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ARTICLES

Annual Review of Developments in Instructions
Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis

Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military
Major Temidayo L. Anderson

TJAGLCS FEATURES

Lore of the Corps

Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses

New Developments

Administrative & Civil Law

Inquiries Regarding Off-Post Gun Ownership
Major T. Scott Randall

BOOK REVIEWS

My Beloved World
Reviewed by *Major Shaun Lister*

CLE NEWS

CURRENT MATERIALS OF INTEREST

THE ARMY LAWYER INDEX FOR 2013

Department of the Army Pamphlet 27-50-487

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Lore of the Corps

Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses 1

Articles

Annual Review of Developments in Instructions
Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis 4

Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military
Major Temidayo L. Anderson 15

TJAGLCS Features

New Developments

Administrative & Civil Law

Inquiries Regarding Off-Post Gun Ownership
Major T. Scott Randall 33

Book Reviews

My Beloved World
Reviewed by *Major Shaun Lister* 35

CLE News 39

Current Materials of Interest 44

***The Army Lawyer* Index for 2013** 46

Individual Paid Subscriptions to *The Army Lawyer* ..... Inside Back Cover

Lore of the Corps

Legal Education for Commanders: The History of the General Officer Legal Orientation and Senior Officer Legal Orientation Courses

Fred L. Borch
Regimental Historian and Archivist

Any judge advocate advising a general court-martial convening authority soon learns that this commander has attended the one-day General Officer Legal Orientation (GOLO) Course held at The Judge Advocate General's Legal Center and School (TJAGLCS). Similarly, any Army lawyer advising a brigade commander knows that most of these men and women have been students in the Senior Officer Legal Orientation (SOLO) Course conducted at TJAGLCS. How the GOLO and SOLO courses originated, and why this legal education for Army commanders continues to be important for the Corps and the Army, is a story worth telling.

As the war in Vietnam ended and the Army re-organized, Major General George S. Prugh, who had become The Judge Advocate General (TJAG) in July 1971, looked for ways to increase the visibility of the Corps. For Prugh, this was especially important because judge advocates were not popular with commanders. Rightly or wrongly, they were seen as "naysayers" who did not support the mission, but instead seemed more interested in telling commanders what they could not do. Prugh called this a "Crisis in Credibility" and he tasked Colonel (COL) John Jay Douglass, who had been the Commandant at The Judge Advocate General's School (TJAGSA) since June 1970, "to look at the problem and come up with a solution;"[1] or, as COL Douglass put it in a recent interview: "Commanders were very negative about lawyers and Prugh wanted us to be more loved."[2]

Douglass decided that one way to achieve Prugh's goal of improving the image of judge advocates in the Army would be to create a legal education program for lieutenant colonels and colonels about to assume duties as special court-martial (SPCM) convening authorities, and brigadier generals and major generals programmed to serve as general court-martial (GCM) convening authorities.

At that time in Army history, it was not unusual for officers to reach the rank of colonel and higher without having anything other than brief (and informal) contact with a uniformed lawyer. This was because the Uniform Code of Military Justice (UCMJ) did not require any judge advocate involvement at SPCMs until 1969, which meant that an Army one-or two-star general assuming duties as a GCM convening authority for the first time in the early 1970s, having been a battalion and brigade commander in the 1960s, had handled virtually all military justice matters without the assistance of an Army lawyer. Additionally, since a division in the 1960s was authorized only five judge advocates,[3] all of whom focused their efforts on delivering legal services to the GCM convening authority, uniformed lawyers simply did not have much contact with brigade or battalion commanders or their staffs, much less provide legal advice to them.

Colonel Douglass saw that it would be helpful to these newly promoted brigadier and major generals—about to fulfill duties as GCM convening authorities—if they were given a two-day program of instruction at TJAGSA. He also saw that it would be helpful if lieutenant colonels and colonels about to assume duties as SPCM convening authorities likewise had a similar course of instruction.

