.

## V. Conclusion

One of the greatest lessons learned since 2005, as strangulation statutes have been passed across the country, is that strangulation assaults should be a presumptive felony. Prosecutors must lead this effort. If prosecutors do not treat these cases as serious felonies, police officers, medical professionals, advocates, and survivors will not treat them as such.<sup>119</sup>

Given the current status of the law, a separate offense is a prosecutor's best mechanism to lead the effort.<sup>120</sup> However, it is important to not overlook the impact enumerating an offense will have on the military justice system, beyond enhancing military prosecutors' capability to secure a felony-level conviction.<sup>121</sup> It will encourage training and coordination among legal, law enforcement, medical, and advocacy communities.<sup>122</sup> It will raise awareness about the lethal implications of strangulation for commanders and victims, and it will arm commanders with a mechanism to promote victim safety. Above all, it will send a message to offenders that their conduct has deadly consequences and will not be tolerated.

As one Minnesota judge stated after the enactment of a strangulation offense, "This law is doing what we hoped it would do: it is drawing attention to the potential lethality of this crime. More resources are being devoted to this type of case. We have also increased the consequences, and in some ways educated the public on domestic violence."<sup>123</sup> To achieve similar results, similar action is needed, and Congress has already accepted the necessity of enacting the offense. It is time to focus efforts on a population at risk, enumerate a strangulation offense in the UCMJ, and alleviate commanders from a dilemma—secure a conviction, albeit a misdemeanor, or risk offender accountability, both of which fail to address victim safety. **TAL**

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## Appendix A. Article 128b: Strangulation, Suffocation

### 54a. Article 128b Strangulation, Suffocation

#### a. Text of statute.

(a) Any person subject to this chapter who intentionally, knowingly, or recklessly impedes the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth, is guilty of strangulation and shall be punished as a court-martial may direct.

#### b. Elements.

(1) That the accused impeded the normal breathing or circulation of the blood of another person by applying pressure to the person's throat or neck, or by blocking the person's nose or mouth; and

(2) That the accused did so intentionally, knowingly, or recklessly;

(Note: Add the following as applicable)

(3) That the person was a family member, co-habitant, or intimate partner.

#### c. Explanation.

(1) *In general.*

(2) *Family member.* A family member includes all members of an extended family unit by blood, marriage, adoption, or government placement, to include, but not limited to: spouses, parents, step-parents, siblings, step-siblings, half-siblings, children, step-children, and foster children. "Family member" specifically includes persons with whom the accused has a child in common or was previously married to. A spouse is considered a current family member until a divorce decree is entered by a court of competent jurisdiction.

(3) *Co-habitant.* A co-habitant is a person who shares the same dwelling as the accused, but is not a family member or an intimate partner at the time of the assault.

(4) *Intimate partner.* An intimate partner includes those in a current or former dating relationship. "Dating relationship" means a continuing or significant relationship of a romantic or intimate nature, regardless of their engagement in sexual conduct.

d. *Lesser included offenses.* Article 128—Assault Consummated by a Battery; Simple Assault.

#### e. Maximum punishment.

(1) *Generally.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

(2) *When committed upon a family member, co-habitant, or intimate partner.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for ten years.

#### f. Sample specification.

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board location), on or about \_\_\_\_\_, (intentionally) (knowingly) (recklessly) impede the normal (breathing) (circulation of the blood) of (another person, to wit: [name of person]) (a family member, to wit: [name of person]) (a co-habitant, to wit: [name of person]) (an intimate partner, to wit: [name of person]) by (applying pressure to the said [name of person]'s throat or neck) (blocking the said [name of person]'s nose or mouth).

## Appendix B. Military Judge's Benchbook

### STRANGULATION, SUFFOCATION (ARTICLE 128b)

#### MAXIMUM PUNISHMENT:

When committed upon a family member, co-habitant, or intimate partner: DD, TF, 10 years, E-1.

Other cases: DD, TF, 5 years, E-1.

#### MODEL SPECIFICATION:

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/on board location), on or about \_\_\_\_\_, (intentionally) (knowingly) (recklessly) impede the normal (breathing) (circulation of the blood) of (another person, to wit: [name of person]) (a family member, to wit: [name of person]) (a co-habitant, to wit: [name of person]) (an intimate partner, to wit: [name of person]) by (applying pressure to the said [name of person]'s throat or neck) (blocking the said [name of person]'s nose or mouth).

#### c. ELEMENTS:

(1) That (state the time and place alleged) you impeded the normal (breathing) (circulation of the blood) of (state the name of the alleged victim);

(2) That you did so by (applying pressure to the person's throat or neck) (blocking the person's nose or mouth);

(3) That you did so (intentionally) (knowingly) (recklessly); [and]

NOTE1: Aggravating circumstances alleged. When the alleged victim is a family member, co-habitant, or intimate partner, add element [4] below.

[(4)] That at the time of the assault(s), (state the name of the alleged victim) was a (family member) (co-habitant) (intimate partner).

#### d. DEFINITIONS AND OTHER INSTRUCTIONS.

A “family member” includes all members of an extended family unit by blood, marriage, adoption, or government placement, to include, but not limited to: spouses, parents, step-parents, siblings, step-siblings, half-siblings, children, step-children, and foster children. “Family member” specifically includes persons with whom the accused has a child in common or was previously married to. A spouse is considered a current family member until a divorce decree is entered by a court of competent jurisdiction.

A “co-habitant” is a person who shares the same dwelling as the accused, but is not a family member or an intimate partner at the time of the assault.

An “intimate partner” includes those in a current or former dating relationship. “Dating relationship” means a continuing or significant relationship of a romantic or intimate nature, regardless of their engagement in sexual conduct.

#### Note 3: Read in all cases.

Impeding the normal breathing or circulation of blood of another person is unlawful if done without legal justification or excuse and without the lawful consent of the victim.

There is no requirement that impeding the normal breathing or circulation of blood be done with the intent to kill or injure the victim.

There is no requirement to show that the victim suffered any injury or harm caused by impeding his or her normal breathing or circulation of blood.

