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Lore of the Corps

The Origin of the Corps' Distinctive Insignia

Fred L. Borch
Regimental Historian & Archivist

When wearing the Army Service Uniform, every judge advocate, legal administrator, and paralegal wears the Corps' "Regimental Distinctive Insignia" (RDI) above the top left pocket flap of the blouse. But this is a fairly recent development, as the Corps had no such insignia until 1986. Just how a small blue enamel shield with a gold-colored crossed-pen-and-sword came to be the Corps' RDI is an interesting piece of our lore.

In the years when the Army was re-building after Vietnam, senior leaders looked for novel ways to enhance morale and esprit de corps among Soldiers. One initiative, approved by the Chief of Staff in 1981, was to create a "U.S. Army Regimental System" in which Soldiers in the combat arms were affiliated with a "regiment" and then were expected to serve recurring assignments with that regiment.[1] While the regimental affiliation idea naturally worked best with infantry, armor and artillery, the Army expected combat support, combat service support, and special branches like the Judge Advocate General's Corps (JAGC) to also carry "on the activities and traditions of a regiment."[2]

On 30 May 1986, the Department of the Army announced that the Corps "is placed under the US Army Regimental System effective 29 July 1986."[3] This explains why on that day in July—on the 211th birthday of the JAGC—Major General (MG) Hugh R. Overholt, The Judge Advocate General (TJAG), announced that the Corps had joined the Army's new regimental system. As the *Army Times* reported a few days later, the JAGC was the seventh "branch-oriented organization" to join the system and, at the time, consisted of 3,730 active-duty Soldiers, 4,278 National Guardsmen, and 1,772 Army Reservists.[4]

When MG Overholt announced that the Corps was now also a regiment, he also revealed that "formal affiliation ceremonies" would take place during the Corps' "Worldwide" annual conference in October 1986 in Charlottesville, Virginia.[5] The planning for this "Regimental Activation Ceremony" had been underway for some time, because "accouterments" for the new "JAG Corps Regiment" were required for the ceremony, including an RDI to be worn by Soldiers to show their regimental affiliation.

Initially, the Corps' leadership considered adopting the Distinctive Unit Insignia used by The Judge Advocate General's School as the RDI. Ultimately, however, this idea was rejected in favor of designing a new RDI. This explains why an article in *The Army Lawyer* announced that there would be a Corps-wide "competition" to design the RDI. This competition was "open to all members of the JAGC (active, Reserve and retired)" and "suggested crest designs" had to be submitted "by the end of June 1986."[6] While a number of drawings were submitted, it seems that the winning design came from Colonel (COL) Richard "Dick" McNeely and Major (MAJ) Ronald Riggs, both of whom were assigned to the International Law Division in the Office of The Judge Advocate General (OTJAG). As then-MAJ David Graham remembers he was at lunch in the Pentagon one day and heard MAJ Riggs say to COL McNeely: "Hey, we can win this competition." McNeely agreed, and the two men sat down and sketched out a design on a small piece of paper, perhaps a napkin, with a ball point pen. They then submitted the design to OTJAG for consideration.[7]

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[1] Although regiments have existed in the American Army since the Revolution, the idea for a regimental system in which Soldiers spent most of their service in one unit became increasingly popular in the post-Vietnam era. For more on the concept, see U.S. DEP'T OF ARMY, REG. 600-82, THE U.S. ARMY REGIMENTAL SYSTEM (5 June 1990) [hereinafter AR 600-82].

[2] AR 600-82, *supra* note 1, para. 2-3f.

[3] Headquarters, U.S. Dep't of Army, Gen. Order No. 22, para. 3 (30 May 1986) (This general order also formally established "Charlottesville, Virginia" as the "home" of the JAGC.).

[4] These total numbers included 4,639 commissioned officers, 197 warrant officers, and 4,944 enlisted Soldiers. Jim Tice, *Legal Specialists Join Regimental System*, ARMY TIMES, Aug. 1986, at 2.

[5] *JAGC Regimental Activation*, ARMY LAW., May 1986, at 16.

[6] *Id*.

[7] Interview with Colonel (Retired) David E. Graham, Executive Dir., The Judge Advocate Gen.'s Legal Ctr. & Sch. (TJAGLCS), in Charlottesville, Va. (Apr. 6, 2012) [hereinafter Graham Interview]. Mr. Graham had a distinguished career as a judge advocate, and served in a variety of important assignments including Staff Judge Advocate, U.S. Army Southern Command (1990–1992) and Chief, International and Operational Law Division, Office of the Judge Advocate General (1994–2002). Mr. Graham has been the Executive Director, TJAGLCS, since 2003.

The McNeely-Riggs design—consisting of a shield upon which the crossed-pen-and-sword insignia was centered, with the letters "JAGC" above the insignia and the numerals "1775" below it—won the competition. Then-MAJ Michael Marchand[8] took the design to The Institute of Heraldry for that office to use in creating the Corps' RDI.

The Institute's initial proposed RDI design, however, deviated significantly from the McNeely-Riggs drawing. On 28 July 1986, the Institute proposed to MG Overholt that the RDI consist of a dark blue shield containing *both* a "balance" and the crossed-pen-and-sword insignia. The balance—or weighing scales—would be *above* the crossed-pen-and-sword and both would be centered on the shield.[9] The Institute design also did not have the letters "JAGC." It did, however, have the numerals "1775" on a scroll at the base of the shield.

Major General Overholt did not like the scales in the proposed RDI design and asked the Institute to redesign the RDI without them. The result was that, on 13 August 1986, the Institute returned to MG Overholt with two proposed designs: the pen and sword in *silver* on a blue shield with the numerals "1775," and the pen and sword in *gold* on a blue shield with the numerals "1775." After MG Overholt selected the gold pen and sword design on 21 August, the Corps had its "Regimental Distinctive Insignia."[10] In the words of the Institute, the official description and symbolism of the new RDI were:

> DESCRIPTION
>
> A silver color medal and enamel device 1 1/8 inches in height consisting of a shield blazoned as follows: argent, an escutcheon azure (dark blue) charged with a wreath of laurel surmounted by a sword bendwise point to base and a quill in saltire all gold. Attached below the shield is a dark blue scroll with the numerals "1775" in silver.
>
> SYMBOLISM
>
> The quill and sword symbolize the mission of the Corps, to advise the Secretary of the Army and supervise the system of military justice throughout the Army. Dark blue and silver (white) are the colors associated with the Corps. Gold is for excellence.

On its website, the Institute added that the motto "1775" "indicates the anniversary of the Corps."[11] More accurately, "1775" reflects the year that the Continental Congress appointed William Tudor as the first Judge Advocate General of the Army—thus marking the beginnings of the Corps in the Army.

On 9 October 1986, MG (Retired) Kenneth Hodson and Sergeant Major (SGM) (Retired) John Nolan, the first Honorary Colonel of the Corps and first Honorary SGM of the Corps, respectively, unveiled the approved design for the RDI. In the months that followed, MAJ Marchand worked closely with The Institute of Heraldry to see that the RDI was manufactured. Actual production of the RDI did not begin until mid-1987, when the Institute of Heraldry authorized insignia manufacturers N.S. Meyer (hallmark M22) and Vanguard (hallmark V21) to produce the RDI for commercial sale.

While members of the Regiment immediately began wearing the new RDI on the Army Green Service Uniform (more often called the "Class A" uniform), there was some resistance to wearing the RDI on the "Class B" light green uniform shirt. Following the Air Force example, the Army had transitioned from a Class B khaki shirt and trousers to a light green short sleeve uniform shirt on which medals and decorations were not (at least initially) authorized to be worn. This uncluttered look pioneered by the Air Force was popular and some judge advocates, legal administrators and legal clerks did not want to wear the RDI on their shirts. This attitude changed, however, after a directive from OTJAG signaled that the new RDI would be worn by all.

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[8] Michael J. Marchand had a thirty-two-year career as a judge advocate. He served in a variety of important assignments, including Assistant Judge Advocate General for Civil Law and Litigation (1997–1998) and Commander, U.S. Army Legal Services Agency & Chief Judge, U.S. Army Court of Criminal Appeals (1998–2001). Major General (MG) Marchand completed his service in uniform as The Assistant Judge Advocate General (2001–2005). After retiring from active duty, MG Marchand was appointed as the President of the Center for American and International Law located in Dallas, Texas.

[9] This design is somewhat similar to the short-lived judge advocate insignia adopted by MG Walter A. Bethel in 1923. *See* Fred L. Borch, *Crossed Sword and Pen: The History of the Corps' Branch Insignia*, ARMY LAW., Apr. 2011, at 3–5.

[10] Graham Interview, *supra* note 7.

[11] *Judge Advocate General*, INST. OF HERALDRY, http://www.tioh.hqda.pentagon.mil/UniformedServices/Branches/JAG.aspx (last visited Aug. 9, 2012).

Almost twenty-five years later, the distinctive Regimental insignia continues to be an integral part of the uniform of all members of the JAGC Regiment—a proud symbol of who we are and what we do.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

https://www.jagcnet.army.mil/8525736A005BE1BE

Do Not Pay $200—Go Directly to Jail: Clarifying the Fine Enforcement Provision

Major Daniel J. Murphy[*]

I. Introduction

When the gavel drops, what are the chances the sentence adjudged by a court-martial will be an effective form of punishment for the accused? The answer to this question necessarily depends on the individual accused in every case, and the interests of society in punishing that particular Soldier. The question becomes more difficult to answer when dealing with financial crimes—crimes frequently committed against the U.S. government. Consider the following hypothetical, representative of an increasing number of fraud cases being investigated throughout the Army.[1]

After a weeklong trial, the trial counsel is successful in convicting an Army staff sergeant with nine years of service at a general court-martial, comprised of members, of charges including larceny of government property and frauds against the United States.[2] The accused is found guilty of signing false documents in order to claim Basic Allowance for Housing (BAH) at the New York City rate for family members who neither lived in New York nor were actual dependents of the accused.[3] Over the course of thirty-three months, the accused collected nearly $98,000 to which he was not lawfully entitled. Upon announcement of sentence, the accused is sentenced to: reduction to Private First Class (E-3); forfeiture of $1,500 pay per month for six months; confinement for six months; a fine of $25,000 (and to serve an additional twelve months confinement if the fine is not paid) and to be discharged with a bad-conduct discharge.[4]

Given the limited information in this hypothetical, the adjudged sentence appears to be an appropriate punishment. Now consider how effective this hypothetical sentence would be if the convening authority *disapproved* the fine at the time of action. Without the fine, the adjudged sentence may seem light compared to the financial windfall received by the accused over two-and-a-half years. In this hypothetical, it is the *fine*, along with the threat of an additional year in confinement, that gives the punishment its severity.

As severe as an adjudged fine may be in a case such as the hypothetical, courts-martial rarely adjudge punitive fines at all.[5] When a fine is adjudged, all too often the convening authority substantially mitigates it or disapproves it entirely. This can, perhaps, be explained by a degree of unfamiliarity among judge advocates regarding the practical aspects of enforcing fines and executing fine enforcement provisions. On its face, executing contingent confinement may seem administratively cumbersome. The rules on executing contingent confinement are confusing and lack procedural guidance. Too often, this results in chiefs of military justice and staff judge advocates recommending the convening authority mitigate or disapprove adjudged fines and contingent confinement. Such recommendation is unnecessary, as the due process procedures for enforcing fines are not as onerous as they appear. There is, however, a need for clarity in the law and clear procedural rules for enforcing an adjudged punitive fine to improve its effectiveness.

This article aims to highlight the need for clarifying punitive fine enforcement rules to ensure fines are effective and viable means to punish Soldiers convicted of financial crimes. The background section in Part II provides an overview of the military justice sentencing procedures and principles of punishment, concluding that financial sanctions are often the most appropriate punishment to deter and punish for financial crimes. Part III then examines the differences between the two forms of financial sanctions authorized by the *Manual for Courts-Martial* (*MCM*): forfeitures of pay and a punitive fine.[6] It compares the two sanctions, highlighting the effect other punishments may

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[*] Judge Advocate, U.S. Army. Presently assigned as the Special Victim Prosecutor, 101st Airborne Division and Fort Campbell, Kentucky.

[1] The U.S. Army Criminal Investigation Division Command has "founded" 491 cases of Basic Allowance for Housing (BAH) fraud since 2007. E-mail from Ms. Teena Hartsoe, Deputy, Intelligence Div., Headquarters, U.S. Army Crim. Investigation Div., to author (Feb. 23, 2012, 11:10 EST) (on file with author). After focusing a task force on the investigation of BAH fraud, founded cases jumped nearly 30% in 2008 from 2007 levels and have remained consistent each year. *Id.*

[2] UCMJ arts. 121, 132 (2012).

[3] New York City has the highest .BAH rates in the continental United States. The allowance for an E-6 with dependents for 2013 is $3,372. Def. Travel Mgmt. Office, U.S. Dep't of Def., 2013 BAH Table WITH DEPENDENTS (Dec. 11, 2012), *available at* http://www.defensetravel.dod.mil /Docs/perdiem/browse/Allowances/BAH/PDF/2012/2012-With-Dependents-BAH-Rates.pdf. Soldiers committing BAH fraud often select the highest paying zip codes when committing this sort of fraud. E-mail from Ms. Gisella Schmitt, Chief of Fin., U.S. Army Europe, Heidelberg, Germany, to author (Feb. 28, 2012, 04:27 EST) (on file with author).

[4] This hypothetical sentence, though an example of a typical sentence adjudged in these cases, is meant only for demonstrative purposes and is not offered to suggest what an appropriate sentence may be in similar cases. This example is a fictitious hypothetical; any similarities between this example and any actual cases are purely coincidence.