Apparently, the GOLO program was established first. Douglass's idea was that general officers assuming duties as GCM convening authorities not only would receive education on the newly enacted Military Justice Act of 1968, which had greatly altered the UCMJ,[4] but also be briefed on administrative and contract law issues that might arise while they were in command.[5] As retired TJAG Hugh R. Overholt, who was then serving at The Judge Advocate General's School, U.S. Army (TJAGSA) as a lieutenant colonel and the Chief, Criminal Law Division, remembers it, the focus was on areas where "GOs [General Officers] had gotten into trouble," such as the Anti-Deficiency Act.[6] One

[1] JOHN JAY DOUGLASS, MEMOIRS OF AN ARMY LAWYER: THE LIFE OF JOHN JAY DOUGLASS 180 (2013).

[2] Telephone Interview with Colonel (Retired) John Jay Douglass (Aug. 9, 2010) [hereinafter Douglass Telephone Interview].

[3] By contrast, today's division is authorized thirteen judge advocates, along with one legal administrator and twelve paralegals.

[4] The Military Justice Act of 1968 radically altered the manner in which military justice was administered in the Army. For the first time in history, a military judge presided over courts-martial, and an accused had the option to elect trial by judge alone. The new legislation also required that an accused "be afforded the opportunity to be represented at trial" by a lawyer. As a result of this and other legislative changes, judge advocates began appearing regularly as both trial and defense counsel at special courts-martial. Uniformed lawyers also began advising special court-martial convening authorities on military justice—and other legal issues—as a matter of routine.

[5] Apparently, there was little to no international law instruction, since legal concepts such as "rules of engagement" and "operational law" did not yet exist, and judge advocates did not advise commanders on the conduct of military operations.

[6] Telephone Interview with Major General (Retired) Hugh R. Overholt (Oct. 21, 2013).

high-profile case that Overholt remembered being discussed in the GOLO involved Quartermaster Corps officials at Fort Lee, Virginia. In the late 1950s, after being denied military construction program funds, senior leaders on that installation had constructed an airstrip "using funds appropriated for operation and maintenance and labor of troops." This illegal construction project had been uncovered and House Hearings held into the matter had harshly criticized Major General Alfred B. Denniston and other Army officers at Fort Lee for having "willfully violated the law of the land."[7] After the Fort Lee airfield fiasco, no senior commander wanted to run afoul of the Anti-Deficiency Act, much less be called to testify before the House of Representatives for fiscal wrongdoing.

Today, the GOLO continues to be an important part of the curriculum at TJAGLCS. The Department of the Army's General Officer Management Office notifies TJAGLCS when it has a general officer (including a colonel selected for promotion to brigadier general) who is either deploying as an individual or is going to a unit where she will serve as a GCMCA. These men and women then come to Charlottesville for a one-day GOLO.

During their day-long visit to Charlottesville, each officer receives briefings tailored to his particular needs based on his orders and upcoming assignment. For example, when Brigadier General Maria R. Gervais, the new Deputy Commanding General, U.S. Army Cadet Command, came for her GOLO, she received briefings on sexual harassment, the proper handling of sex assault allegations and cases, administrative investigations, standards of conduct, fiscal law, unlawful command influence, improper relationships and fraternization, non-judicial punishment, government contracting, adverse administrative actions, and the law of federal employment.[8]

Within months of initiating the GOLO course of instruction, Douglass began putting together the SOLO program. The idea was to teach "senior non-JAG officers at the special court-martial level [about] the legal problems they [would] face with suggested solutions."[9] After the TJAGSA faculty put together a program of instruction, selected faculty members took the classes "on the road to Fort Sill [Oklahoma] and Fort Lewis [Washington] as field tests for courses to be presented in Charlottesville."[10]

After receiving positive feed-back from these two "road shows," COL Douglass and Lieutenant Colonel David A. Fontanella, the Chief, Civil Law Division, flew in Fontanella's private airplane to Carlisle Barracks, Pennsylvania, for a meeting with the Army War College (AWC) commandant.[11] After Douglass and Fontanella explained what the SOLO course was and how it could enhance the educational experience of AWC students, the commandant agreed to have TJAGSA faculty travel to Carlisle Barracks to present the SOLO course. The first course was conducted in May 1972, and the second in April 1973. Senior Officer Legal Orientation instruction was also conducted in the field. Courses were held at Fort Sill in December 1971, Fort Hood in March 1972, and Fort Lewis in April 1972; these were not "road shows," but the full SOLO program of instruction.[12]

The goal, however, was to have the program of instruction done exclusively at TJAGSA, and the *first* three-day SOLO course *held in Charlottesville* was on 15–17 November 1971; the second SOLO class at TJAGSA was held 6–8 March 1972.[13] Instruction in the field ceased shortly thereafter.