**Note 4: Attempted strangulation or suffocation. If the specification alleges an attempt to impede the normal breathing or circulation of blood, give the following instruction:**

Attempted strangulation or suffocation is an overt act which amounts to more than mere preparation and is done with apparent present ability to impede the normal

breathing or circulation of blood of another. Physical injury or offensive touching is not required.

**Note 5: Victim’s status. When the alleged victim is a family member, intimate partner, co-habitant, law enforcement, or servicemember, provide the following instruction:**

Knowledge that the victim was a family member, co-habitant, or intimate partner is not an element of the offense.

Accordingly, if the factfinder is convinced beyond a reasonable doubt that (state the name of the alleged victim) was a [family member] [co-habitant] [intimate partner] at the time of the alleged offense(s), the factfinder is advised that the prosecution is not required to prove that the accused knew that (state the name of the alleged victim) was a [family member] [co-habitant] [intimate partner] at the time of the alleged offense(s), and it is not a defense to strangulation or suffocation upon a [family member] [co-habitant] [intimate partner] even if the accused reasonably believed that (state the name of the alleged victim) was not a [family member] [co-habitant] [intimate partner].

#### Note 6: Other instructions.

**Instruction 5-4, Accident: Instruction 7-3, Circumstantial Evidence (Intent and Knowledge), may be raised by the evidence.**

#### Notes

1. Letter from Jennifer Bishop Jenkins to U.S. Sentencing Comm’n (Feb. 4, 2014) (on file with The Training Inst. on Strangulation Prevention).
2. Ctr. for Disease Control & Prevention, The National Intimate Partner and Sexual Violence Survey 2 (2010) [hereinafter CDC SURVEY].
3. Jennifer L. Truman & Rachel E. Morgan, U.S. Dep’t of Just., NCJ 244697, Nonfatal Domestic Violence, 2003-2012, at 1 (Apr. 2014).
4. *Id.* at 1 (finding that seventy-six percent of victims were women). Domestic violence generally refers to violence between family members or relatives, to include intimate partners, whereas intimate partner violence is committed by a current or former spouse, boyfriend, or girlfriend. *Id.*
5. Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: From a Multistate Case Control Study*, 93 Am. J. Pub. Health 1089, 1089 (2003); see also Mohammad Amin, Asif Islam & Augusto Lopez-Claros, *Absent Laws and Missing Women: Can Domestic Violence Legislation Reduce Female Mortality?* 3 (World Bank Grp., Policy Research Working Paper No. 7622, 2016) (finding that sixty-one percent of female homicides in the United States in 2011 were caused by an intimate

partner). On average, three women are killed every day in the United States at the hands of a current or former intimate partner. See Nat’l Inst. of Just., U.S. Dep’t of Just., NCJ 225722, Practical Implications of Current Domestic Violence Research For Law Enforcement, Prosecutors & Judges 3 (2009) (finding that 1,181 women were killed by intimate partners in 2005 and that “[t]he proportion of female homicide victims killed by an intimate partner is increasing.”).

6. Casey Gwinn & Gael B. Strack, *Introduction and Overview of Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 1, 1 (2013) [hereinafter *Introduction and Overview of Strangulation Cases*].

7. Nancy Glass et al., *Non-Fatal Strangulation is an Important Risk Factor for Homicide of Women*, 35 J. Emergency Med. 329, 329 (2008).

8. CDC Survey, *supra* note 2, at 44-45 (estimating an additional 1.2 million men have been the victim of non-fatal strangulation in their lifetime). Compare 1.1 million women strangled in a twelve month period circa 2010 with the Federal Bureau of Investigation (FBI) reporting just over 1.2 million violent crimes in all of 2010. See *Uniform Crime Report 2010*: <https://ucr.fbi.gov/crime-in-the-u.s./2010/crime-in-the-u.s.2010/tables/10tbl01.xls> (last visited Jan. 18, 2017).

9. See generally Melissa Mack, *He Takes My Breath Away: Why Legislators Must Take Action to Protect Victims of Strangulation*, May 10, 2013, (unpublished manuscript) (on file with The Training Inst. on Strangulation Prevention); Heather Douglas & Robin Fitzgerald, *Strangulation, Domestic Violence and the Legal Response*, 36 Sydney L. Rev. 231 (2014) (discussing legal responses from Canada, United Kingdom, Australia, and New Zealand).

10. **Alabama:** Ala. Code § 13A-6-138; Ala. Code § 13A-6-133. **Alaska:** Alaska Stat. § 11.81.900; Alaska Stat. § 11.41.200; Alaska Stat. § 11.41.210; Alaska Stat. § 11.41.220; Alaska Stat. § 11.41.230. **Arizona:** Ariz. Rev. Stat. § 13-1204. **Arkansas:** Ark. Code Ann. § 5-13-204. **California:** Cal. Penal Code § 273.5; Cal. Penal Code § 13730. **Colorado:** Colo. Rev. Stat. § 18-3-202; Colo. Rev. Stat. § 26-3.1-101. **Connecticut:** Conn. Gen. Stat. § 53A-64AA; Conn. Gen. Stat. § 53A-64BB; Conn. Gen. Stat. § 53A-64CC. **Delaware:** Del. Code Ann. tit. 11, § 607; Del. Code Ann. tit. 11, § 4201(c). **District of Columbia:** D.C. Code § 16-2301. **Florida:** Fla. Stat. Ann. § 784.041; Fla. Stat. Ann. § 39.01. **Georgia:** Ga. Code Ann. § 16-5-19; Ga. Code Ann. § 16-5-21. **Hawaii:** Haw. Rev. Stat. Ann. § 709-906. **Idaho:** Idaho Code § 18-918; Idaho Code § 18-923. **Illinois:** 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; 725 Ill. Comp. Stat. Ann. 5 / § 110-5; 725 Ill. Comp. Stat. Ann. 5 / § 110-5. **Indiana:** Ind. Code Ann. § 35-42-2-9; Ind. Code Ann. § 12-7-2-53.2. **Iowa:** Iowa Code § 708.2A; Iowa Code § 236.12. **Kansas:** K.S.A. § 21-5414. **Louisiana:** La. Stat. Ann. § 14:34.9; La. Stat. Ann. § 14:35.3; La. Stat. Ann. § 40:2405.8. **Maine:** Me. Rev. Stat. Ann. tit. 17-A § 208; Me. Rev. Stat. Ann. tit. 25 § 2803-B. **Maryland:** Md. Code Ann. Crim. L. § 3-303; Md. Code Ann. Crim. L. § 3-305; Md. Code Ann. Crim. L. § 3-307. **Massachusetts:** Mass. Ann. Laws ch. 265, § 16; Mass. Ann. Laws ch. 265 § 15D; Mass. Ann. Laws ch. 12 § 33; Mass. Ann. Laws ch. 6 § 116A. **Michigan:** Mich. Comp. Laws Serv. § 750.91; Mich. Comp. Laws Serv. § 750.84. **Minnesota:** Minn. Stat. Ann. § 609.2247; Minn. Stat. Ann. § 125A.0942; Minn. Stat. Ann. § 125A.0942. **Mississippi:** Miss. Code Ann. § 97-3-7. **Missouri:** Mo. Ann. Stat. § 565.073. **Montana:** MT Code Ann. § 45-5-215. **Nebraska:** Neb. Rev. Stat.