[5] The Army Court of Criminal Appeals (ACCA) reports that in calendar year 2011, 996 courts-martial were forwarded to the Clerk of Court pursuant to Uniform Code of Military Justice (UCMJ) Article 66 and Article 69. E-mail from Mr. Jeffrey Todd, Paralegal Specialist, U.S. Army Ct. of Crim. App., to author (Jan. 11, 2012, 15:54 EST) [hereinafter Todd e-mail] (on file with author). The accused was adjudged a fine in only twelve of these cases, or 1.2% of all reported cases. *Id.*

[6] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003 (b)(2), (3) (2012) [hereinafter MCM].

have on the effectiveness of forfeitures and suggesting that a punitive fine may be more effective in certain cases. Part IV then examines how ambiguous language in Rule for Courts-Martial (RCM) 1003(b)(3) fails to address whether serving of contingent confinement releases the accused from liability to pay the adjudged fine. It examines how a lack of procedural rules for executing contingent confinement and how seemingly cumbersome indigence hearings may result in convening authorities mitigating or disapproving adjudged fines altogether: This result needlessly changes the sentence to one that fails to adequately punish the convicted Solder. Then in Part V, this article proposes amended language to the RCM that would eliminate the ambiguity in the rule and also proposes clear procedural rules for executing contingent confinement. Finally, the article concludes by explaining that the amendments proposed in this article would improve the RCM, better allowing for the fair, consistent, and effective administration of justice.

II. Background

Sentencing procedures at a court-martial differ significantly from civilian federal courts, in which trial judges use federal sentencing guidelines to arrive at a calculated, and predictable, sentence.[7] Conversely, in courts-martial, the trier of fact, either a panel or a military judge, considers evidence in both aggravation and mitigation through an adversarial proceeding before determining an appropriate sentence unconstrained by federal guidelines.[8] Channeled only by sentence limitations and instructions issued by the military judge, panel members, rarely equipped with any significant training or experience in behavioral science or criminal psychology, are left to their collective devices on formulating what they believe is an appropriate sentence.[9]

To determine a sentence, the trier of fact must consider the five societal principles for punishing

> those who violate the law. . . . (1) [r]ehabilitation of the wrongdoer; (2) [p]unishment of the wrongdoer [(retribution)]; (3) [p]rotection of society from the wrongdoer; (4) [p]reservation of good order and discipline in the military; and, (5) [d]eterrence of the wrongdoer and those who know of his . . . crime(s) and his . . . sentence from committing the same or similar offenses.[10]

Pursuant to authority vested in him by Congress,[11] the President prescribed procedural rules and maximum authorized punishments through executive orders, outlined in the *MCM*.[12] These punishments fall under one of the following general categories: (1) discharge from the Armed Forces; (2) deprivation of liberty; (3) financial sanctions; (4) reduction in grade; and, (5) a reprimand.[13]

Given the range of permissible punishments, it is not surprising when a court-martial sentences an accused convicted of a *violent* crime to a substantial length of confinement. Confinement in this case is a reflection of the court's interest in protecting society from the violent criminal. The need to protect society from a Soldier convicted of a purely *financial* crime, however, is arguably not as grave. It is in these cases where courts frequently turn to other forms of punishment, often imposing financial sanctions on the accused to promote society's interests in deterrence and retribution.[14] But in reality, the effectiveness of these financial sanctions depends on what other punishments the court imposes as well as the ability of the government to enforce the sanctions. Understanding the nuances of each type of financial sanction reveals stark differences in the relative effectiveness of forfeitures compared with a punitive fine.

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[7] 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE 373 (2d ed. 1999). For a compelling comparative analysis of the U.S. sentencing guidelines to the military sentencing process, see Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000) (arguing that creating military sentence guidelines that parallel federal guidelines would promote discipline by reducing sentencing disparity).

[8] Immel, *supra* note 7, at 168 (noting that neither the Sentencing Reform Act of 1984 nor the U.S. Sentencing Commission applies to military justice sentencing); *see also* MCM, *supra* note 6, R.C.M. 1001. (providing procedural rules for the pre-sentencing hearing).

[9] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 8-3-20 to 8-3-28 (1 Jan. 2010) [hereinafter BENCHBOOK]. *See also* MCM, *supra* note 6, R.C.M. 1002 (stating, "[s]ubject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.").

[10] BENCHBOOK, *supra* note 9, para. 8-3-21.

[11] UCMJ art. 56 (2012); *see also* United States v. Palmer, 59 M.J. 362, 364 (C.A.A.F. 2004) (stating, "[p]ursuant to the authority Congress has given him to establish punishments, Article 56, UCMJ, 10 U.S.C. § 856 (2000), the President has provided that a court-martial 'may adjudge a fine in lieu of or in addition to forfeitures.' R.C.M. 1003(b)(3).").

[12] 1 GILLIGAN & LEDERER, *supra* note 7, at xxvii.

[13] MCM, *supra* note 6, R.C.M. 1003; *see also* 2 GILLIGAN & LEDERER, *supra* note 7, at 381–95.

[14] *See* 2 GILLIGAN & LEDERER, *supra* note 7, at 374 (noting "[t]he traditional goals for sentencing are rehabilitation; specific (or special) deterrence; general deterrence; incapacitation (or warehousing); retribution; respect for law and order; *(and) restitution*.") (alteration in original) (emphasis added). It is noted that restitution is not one of the five principles of punishment recognized in the *Benchbook* or in Rule for Court-Martial (RCM) 1001(g). *See generally* BENCHBOOK, *supra* note 9; MCM, *supra* note 6, R.C.M. 1001(g).

III. Comparison of Financial Sanctions Authorized by the RCM

Rule for Court-Martial 1003 outlines those punishments a court-martial may adjudge.[15] Subject to statutory and jurisdictional limitations,[16] the RCM authorizes the imposition of two distinct means of financial sanctions at a court-martial: a forfeiture of pay and allowances and a punitive fine.[17] While both punishments amount to forms of financial deprivation, adjudged forfeitures and an adjudged fine have very different legal effects on the accused.[18]

A. Forfeitures of Pay and Allowances

Courts-martial frequently adjudge forfeitures of pay and allowances, irrespective of the type of crime committed.[19] This is, perhaps, a reflection of the belief that an effective way to punish someone is to take away the resources they use for personal pleasure. Forfeitures deprive the accused of a specific amount of money per month for a specified period of time, becoming due as the accused's pay accrues.[20] A general court-martial may sentence an accused to either total or partial forfeiture of pay.[21] A court-martial may only sentence an accused to forfeit allowances if the sentence also includes total forfeiture of pay.[22] A special court-martial may sentence an accused to partial forfeiture of pay not to exceed two-thirds pay.[23] Unless total forfeitures are adjudged by a general court-martial, the amount of forfeitures imposed upon an accused is limited to the accused's monthly basic pay at the pay grade to which the accused is reduced or, if not reduced in rank, the pay grade at the time of sentencing.[24] Forfeitures of pay and allowances adjudged by a court-martial become effective fourteen days after the sentence is adjudged or when the convening authority approves the sentence, whichever is earlier.[25] In addition to the relatively quick effective date of forfeitures, enforcing forfeitures is entirely within the control of the government.[26]

Forfeitures can be an effective financial sanction, particularly for an accused remaining on active duty after his conviction. But, because forfeitures may not be applied retroactively, they amount to a prospective financial sanction effective only so long as the accused remains on active duty.[27] As such, forfeitures adjudged against a Soldier nearing his expiration term of service (ETS) date have only limited effectiveness. Furthermore, any change in the Soldier's pay status (e.g., transfer to voluntary or involuntary excess leave pending discharge, etc.) will affect the government's ability to withhold pay and allowances.

In addition to these administrative distinctions that reduce the overall effectiveness of forfeitures, prospective forfeitures also fail to address the unjust enrichment already received by the accused in cases involving financial crimes of substantial proportion. As with the introductory hypothetical case, an accused convicted of financial fraud offenses often has received the benefit of his crime. Whether this money remains in the accused's bank account or was squandered elsewhere, the accused profited from money to which he was never entitled. In these cases, forfeitures alone barely scratch the surface in punishing the accused for his unjust enrichment. It is in these cases that a punitive fine, accompanied by a fine enforcement provision, most appropriately penalizes the accused.

B. Fine

Rule for Court-Martial 1003(b)(3) also authorizes a court-martial to adjudge a fine, either instead of or in addition to any adjudged forfeitures.[28] A punitive fine, or a combination of forfeitures *and* a punitive fine, serves an

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[15] MCM, *supra* note 6, R.C.M. 1003.

[16] *See generally id.* R.C.M. 1003(c) (limiting punishments generally by the jurisdiction of the forum in accordance with UCMJ Articles 18 through 20 and RCM 201, by the rank of the accused, or by limitations established in Part IV of the *MCM* pertaining to offenses).

[17] *Id.* R.C.M. 1003(b)(2),(3).

[18] These differences are magnified when the accused is also sentenced to either confinement in excess of six months, or any amount of confinement and a punitive discharge. UCMJ Article 58b requires total forfeiture of all pay and allowances (two-thirds of all pay in the case of a special court-martial), by operation of law, when the accused is sentenced to either confinement in excess of six months, or any amount of confinement along with a punitive discharge. UCMJ art. 58b (2012).

[19] *See* Todd e-mail, *supra* note 5. Of the 996 cases forwarded to the Clerk of Court, the accused received an adjudged forfeiture in 344 cases. As such, some variation of forfeiture of pay and allowances was adjudged in 35% of reported cases. *Id.*

[20] MCM, *supra* note 6, R.C.M. 1003(b)(2) discussion.

[21] UCMJ art. 19 (2012). Unless adjudging total forfeitures, the amount of partial forfeitures must be stated by the court-martial in whole dollars to be forfeited each month and for how many months. MCM, *supra* note 6, R.C.M. 1003(b)(2).

[22] *Id.* (stating "[a]llowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances.").

[23] UCMJ art. 19 (2012).

[24] MCM, *supra* note 6, R.C.M. 1003(b)(2).

[25] UCMJ art. 57 (2012); *see also* MCM, *supra* note 6, R.C.M. 1003(b)(2) discussion. In practice, rarely does a convening authority act on a court-martial sentence within fourteen days. This assertion is based on the author's recent professional experiences as the V Corps Chief of Military Justice, from 15 July 2009 to 1 July 2011.

[26] Forfeitures are initiated when the government files a signed DA Form 4430, Report of Result of Trial, through the accused's immediate commander to the installation finance office. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-30b. (3 Oct. 2011).

[27] *See* 2 GILLIGAN & LEDERER, *supra* note 7, at 389.

[28] A special or summary court-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. MCM, *supra* note 6, R.C.M. 1003(b)(3).

extraordinarily effective punishment where forfeitures alone fall short of their intended penological interest. Unlike forfeitures, a fine is a sum certain that "makes the accused immediately liable to the United States for the entire amount" when it is ordered executed.[29] Different from forfeitures, a fine does not deprive the accused of prospective pay and allowances.[30] While forfeitures are limited at a general court-martial by the basic pay and allowances due to an accused, no such limitation exists for fines.[31] Only the Eighth Amendment protection against cruel and unusual punishment limits the amount of a fine that a court-martial may adjudge.[32] As such, a fine is the most effective means of targeting the unjust enrichment gained by the accused in financial crimes.

While courts-martial may adjudge forfeitures for any crime committed, they ordinarily should adjudge a punitive fine only in cases where the accused was unjustly enriched by his offense.[33] It is important to note that a punitive fine is paid to the U.S. Treasury; consequently, a court-martial may not direct payment of a fine to a particular victim or to the U.S. Army.[34] In light of this requirement, a fine is most appropriate in cases where the accused stole money from the United States, such as for larceny of government property or BAH fraud cases.[35]

A fine also differs from forfeitures in the date it becomes effective. Unlike forfeitures, that become effective fourteen days after sentencing,[36] a fine is not effective—and therefore not due—until the convening authority approves and orders its execution.[37] Nevertheless, geared towards the accused's unjust enrichment, it is a fine's definite and certain liability, which makes an adjudged fine such a powerful punishment.

As powerful a punishment as it may be, a fine is only as effective as the government's ability to enforce it. While forfeitures are enforceable through the government's withholding of pay, satisfaction of a punitive fine requires the accused to affirmatively pay money to the government. Absent some enforcement measure, the accused's obligation to pay a fine is subject only to the accused's own "moral persuasion."[38] RCM 1003(b)(3) provides this enforcement measure, stating:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired.[39]

On its face, the authority to execute contingent confinement provides the government with a powerful tool for enforcing payment of a fine. This authority, however, is not without limitation. RCM 1113(e)(3) protects an accused whose inability to pay a fine is due solely to indigence.[40]

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[29] *Id.* discussion ("A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the money specified in the sentence.").

[30] *See* 2 GILLIGAN & LEDERER, *supra* note 7, at 389 ("The only form of *deprivation* of pay that may be imposed as a court-martial punishment is forfeiture of pay and allowances.") (emphasis added).

[31] MCM, *supra* note 6, R.C.M. 1003(b)(2).

[32] U.S. CONST. amend. VIII; *see also* United States v. Williams, 18 M.J. 186, 187 (C.M.A. 1984) (finding there to be no financial limits on the amount of fine able to be adjudged by a general court-martial other than the constitutional and statutory proscriptions against cruel and unusual punishment); United States v. Parini, 12 M.J. 679, 685 (A.C.M.R. 1981) (finding that a fine is unconstitutionally excessive only if it is "so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances").

[33] MCM, *supra* note 6, R.C.M. 1003(b)(3) discussion (stating, "[a] fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted."). But, this is not a legal requirement and fines may be imposed in other cases. *See* United States v. Czeck, 28 M.J. 563 (N.M.C.M.R. 1989) (whether accused has been unjustly enriched is only one factor to be considered in determining whether a fine is an appropriate sentence); *see also* United States v. Stebbins, 61 M.J. 650 (C.A.A.F. 2007) (holding that, based on the plain language of the rule as well as the history of a fine as punishment, it is not unlawful to impose a fine where there is no unjust enrichment).

[34] Lieutenant Colonel David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 NAVAL L. REV. 1, 2 (2005) ("Under the military's present punishment system, there is no judicial mechanism for victim restitution."). Therefore, a fine should not be considered a form of restitution in cases where the victim of the financial crime is not the government.

[35] *See Stebbins*, 61 M.J. at 370 (noting that historically, fines were considered "especially appropriate to those offenses which consist in a misappropriation or misapplication of public funds or property, being in general adjudged with a view mainly to the reimbursement of the United States for some amount illegally diverted to private purposes.").

[36] *See supra* note 25.

[37] MCM, *supra* note 6, R.C.M. 1003(b)(3) discussion. *See also* UCMJ art. 57(c) (2012) (stating all punishments except forfeitures and confinement become effective on the date ordered executed); United States v. Phillips, 64 M.J. 410, 412 (C.A.A.F. 2007) (noting that "[u]nless a different date or payment schedule is set forth in the convening authority's action or otherwise agreed to by the convening authority, payment of the fine is due on the date that the convening authority takes action" approving the sentence).