The first course offered at TJAGSA in 1971 was described as follows:

> A three-day course for commanding officers in the grade of Lieutenant Colonel and above designed to acquaint these senior commanders with legal problems they are likely to encounter in the areas of both criminal and civil law. Civil law instruction will include installation management, labor-management relations, military personnel law, nonappropriated funds, investigations, legal assistance and claims and litigation. Criminal law instruction will include options available to commanders, search and seizure, confessions and convening authorities' duties before and after trial. The course will be presented using seminar techniques, and outlines and textual material suitable for future use will be

[7] *Illegal Actions in the Construction of the Airfield at Fort Lee, Va.: Hearings by the House Committee on Government Operations*, 87th Cong., 2d Sess. 36 (1962).

[8] *Compare* Gen. Officer Legal Orientation Schedule, Brigadier Gen. Maria R. Gervais, 26 Sept. 2013 (25 Sept. 2013), *with* Gen. Officer Legal Orientation Schedule, Major General Leslie C. Smith, 19 Aug. 2013 (14 Aug. 2013). Major General Leslie received briefings on sexual harassment, the proper handling of sexual assault allegations and cases, administrative investigations, standards of conduct, fiscal law, unlawful command influence, improper relationships and fraternization, law of federal employment, domestic support to civil authorities, freedom of information and privacy act, and federal labor-management relations. Major General Smith, at the time of his GOLO, had just taken command of Mission Support Center of Excellence & Fort Leonard Wood, MO. *Id*.

[9] DOUGLASS, *supra* note 1, at 180.

[10] *Id.*

[11] *Id.*; Douglass Telephone Interview, *supra* note 2.

[12] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, ANNUAL REPORT, 1971–1972, at 56 (1972) [hereinafter ANNUAL REPORT].

[13] *The Judge Advocate Gen.'s School, U.S. Army, TJAGSA Schedule of Courses*, ARMY LAW., Nov. 1971, at 24.

> utilized. Staff Judge Advocates are urged to make this course availability and utility known to commanders they serve and advise.[14]

More than forty years later, very little has changed about the SOLO, in the sense that the course continues to be designed for lieutenant colonels and colonels going into assignments where they will perform duties as special court-martial convening authorities. The SOLO course is four-and-one-half days long and is held four times a year (March, June, August, and November). In the 229th SOLO course held at TJAGLCS from 4 to 8 November 2013, the students received instruction on more than twenty subjects, including: fiscal law; consumer law; improper superior/subordinate relationships and fraternization; the commander's role in military justice and unlawful command influence; handling sexual harassment complaints; sexual assault investigations and cases; administrative investigations, nonjudicial punishment and summary courts; means and methods of warfare; the law of federal employment; and military personnel law.[15]

So have the GOLO and SOLO courses achieved their goals? As COL Douglass might ask, do commanders in the Army "love" judge advocates more today as a result of these two legal education programs? This is difficult to know, but it is certainly correct to say that commanders appreciate what Army lawyers bring to a command and routinely seek out judge advocates for advice and counsel. In any event, given the demonstrated success of GOLO and SOLO for more than forty years, there is no doubt that the programs of instruction will continue. This is particularly true given today's increasingly complex legal issues facing commanders deployed overseas or in garrison at home or abroad.

In fact, the GOLO and SOLO courses so impressed Sergeant Major of the Army Raymond F. Chandler III that he requested that TJAGLCS establish a legal education course for senior Army non-commissioned officers. Lieutenant General Dana K. Chipman, then serving as TJAG, supported this request and the result was a new course: the Command Sergeant Major Legal Orientation (CSMLO).[16] It seems that senior leaders at all levels in the Army have a desire for legal education—which Army judge advocates will be more than willing to deliver.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

[14] ANNUAL REPORT, *supra* note 12, at 25.