Ann. § 28-310.01; Neb. Rev. Stat. Ann. § 29-4503. **Nevada:** Nev. Rev. Stat. Ann. § 200.481; Nev. Rev. Stat. Ann. § 193.166; Nev. Rev. Stat. Ann. § 200.400; Nev. Rev. Stat. Ann. § 200.485; Nev. Rev. Stat. Ann. § 202.876. **New Hampshire:** N.H. Rev. Stat. Ann. § 631:2. **New Jersey:** N.J.S.2C:12-1. **New Mexico:** N.M. Stat. Ann. § 29-7-4.1; N.M. Stat. Ann. § 30-3-11; N.M. Stat. Ann. § 30-3-16; N.M. Stat. Ann. § 32A-4-2; N.M. Stat. Ann. § 40-13-2. **New York:** N.Y. Penal Law § 121.11; N.Y. Penal Law § 121.12; N.Y. Penal Law § 121.13; N.Y. Crim. Proc. § 530.11. **North Carolina:** N.C. Gen. Stat. § 14-32.4. **North Dakota:** N.D. Cent. Code § 11-19.1-01; N.D. Cent. Code § 12.1-01-04. **Ohio:** Ohio Rev. Code Ann. § 2919.251. **Oklahoma:** Okla. Stat. Ann. tit. 21, § 644; Okla. Stat. Ann. tit. 22, § 58; Okla. Stat. Ann. tit. 22, § 1105. **Oregon:** Or. Rev. Stat. Ann. § 163.187; Or. Rev. Stat. Ann. § 124.105; Or. Rev. Stat. Ann. § 135.703; Or. Rev. Stat. Ann. § 133.055; Or. Rev. Stat. Ann. § 135.951. **Pennsylvania:** 18 Pa. Stat. and Cons. Stat. Ann. § 2718; 23 Pa. Stat. and Cons. Stat. Ann. § 6303. **Rhode Island:** 11 R.I. Gen. Laws § 5-2.3. **South Carolina:** S.C. Code Ann. § 16-25-65; S.C. CODE ANN. § 43-35-10. **South Dakota:** S.D. Codified Laws § 22-18-1.1. **Tennessee:** Tenn. Code Ann. § 39-13-102. **Texas:** Tex. Penal Code Ann. § 22.01. **Utah:** Utah Code Ann. § 76-5-103; Utah Code Ann. § 76-5-109. **Vermont:** Vt. Stat. Ann. tit. 13, § 1021; Vt. Stat. Ann. tit. 13, § 1024. **Virginia:** Va. Code Ann. § 18.2-51.6; Va. Code Ann. § 18.2-57.2; Va. Code Ann. § 18.2-58; Va. Code Ann. § 18.2-58.1. **Washington:** Wash. Rev. Code Ann. § 9A.36.021; Wash. Rev. Code Ann. § 9A.04.110; Wash. Rev. Code Ann. § 9A.16.100; Wash. Rev. Code Ann. § 74.34.035. **West Virginia:** W. Va. Code Ann. § 61-2-9d; W. Va. Code Ann. § 48-27-1002; W. Va. Code Ann. § 61-2-12. **Wisconsin:** Wis. Stat. Ann. § 940.235; Wis. Stat. Ann. § 813.129. **Wyoming:** Wyo. Stat. Ann. § 6-2-509. **Guam:** 9 Guam Code Ann. § 19.80. **Virgin Islands:** V.I. Code Ann. tit. 14, § 296; V.I. Code Ann. tit. 14, § 507. **Federal Statute:** 18 U.S.C. § 1113.

11. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 906, 127 Stat. 54, 124 [hereinafter VAWA 2013] (also addressing suffocation).

12. See generally Nicole Verdi, *Releasing the Stranglehold on Domestic Violence Victims: Implications and Effects of Rhode Island's Domestic Assault Strangulation Statute*, 18 Roger Williams U. L. Rev. 255 (2013); Heather Wolfgram, WATCH, *The Impact of Minnesota's Felony Strangulation Law* (2007); David Martin & Emily Elting, *Strong New Laws Target Most Deadly Conduct*, 19 Domestic Violence Rep. 1 (2013); Gael Strack & Casey Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, 26 Crim. J. Mag. 32 (2014) [hereinafter *On the Edge of Homicide*]. At least one study has even correlated domestic violence legislation with reduced mortality rates of women. See Amin, *supra* note 5, at 4.

13. U.S. Dep't of Def., Defense Manpower Requirements Report: Fiscal Year 2018, at 2 (2017), [http://prhome.defense.gov/Portals/52/Documents/MRA\\_Docs/TFM/Reports/Final%20FY18%20DMRR%2011Dec2017.pdf](http://prhome.defense.gov/Portals/52/Documents/MRA_Docs/TFM/Reports/Final%20FY18%20DMRR%2011Dec2017.pdf) (includes active duty, reserve, and National Guard estimates).