[38] United States v. Rascoe, 31 M.J. 544, 552 (1990).

[39] MCM, *supra* note 6, R.C.M. 1003(b)(3). This fine enforcement provision is really the brawn of the punishment. Confinement ordered pursuant to this fine enforcement provision is often referred to as "contingent confinement." *Rascoe*, 31 M.J. at 548 n.1.

[40] Major Larry Cuculic, *Contingent Confinement and the Accused's Counter-Offer*, ARMY LAW., May 1992, at 28, 29; *see also Rascoe*, 31 M.J. at 550 (noting that while RCM 1003(b)(3) appears to authorize an enforcement provision resulting in an automatic reversion to confinement in the event a fine is not paid, RCM 1113(d)(3), now RCM 1113(e)(3), "appears to limit that automatic transformation until [the accused] is afforded the due process of law that might prevent his imprisonment if he invokes it"). In 2008, Executive Order 13,468 re-designated subparagraph

RCM 1113(e)(3) extends a right of procedural due process to an accused before the accused may be ordered into confinement for his failure to pay a fine.[41] The rule states that:

> Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.[42]

Notwithstanding these limitations, this fine and enforcement provision may potentially form a powerful punishment appropriate for financial crimes committed against the government. Despite this potential, as infrequently as fines are adjudged across the Army, convening authorities often mitigate or disapprove the fine or any contingent confinement announced with the sentence.[43] The potential effectiveness of fines and contingent confinement is stifled by the rules' lack of procedural clarity, lack of implementing guidance, and ambiguous language. As a result, staff judge advocates and convening authorities are left to decipher the rule and navigate through conflicting case law to execute contingent confinement and enforce punitive fines. Faced with unanswered questions and seemingly cumbersome procedures, convening authorities often mitigate fines or disapprove them entirely. The rules' textual ambiguity and lack of procedural guidance render a potentially powerful punishment and enforcement provision otherwise weak and ineffective.

IV. Deciphering the Fine Enforcement Provision

Unclear procedural requirements and ambiguities in the RCM create uncertainty amongst judge advocates in determining exactly what is required to execute contingent confinement. Trial courts, and even appellate courts, struggle with interpreting the rules as well.[44] The rules themselves are the source of the greatest confusion. Poorly written, RCM 1003(b)(3) and RCM 1113(e)(3) contain textual ambiguities leaving open for interpretation the legal effect of contingent confinement while providing no implementing guidance or procedural requirements.

A. Ambiguous Language in RCM 1003(b)(3)

Naturally, judge advocates first look to the rule to determine the applicability of a fine enforcement provision. Given the language of RCM 1003(b)(3) and RCM 1113(e)(3), this is not always helpful. These rules contain ambiguous language[45] that creates confusion as to the legal effect of a fine enforcement provision.

Assume that an accused fails to pay an adjudged fine and is ordered to confinement pursuant to the fine enforcement provision announced with his sentence. As written, RCM 1003(b)(3) is unclear whether serving this contingent confinement discharges the accused's liability to pay the adjudged fine. A logical reading of RCM 1003(b)(3) suggests it does, stating, "the person fined shall . . . be further confined until a fixed period *considered an equivalent punishment to the fine* has expired."[46] The emphasized language of the rule implies that by serving an "equivalent" amount of confinement, the punishment is

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(d) of RCM 1113 to subparagraph (e) by inserting a new subparagraph. Exec. Order No. 13,468, 73 Fed. Reg. 43,831 (July 28, 2008).

[41] *Rascoe*, 31 M.J. at 550. This due process is frequently referred to as an "indigence hearing." United States v. Palmer, 59 M.J. 362, 364 (C.A.A.F. 2004).

[42] MCM, *supra* note 6, R.C.M. 1113(e)(3). This rule modifies RCM 1003(b)(3) to ensure constitutional protection under the Equal Protection clause of the U.S. Constitution. *Id.* R.C.M. 1113 analysis, at A21-93.

[43] *See* Todd e-mail, *supra* note 5. At the time this article was written, the respective convening authorities had taken action on only seven of the twelve courts-martial in which a fine was adjudged in 2011. *Id.* Of these seven cases, the convening authorities mitigated the fine in two cases reducing each fine to roughly one third of the adjudged amount, disapproved the contingent confinement in one case, and disapproved the fine and contingent confinement in another. *Id.*

[44] *See Rascoe* 31 M.J. at 550 (addressing the trial judge's mischaracterization of the fine enforcement provision).

[45] Prior to 20 March 2013, there was one more ambiguity in RCM 1003(b)(3): whether a convening authority may execute contingent confinement when the adjudged sentence does not also include ordinary confinement. 2 GILLIGAN & LEDERER, *supra* note 7, at 392. The confusion stems from a poorly drafted rule, which states:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, *in addition to any period of confinement adjudged*, be *further* confined until a fixed period considered an equivalent punishment to the fine has expired.

MCM, *supra* note 6, R.C.M. 1003(b)(3) (emphasis added). The emphasized words caused confusion as to whether ordinary confinement must also be adjudged before contingent confinement may be imposed. The Air Force interpreted these words to require adjudged confinement, United States v. Carmichael, 27 M.J. 757, 757 (A.F.C.M.R. 1988) (holding a fine enforcement provision is invalid when a sentence does not also include a term of ordinary confinement), whereas the Army did not. United States v. Bevins, 30 M.J. 1149, 1149 (A.C.M.R. 1990) (holding a fine enforcement provision is valid even when the sentence does not also include a term of ordinary confinement). Recently, however, the Air Force Court of Criminal Appeals overruled its *Carmichael* decision holding that fine enforcement provision is valid without an ordinary confinement. United States v. Ferris, ACM 37885 (A.F. Ct. Crim. App. Mar. 20, 2013), *available at* http://afcca.law.af.mil/content/afcca_opinions/cp/ferris-37885.pub.pdf. Hence, this issue appears to have been clarified, though the rule remains ambiguous.

[46] MCM, *supra* note 6, R.C.M. 1003(b)(3) (emphasis added).

satisfied. Furthermore, whether intended by the drafters of the RCM or not, the short title of RCM 1113(e)(3), "*Confinement* in lieu *of fine*," supports this understanding.[47] But, it is critical to remember that a fine enforcement provision itself is not punishment for the crime.[48] As such, it would follow that an accused's confinement served under a fine enforcement provision would not discharge his liability to pay an adjudged fine, but only serve to enforce payment of the punitive fine.

A review of the historical origins of the RCM 1003(b)(3) fine enforcement provision supports that contingent confinement does *not* discharge the accused of his liability to pay a punitive fine. The Navy-Marine Corps Court of Military Review provided a thorough historical review of the origins of the current RCM 1003(b)(3) fine enforcement provision in *United States v. Rascoe*.[49] In *Rascoe*, the court explained that the RCM 1003(b)(3) fine enforcement provision was analogous to the "committed fine" used by the federal courts before 1987.[50] The court explained that under this "committed fine," the civilian remedy for a defendant's refusal to pay a fine was for the court to authorize, prospectively, additional confinement *until* the fine was paid.[51] This confinement was intended to address "willful refusal to pay and was an action taken for contumacious conduct rather than as the imposition of punishment for the offense of which the defendant had been convicted."[52] In the civilian courts, the defendant remained liable for the fine notwithstanding any confinement served for nonpayment of the fine.[53] However, RCM 1003(b)(3) and RCM 1113(e)(3) seem to suggest contingent confinement is an alternative to an adjudged fine triggered by an accused's failure to pay a fine.

In *Rascoe*, the court acknowledges this ambiguity but leaves unanswered the question of whether a Soldier's adjudged fine is discharged once he has served contingent confinement.[54] The court distinguishes an accused with the ability to pay but willfully refuses from an accused who cannot pay due to indigence.[55] The court explains under certain conditions, contingent confinement *may* be "transformed into punishment under RCM 1113(d)(3) [now RCM 1113(e)(3)]," becoming a substitute for the adjudged fine.[56] In these cases, the court explains, "the fine is thereby discharged at the time an accused has served the substituted punishment."[57] Nevertheless, the court also notes, "we believe the fine of an accused confined for contumacious conduct is *not* discharged regardless of how much confinement he serves; *nor* is an indigent accused's fine discharged if the fine enforcement provision is not transformed into punishment."[58] In the same footnote, the court acknowledges that the language of RCM 1003(b)(3) could mean that the accused's fine is discharged upon his serving contingent confinement.[59] The court chose not to clarify the question.[60] The court's analysis, however, suggests that the authority ordering confinement must make a determination as to whether an executed fine enforcement provision is intended to *transform* into punishment, thereby discharging the punitive fine, or is intended to serve only as a fine enforcement tool.[61] The Court of Appeals for the Armed Forces (CAAF) also chose not to clarify the issue in *United States v. Palmer*. In *Palmer*, the CAAF highlighted this same ambiguity in a footnote, but chose not to address whether serving a period of contingent confinement discharges the adjudged punitive fine.[62] Thus, the answer remains unclear, once again leaving staff judge advocates and convening authorities on their own in interpreting the rule.

This ambiguity weakens the effect of a punitive fine when the rules fail to provide the accused, counsel, convening authority, and the court with a clear understanding of what is intended by the fine enforcement provision. It is not, however, just the ambiguity in the rule that weaken the effectiveness of a fine and enforcement

[47] *Id.* R.C.M. 1113(d)(3) (emphasis added).

[48] *Rascoe*, 31 M.J. at 550 (expressly stating, "a fine enforcement provision is not punishment.") (citing *Sarae*, 9 C.M.R. at 633 ("There is a clear distinction between confinement imposed as punishment for an offense, and confinement until a fine is paid. That distinction rests upon the fact that the latter is imposed, not as punishment for the offense, but to compel obedience to the sentence of the court, i.e., the payment of the fine.")).

[49] *Id.* at 544 (accused (E-1) was convicted of nine specifications of larceny when he altered and presented his government paychecks to receive $5200 to which he was not entitled. He was sentenced to a dishonorable discharge, six months confinement, forfeiture of all pay and allowances, a fine of $6000, and to serve an additional five years confinement if the fine is not paid).

[50] *Id.* at 550. As further support, the court noted that the 1949 edition of the *MCM* included language indicating that an accused may be imprisoned "until the fine is paid." *Id.* at 551.

[51] *Id.* at 551.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 552 n.6.

[55] *Id.* at 551.

[56] *Id.* at 552.

[57] *Id.*

[58] *Id.* at 552 n.6 (emphasis added).

[59] *Id.*

[60] *Id.*

[61] *Id.* at 552–53.

[62] United States v. Palmer, 59 M.J. 362, 364 n.4 (C.A.A.F. 2004) ("[T]he unpaid portion of Palmer's fine was remitted pursuant to Department of the Air Force Instruction 51–201, Administration of Military Justice, §§ 9.9.2, 9.9.5.11 (Nov. 26, 2003) [AFI 51–201], both of which indicate that the additional confinement is a 'substitute' for the fine. This opinion does not address whether the convening authority may execute contingent confinement without remitting any unpaid portion of an approved fine or providing for remission of the unpaid portion of a fine upon service of a contingent period of confinement.").

provision. The rules also lack procedural guidance for executing contingent confinement, which further stifles the effectiveness of a punitive fine and contingent confinement.

B. Lack of Procedural Rules for Executing Fine Enforcement Provision

As discussed, RCM 1113(e)(3) is the procedural safeguard against punishing the accused whose failure to pay an adjudged fine was due solely to indigence.[63] Before executing contingent confinement, RCM 1113(e)(3) requires the "authority considering the imposition of confinement" to first determine whether the accused has made a good faith effort to pay the fine and whether the accused's inability to pay the fine is due to indigence.[64] Although RCM 1113(e)(3) provides limitations on executing contingent confinement, the rule is silent on specific procedures the government must follow before doing so and leaves open for interpretation what exactly the rule requires.[65]

Military appellate courts have attempted to clarify where the RCM fall short in providing procedural guidance to practitioners.[66] In *United States v. Rascoe*, the Navy-Marine Corps Court of Military Review outlined criteria to be reviewed by the authority considering executing contingent confinement.[67] The U.S. Court of Military Appeals (CMA) again addressed the procedural requirements of RCM 1113(e)(3) in *United States v. Tuggle*. In reversing the lower court, the CMA discussed several factors that should and should not be considered in determining whether the accused is indigent.[68]

Despite the appellate courts' efforts at clarifying the requirements of RCM 1113(d)(3), the courts' guidance amounts to piecemeal treatment, as the courts only address the particular procedural issues raised by the cases before them. While *Rasco*e and *Tuggle* may provide some guidance on factors to be considered in determining whether an accused is indigent, these cases fail to provide comprehensive treatment of other questions raised by the RCM. The CAAF highlighted this lack of guidance when it stated:

> The *Manual for Courts–Martial, United States* (2002 ed.) lacks specific guidance regarding the procedures applicable to a delinquent, but not indigent accused. In light of the more substantial civilian experience in this area, the President might well consider further amplification in lieu of case-by-case appellate review of such matters.[69]

The CAAF reiterated this same concern when addressing the question of who is authorized to execute contingent confinement in *United States v. Phillips*. In *Phillips*, the CAAF noted that the UCMJ fails to identify who is authorized to execute contingent confinement, and the question "is covered only obliquely in the *Manual for Courts-Martial*."[70] The CAAF also addressed other procedural questions relating to RCM 1113(e)(3) that had not previously been addressed by the courts.[71]

This piecemeal treatment by the military courts in clarifying the procedural requirements of RCM 1113(e)(3) highlights the persistent questions raised by the rule's lack of clear guidance. This same treatment also creates a patchwork of judicial interpretation that requires staff judge advocates and convening authorities to decipher before executing contingent confinement. What the services need is a decisive, comprehensive set of procedures that clearly outline the requirements of RCM 1113(e)(3). These rules would eliminate questions about how to execute contingent confinement, thereby improving the effectiveness the RCM 1003(b)(3) fine enforcement provision.

V. Recommended Solutions

The confusion created by RCM 1003(b)(3) and RCM 1113(e)(3) can be eliminated. This article proposes amended language to the RCM that would eliminate ambiguous language. The article also proposes clear procedural rules for executing contingent confinement. Together, these proposed amendments would improve the RCM, better allowing for the fair, consistent, and effective administration of justice.