[15] 229th SOLO Course Schedule, 4–8 Nov. 2013 (17 Oct. 2013).

[16] The first Command Sergeant Major Legal Orientation was held at The Judge Advocate General's School 29–31 January 2013; the second course was held 16–19 September 2013. The Command Sergeants Major (CMSs) who attend are selected by Sergeant Major of the Army Chandler, and the subjects taught reflect what he believes that CSMs operating at the general-officer level and higher level in the Army need to know.

Annual Review of Developments in Instructions

Colonel R. Peter Masterton, Colonel David Robertson,** and Colonel Wendy P. Daknis****

I. Introduction

This article provides military practitioners an overview of recent developments in the area of instructions to members,[1] covering cases decided by the Court of Appeals for the Armed Forces (CAAF) during its 2012 term,[2] as well as important decisions published by service courts during the same period. Because an article of this nature has not been published for several years,[3] this article will also discuss important cases and statutory changes that have occurred during the past three years.

The *Military Judges' Benchbook* (*Benchbook*)[4] remains the primary resource for drafting instructions. Part II of this article addresses instructions on offenses and defenses, including recent changes to the military's statute dealing with sex offenses, Article 120, Uniform Code of Military Justice (UCMJ).[5] Part III discusses instructions on lesser included offenses, to include changes mandated by the CAAF decision of *United States v. Jones*.[6] The article ends with discussions of evidentiary and sentencing instructions.

II. Instructions on Offenses and Defenses

A. 2006 Revisions to Sex Offense Statute

In 2006 the U.S. Congress made substantial changes to the military statute dealing with sex offenses, Article 120 of the UCMJ.[7] The statutory changes moved many sex offenses previously addressed by other articles of the UCMJ into Article 120.[8] They changed the elements of the crime of rape and created many new offenses, to include aggravated sexual assault, aggravated sexual contact and abusive sexual contact. One of the changes scrutinized most closely dealt with the issue of consent. Before 2007, the military crime of rape included the requirement that the sex act be perpetrated "by force" and "without consent."[9] In the 2007 version of the military crime of rape, consent was not an element.[10] However, Congress complicated matters by making consent an affirmative defense and creating complex provisions to raise and rebut the defense.[11] Consequently, the trial judiciary and appellate courts resorted to the application of "judicial band-aids"[12] to ensure that convictions under this new statute passed constitutional scrutiny.

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[1] The *Manual for Courts-Martial* (*MCM*) requires the military judge to instruct members (jurors) on questions of law and procedure, findings, and sentencing. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 801(a)(5), 920 and 1005 (2012) [hereinafter MCM].

[2] The 2013 term began on 1 September 2012 and ended on 31 August 2013.

[3] The most recent article of this nature was published in May 2011. Lieutenant Colonel Christopher T. Fredrikson, Lieutenant Colonel Wendy P. Daknis, and Lieutenant Colonel James L. Varley, *Annual Review of Developments in Instructions*, ARMY LAW., May 2011, at 25. The authors of this article relied a great deal on materials prepared in 2012 by Lieutenant Colonel Varley and Colonel Fredrikson and are extremely grateful for their contributions.

[4] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK (1 Jan. 2010) [hereinafter BENCHBOOK].

[5] UCMJ art. 120 (2012).

[6] 68 M.J. 465 (C.A.A.F. 2010).

[7] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136 (codified in UCMJ art. 120 (2008)).

[8] For example, the crimes of indecent acts or liberties with a child, indecent exposure, indecent acts with another, contained as enumerated offenses defined by the President under Article 134, Uniform Code of Military Justice (UCMJ), were moved to Article 120 of the UCMJ. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 87, 88, 90 (2005); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 120 (2008).

[9] The elements of rape under the Article 120, UCMJ, effective before October 1, 2007, were that the accused committed the act of sexual intercourse and that the act of sexual intercourse was done by force and without consent. UCMJ art. 120 (2005).

[10] *See* UCMJ art. 120 (2008).