14. See U.S. Dep't of Veterans Aff., *Intimate Partner Violence: Prevalence Among U.S. Military Veterans and Active Duty Servicemembers and a Review of Intervention Approaches* 7, 10 (2013) (finding "that [intimate partner violence] victimization and perpetration are prevalent among active duty servicemembers and veterans" and that "[m]ilitary service has unique psychological, social, and environmental factors that may contribute to elevated risk[,] such as: "[m]ultiple deployments, family separation and reintegration, [and]

demanding workloads . . ."); Ctr. for Disease Control & Prevention, *Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men—Comparisons with Women in the U.S. General Population* 39 (2013) (finding that an estimated 4,000 active duty women and 14,000 wives of active duty men had been the victim of severe physical violence by their intimate partner in the twelve months preceding a 2010 survey).

15. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001–5521, 130 Stat. 2000. See discussion *infra* Section IV.B.I.

16. U.S. Dep't of Def., Report on Child Abuse and Neglect and Domestic Abuse in the Military for Fiscal Year 2017, at 35-37 (Apr. 2018) [hereinafter FY 17 FAP Data] (out of 15,657 total reports of spousal abuse).

17. *Id.* at 37. Seventy-four percent of incidents that met criteria for abuse were physical in nature. *Id.* at 32. These statistics are still likely low, because military families face unique disincentives to reporting family violence. Christine Hansen, *A Considerable Service: An Advocate's Introduction to Domestic Violence and the Military*, 6 Domestic Violence Rep. 49, 49-50 (2001).

Women associated with the military are particularly vulnerable due to geographical isolation from family and friends, social isolation within the military culture, residential mobility, financial insecurity and fear of adverse career impact. Abused women are often fearful of reporting incidents due to the lack of confidentiality and privacy; limited victim services; and lack of adequate training and assistance available from [c]ommand, military police, family advocacy programs, medical corps and military justice trial counsel.

*Id.*

18. U.S. Dep't of Def., Sexual Assault Prevention & Response Off., Department of Defense Annual Report on Sexual Assault in the Military 14 (2016) (nearly nine-thousand fewer reports than all reports of spousal abuse).

19. FY 17 FAP Data, *supra* note 16, at 55 (nine deaths in FY 2017); U.S. Dep't of Def., Report on Child Abuse and Neglect and Domestic Abuse in the Military for Fiscal Year 2016, at 51 (May 2017) (nine deaths in FY 2016); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2015 Data 16 (fourteen deaths in FY 2015); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2014 Data 24 (28 Aug. 2015) (eleven deaths in FY 2014); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2013 Data 27 (20 May 2014) (sixteen deaths in FY 2013); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2012 Data 18 (28 June 2013) (seventeen deaths in FY 2012); Memorandum from Deputy Assistant Sec'y of Def. (Mil. Cmty. & Fam. Pol'y) to Assistant Sec'y of Def. (Pub. Aff.) et al., subject: Department of Defense Family Advocacy Program Fiscal Year 2011 Data 21 (29 May 2012) (eighteen deaths in FY 2011).

20. Colonel (Ret.) James E. McCarroll et al., *Characteristics of Domestic Violence Incidents Reported at*

*the Scene by Volunteer Victim Advocates*, 173 Mil. Med. 865, 867 (2008) (results limited to families living on base). These figures equate to 489 incidents of strangulation on a single installation during this time period. See *id.* In an additional 276 cases, victims were unwilling to speak with advocates at all. *Id.* at 869.

21. See Kathryn Laughon, Nancy Glass, & Claude Worrell, *Review and Analysis of Laws Related to Strangulation in 50 States*, 33 Evaluation Rev. 358, 364 (2009).

22. William Green, *Medical Evidence in Non-Fatal Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 53, 55 (2013).

23. Gael B. Strack et al., *How to Improve Your Investigation and Prosecution of Strangulation*, Nat'l Ctr. on Domestic & Sexual Violence 3 (May 1999), [http://www.ncdsv.org/images/strangulation\\_article.pdf](http://www.ncdsv.org/images/strangulation_article.pdf). Compare eleven pounds of pressure to block blood flow to the brain with the twelve pounds of pressure to fire a double action shot from a Beretta M9 pistol. David Tong, *A Fair and Balanced Analysis of the M9 Service Pistol*, [http://www.chuckhawks.com/beretta\\_M9\\_pistol.htm](http://www.chuckhawks.com/beretta_M9_pistol.htm) (last visited Jan. 15, 2017).

24. Gael B. Strack & Michael Agnew, *Investigation of Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases s 21, 21 (2013) [hereinafter *Investigation of Strangulation Cases*].

25. See Green, *supra* note 22, at 56-58.

26. *Id.* at 59; see also Lee Wilbur et al., *Survey Results of Women Who Have Been Strangled While in an Abusive Relationship*, 21 J. Emergency Med. 297, 298 (2001) (explaining that psychosis, progressive dementia, and post-traumatic stress disorder are among the possible psychological effects of strangulation).

27. Allison Turkel, "And Then He Choked Me": *Understanding and Investigating Strangulation*, 2 Fam. & Intimate Partner Violence Q. 339, 339 (2010). Victims commonly, yet incorrectly, refer to their near-death experiences as "choking," which, in contrast, refers to an object impeding the airway (i.e. food) and is generally accidental. See *id.*; *On the Edge of Homicide*, *supra* note 12, at 33 (2014). Similarly, many practitioners still use the term "attempted strangulation," which fails to acknowledge that neither unconsciousness, nor death are required to complete the crime. Casey Gwinn, *Strangulation and the Law*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 5, 13 (2013) [hereinafter *Strangulation and the Law*].

28. *Introduction and Overview of Strangulation Cases*, *supra* note 6, at 1; *Strangulation and the Law*, *supra* note 27, at 17.

29. *Introduction and Overview of Strangulation Cases*, *supra* note 6, at 2.

30. *Investigation of Strangulation Cases*, *supra* note 24, at 21; see, e.g., Melissa Jeltsen, *A Legal Loophole May Have Cost This Woman Her Life: When States Fail to Recognize Strangulation as a Precursor to Domestic Homicide*, *The Results Can Be Fatal*, The Huffington Post (Oct. 9, 2015 08:01 AM EDT), [http://www.huffingtonpost.com/entry/ohio-strangulation-felony\\_us\\_56153530e4b0fad1591a36bf](http://www.huffingtonpost.com/entry/ohio-strangulation-felony_us_56153530e4b0fad1591a36bf).