A. Clarify Ambiguous Language in RCM 1003(b)(3)

It is essential that the RCM provide clear, consistent, and unequivocal guidance to everyone involved in our justice system. Where interpretation of rules leads to disparate treatment by convening authorities, we run the risk of violating some accuseds' rights by subjecting them to

[63] Cuculic, *supra* note 40, at 29. *See also Rascoe*, 31 M.J. at 550 (noting that while RCM 1003(b)(3) appears to authorize an enforcement provision resulting in an automatic reversion to confinement in the event a fine is not paid, RCM 1113(d)(3) "appears to limit that automatic transformation until [the accused] is afforded the due process of law that might prevent his imprisonment if he invokes it.").

[64] MCM, *supra* note 6, R.C.M. 1113(e)(3).

[65] *Id.*; *see also* Cuculic, *supra* note 40, at 29.

[66] Cuculic, *supra* note 40, at 29.

[67] *Rascoe*, 31 M.J. at 563. This guidance forms the basis of the proposed rules outlined in Appendix B, *infra*.

[68] United States v. Tuggle, 34 M.J. 89, 92 (C.M.A. 1992).

[69] United States v. Palmer, 59 M.J. 362, 366 (C.A.A.F. 2004).

[70] United States v. Phillips, 64 M.J. 410, 412 (C.A.A.F. 2007).

[71] *Id.* at 411.

impermissible punishments. Conversely, ambiguities weaken our justice system when convening authorities mitigate punishments based upon unclear rules to avoid appellate issues. Clarification of RCM 1003(b)(3) is in the best interest of all military justice practitioners.

There is no logical rationale supporting the conclusion that serving contingent confinement discharges the accused's liability to pay a punitive fine. Our precedent establishes that the RCM 1003(b)(3) fine enforcement provision is not a punishment for the crime committed, but an enforcement tool for collecting a fine.[72] Because ordinary confinement and punitive fines serve distinct penological interests, it is illogical that an accused's willful failure to pay a fine resulting in contingent confinement should discharge him of the very same punishment that levied his pecuniary liability to the United States. Subject to limitations, a court-martial is always at liberty to adjudge some degree of confinement.[73] A sentence to a punitive fine, however, reflects the court-martial's determination that the accused should satisfy a debt to the United States, and not that the accused requires additional confinement. Therefore, the fine enforcement provision of RCM 1003(b)(3) should remain an enforcement tool and courts should not interpret the provision as creating an alternative form of punishment.

Although an important enforcement tool, the rule cannot be so inflexible as to unduly prejudice the indigent. Confining an indigent incapable of paying his debt, until such time as he *is* able to pay, presents its own problem. If confined and out of the workforce, an indigent prisoner is unable to earn the money to pay off his debt. Thus, RCM 1113(e)(3) must remain the procedural safeguard against punishing those whose failure to pay is due *solely* to indigence. Our rules must continue to protect those whose inability to pay a fine is due solely to indigence: Indigence must become the threshold determination under RCM 1113(e)(3). As proposed in the procedural rules for RCM 1113(e)(3),[74] a finding that an accused's failure to pay a fine was *not* due solely to indigence, but due to his own willful disregard, should subject the accused to confinement under an announced fine enforcement provision *until* such fine is paid. Of course, an accused's inability to pay a fine for whatever reason may still be considered by the convening authority at the time of action. Should a convening authority determine that an accused's indigence might prevent him from paying a fine, the convening authority may always disapprove, commute, or mitigate the fine to an alternative form of punishment.[75] Appendix A proposes language that eliminates the ambiguity and improves the overall effectiveness of the fine enforcement provision.

B. Promulgate Rules for Executing Contingent Confinement

Rule for Courts-Martial 1113(e)(3) is only triggered when an authority is considering executing contingent confinement and is *not* invoked when a fine is either paid or disapproved. As intuitive as this is, it is important to note. Because RCM 1113(e)(3) is confusing and lacks procedural guidance, convening authorities often mitigate fines to an amount already paid by the accused, if any, or disapprove a fine or contingent confinement to avoid a seemingly onerous administrative hearing pursuant to RCM 1113(e)(3).[76] To the extent the court-martial believed an adjudged fine was an appropriate punishment for the particular accused, it may be an injustice for convening authorities to disapprove the punishment due solely to unanswered procedural questions. This is especially true when providing guidance could be as easy as promulgating procedural rules within the RCM.

An indigence hearing under RCM 1113(e)(3) need not be the nebulous procedure it is today. Promulgating clear rules on conducting a fine enforcement hearing would prevent further piecemeal interpretation by appellate courts and provide staff judge advocates and convening authorities a powerful tool to enforce a punitive fine. Just as RCM 405 provides procedural rules for conducting a pre-trial investigation under Article 32, UCMJ, similar rules should be promulgated under RCM 1113(e)(3) outlining the exact requirements of the rule.[77] Appendix B proposes procedural rules for executing contingent confinement. These rules, proposed for inclusion within the RCM, provide clear guidance on what is required to protect the due process rights of an accused. Where appropriate, the proposed rules contain citations to the appellate case law that establishes the principle outlined. These rules make imposing contingent confinement a less daunting task for convening authorities, thereby adding to the overall effectiveness of a punitive fine and enforcement provision.

VI. Conclusion

Over the past five years, we have seen a demonstrable increase in the numbers of financial crimes, including larceny of government property and financial fraud,

[72] *Rascoe*, 31 M.J. at 550.

[73] BENCHBOOK, *supra* note 9, paras. 8-3-20 to 8-3-28; *see also* MCM, *supra* note 6, R.C.M. 1002 ("Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.").

[74] *See infra* Appendix B.

[75] MCM, *supra* note 6, R.C.M. 1107(d)(1) ("The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a court-martial.").

[76] *See supra* note 43.

[77] MCM, *supra* note 6, R.C.M. 405.

committed against the United States by servicemembers.[78] With these increases, we can expect the number of courts-martial to increase proportionally. We must ensure the financial sanctions provided in the RCM are suited to adequately address these crimes.

Larceny of government property and similar financial crimes are serious crimes that need to be prosecuted diligently. But, Soldiers committing these crimes rarely pose the same sort of threat to our community as do those committing offenses involving drugs, violence, or sexual assault. While confinement may be best suited to punish those sorts of offenders, it may not be the best punishment for those committing financial crimes. Often, lengthy terms of confinement are not warranted for the purpose of protecting society from those convicted of financial crimes. Instead, effective financial sanctions must be available to effectively punish Soldiers for committing financial crimes.

As the hypothetical posed in the introduction suggests, forfeitures alone are often an inadequate financial sanction to punish a Soldier relative to the amount of money stolen. This is especially true in cases where the accused has received tens of thousands of dollars in unauthorized pay or allowances. Because forfeitures are a prospective sanction, their penological effect falls short in punishing Soldiers who are discharged from the service shortly after their conviction. Often, the more effective way to punish a Soldier convicted of a financial crime is through imposition of a punitive fine. A punitive fine, however, is only as effective as the government's ability to enforce it.

The fine enforcement provision found in RCM 1003(b)(3) could be a powerful enforcement tool for a punitive fine. But, the rules authorizing a fine enforcement provision are ambiguous and unclear. Textual ambiguities in the rule creates confusion on its legal effect. Furthermore, a lack of procedural rules and implementing guidelines makes the procedural due process required to execute contingent confinement appear uncertain and cumbersome. Consequently, convening authorities often mitigate or disapprove a punitive fine and/or contingent confinement. This weakens the effectiveness of a punitive fine and weakens our justice system.

Adoption of the recommended amendments provided in the appendices would clarify the fine enforcement provision and give convening authorities clear guidance on how to execute contingent confinement. This clear guidance would improve the effectiveness of an adjudged punitive fine and provide convening authorities the tools necessary to enforce the only effective punishment available that specifically addresses the unjust enrichment received by those committing financial crimes against the government. These recommendations would strengthen our judicial system, leading to the fair, just, administration of justice in cases of financial fraud against the government.

[78] *See supra* note 1.

Appendix A

Proposed Language to Replace the Current RCM 1003(b)(3)

The following is proposed language to replace the current RCM 1003(b)(3):

> (3) *Fine*. Any court-martial may adjudge a fine in lieu of, or in addition to forfeitures. Special and summary courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. *To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid on the date ordered by the convening authority, the person fined shall be confined until such time as the fine is paid. Such confinement shall be served in addition to any confinement adjudged, if any. Confinement under this provision is not a punishment for the crime committed, but an enforcement provision authorized upon the convening authority's finding that the accused's failure to pay was willful and not due solely to the accused's indigence. In no way shall this confinement discharge the accused of his liability to the United States under the fine imposed.* The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

Modified language is shown in *italics.*

Appendix B

Proposed Language to Replace the Current RCM 1113(e)(3)

The following is proposed language to replace the current RCM 1113(e)(3):

(3) ***Execution of Fine Enforcement Provision.***

(a) In general. Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigence, unless the *General Court-Martial Convening Authority exercising jurisdiction over the accused at the time confinement is considered* determines, after giving the accused notice and opportunity to be heard, that *confinement is necessary to compel the accused to pay his fine, and* there is no other punishment adequate to meet the Government's interest in appropriate punishment.

(b) Action on fine and enforcement provision. *A fine is effective on the date ordered executed.*[79] *Upon taking action, the convening authority may approve, disapprove, or otherwise mitigate any sentence providing for a fine.*[80] *This approval, disapproval, or mitigation must also address any fine enforcement provision included in the sentence. The convening authority may require the fine be paid immediately, or at a reasonable date as determined within the discretion of the convening authority.*[81] *Requests for additional time in satisfying a punitive debt, as well as supporting evidence for this request, are proper matters for the accused to submit within his clemency matters under RCM 1105.*[82]

(c) Notice. *The accused must be notified of the date a fine is ordered due, and that if the fine is not paid in full by such date, additional confinement may be ordered until the fine is paid.*[83]

(d) Opportunity to be heard. *Upon receiving notice that the convening authority may direct the accused be confined until such period as an adjudged fine is paid, the accused may request an opportunity to be heard to explain his failure to pay.*

(e) Authority directing indigence hearing. *If an accused requests an opportunity to be heard, the General Court-Martial Convening Authority exercising jurisdiction over the accused*[84] *shall appoint a neutral and detached hearing officer to conduct a non-adversarial fact-finding hearing.*[85]

(f) Personnel.

(i) Hearing Officer. *The convening authority directing the hearing shall detail a commissioned officer to serve as the hearing officer. The hearing officer will conduct the hearing and make of report of findings and recommendations.*

(ii) Defense Counsel. *If requested, the accused shall have the right to be represented by military counsel certified in accordance with Article 27(b).*[86]

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[79] UCMJ art. 57 (2012).

[80] MCM, *supra* note 6, R.C.M. 1107; *see also* UCMJ art. 60 (2012).

[81] United States v. Phillips, 64 M.J. 410, 412 (C.A.A.F. 2007).

[82] MCM, *supra* note 6, R.C.M. 1105(b)(1).

[83] United States v. Rascoe, 31 M.J. 544, 550 (N.M.C.M.R. 1990).

[84] The authority to transform a fine enforcement provision into confinement lies with the officer exercising general court-martial jurisdiction over the accused at the relevant time, not necessarily the original convening authority. *Id.* at 568.

[85] In *United States v. Tuggle*, the court questioned the impartiality of the hearing officer when the appointed hearing officer's primary duty position was the chief of military justice: It is essential that the hearing be objectively neutral, much like a military magistrate. 34 M.J. 89, 90 (C.M.A. 1992).

[86] United States v. Palenius, 2 M.J. 86, 93 (C.M.A. 1977).

(iii) Others. *The convening authority directing the hearing may, as a matter of discretion, detail or request an appropriate authority to detail:*

(A) Counsel to represent the United States
(B) A reporter; and
(C) An interpreter

(g) Scope of indigence hearing. *A hearing under this provision shall be convened to first determine the underlying reason for an accused's inability to pay a fine. Paramount to this hearing is the determination into whether an accused's inability to pay a debt is willful and recalcitrant, or is otherwise due solely to indigence. The accused shall bear the burden of demonstrating that, despite good faith efforts, he has been unable to pay the fine because of indigence.*[87]

(h) Procedure.

(i) Notice. *The hearing officer will notify the accused of his rights to counsel and of the date, time, and location of the hearing. The hearing officer will provide the accused with a reasonable amount of time to prepare matters to be presented by the accused.*

(ii) Mode of hearing. *A fine enforcement hearing under this rule is a non-adversarial fact finding hearing. At this indigence hearing, the accused shall bear the burden of demonstrating that, despite good faith efforts, he has been unable to pay the fine because of indigence. This burden rests with the accused, and must be demonstrated by a preponderance of the evidence.*[88]

(i) Indigence determination. *The hearing officer will make a report of findings with respect to the indigence of the accused. In considering whether the accused's failure to pay was due to indigence, the hearing officer should consider the following criteria:*

- *the accused's income, earning capacity, and financial resources;*
- *the burden that the fine will impose upon the accused, any person who is financially dependent on the accused, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the accused, relative to the burden that alternative punishments would impose;*
- *any pecuniary loss inflicted upon others as a result of the offense;*
- *whether restitution is ordered or made and the amount of such restitution;*
- *the need to deprive the accused of illegally obtained gains from the offense;*
- *the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence; and*
- *whether the accused can pass on to consumers or other persons the expense of the fine.*[89]

(i) Finding of willful failure to pay. *If the hearing officer determines that an accused's failure to pay was willful or recalcitrant, confinement may be imposed with no further consideration.*[90] *In these cases, confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as the fine is paid, not to exceed the length of time announced as part of the fine*

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[87] United States v. Palmer, 59 M.J. 362, 364 (C.A.A.F. 2004).

[88] *Id.* at 365.

[89] *Rascoe*, 31 M.J. at 563 (modeling its own criteria to the federal criteria for fine enforcement provision found in 18 U.S.C. §§ 3572, 3614 (2012)).