31. *On the Edge of Homicide*, *supra* note 12, at 33. This study also encouraged the founding of The Training Institute on Strangulation Prevention by former City Attorney of San Diego Casey Gwinn and former prosecutor Gael Strack. See *Our Team*, Training Institute on Strangulation Prevention, <https://www.strangulation-traininginstitute.com/about-us/our-team/> (last visited Feb. 19, 2017).
32. Gael B. Strack, George E. McClane & Dean Hawley, *A Review of 300 Attempted Strangulation Cases Part I: Criminal Legal Issues*, 21 J. Emergency Med. 303, 306 (2001) [hereinafter *A Review of 300 Attempted Strangulation Cases*]. Notably, eighteen percent of suspects studied were servicemembers. *Id.* at 304.
33. *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 308.
34. Glass, *supra* note 7, at 330.
35. *Id.* at 334.
36. *Id.* at 329. See also Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 Nat'l Inst. Just. J. 14, 17 (2003) (finding that women who were a victim to non-fatal strangulation were in excess of 900 percent more likely to be the victim of homicide).
37. See Laughon, *supra* note 21, at 360.
38. *On the Edge of Homicide*, *supra* note 12, at 33; *A Review of 300 Attempted Strangulation Cases*, *supra* note 31, at 308; see generally Wilbur, *supra* note 26 (discussing the physical, neurological, and psychological injuries associated with strangulation).
39. Dean A. Hawley, *Forensic Medical Findings in Fatal and Non-fatal Intimate Partner Strangulation Assaults*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, *California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases* Appx. 115, 116 (2013).
40. See *Investigation of Strangulation Cases*, *supra* note 24, at 30 ("Victims of domestic violence may recant, minimize, or even completely change their story by the time the case goes to trial. If that happens, it will be the evidence gathered by investigators that tells the truth."); Bridgette P. Volochinsky, *Obtaining Justice for Victims of Strangulation in Domestic Violence: Evidence Based Prosecution and Strangulation-Specific Training*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, *California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases* Appx. 8, 9 (2013).
41. *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 308 ("The combination of limited visible injuries, a poor understanding of the medical significance of symptoms, the victim's failure to report symptoms, and the victim's unwillingness to seek medical attention may have caused police and prosecutors to unintentionally minimize or trivialize the seriousness of the actual violence.").
42. Laughon, *supra* note 21, at 360.
43. See Verdi, *supra* note 12, at 268 ("Since the early 2000s numerous states have passed legislation making domestic violence strangulation a felony.").
44. National Defense Authorization Act of 2000, Pub. L. No. 106-65, §591, 113 Stat. 512, 639.
45. Memorandum from Defense Task Force on Domestic Violence to Sec'y of Defense, subject: Domestic Violence 39 (28 Feb. 2001).
46. See generally Laughon, *supra* note 21.
47. *Id.* at 358.
48. Casey Gwinn & Gael Strack, *Why Strangulation Should be a Felony*, Strangulation Training Inst. 2 (Jan. 2011), <http://www.strangulationtraininginstitute.com/file-library/strangulation-07-strangulation-white-paper-nfca-01-10-pdf/> [hereinafter *Why Strangulation Should be a Felony*].
49. Director, Women's Human Rights Program, *Legal Reform on Domestic Violence in Central and Eastern Europe and the Former Soviet Union*, UN Doc. EGM/GPLVAW/2008/EP.01, at 11-12 (Jun. 17, 2008). Several nations have taken similar steps to study and codify strangulation as a felony-level offense. See, e.g., Douglas, *supra* note 9; Law Commission *The Prosecution of Offences* (NZLC R138, 2016) (reporting on the need for a specific strangulation offense in New Zealand); Legal Affairs and Community Safety Committee, 55th Parliament of Queensland, *Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015*, Report No. 23 (2016) (Austl.) (recommending legislation creating a specific strangulation offense).
50. Verdi, *supra* note 12, at 268.
51. See *supra* note 10. At the time of this writing, Kentucky and Ohio do not have strangulation-specific offenses, although Ohio does recognize strangulation in bail determinations hearings and is pending legislation to expand felonious assault to include strangulation. Ohio Rev. Code Ann. § 2919.251 (LexisNexis 2016); S.B. 207, 132nd Gen. Assemb.
52. See *supra* note 10. Among these fifty-three jurisdictions, legislation can be divided into three categories: (1) states that enacted a separate offense for strangulation; (2) states that amended existing offenses to address strangulation; and (3) states that have enacted some limited authority over strangulation offenses. *Id.*
53. VAWA 2013, *supra* note 11, at 124 (amending 18 U.S.C §113).