[90] Bearden v. Georgia, 461 U.S. 660, 673 (1983).

enforcement provision.[91] *An accused's confinement under this paragraph shall not discharge him of liability to pay the adjudged fine. The accused will remain liable for the fine until such time as it is paid, or otherwise remitted.*[92]

(ii) Finding of indigence. *Upon finding that the accused's inability to pay a fine is due to indigence, the hearing officer must next determine whether the accused has made sufficient bona fide efforts to acquire the resources to pay the fine. In determining whether the accused has made sufficient bona fide efforts to acquire the resources to pay the fine, the hearing officer may consider conduct taken by the accused to liquidate assets as compared to any efforts by the accused to remove assets from his control or to hide assets.*[93] *Good faith efforts do not require an accused's family to liquidate assets so that the accused may pay a fine.*[94]

(a) No bona fide efforts were made. *If the hearing officer determines that an accused failed to make sufficient bona fide efforts to acquire the resources to pay, confinement may be imposed with no further consideration.*[95] *In these cases, confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as sufficient bona fide efforts are made to acquire the resources to pay the adjudged fine.*[96] *An accused's confinement under this paragraph shall not discharge him of liability to pay the adjudged fine. The accused will remain liable for the fine until such time as it is paid, or otherwise remitted.*[97]

(b) Sufficient bona fide efforts were made. *If the hearing officer determines that an accused has made sufficient bona fide efforts to acquire the resources to pay, but was unable to pay due to indigence, the hearing officer must consider and recommend to the convening authority, whether, in light of the nature of the offense and characteristics of the accused, there is any other punishment adequate to meet the Government's interest in appropriate punishment and deterrence.*[98] *There shall be a presumption that alternative means of punishment can serve the Government's interest given the variety of punishments available under the UCMJ.*[99]

(c) Recommendations of the hearing officer. *The hearing officer will forward a report of his findings and recommendations to the convening authority.*

(d) Decision by convening authority. *The convening authority may adopt the findings and recommendations of the hearing officer or substitute findings of fact.*[100] *The convening authority may order the execution of a fine enforcement provision only if alternative punishments would be inadequate to meet the Government's interest in appropriate punishment. An accused's confinement under this paragraph shall become a substitute punishment for the adjudged fine and shall be limited to the period announced as part of the sentence. Upon serving confinement under this paragraph, the fine will be discharged.*

Modified language is shown in *italics*.

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[91] *Rascoe*, 31 M.J. at 551.

[92] *Id.* at 558 (citing Bearden v. Georgia, 461 U.S. 660, 673 (1983)).

[93] *Palmer*, 59 M.J. 365 (reviewing several of the enforcement hearing officer's findings in assessing the accused's contention that he acted in good faith to pay the fine). These findings provide good examples of conduct *not* amounting to "good faith efforts." *Id.*

[94] United States v. Tuggle, 34 M.J. 89, 91 (C.M.A. 1992).

[95] *Rascoe*, 31 M.J. at 558 (citing Bearden v. Georgia, 461 U.S. 660, 673 (1983)).

[96] *Id.* at 551.

[97] *Id.*

[98] *Id.* at 558.

[99] *Id.*

[100] To facilitate appellate review of such actions, the convening authority should include in his action executing contingent confinement: his findings of fact as to accused's indigence status; accused's opportunity to acquire funds to pay fine; accused's efforts to acquire funds to pay fine; alternative measures considered; and, if those alternatives are inadequate to meet penological interests of Government in punishment and deterrence, statement as to why they are inadequate. *Id.* at 544.

Look But Don't Copy: How the Adam Walsh Act Shields Reproduction of Child Pornography in Courts-Martial

Captain Sasha N. Rutizer[*]

I. Introduction

Child pornography cases can be complex, burdensome, and expensive to prosecute. The defense will in most cases request a digital forensic examiner as an expert consultant and witness. This typically is a civilian whom the government must reimburse to review the evidence, create a report, consult with the defense, testify, and travel. In recent years, the defense has begun requesting, as discovery, a forensic duplicate, a bit-for-bit forensic copy of the digital media. What does the law require and what should trial counsel do?

To answer these questions, this article discusses the applicability of the 18 U.S.C. § 3509(m), a child victim's right under Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh Act)[1] prohibiting the reproduction of child pornography, to courts-martial and provides tips and advice to trial counsel when responding to requests for, and motions to compel, this kind of discovery.

II. Applicability of 18 U.S.C. § 3509(m) to Courts-Martial

"The Constitution grants Congress 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"[2] Congress has exercised that authority by creating a system of military justice separate from the civilian one.[3] Yet Congress has directed the President to make the Rules for Court-Martial compatible with civilian justice "so far as he considers practicable,"[4] and the President has directed courts-martial to apply civilian rules of evidence as far as is practicable.[5] Military appellate courts "frequently look to parallel civilian statutes for guidance."[6] The Court of Appeals for the Armed Forces (CAAF) has been cautious "about applying statutes outside the Code to the conduct and review of court-martial proceedings" because it views the Uniform Code of Military Justice as "Congress' primary expression of the rights and responsibilities of servicemembers."[7] Sometimes, however, it does so.

In so doing, the CAAF has "not turned a blind eye . . . to all statutes outside the Code."[8] The All Writs Act is one such statute.[9] Although a strict reading of the Uniform Code of Military Justice (UCMJ) would seem to preclude any proceedings after direct appellate review has been completed, the CAAF and its predecessor, the Court of Military Appeals, has exercised jurisdiction over post-appellate habeas corpus proceedings under the All Writs Act.[10] The Supreme Court has recognized the CAAF's authority to do so.[11] In *United States v. Dowty*, the CAAF applied The Right to Financial Privacy Act (RFPA),[12] to court-martial proceedings.[13] The RFPA tolls any applicable limitation period while the accused avails himself of its procedural protections in seeking redress from district court to the government's attempt to gain access to financial records.[14] The CAAF held that this tolling applies to the five-year limitations period set by UCMJ Article 43 even

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[*] Judge Advocate, U.S. Army. Currently assigned to the Government Appellate Division, Fort Belvoir, Virginia. Previously assigned to the Trial Counsel Assistance Program, Fort Belvoir, Virginia; Defense Counsel at the 25th Infantry Division, Schofield Barracks, Hawaii; Defense Counsel at the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky.

[1] Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006) (codified in 18 U.S.C. § 3509(m) (2011)).

[2] United States v. McElhaney, 54 M.J. 120 (C.A.A.F. 2000) (citing Weiss v. United States, 510 U.S. 163 (2000)).

[3] "Congress has exercised its control over military discipline through the Uniform Code of Military Justice, which 'establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts.'" United States v. Dowty, 48 M.J. 102, 106 (C.A.A.F. 1998).

[4] Article 36, UCMJ, empowers the President to prescribe rules for court-martial "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in [federal civilian court]." 10 U.S.C. § 836 (2011), *cited in Dowty*, 48 M.J. at 106.

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 101(b), (2012) [hereinafter MCM] ("If not otherwise prescribed in this Manual or these rules, and insofar as practicable and not inconsistent with or contrary to the code or this Manual, courts-martial shall apply: (1) First, the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."); *see also id.* MIL. R. EVID. 1102(a). "Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.").

[6] *Dowty*, 48 M.J. at 106.

[7] *Id.*

[8] *Id.*

[9] 28 U.S.C. § 1651(a) (2011). "The All Writs Act provides that extraordinary writs may be issued by 'the Supreme Court and all courts established by Act of Congress.'" *Dowty*, 48 M.J. at 106. The Court of Appeals for the Armed Forces (CAAF) is an Article 1 court. UCMJ art. 141 (2012).

[10] *See* Loving v. United States, 62 M.J. 235, 255–56 (C.A.A.F. 2005).

[11] Noyd v. Bond, 395 U.S. 683, 695 n.7 (1969) (citing United States v. Frischholz, 36 C.M.R. 306, 307–09 (C.M.A. 1966)).

[12] 12 U.S.C. § 3410 (2011).

[13] *Dowty*, 48 M.J. at 111.

[14] 12 U.S.C. § 3410.

though UCMJ Article 43 does not mention the RFPA and the RFPA does not mention the UCMJ.[15] In determining whether to apply a statute outside the Code to court-martial proceedings, the general analytical framework was outlined as follows: "[A] generally applicable statute must be viewed in the context of the relationship between the purposes of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to military personnel and court-martial proceedings."[16]

We now turn to the discovery restriction enacted as part of the Adam Walsh Act. This provision requires that "in any criminal proceeding, any property or material that constitutes child pornography . . . shall remain in the care, custody or control of either the Government or the court."[17] It further requires any court to "deny, in any criminal proceeding, any request by the defendant to copy . . . or otherwise reproduce any property or material that constitutes child pornography, so long as the Government makes the property or material reasonably available to the defendant."[18] This is required "[n]otwithstanding Rule 16 of the Federal Rules of Criminal Procedure."[19]

In the author's experience, there is some disagreement within the Army Trial Judiciary as to whether the Adam Walsh Act applies at courts-martial. The issue has not yet been decided in published case law.[20] Nonetheless, applying the Adam Walsh Act to courts-martial meets the intent of Congress, and there is no countervailing "military purpose" to suggest it should not be so applied.

A. Applying § 3509(m) to Courts-Martial Meets the Intent of Congress

The purpose of this section of the statute is unambiguously stated in the associated congressional findings:

> The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disk, and related media. . . . Child pornography is not entitled to protection under the First Amendment and thus may be prohibited. . . . The Government has a compelling State interest in protecting children from those who sexually exploit them, and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. . . . Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse. . . . Child pornography constitutes prima facie contraband, and as such should not be distributed to, or copied by, child pornography defendants or their attorneys . . . . It is imperative to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims, so long as the government makes reasonable accommodations for the inspection, viewing, and examination of such material for the purposes of mounting a criminal defense.[21]

The purpose is clear. Congress wanted to restrict the viewing of child pornography and the repeated violation of victims' privacy.

One argument against applying this section is that Congress did not specifically use words unique to the military justice system (e.g., Military Rules of Evidence, courts-martial, trial counsel, accused) and instead chose to use the common words of civilian criminal justice (criminal proceeding, Government, Court, Defendant). There is nothing particularly "civilian," however, about the notion of protecting victims' privacy. Congress was arguably silent with respect to military justice, but not all silences are pregnant. Perhaps Congress assumed that nothing more needed to be said on the issue in order to accomplish its objective when it specifically wrote "in any criminal proceeding." "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent."[22]

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[15] *Dowty*, 48 M.J. at 110–11.

[16] *Dowty*, 48 M.J. at 107 (citing United States v. Noce, 19 C.M.J. 11, 17 (C.M.A. 1955)).

[17] 18 U.S.C. § 3509(m) (2011).

[18] *Id.*

[19] *Id.* Rule 16 pertains to Discovery and Inspection, and is similar to Military Rule of Evidence 701. *Compare* FED. R. CRIM. P. 16, *with* MCM, *supra* note 5, MIL. R. EVID. 701.

[20] The Navy-Marine Court of Criminal Appeals hinted at the answer in *United States v. Jones*, No. 200602320, 2009 CCA LEXIS 356 (N-M. Ct. Crim. App. Oct. 27, 2009), when it found that the military judge did not abuse his discretion by refusing to permit the accused to personally inspect child pornography the day before his guilty plea. The court cited 18 U.S.C. § 3509(m), but did not specifically rule on whether the statute controlled. The CAAF affirmed, *United States v. Jones*, 69 M.J. 294 (2011).

[21] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006).

[22] Burnes v. United States, 501 U.S. 129, 136 (1991) (quoting Illinois Dep't of Pub. Aid v. Schweiker, 707 F. 2d 273, 277 (7th Cir. 1983)).

B. There is No "Contradictory Military Purpose" Against Application of § 3509(m).

Does a contradictory military purpose exist? Within the UCMJ, it does not;[23] however, Rule for Court-Martial (RCM) 701(a)(2)(A) may arguably provide such a purpose. This rule requires the trial counsel to provide:

> any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belonging to the accused.[24]

But 18 U.S.C. § 3509(m) specifically requires a court to deny discovery "[n]otwithstanding Rule 16 of the Federal Rules of Criminal Procedure," and that rule also requires the government to provide:

> any books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody or control, and:
>
> (i) the item is material to preparing the defense;
> (ii) the government intends to use the item in its case-in-chief at trial; or
> (iii) the item was obtained from or belongs to the defendant.[25]

Ultimately, they are the same requirements in almost the same words. Thus, meeting the discovery requirements of RCM 701(a)(2)(A) is not a specifically *military* purpose that runs contrary to the statute.

Also, RCM 701(g)(2) (like Rule 16(d)(1) of the Federal Rules of Criminal Procedure) gives the military judge authority to regulate discovery and to restrict or deny it "upon a sufficient showing."[26] Congress, by articulating its findings, has provided a "sufficient showing" that applies equally well to military and civilian courts, and thus arguably has simply ordered judges to do something they had the power to do anyway.[27] There is no "contradictory military purpose." The statute should therefore apply.

III. Tips for Trial Counsel—Providing "Ample Opportunity"

It appears thus, that the Adam Walsh Act applies—or should apply—to courts-martial. While some military judges do not believe the act applies, the individual trial counsel should not make that decision. Defense discovery requests for forensic duplicates of media containing child pornography should be denied. The denial should cite the Adam Walsh Act and—this is key—carefully describe how "ample opportunity" for defense inspection will be made.

The issue of ample opportunity has been intensely litigated since 2006, with very promising results for the prosecution.[28] Usually, the government was able to show it provided ample opportunity for defense access.[29] The major exception has been *United States v. Knellinger*, where the defense theory of virtual child pornography[30] required analysis using equipment that was not available in the government facility and that would cost too much to move

[23] While UCMJ Article 46 requires equal access to evidence, there is nothing about applying this statute which is contrary to this rule. Each side has access to the same evidence and there is no unfair advantage to the government.

[24] MCM, *supra* note 5, R.C.M. 701(a)(2)(A).

[25] FED. R. CRIM. P. 16(a)(1)(E).

[26] MCM, *supra* note 5, R.C.M. 701(g)(2).

[27] *See* United States v. Jones, No. 200602320, 2009 CCA LEXIS 356, at *15 (N-M. Ct. Crim. App. Oct. 27, 2009) (upholding decision of trial judge to refuse to allow accused to inspect child pornography before his guilty plea, and citing his power to regulate discovery under Rule for Court-Martial 701(g) in support of that ruling).

[28] Many cases ruling on issues of ample opportunity are collected in Fern L. Kletter, *Validity, Construction, and Application of 18 U.S.C.A. § 3509(m) Prohibiting Reproduction of Child Pornography Used as Evidence in Criminal Trials*, 47 A.L.R. FED. 2d 25, §§ 13-14 (2010). As American Law Reports are routinely updated, this report should be consulted for counsel litigating a motion to compel production of digital media containing child pornography.

[29] *See, e.g.*, United States v. Butts, No. CR 05-1127-PHX-MHM, 2006 U.S. Dist. LEXIS 90165, at *4–5 (D. Ariz. Dec. 6, 2006). The court found that the defendant's rights to due process were not violated, even though defendant provided a list of reasons why reviewing the approximately one terabyte of evidence at the government location was over burdensome. *Id.* The judge found that the government was willing to make significant accommodations for the defense forensic expert and therefore the defense had ample opportunity to access the evidence. *Id.* United States. v. Spivack, 528 F. Supp. 2d 103, 107–08 (E.D.N.Y. 2007) (concluding that this case was distinguishable from *Knellinger*, in that there were no virtual images, and the government's offer to make the evidence available for inspection at two separate government offices satisfied defendant's due process rights under the Fifth and Sixth amendments). United States v. Flinn, 521 F. Supp. 2d 1097, 1101 (E.D. Cal. 2007). Defense expert witness conceded that hardware and software available at the government facility was adequate for defense examination, so that access was sufficient. *Id.* The judge noted that the defense should not be able to circumvent the law by "merely positing conceptual difficulties." *Id.*

[30] Under *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 122 S. Ct. 1389 (2002), "virtual" images of what appear to be children were considered protected speech under the First Amendment of the Constitution. When charged under clause 1 or clause 2 of Article 134, UCMJ, no such protection exists.

there, so that the defense theory became impossible to support without the forensic copy.[31]

Typically, the defense employs a digital examiner who does not live near the situs of the court-martial. The government must then arrange or at least pay for the examiner's travel to provide ample opportunity. The local Criminal Investigation Division (CID) office must provide a room, access to the digital media, software, internet access,[32] and, to some degree, privacy.[33] This will require coordination with and the cooperation of CID. Trial counsel must work with CID early to coordinate. CID should educate their personnel on this issue, and require their assistance in providing ample opportunity, lest they become the straw that breaks the camel's back.

The government may decide that the office that conducted the digital forensic examination is the best place for the defense expert to access the evidence. Or that office may send a forensic duplicate to another CID, Air Force Office of Special Investigations (OSI), or Navy Criminal Investigative Service (NCIS) office nearer to the defense expert. For example, a defense expert who lives in Portland, Oregon, could travel to Fort Lewis, Washington, to view the evidence, even though the U.S. Army Criminal Investigation Laboratory (USACIL) in Georgia conducted the examination.

The best solution is for CID to treat the defense expert as a member of the defense team, and afford the expert the same professional courtesy as they would a trial or defense counsel. Ideally, CID should give the expert access to a room that does not have reflective glass, as an interview room does, but rather an office or conference room where the stand-alone laptop can be set up. If space is a problem, perhaps covering the reflective glass with newspaper will suffice. There should not be a CID agent in the room with the defense expert, absent extraordinary circumstances.[34] The expert should also be provided reasonable access to the internet. If connection to the installation Wi-Fi is not possible, each CID or SJA office could purchase one portable hot spot for defense expert use.

None of the above will be an option, however, if the contract for the defense expert is not expedited so that funds may be properly obligated. Dilatory processing of a contract may be enough to support a defense claim that they lacked ample opportunity. The contract should include a cap on expenses for the expert's time and also detail how travel arrangements for viewing the evidence are to be made. For instance, if the expert lives in Kentucky and the evidence to be viewed is in Georgia, the expenses for travel should be included in the contract. Very few experts will pay out-of-pocket for travel expenses without a firm contract in place. The government may resolve this issue by setting up the expert's travel through the Defense Travel System (DTS) and paying for his hotel, rental car, and so forth. The objective for the government is to provide ample opportunity for access and be able to articulate the steps taken to ensure it.

If the defense nonetheless moves to compel production of a forensic copy, trial counsel should oppose the motion and put the burden on the military judge to rule on the issue. The trial counsel should not only argue the applicability of the Adam Walsh Act, but the judge's broad power to regulate discovery under RCM 701(g), and the goals articulated by Congress in passing the Adam Walsh Act. The government's efforts to provide ample opportunity for defense access will strongly support both arguments.

If these arguments fail, the trial counsel should ask the military judge to issue a court order that: (a) at all times, the forensic copy will be secured in a safe or in the personal possession of the named expert; (b) without express approval of the court, no person other than the named expert will handle or view the forensic copy; (c) the defense expert will not copy, distribute, or publish any material which could be considered child pornography under the law; and (d) upon completion of his examination, he will return all materials to the entity that provided them. The trial counsel should ask the military judge to require the defense expert to sign the court order, showing that he has read it and will comply. After all, being an expert witness does not grant a citizen the right to retain a permanent collection of child pornography

[31] United States v. Knellinger, 471 F. Supp. 2d 640, 647–50 (E.D. Va. 2007).

[32] Internet access is not for the computer being used to view the child pornography. Rather, it is oftentimes important for the defense expert to conduct internet research contemporaneous with the examination on another computer. Search terms purportedly used by the accused need to be run to see what happens to the operating system as a result of the search. Additionally, hyperlinks associated with the internet activity provide valuable information in order to replicate the internet activity.

[33] Having a Criminal Investigation Division (CID) agent standing in the room watching the defense examination may be considered over burdensome by the military judge, especially as the defense counsel may well wish to be present during the examination and discuss the case with the expert. *See* United States v. Patt, No. 06-CR-6016L, 2008 U.S. Dist. LEXIS 57318 at *57–58 (W.D.N.Y. July. 24, 2008) (discussing United States v. Winslow, No. 07-CR-00072 (D. Alaska Jan. 28, 2008), in which the judge was "troubled" by a government requirement that a defense expert remain under closed-circuit video surveillance while examining a hard drive containing child pornography, because this requirement would likely reveal "defense strategies and weaknesses," and therefore granted the defense motion to compel production).

[34] If the media at issue were examined at a local police department, but were later transferred to CID, then CID may not have a forensic duplicate. In this case, the only media that exists at CID is the original. If this is a micro-SD card for instance, the card will have to be placed into a micro-SD card reader and may or may not be read only/write block protected. In this limited circumstance, it may be necessary to have a CID representative in the room to preserve the integrity of the evidence.

nor does it shield him from prosecution for violation of the law.

IV. Conclusion

The Adam Walsh Act should and arguably does apply to courts-martial. When the defense requests forensic copies of digital media including child pornography, the government should deny the request, but provide the defense and its experts appropriate access to such copies at the appropriate CID office. The government's efforts to provide access are vital to litigating against a defense motion to compel. If the defense succeeds in compelling production, the government should still ask the judge to issue orders to carry out the goals of the Adam Walsh Act—"to prohibit the reproduction of child pornography in criminal cases so as to avoid repeated violation and abuse of victims."[35]

[35] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587 (2006).

Kill or Capture: The War on Terror and the Soul of the Obama Presidency[1]

Reviewed by *Major Madeline F. Gorini*[*]

There's always the sense that the next bad guy is going to slip our defenses and get in . . . and that keeps presidents up at night.[2]

I. Introduction

On January 22, 2009, President Obama signed his first series of executive orders as the newly elected Commander in Chief.[3] With the stroke of a pen, the President ended coercive interrogation methods, shut down the Central Intelligence Agency's (CIA) secret overseas prisons, and ordered the Guantánamo Bay detention facility closed within a year.[4] Flanked by sixteen retired "flag officers" as he signed the orders, the President declared, "We intend to win this fight, but we are going to win it on our terms."[5] His act conveyed an even louder yet unspoken message: the strength and safety of America rested squarely on upholding its constitutional values.[6]

During an August 2007 campaign speech, Obama stated, "I will not hesitate to use force to take out terrorists who pose a direct threat to America. I will ensure that the military becomes more stealthy, agile and lethal in its ability to capture or kill terrorists."[7] Despite this early declaration, the President also recognized the need for limits to his own power.[8] A few months after he had signed the executive order closing Guantánamo Bay, during a meeting with his cabinet advisors in the spring of 2009, President Obama expressed his desire to "create[] a series of institutions and laws that would limit the scope of presidential action in the fight against terrorism."[9] In particular, the President worried about "the dangers of unfettered presidential powers in the panic that would follow a future terrorist attack."[10] With the enhanced lens of a constitutional lawyer, President Obama argued for groundbreaking action: legitimate restraints to his own power in the war on terror.[11]

In Daniel Klaidman's book *Kill or Capture: The War on Terror and the Soul of the Obama Presidency*, the author poses the controversial question of Obama's War on Terror: "Can you kill or capture bad guys wherever you find them while staying true to American values and the rule of law?"[12] Unfortunately, Klaidman fails to provide the reader a clear answer to this important question. Instead of writing a coherent and chronological analysis of the ideological struggles surrounding the president and his war on terror, the author instead overwhelms the reader with voluminous and unnecessary details about political tugs-of-war, personality conflicts, and general White House politics. Further, the author relies on over 200 "on background" anonymous interviews to form the backbone of his book and insists that the identities of his sources be protected under journalist-source privilege.[13] As a result, his prose resonates with a distracting "noise" that makes it difficult to focus on the War on Terror and leaves the reader wondering exactly what comprised the "soul" of the Obama presidency that the author implicitly promises to reveal.

II. Searching for the Soul of the Obama Presidency

> *It's striking if you think about the Obama legacy. Here is the perceived liberal, who is the one to unilaterally invade a country to kill a guy. And that's what he did with Osama bin Laden.*[14]

When asked to "[t]alk about what you reveal in this book that we didn't know about the president's wars, particularly against al-Qaeda,"[15] Klaidman explains that he revealed the President's "almost singular involvement in making those [individual military targeting strike] killing

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[*] Judge Advocate, U.S. Army. Student, 61st Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[1] DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY (2012).

[2] Interview by David Gregory with Daniel Klaidman, *Meet the Press: PRESS Pass* (NBC television broadcast Jun. 3, 2012) [hereinafter *Meet the Press Interview*], *available at* http://presspass.nbcnews.com/_news/2012/06/03/12011857-press-pass-dan-klaidman?lite (quote by Daniel Klaidman).

[3] KLAIDMAN, *supra* note 1, at 36.

[4] *Id*.

[5] *Id.* at 38. In this context, "flag officer" refers to the group of retired general officers and admirals.

[6] *Id*.

[7] *Id*. at 119.

[8] *Id*. at 133.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] *Id*. at 19.

[13] *See infra* notes 26–27 and accompanying text.

[14] *Meet the Press Interview*, *supra* note 2 (quote by David Gregory).

[15] *Id*. (quote by Daniel Klaidman).

decisions," noting that the President "did that because he was concerned that the use of force was spinning out of control and he wanted to make sure he exercised some sort of supervision over that process."[16] Absent this disclosure, a reader would be hard pressed to conclude that executive oversight on the military drone-targeting program was the author's most revealing aspect on the "soul" of the Obama presidency.

Buried in his prose, Klaidman recognizes a critical theme that should have been the primary anchor for his book: President Obama's struggle to balance constitutional values, the rule of law, and the global war on terrorism.[17] In retrospect, this thesis deserved an unambiguous roadmap—one from which the reader could ascertain whether or not the President was "tough enough" to wage the war on terror; which constitutional mandates were his top priority; and how often his idealism clashed with realistic impediments.[18] A more effective writing style would have approached each chapter as a case study analyzing such topics as targeting objectives, the administration's efforts to try terrorists in federal court, and the struggles with trying to close down Guantánamo Bay.[19] While Klaidman writes on each of these topics, he does so with little methodology and a tremendous amount of extraneous information. The author squanders a prime opportunity to write an engaging, analytical, and chronological narrative that clearly lays out for the reader a series of ideological and political snapshots, and that guides the reader through the most pressing national security concerns defining the Obama presidency.

The author attempts to project a more intimate and personal look at the Obama administration by writing about "the emotional state and interior thoughts of President Obama and his top aides."[20] For instance, Klaidman writes that President Obama "believed America's strength was rooted in its ideals;"[21] that Harold Koh, the State Department's top civilian lawyer, confided to a friend that "trying to stop a targeted kill 'would be like pulling a lever to stop a massive freight train barreling down the tracks;'"[22] and that Attorney General Holder told his wife "he didn't know if he had the emotional strength to go on as attorney general."[23] While the prose humanizes the national security debate to a certain extent, the personal references are sporadic and often come across as if the author has firsthand knowledge of various thought processes—even though he relies on such accounts from his unnamed reporting sources.[24] This leaves the reader questioning both the author's objectiveness and his source validity.

III. Journalist-Source Privilege[25]

Klaidman goes too far to protect his sources. After listing a cast of over sixty political characters, Klaidman informs the reader that his book is based on more than two hundred interviews, most of which were conducted "on background" to protect source anonymity.[26] In a June 2012 interview, Klaidman states, "I promised my sources I would not reveal their identities because if journalists started to do that, then some of the important information that I write about and others write about wouldn't get out there . . . ."[27] The author's declaration raises two concerns. First, the book loses credibility because it relies on a significantly high number of unnamed sources. Second, the author's attempt to use much, if not all, of the information gained undermines his goal of portraying the more intimate "human dimensions of national security decision-making."[28]

From 1996 to 2011, Daniel Klaidman worked as an investigative reporter, Middle East correspondent, Washington bureau chief and managing editor for *Newsweek* magazine.[29] He currently works as a special correspondent for both *Newsweek* and *The Daily Beast*.[30] As a journalist, Klaidman can grant promises of confidentiality to his *Kill or Capture* sources that are protected by either statute or

[16] *Id*. The author explains to David Gregory that while the president also authorized the CIA drone targeting program, he was much more hands-on with the military targeting program. *Id.* Interestingly, Klaidman then talks about a "botched" CIA drone strike—which raises the question of why, at least according to Klaidman, there was not equivalent presidential involvement in the CIA targeting program. *Id.*

[17] *See* KLAIDMAN, *supra* note 1, at 19, 25, 128, 133.