54. *Id.* Ten years' confinement is consistent with the maximum punishment for assault with a dangerous weapon and assault with serious bodily injury. 18 U.S.C.A. § 113 (West 2016). The Department of Justice noted "[t]here are clear reasons why strangulation assaults, particularly in an intimate partner relationship should be a separate felony offense and taken extremely seriously at sentencing" and "urge[d] the commission to make the enhancement for strangulation or suffocation five offense levels." U.S. Dep't of Just., U.S. Department of Justice Views on the Proposed Amendments to the Federal Sentencing Guidelines and Issues for Comment Published by the U.S. Sentencing Commission in the Federal Register on January 17, 2014, at 9, 11 (Mar. 6, 2014).
55. VAWA 2013, *supra* note 11, at 124. The change to 18 U.S.C. § 113 was enacted as part of Title IX, Safety for Indian Women. *Id.*; see also, 159 Cong. Rec. S45 (daily ed. Jan. 22, 2013) (statement of Sen. Reid) ("Congress should . . . ensure that all victims of domestic or sexual violence, including Native American women, gay and lesbian victims, and battered immigrant women, receive the support and protections provided by VAWA."); 159 Cong. Rec. S157 (daily ed. Jan. 22, 2013) (statement of Sen. Leahy) (noting the need for assisting tribal communities, lesbian, gay, bisexual, transsexual (LGBT) communities, and immigrant victims).
56. See generally Martin, *supra* note 12.
57. Stacey Bederka, New York State Division of Criminal Justice Services, Arrests and Arraignments Involving Strangulation Offenses Nov. 11, 2010 – Feb. 22, 2011, at 1 (Apr. 2011). Although eighty-three percent of offenders were charged with misdemeanors, "perpetrators who had previously avoided any punishment because of a lack of visible injuries were now facing criminal sanctions . . ." *On the Edge of Homicide*, *supra* note 12, at 35.
58. Andrew Wheeler, New York State Division of Criminal Justice Services, Arrests and Arraignments Involving Strangulation Offenses Nov. 11, 2010 – June 30, 2012, at 1 (Sept. 2012).
59. Adriana Fernandez-Lanier, New York State Division of Criminal Justice Services, Domestic Homicide in New York State 2015, at 11 (July 2016).
60. Wolfgram, *supra* note 12, at 28-29.
61. *Id.* at 7.
62. Marna L. Anderson, WATCH, WATCH Report Part II: The Impact of Minnesota's Felony Strangulation law 5 (2009) (emphasis added). Convictions for lesser qualifying domestic violence crimes also saw a seven percent increase. *Id.*
63. Wolfgram, *supra* note 13, at 6.
64. See, e.g., Melissa Gomez, *Training Teaches Law Vegas Law Enforcement, Medical Staff to Spot Signs of Strangulation* Las Vegas Rev. J. (Aug. 10, 2016, 5:30 AM), <http://www.reviewjournal.com/view/training-teaches-las-vegas-law-enforcement-medical-staff-spot-signs-strangulation> (reporting that Las Vegas law enforcement officers and medical personnel attended training after receiving approximately 700,000 reports of strangulation in 2014); Heather Mongilio, *Authorities Lead Strangulation Investigation Training*, Carroll Cty Times (June 22, 2016, 9:55 PM), <http://www.carrollcountytimes.com/news/crime/ph-cc-sa-strangulation-training-20160622-story.html> (reporting on the local State's Attorney's Office and police department leading three training sessions on investigating and prosecuting strangulation).
65. See *supra* note 10 (Maine, Maryland, and Massachusetts, Louisiana, and New Mexico).
66. See Domestic Violence Strangulation Project, *The Burden of Proof: Strangulation and Suffocation Cases*, at slides 16-19 (unpublished PowerPoint presentation), [https://www.azmag.gov/Documents/DVPEP\\_2012-11-02\\_Burden-of-Proof\\_Strangulation-and-Suffocation-Cases.pdf](https://www.azmag.gov/Documents/DVPEP_2012-11-02_Burden-of-Proof_Strangulation-and-Suffocation-Cases.pdf) (last visited Jan. 16, 2017). See also Alexa N. D'Angelo, *Maricopa County domestic-violence deaths drop after policy change*, azcentral.com (Mar. 2, 2015 3:18 PM), <http://www.azcentral.com/story/news/local/phoenix/2015/03/02/county-attorney-strangulation-protocol/24001897/>.
67. Domestic Violence Strangulation Project, *supra* note 66, at slide 18.
68. D'Angelo, *supra* note 66.
69. Wolfgram, *supra* note 12, at 5.
70. *Id.* at 6.
71. See Laughon, *supra* note 21, at 360 (discussing the difficulties in charging assault or attempted murder).
72. See e.g., Del. Code Ann. tit. 11, § 607; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; 725 Ill. Comp. Stat. Ann. 5 / § 110-5; Mass. Ann. Laws ch. 265 § 15D; Miss. Code Ann. § 97-3-7; Neb. Rev. Stat. Ann. § 28-310.01; Ohio Rev. Code Ann. § 2919.251; Okla. Stat. Ann. tit. 22, § 1105; 18 Pa. Stat. and Cons. Stat. Ann. § 2718; Tex. Penal Code Ann. § 22.01; Wis. Stat. Ann. § 940.235. See also Fed. R. Evid. 609 (permitting evidence of prior convictions).

73. Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 Fed. Sent'g Rep. 220, 221 (2003). A servicemember is subject to either a special court-martial—akin to misdemeanor court because the court is limited to awarding twelve months confinement—or a general court-martial—more often associated with felonious offenses because the court can award the maximum punishment available for the offense. See The Judge Advocate Gen.'s Legal Ctr. & Sch., Criminal Law Deskbook: Practicing Military Justice 1-7-8 (2015) (explaining that general courts-martial also procedurally require a pre-trial investigation, similar to a grand jury).
74. See Freedus & Fidell, *supra* note 73, at 221.
75. See 18 U.S.C. §3559(a) (2012) (defining a felony as any offense that carries a maximum sentence of more than one year in confinement).
76. See Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military State Criminal Record Reporting*, 1995 Army Law. 3, 12 (1995) (arguing that “[b]ecause an offender’s prior court-martial conviction can have an impact on the disposition of a pending civilian offense, the Army has an obligation to be complete and accurate in reporting court-martial convictions.”). See also U.S. Dep’t of Def., Instr. 5505.11, Fingerprint Card and Final Disposition Report Submission Requirements (C1, 31 Oct. 2014) (requiring DoD components to report the final disposition of cases to the FBI).
77. See, e.g., Del. Code Ann. tit. 11, § 607; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.05; 720 Ill. Comp. Stat. Ann. 5 / § 12-3.3; Mass. Ann. Laws ch. 265 § 15D; Miss. Code Ann. § 97-3-7; Neb. Rev. Stat. Ann. § 28-310.01; 18 Pa. Stat. and Cons. Stat. Ann. § 2718; Tex. Penal Code Ann. § 22.01; Wis. Stat. Ann. § 940.235.
78. See generally Hargis, *supra* note 76. See also Legal Affairs and Community Safety Committee, *supra* note 49, at 9 (“A specific strangulation [offense] will ensure that strangulation appears clearly on the criminal record of the accused and alert social services and future sentencing judges to the dangerous level of the offender’s domestic violence history.”).
79. See Manual for Courts-Martial, United States, pt. IV, ¶ 54(e)(8)(b) (2016) [hereinafter MCM].
80. 10 U.S.C. §928(b) (2012).
81. *United States v. Joseph*, 37 M.J. 392, 397 (C.M.A. 1993) (holding that having unprotected sexual intercourse with an unknowing partner, while infected with human immunodeficiency virus (HIV), was an assault with a means likely to cause death or grievous bodily injury), *overruled by* *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015).
82. *United States v. Gutierrez*, 74 M.J. 61 (C.A.A.F. 2015) (reversing an aggravated assault conviction for factual insufficiency where the accused’s likelihood of transmitting HIV to an unknowing partner during unprotected sex was too low to be “likely” to produce death or grievous bodily harm). The court determined that a “plain English definition” of the word “likely” required this heightened standard. *Id.* at 63, 66.
83. See *id.* at 66.
84. See Gerald W. Fineman, *Prosecuting Strangulation Cases*, in Cal. Dist. Attorneys Assoc. & Training Inst. on Strangulation Prevention, California Strangulation Manual: The Investigation and Prosecution of Strangulation Cases 39, 48 (2013) (discussing common misperceptions jurors have about strangulation cases).
85. Military Justice Act of 2016, *supra* note 15.
86. *Id.* § 5441.
87. *Id.* Currently, the Manual for Courts-Martial states: “A weapon is dangerous when used in a manner likely to produce death or grievous bodily harm.” MCM, *supra* note 79, pt. IV, ¶54(c)(4)(a)(1).
88. Report of the Military Justice Review Group, Part I: UCMJ Recommendations, Mil. Just. Rev. Grp. 937-40 (Dec. 22, 2015) (recommending conformity with 18 U.S.C. §113(a)(3)).
89. See *A Review of 300 Attempted Strangulation Cases*, *supra* note 32, at 306; Laughon, *supra* note 21, at 360.
90. See U.S. Dep’t of Army, Pam. 27-9, Military Judges’ Benchbook 738 (10 Sept. 2014) [hereinafter Military Judges’ Benchbook].
91. UCMJ art. 118 (2016).
92. See Laughon, *supra* note 21, at 360.
93. See *id.*
94. See *Strangulation and the Law*, *supra* note 27, at 5 (“Many domestic violence offenders . . . do not strangle their partners to kill them; they strangle them to let them know they can kill them—anytime they wish.”).
95. See *id.* at 8 (“Jurors expect to see visible injuries.”); Fineman, *supra* note 84, at 48.
96. See Laughon, *supra* note 21, at 360 (“When injury is caused by a person’s hands, however, as is often the case in strangulation, the judge or jury has more difficulty inferring any specific intent.”).
97. UCMJ art. 134 (2016)
98. *Id.*; MCM, *supra* note 79, pt. IV, ¶ 60(c).
99. 18 U.S.C. §13 (2012) (meaning the state crime is already a crime under a federal statute).
100. See MCM, *supra* note 79, pt. IV, ¶ 60(c)(4).
101. Local application means that the specific offense is only an offense when committed where the law applies, whereas unlimited application means that the offense is an offense regardless of where it is committed. *Id.* Notably, the recent passage of the Military Justice Act of 2016 expands federal jurisdiction of all federal offenses to worldwide applicability for service members. Military Justice Act of 2016, *supra* note 15, § 5451.
102. MCM, *supra* note 79, pt. IV, ¶ 60(c)(4).
103. 18 U.S.C.A. § 113 (West 2016).
104. States vary widely in how they have chosen to define and punish strangulation offenses, and some states have no strangulation-specific law at all. See *supra* note 10. Currently Kentucky and Ohio do not have any strangulation-specific offense. The District of Columbia limits application to child abuse cases, and Maryland limits application to sexual offenses. See *id.*
105. *Why Strangulation Should be a Felony*, *supra* note 48, at 5 (“Strangulation violence is a felony under virtually any assault statute in the United States. A specialized strangulation statute will not create a new crime, it will simply provide clear elements of an offense for existing lethal force being used consistently by violent and abusive intimate partners . . .”).
106. See *id.* “Strong laws make a difference. How seriously a crime of domestic violence is defined, how seriously it is sentenced, and what statistics are kept regarding the frequency or cycle of domestic violence makes a difference on many levels—to victims, offenders, police, and to the community at large.” Martin & Elting, *supra* note 12, at 12.
107. *Strangulation and the Law*, *supra* note 27, at 14.
108. *Id.* at 16.
109. See *infra* App. A, B (definitions provided within).
110. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 818 (1993) (“Domestic violence statutes must offer coverage to a wide range of extended family relationships to fully reflect the reality of American family life.”); Laughon, *supra* note 20, at 365 (recommending “all states . . . use language that includes all potential victims”).
111. See Military Judges’ Benchbook, *supra* note 90, at 738.
112. See Laughon, *supra* note 21, at 365.
113. “Low sentences feed into denial.” Wolfgram, *supra* note 12, at 12 (quoting a probation officer who felt offenders were not adequately punished for their offenses with merely sixty or ninety days in confinement).
114. 18 U.S.C.A. § 113 (West 2016).
115. See discussion *supra* Section IV.B.III.
116. See *supra* note 20 and accompanying text.
117. Glass, *supra* note 7, at 329. See also Legal Affairs and Community Safety Committee, *supra* note 48, at 10 (“While strangulation is arguably covered already by common assault, an assault charge underrepresents the seriousness of non-fatal strangulation given the high risk and danger associated with it.”).
118. MCM, *supra* note 79, at Appx. 12.
119. *Strangulation and the Law*, *supra* note 27, at 17.
120. See Amin, Islam & Lopez-Claros, *supra* note 5, at 6 (“Furthermore, the presence of domestic violence legislation may legally bind governments to be more responsive to cases of domestic violence, possibly improving accountability and increasing provision of public services that both deter domestic violence and assist victims . . .”).
121. See Mack, *supra* note 9, at 2 (“Without an express statute, there is a lack of awareness of the crime, a lack of charging and prosecution of the crime, and therefore a lack of offender accountability.”).
122. Organizations within the DoD already participate in training put on by The Training Institute on Strangulation Prevention. Email from Gael Strack, Chief Executive Officer, The Training Institute on Strangulation Prevention, to author (Jan. 29, 2017, 6:59PM EST) (on file with author). The Institute is a Department of Justice-funded technical assistance organization, and since its founding has conducted training in every state and sixteen countries, training, on average, five-to-ten thousand practitioners annually. *Id.* Continued utilization of this program on a broader spectrum would assist in ensuring the provision of necessary training and guidance in investigating and prosecuting these offenses.
123. Wolfgram, *supra* note 12, at 3.