[18] *See generally id.* at 119, 122, 129, 175, 178–79, 247, 259–60, 268 (portrayed as weak on terrorism); *id*. at 5, 18–19, 25, 30, 37–38, 63, 133, 136, 270–71 (American constitutional values); *id.* at 133, 142 (limits on executive power); *id.* at 59, 129, 134–35, 181, 186 (criticized from the left); *id.* at 2–3, 5–6, 8, 19, 63, 131–32, 185 (rule of law); *id.* at 119–20 (attitude toward use of force); *id.* at 2, 5, 7–8, 15, 20, 76, 171, 185, 228, 260 (political realist).

[19] *Id*. at 39–43, 117–21, 256 (CIA's covert drone program and "signature strikes"); *id.* at 58–59 (Guantánamo detainee court cases); *id.* at 37, 100, 124, 127–28, 131, 154, 195, 258, 271–72 (orders closure of Guatanamo); *id.* at 131, 136, 164, 165, 188 (civilian trials of detainees).

[20] *Id.* at xiv.

[21] *Id.* at 5.

[22] *Id*. at 202.

[23] *Id*. at 196.

[24] *Id*. at xiv.

[25] Geoffrey R. Stone, *The Merits of the Proposed Journalist-Source Privilege*, 1 ADVANCE, no. 1, Spring 2007, at 67, 68–69, *available at* http://www.acslaw.org/sites/default/files/Advance_Volume_1_Number_1_Spring_2007.pdf.

[26] KLAIDMAN, *supra* note 1, at x–xv. With an on background source, the author agrees not to attribute direct quotes by name.

[27] Interview by Stephen Colbert with Daniel Klaidman, *The Colbert Report* (Comedy Central television broadcast Jun. 20, 2012), *available at* http://www.colbertnation.com/the-colbert-report-videos/415623/june-20-2012/daniel-klaidman (quote by Daniel Klaidman).

[28] KLAIDMAN, *supra* note 1 (book jacket cover).

[29] *2011 Moderators: Daniel Klaidman*, ASPEN SEC. FORUM, http://aspensecurityforum.org/daniel-klaidman (last visited Sept. 8, 2012).

[30] *Id*.

common law journalist-source privileges recognized in forty-nine states and the District of Columbia.[31] The federal government lacks this same legislative protection,[32] although federal courts have produced a small body of case law that upholds the privilege.[33]

Since 2007, a variation of the "Free Flow of Information Act" has been introduced in both the House and Senate as proposed federal legislation governing the journalist-source privilege.[34] The most recent version of the bill, introduced in 2011 by Representative Mike Pence, seeks to "provide[] conditions for the federally compelled disclosure of information by certain persons connected with the news media."[35] In a 2009 *Washington Times* interview, Representative Pence stated that while he "believe[s] the only check on government power in real time is a free and independent press" and that the bill was a "federal media shield . . . to provide a qualified privilege of confidentiality to journalists," he also declares, "[T]here should be no confusion: This bill is not about protecting journalists. This bill is about protecting the public's right to know."[36] Among other considerations, the bill proposes that "a court may consider the extent of any harm to national security."[37] Representative Pence explained further, "[T]he House bill takes a reasonable and measured approach, allowing for compelled disclosure when national security, terrorism or the disclosure of classified information that harms national security is at issue."[38] While there may be instances in which total source anonymity is critical to the free flow of information, Klaidman fails to reach a compromised middle ground—one that balances protecting sources with the reader's right for readers to scrutinize and publicly examine his source information.

A. National Security and Anonymous Sources: Is There No Middle Ground?

Though the author cites over 200 source interviews, "internal government documents," "numerous academics and legal experts," "transcripts of speeches, press conferences and background briefings provided by the White House and other government agencies" to write his book,[39] not one source is specifically named. Instead, Klaidman provides the reader with an insufficient two-page synopsis about his sources and writing methodology.[40] As a journalist trying to protect his sources, Klaidman still possesses broad discretion to disclose as many non-confidential sources as possible. Klaidman's exaggeration of the journalist-source privilege leaves the reader guessing about the weight, relevance, and persuasiveness of his authorities.

Bob Woodward, journalist and author of the book *Obama's Wars*, informs his reader about the over 100 "on background" White House interviews that were sources for his book on national security issues.[41] At the conclusion of his book, Woodward provides the reader with twenty-six pages of source material.[42] Each chapter is cited, includes the approximate number of background interviews upon which the chapter relies, and lists his additional non-confidential sources.[43]

In contrast to Woodward's candid disclosures, Klaidman's secrecy overreaches journalist source protection boundaries and responsible authorship. Though Klaidman claims that his disclosure is "in the interest of transparency," his general assertions are anything but transparent.[44] In particular, his declaration that "it is a reporter's obligation to carefully verify the accuracy of their accounts, and to give readers a glimpse into the reporting process so that they can assess the credibility of the information themselves" misleads readers into believing that they will have the independent means to assess sources instead of solely trusting the author.[45] Particularly on a topic as sensitive as national security, Klaidman fails to balance the obligation to his sources with the public's right to evaluate the validity of his information.

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[31] Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39, 42 (2005). Wyoming is the only state that does not recognize journalist-source privileges.

[32] *Id*.

[33] *See* Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 29 YALE L. & POL'Y REV. 97, 118–24 (2002); Julie M. Zampa, *Journalist Privilege: When Deprivation Is a Benefit*, 108 YALE L.J. 1449 (1999).

[34] KATHLEEN ANN RUANE, CONG. RESEARCH. SERV., RL34193, JOURNALISTS' PRIVILEGE: OVERVIEW OF THE LAW AND LEGISLATION IN RECENT CONGRESSES 4–10 (2011), *available at* http://www.fas.org/sgp/crs/secrecy/RL34193.pdf.

[35] H.R. 2932, 112th Cong. (2011).

[36] *Protecting Confidential Sources*, WASH. TIMES, Sept. 24, 2009, http://www.washingtontimes.com/news/2009/sep/24/protecting-confidential-sources/.

[37] H.R. 2932 § (2)(b).

[38] *Protecting Confidential Sources*, *supra* note 36.

[39] KLAIDMAN, *supra* note 1, at xiii.

[40] *Id*. at xiii–xv.

[41] BOB WOODWARD, OBAMA'S WARS, at xiii (2010).

[42] *Id*. at 391–416.

[43] *Id*.

[44] KLAIDMAN, *supra* note 1, at xiv.

[45] *Id*.

B. Too Many Stories Spoil the Broth

Assuming the author did gather tremendous amount of source information upon which to base his book, it makes sense that various chapters emanate this cacophony of "noise," which detracts from his thesis. For example, in a single fourteen-page chapter, the author tackles four critical subjects: the President signing the National Defense Authorization Act; the start of the kill or capture Osama bin Laden campaign; Attorney General Eric Holder's conversation with Secretary of State Clinton about trying terrorist Khalid Sheik Mohammed in upstate New York; and the Ahmed Ghailani terrorism trial verdict that resulted in his acquittal of all but one of 284 murder and conspiracy charges.[46] Another chapter discusses Abdulmutallab, the Nigerian shoe bomber; President Obama's slow public response; Holder's contemplation of resignation; the public safety exception rule that applies when interrogating suspects; and Secretary of State Clinton's declaration on the best ways to support the President.[47] At these various points in the book, the author aims a veritable "fire hose" of information at his readers, instead of flushing out in greater depth the key ideological struggles and triumphs in the Obama administration's battle against terrorism.

The author could have done a more conscientious job prioritizing and highlighting the most salient and pressing issues in a more chronological and well-organized fashion. For instance, the book starts out on shaky ground with its first title, "The Promise," because it fails to inform the reader of anything about a promise.[48] The second chapter, "Where the Fuck is Osama bin Laden?" also fails to provide the reader with any information about the hunt for Osama bin Laden, which is not discussed until the very last chapter of the book.[49] Setting up these expectations so early in his prose leaves the reader with lingering confusion and unanswered questions. With a cast of over sixty political characters and a clear abundance of information about White House politics, the reader ultimately struggles to discern how Klaidman provides a unique perspective on national security issues, or why it is "the most revealing and important book yet about the Obama presidency."[50]

IV. Conclusion

Ultimately, Klaidman misses an opportunity to spotlight his intended protagonist: a president who expressed deep concerns about using the rule of law within the limits of his own power. Specifically, the book fails to address the tenuous balance between President Obama's personal beliefs on executive and national power and his desire to act for the greater good. Instead, Klaidman's eagerness to incorporate abundant source information results in a broad, sweeping brush of White House political dynamics and undermines any purported glimpse for the reader into the "soul" of the Obama Presidency.

Kill or Capture would interest readers who enjoy the general landscape of White House national security politics. With some effort, seasoned judge advocates could probably identify and discern the rule of law concerns. Those unschooled in national security issues, however, would fare much better with a book that stays more firmly anchored to its thesis.

[46] *Id.* at 225–39.

[47] *Id*. at 199–223.

[48] *Id*. at 13–35. Even after reading the chapter a couple of times, it is difficult to discern what "The Promise" refers to. It is another chapter packed with various events occurring late in Obama's campaign and early in Obama's presidency (i.e., conversations with Richard Clarke, President Bush's counterterrorism advisor; Obama's August 2007 national security address; Obama's first intelligence briefing as president-elect; and John Brennan being chosen as Obama's top counterterrorism advisor). This is not even the entire list of topics covered in the 23-page first chapter of the book. The author creates reader confusion from the very beginning, particularly when his chapter content is in direct odds with the chapter title. The closest thing to a promise is when the author writes President Obama vowed, "If we have actionable intelligence about high-value terrorist targets and [then Pakistani president Pervez] Musharraf won't act, we will." *Id.* at 18.

[49] *Id*. at 37–63. The title of the chapter, "Where the Fuck is Bin Laden?" is highly misleading. Absent these words coming out of White House Chief of Staff Rahm Emanuel's mouth a single time, the rest of the chapter has little or nothing to do with the search for terrorist Osama bin Laden. Instead, it speaks in more general terms about the al-Qaeda terrorist organization, missile strikes in Pakistan, and signature strikes being conducted or contemplated by the CIA. Again, while that is not an exhaustive list of all the topics covered in the chapter, none of the topics discussed are squarely on point with the chapter's title. The actual hunt for Osama bin Laden (Operation Neptune Spear) occurs in Chapter 10, "Textbook." *Id.* at 241–65.

[50] KLAIDMAN, *supra* note 1, book jacket cover.

The Art of Intelligence: Lessons from a Lifetime in the CIA's Clandestine Service[1]

Reviewed by *Major Adam W. Kersey*[*]

The heart of intelligence . . . is human espionage. At its most elemental, spying is about understanding and influencing the scope of behavior, from evil to exalted, and maneuvering through this emotional labyrinth in pursuit of valuable information otherwise unavailable. Espionage is also the foundation of covert action, which is not collection but rather another tool of statecraft, a supplement to foreign policy.[2]

I. Introduction

Picking up his office's secure phone line shortly after September 11, 2001, Henry Crumpton, a twenty-year veteran of the Central Intelligence Agency's (CIA) Clandestine Service, receives a request passed from CIA Director George Tenet.[3] "This is not an order. This is a request," the voice says.[4] "We are going into Afghanistan. Cofer [the CIA Counterterrorism Center Director] wants you to organize and lead the war. Director Tenet has approved it."[5] Within seconds, Crumpton agrees to the mission and begins spearheading the CIA's efforts in Afghanistan, the mission which forms the central focus of *The Art of Intelligence*.[6]

In *The Art of Intelligence*, Crumpton attempts to collate decades of experience as a CIA operative into an informational resource on the intelligence mission. He tries to do so without compromising the inherent necessity of confidentiality that accompanies covert operations.[7] Crumpton focuses on two areas to explain intelligence to the layman. First, he tells the reader about what he terms the "fundamentals of the business"—specifically covert action.[8] Crumpton personally and intimately presents the CIA and its operatives' roles from the Cold War era through the United States' operations in Afghanistan and Iraq.[9] Crumpton tangentially explains the CIA's training, recruiting, collecting, liaising, and inter-agency operations before launching into a lengthy case study focused on strategy and operations in Afghanistan.[10] Second, he briefly looks into a "new world of risk and the role of intelligence collection and covert action" in the current geopolitical environment.[11]

For a student of intelligence, a common theme quickly emerges from Crumpton: the CIA is a poorly utilized and little-understood tool of statecraft and policy. The book finds its strength in its pointed criticism of the policy makers' failure to grasp the power and importance of intelligence.[12] Additionally, the book appears in many ways to be Crumpton's retort to allegations of intelligence shortcomings following the events of September 11, 2001.[13] His personal memories relating to intelligence are more than anecdotal; they serve to broadly highlight the root of human motivations as well as the origin of many vexing legal issues continuing to impact U.S. Army contingency operations.[14]

Yet, at its core, *The Art of Intelligence* is a memoir, incompletely providing "lessons" in intelligence as the book's subtitle proclaims. Never clear on his intended audience, Crumpton's recollections most likely appeal only to the true aficionado of intelligence, hoping to hear from one of its most famous veterans. Academics will lament the dearth of potential lessons on how to restructure intelligence; the layman will be underwhelmed at Crumpton's shallow brevity and the slow pace of espionage. Although Crumpton successfully educates the layperson about the CIA in general terms, in the end, the book's lack of historical and academic context coupled with overreliance on personal experiences fails to achieve any lasting improvement in how the policy makers utilize intelligence.

II. The Fundamentals of Intelligence

The first portion of *The Art of Intelligence*, in which Crumpton uses short vignettes to highlight various themes pertinent to the CIA's business of espionage, focuses on the "fundamentals" of intelligence.[15] Despite the fundamentals covered, the author reveals few details about his trade. When

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[*] Judge Advocate, U.S. Army. Student, 61st Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia.

[1] HENRY A. CRUMPTON, THE ART OF INTELLIGENCE (2012).

[2] *Id.* at 32.

[3] *Id.* at 1, 173.

[4] *Id.* at 173.

[5] *Id.*

[6] *Id.* at 174.

[7] *Id.* at 12.

[8] *Id.* at 12–13, 25–120.

[9] *Id.* at 12–13.

[10] *See generally id.* at 25–38 (training), 39–65 (recruiting), 65–81 (collecting), 83–98 (liaising), 105–120 (inter-agency cooperation), 169–215 (strategy), 217–68 (operations in Afghanistan).

[11] *Id.* at 13, 309–17.

[12] *Id.* at 6–9, 97, 124–25.

[13] *See generally* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 407–19 (2004).

[14] *See* CRUMPTON, *supra* note 1, at 125 (detainee operations), 148–60 (unmanned aerial vehicles), 279–80 (asymmetric warfare).

[15] *See supra* note 10.

working through concepts such as training, recruiting, liaising, and inter-policy coordination, Crumpton consistently fails to go beyond short accounts of his experiences in the field. Notwithstanding the title's suggestion, the reader quickly finds that the book is not a practical guide to intelligence nor does it offer suggestions on improving the intelligence landscape. Instead, the book reveals itself to be a memoir, leaving the reader to decipher its lessons.

To highlight the shortcomings of the storybook narrative, consider one of Crumpton's recurrent themes: the importance of motivation and self-awareness to a CIA operative. Determining someone's motivation, at least to Henry Crumpton, is an imperative aspect of his trade. "Self-awareness through self-examination," he offers, "is essential for a successful intelligence officer . . . . Without a solid, central reference point of yourself, every other assessment and judgment is skewed."[16] While training at the CIA's secret training center known as "The Farm," Crumpton's instructors detail mechanisms to recruit potential sources to provide the CIA information.[17] Termed "MICE," for money, ideology, compromise, and ego, Crumpton soon realizes that potential operatives have other motivations as well.[18] Crumpton later adds revenge and coercion to the list, but recognizes that "[i]n almost all recruitments, an operations officer explores and exploits a combination of motivational factors."[19] These motivational factors—each introduced through a vignette—appear regularly throughout the book, regardless of whether they relate to a CIA source, to an operative, or to a target.

Crumpton never effectively or explicitly uses these fundamentals—specifically the concept of self-awareness and motivation—to frame his recollections of disputes over the use of intelligence during the wars in Afghanistan and Iraq. Certainly a lack of self-awareness and overabundance of ego would permeate the relationship between the intelligence community, the Department of Defense, and other policy makers during the Afghanistan and Iraq campaigns.[20] Despite recognizing the key motivators at play, Crumpton fails to do more than identify them and provide examples. Crumpton last served the government as the Department of State's Coordinator for Counterterrorism, with the rank of ambassador-at-large, presumably a strong platform from which to recommend significant changes and alterations to utilization of intelligence assets.[21] Nonetheless, he never posits any recommendation for improved inter-agency operability following lessons learned from Afghanistan and Iraq other than to point his finger back at the policy makers, seemingly saying, "make it better" without providing a roadmap to do so.[22] Instead, he leaves the policy issues and interoperability question for another day and another scholar.[23]

III. Afghanistan Operations and Strategy

Although Secretary of Defense Donald Rumsfeld informed President Bush that there was "[v]ery little, effectively," that the DoD could do in the short term after the September 11 attacks, the CIA was very differently situated.[24] The CIA briefed the President on a plan incorporating intelligence assets, military power (specifically air support and Special Forces), and regional support from the Northern Alliance inside Afghanistan within forty-eight hours of the attacks.[25] Fifteen days after the attacks, the CIA dispatched that team, codenamed Jawbreaker, into Afghanistan.[26]

Crumpton, at the helm of CIA operations moving into Afghanistan, presents a stunning case study raising myriad legal issues and ramifications for consideration by a judge advocate. Jawbreaker, a non-uniformed paramilitary force, was entering a sovereign, foreign nation with the intent of conducting combat operations across Afghanistan.[27] As a CIA operative, Crumpton seemingly bore little concern for the legal boundaries of his (or the CIA's) actions, working more on a simple "[g]o get 'em" directive from President Bush.[28] To carry out that directive, Jawbreaker was

[16] CRUMPTON, *supra* note 1, at 63.

[17] *Id.* at 34–35.

[18] *Id.* at 35.

[19] *Id.*

[20] *See, e.g.*, *id.* at 225 ("It was driving Rumsfeld crazy—CIA officers were in the field, and his men were not."). This sentiment is echoed throughout the discourse on the relationship between intelligence and the Department of Defense. *See* BOB WOODWARD, STATE OF DENIAL 77 (2006) ("At an NSC meeting the day after the [September 11th] attacks, Bush asked what the military could do immediately. Rumsfeld replied, 'Very little, effectively.' . . . . The CIA stepped in to fill the void left by the secretary of defense and the uniformed military."). Woodward's account effectively indicates that the Department of Defense's (DoD) lack of an Afghanistan strategy on September 11, 2001, created an impetus for DoD's immediate preparations for operations in Iraq. *Id.* ("Later that day, at another NSC meeting, Rumsfeld asked Bush, Why shouldn't we go against Iraq, not just al Qaeda?") (quotation marks omitted in original).

[21] CRUMPTON, *supra* note 1, at 317.

[22] *Id.* at 310 ("There were no incentives for policy makers to blame themselves. They were protecting their tribe."). Crumpton is notably harsh on the Federal Bureau of Investigation, taking the agency to task for its justice-oriented mission: "Forward-looking intelligence collection and analysis were almost nonexistent [within the FBI]. The FBI sought justice, not prevention." *Id.* at 110.

[23] *See id.* at 317. Crumpton spends a mere nine pages devoted to "policy" despite overt dissatisfaction with policy makers' utilization of the intelligence community throughout the majority of the book. Most of Crumpton's discussion of policy focuses on his promotion to Coordinator for Counterterrorism at the Department of State. *Id.* at 309–18.

[24] WOODWARD, *supra* note 20, at 77.

[25] *Id.*

[26] *Id.*

[27] CRUMPTON, *supra* note 1, at 192–93.

[28] *Id.* at 184.

supported by unmanned aerial vehicles (UAVs).[29] The CIA's use of armed drones, especially the Predator, opened a new area of legal discourse still being debated today.[30] This conversation was not lost on Crumpton who notes that "[w]ith the eventual incorporation of Hellfire missiles on the [Predator], the system would call into question the very nature of war."[31]

In this regard, Crumpton—who was a prime player in the development of armed UAVs[32]—is correct: the questions raised by Crumpton's initial assault into Afghanistan, especially the use of UAVs, have not subsided, nor have they been settled. Following the killing of an American citizen, Anwar al-Awlaki, by UAV in 2011, the controversy over what has been termed President Obama's "weapon of choice" has only intensified.[33] Scholars continue to debate the legalities of use of UAVs as an instrument of war,[34] a notion that Crumpton succinctly dismisses.[35] Given that the legalities of the use of UAVs as an instrument in armed conflict are not resolved, however, they pose a ripe area for normative and substantive discourse by judge advocates now and in the future. For the legal scholar looking into the history of this novel legal issue, Henry Crumpton was a witness to the nascent UAV program, and he confronts the issue head-on in his narrative discourse on operations in Afghanistan.

Given the speed at which Jawbreaker entered into Afghanistan, Crumpton provides a warning on another issue highly relevant to the judge advocate's practice: protocol on detainee operations. Crumpton recalls that his team

> encountered a prisoner problem. Our Afghan allies had captured hundreds of the enemy but had no prison system to process and contain them. The U.S. military had not established any prisoner of war protocols or allocated resources to handle the captured enemy. With the CIA having no writ for prisoners at that time (and not wanting one) and so few U.S. troops being on the ground, the obvious default was to our Afghan allies.[36]

The results were disastrous; a prison revolt took place in the Afghan's makeshift prison on November 25, 2001, drawing public attention, for the first time, to CIA operations on the ground in Afghanistan and resulting in the first American casualty of the operation.[37] Unwittingly, Crumpton provides a lesson for the judge advocate: given the potential for future conflicts to unfurl as rapidly as the situation in Afghanistan, preparation for collection of detainees cannot be overlooked and must be considered in operational plans from the outset.

IV. Conclusion

Although Crumpton's personal experiences pertaining to training, recruiting, collecting, and liaising provide context and anecdotal background to the intelligence business, the focus of the book centers on operations and strategy in Afghanistan. Through his discussion of the strategy and operations conducted, Crumpton offers the reader and—in many regards—the judge advocate a window into some of the burgeoning consequences of the conflict, most notably the use of UAVs and detainee operations. These insights fail to make up for the ultimate shortcoming of the book: a lack of discussion on how the United States can fix its often-alluded to inability to properly utilize intelligence assets.

Crumpton takes the reader directly into the origins of the United States' fight in Afghanistan.[38] From his perspective within the operations, Crumpton draws several, overly simplified conclusions. The attacks on September 11, 2001, followed by the United States' response marked "an era of war unrestricted by conventional boundaries"[39]—one that had "the potential to take new and dangerous forms with great speed and little warning."[40] In short, the nature of war

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[29] *Id.* 148–60.

[30] *See, e.g.*, *Battle Brewing over Obama Administration's Use of Deadly Drones*, THE PLAIN DEALER (Feb. 06, 2013, 6:05 AM), http://www.cleveland.com/nation/index.ssf/2013/02/battle_brewing_over_obama_admi.html (discussing political and legal debate over use of UAVs to target U.S. citizens).

[31] CRUMPTON, *supra* note 1, at 151.

[32] *Id.* at 148–52.

[33] Scott Baldauf, *Good Reads: Drones, Al Qaeda, and American Exceptionalism*, CHRISTIAN SCI. MONITOR, Oct. 11, 2011, http://www.csmonitor.com/World/2011/1011/Good-Reads-Drones-Al-Qaeda-and-American-exceptionalism (noting that the United States engaged in only thirteen UAV attacks between 2004–2007 but had executed eighty-one UAV missions between January and October 2011).

[34] *Compare* Robert P. Barnidge, Jr., *A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law*, 30 B.U. INT'L L.J. 409, 446 (2012) (concluding that the use of UAVs to support operations in Pakistan are not unlawful), *with* Peter Margulies, *The Fog of War Reform: Change in Structure to the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417, 1471–77 (2012) (raising the legal issue of remote targeting by UAVs and concluding that remote targeting is an acceptable change to the law of armed conflict).

[35] *See* CRUMPTON, *supra* note 1, at 155 (noting that President Clinton limited the use of covert actions to kill Usama Bin Laden but would have "no apparent problem killing him with a cruise missle").

[36] *Id.* at 241.

[37] *Id.* at 241–42, 244.

[38] *See generally id.* at 170–215 (describing Crumpton's recollection of preparations for CIA operations in Afghanistan, including pre-September 11, 2001, actions) .

[39] *Id.* at 277.

[40] *Id.* at 278 (quoting Eliot A. Cohen, *A Strange War*, NAT'L INT., Nov. 1, 2001, http://nationalinterest.org/article/a-strange-war-579).

and warfare had changed. From this shift in war, Crumpton came to understand three key points: First, that the "degree of asymmetry in warfare had reached a new level."[41] Second, he noted "the role of nonstate actors was increasing."[42] War was no longer simply state-on-state action; the United States would now have to focus on three separate actors: "nonstate actors, enemies, and allies."[43] Third, he found that "at an operational, even tactical level, the battlefield was now global."[44] The global battlefield would require "attack[ing] the enemy in their safe havens," notably border areas.[45]

In one regard, Crumpton's insights are welcome; he was directly involved in the formulation of the entry strategy and subsequent conduct of operations in Afghanistan. Further, he was involved with CIA operations surrounding embassy bombings in Tanzania and Kenya,[46] as well as the attack on the USS *Cole*.[47] Presumably, few people should be better situated to detail the implications of the post-September 11 world than Henry Crumpton. Yet, given the short shrift the book gives to policy considerations, his conclusions are axiomatic and less than timely to anyone who lived through the September 11th attacks. Instead of seizing on his opportunity to transform his observations into firm lessons on the nature of war and the improper use of intelligence assets, Crumpton chooses to avoid engaging in a comprehensive discussion about the use of intelligence as a tool of statecraft.

The end result is a memoir void of future applicability that will appeal only to the most insatiable fans of intelligence operations. Possessing the knowledge, the education, the background, and the control of the facts that he does, Crumpton should have incorporated a prospective recommendation to policy makers so that they would not have to search for the "lessons" in his book.[48] Crumpton could easily have melded his memoirs into a brilliant treatise on how to improve intelligence operations. Ultimately, the reader is left pondering if perhaps the author could not engender a recommendation, preferring only to vent his frustrations about the treatment of the CIA in which he served.

[41] *Id.* at 279.

[42] *Id.* at 280.

[43] *Id.* at 311.

[44] *Id.* at 280.

[45] *Id.* at 311.

[46] *Id*. at 105–20.

[47] *Id*. at 163–67.

[48] For another presentation of intelligence operations, including prospective policy recommendations, see MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY (2012). Lowenthall effectively presents a clear, concise guide to intelligence operations across the full spectrum of operations and includes a discussion on intelligence reform. *Id*. at 327–44.

CLE News

1. Resident Course Quotas

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

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

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

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

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

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

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

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

2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

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

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

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

3. Civilian-Sponsored CLE Institutions

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

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

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

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

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

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

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

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

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

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

e. If you have additional questions regarding JAOAC, contact LTC Baucum Fulk, commercial telephone (434) 971-3357, or e-mail baucum.fulk@us.army.mil.

5. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

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

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

Date	Region, LSO & Focus	Location	POCs
19 – 21 Apr 13	Southwestern Region 22d LOD Focus: Military Justice and Separations	Camp Robinson North Little Rock, AR	CPT DeShun Eubanks d.eubanks@usar.army.mil SFC Tina Richardson Tina.richardson@usar.army.mil
3 – 5 May 13	National Capital Region 151st LOD Focus: Fiscal and Contract Law	Camp Dawson, WV	LTC Tom Carter gcarter@nmic.navy.mil SGT Jessica Steinberger jessica.f.keller@usar.army.mil
31 May – 2 Jun 13	Northeast Region 4th LOD Focus: Client Services	Philadelphia, PA	LTC Leonard Jones ltcleonardjones@gmail.com SSG James Griffin james.griffin15@usar.army.mil CWO Chris Reyes chris.reyes@usar.army.mil
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

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

b. Access to the JAGCNet:

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

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

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

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

(d) FLEP students;

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

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

c. How to log on to JAGCNet:

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

(2) Follow the link that reads "Enter JAGCNet."

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

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

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

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

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

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

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

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

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

4. The Army Law Library Service

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

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

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