Members of the Office Basic Course perform leg lifts during physical training outside of The Judge Advocate General's Legal Center and School in April (Credit: Chris Tyree).

# Closing Arguments

## PT: With the Office or On Your Own?

By Lieutenant Colonel Josh Berry and Lieutenant Colonel Dave Goscha

*Lieutenant Colonel Dave Goscha (DG):* I called my local attorney the other day in order to make an appointment for legal help

in incorporating my wife's business. The attorney warned me that he charged \$300 per hour for his services. I agreed, but told

him that I was in the Army, and that in the Army Judge Advocate General's Corps we do physical training before we are allowed to give legal advice to our client. I expect nothing less from a civilian attorney. I added that no individual physical training would do, it would have to be 90 full minutes of training with every member of his firm and their paralegals. By the time I arrived for my initial consultation, I was greeted by a bill for \$1,700.00. After I paid the bill and stepped in with the attorney, I quickly realized that his advice was no better than attorneys who work out on their own. Do you see where I am going with this?

*Lieutenant Colonel Josh Berry (JB):* I see what you are doing there! Did you also demand that your attorney be vaccinated for world-wide deployment, be fully qualified on a personal weapon, be able to provide life-saving first aid, and be prepared to deploy to war with no notice? I assume you did not, and I do not even know if Warren Buffett could afford that legal bill. My point is simple—we are different than civilian attorneys. All of us volunteered to join the Army, and all of us knew, or quickly learned, that the expectations of Soldiers are different than those of civilians. One of those extremely important differences is the requirement to maintain a high level of physical fitness. A critical tool in maintaining physical fitness for an Office of the Staff Judge Advocate (OSJA) is an organized and mandatory physical readiness training (PRT) program.

*DG:* I see your point. My attorney does not appear to be deployable. However, when considering whether organized PRT is worthwhile, consider these two words: Prone Row. The Prone Row, contrary to published standards, consists of lying face down in either grass that has been freshly sprayed by DPW, mud, asphalt, or a surface that is hiding worms, mosquitos, or fire ants. After you assume the starting position, you have to arch your back in a direction that nature never intended. After you survive that treatment, you may be expected to

do the Power Skip, the military movement drill that strikes fear in the hearts of no one. And what about Four for the Core? Does the Army believe that maintaining stress positions prepares a Soldier for worldwide deployment into a high intensity battle? Professional football strength and conditioning coaches of winning teams do not prepare their players in such a manner.

*JB:* I hear you, and when we served together as captains, we both did enough overhead arm claps to understand how truly detrimental a poor PRT program can be to both morale and your health! Let's take a step back—why should we have an organized PRT program? *Field Manual 7-22* says PRT “prepares Soldiers and units for the physical challenges of fulfilling the mission in the face of a wide range of threats, in complex operational environments, and with emerging technologies.” You are saying that Soldiers in an OSJA can accomplish this on their own, right? I disagree—I believe our responsibilities as leaders requires us to conduct an organized, mandatory PRT program for the OSJA.

*DG:* Unit leadership is vitally important. *Field Manual 7-22* inspires me. However, consider the physical training, not as written, but as practiced. As legal professionals, we strive to elevate our status to that of, or superior to, Soldiers in combat MOSs. I have done PT in weather conditions where no other unit dared to train. Why? Because we are the 27-series fighting for respect. Oftentimes, our training is skewed because we factor in ego and forget to respect the law of reasonableness. When it comes to egos, the 27-series tends to over-achieve! Unreasonable PRT does not prepare us to execute missions. In fact, heat injuries are cumulative, cold weather injuries are debilitating and cause illness, and poorly run PRT can lead to injuries, profiles, and a degradation of combat readiness. Because PRT can be poorly executed, we should embrace the mantra that physical fitness is an individual responsibility. Nobody knows our physical limitations and constitution like ourselves.

*JB:* I concur that for some Soldiers, their duty position may require individual PRT, but for an OSJA, I believe mandatory PRT is vital. First, if we are honest, in every OSJA there is a population of Soldiers who,



A member of the Officer Basic Course performs pullups at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia (Credit: Chris Tyree).

if left to their own devices, will not meet their personal responsibility to “achieve and sustain a high level of physical readiness.” Second, PRT gives the OSJA leadership the opportunity to get to better know their Soldiers as individuals, and appreciate their “individual physical and mental differences”—you can learn a lot about your Soldiers by the effort they give at PRT. Third, a mandatory PRT program—when planned, resourced, and executed effectively—gives all Soldiers in an OSJA the opportunity to better themselves physically and mentally, and can increase camaraderie and trust within the OSJA. I fully concede that for many, PRT can be demoralizing, but I believe this is due to poor PRT programs that lack diversity and are not designed to build

over time toward a goal—clear leadership failures. Finally, and most importantly, I believe we as leaders are derelict in our responsibilities to our Army and nation if we do not work tirelessly to ensure our Soldiers are physically and mentally ready to fight and win our nations wars—a good PRT program is a critical foundation of readiness. **TAL**

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*LTC Berry is a Deputy Staff Judge Advocate for the 4th infantry Division at Fort Carson, Colorado. LTC Goscha is a Deputy Staff Judge Advocate with the Combined Arms Center at Fort Leavenworth, Kansas.*

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## AROUND THE CORPUS

Mr. Malcolm H. Squires, Clerk of Court/Judicial Advisor for the Army Court of Criminal Appeals, describes the role of the court to visitors (Credit: SFC Bryan OrtizArman)





## AROUND THE CORPS

JAGC Soldiers in Advanced Individual Training take part in morning PT at Fort Lee, Virginia. (Credit: SFC Bryan OrtizArman).



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