[11] For a detailed critique and analysis of these provisions, see Major Howard H. Hoege III, *"Overshift" The Unconstitutional Double Burden-Shifting on Affirmative Defenses in the New Article 120*, ARMY LAW., May 2007, at 2. *See also* James G. Clark, *"A Camel is a Horse Designed by a Committee": Resolving Constitutional Defects in Uniform Code of Military Justice Article 120's Consent and Mistake of Fact as to Consent Defenses*, ARMY LAW., July 2011, at 4.

[12] The term "judicial band-aid" comes from Judge Margaret A. Ryan's dissenting opinion in *United States v. Neal*, 68 M.J. 289, 305 (C.A.A.F. 2010). The CAAF implied that it may be appropriate to apply such judicial band-aids when it stated that "[T]he military judge has the authority to craft an appropriate instruction ensuring that the burden of proof remains with the government." *Id*. at 304.

For crimes alleged to have happened between 1 October 2007 and 27 June 2012, the relevant text of Article 120 provided:

> (r) Consent and mistake of fact as to consent . . . . Consent and mistake of fact as to consent are not an issue, or an affirmative defense . . . except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact) . . . .
>
> (t)(16) Affirmative defense. The term "affirmative defense" means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.[13]

The U.S. Army Trial Judiciary (USATJ) recognized the problems with the double-burden shifting provision in the 2007 version of Article 120. The *Benchbook* provided the following guidance for instructing panels when "consent" is raised in cases involving rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact:

> When a child is not the victim of the alleged rape, consent is an affirmative defense to rape. The National Defense Authorization Act for Fiscal Year 2006 and the implementing Executive Order provide that the accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution has the burden of proving beyond a reasonable doubt that the affirmative defense did not exist. Because this burden shifting standard appears illogical, it raises issues ascertaining Congressional intent. The Army Trial Judiciary is taking the approach that consent is treated like many existing affirmative defenses; if raised by some evidence, the military judge must advise the members that the prosecution has the burden of proving beyond a reasonable doubt that consent did not exist. Because lack of consent is not an element however, the prosecution need not otherwise prove lack of consent.[14]

Trial judges facing the issue of consent under the 2007 version of Article 120 dealt with it in three distinctly different ways. Some judges instructed in accordance with the statutory double-burden shift, not following the guidance from the *Benchbook*.[15] Some ruled that the double-burden shift made the statute unconstitutional and simply dismissed the affected charge.[16] Some instructed in accordance with the modifications suggested by the *Benchbook*.[17]

In *United States v. Neal*,[18] the CAAF addressed the confusing double-burden shifting language in the 2007 version of Article 120. The accused in *Neal* was charged with aggravated sexual assault by force. The trial judge ruled that the double-burden shift made Article 120 unconstitutional and dismissed the specification. The CAAF disagreed with the trial judge, holding that removal of the element of "without consent" was constitutional. The CAAF held that Congress has broad authority to define and redefine the elements of an offense and "place the burden on the accused to establish an affirmative defense even when the evidence pertinent to an affirmative defense also may raise a reasonable doubt about an element of the offense,"[19] as long as it did not shift the burden of proving an element of the offense. An affirmative defense cannot be "an implicit element of the offense" or "element-based."[20] Simply put, an affirmative defense and an element of an offense cannot be "two sides of the same coin,"[21] but the evidence pertinent to each may "overlap."[22]

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[13] Article 120 provides the specific elements of the offenses of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. UCMJ art. 120 (2008).

[14] BENCHBOOK, *supra* note 4, para. 3-45-3 n.10. This explanation and the accompanying instructions were subsequently modified. *See infra* note 22 and accompanying text.

[15] This was the approach followed by the trial judge in *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011).

[16] This was the approach followed by the trial judge in *United States v. Neal*, 68 M.J. 289 (C.A.A.F. 2010).

[17] This was the approach used by the trial judge in *United States v. Medina*, 69 M.J. 462 (C.A.A.F. 2011).

[18] 68 M.J. 289 (C.A.A.F. 2010).

[19] *Id.* at 299.

[20] *Id.* at 303.

[21] This term was used in Judge Ryan's dissent. *Id.* at 305.

[22] *Id.* at 299.

In response, the USATJ revised the *Benchbook* and provided a more specific instruction for when evidence of consent was raised at trial involving rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. In these cases, the judge should provide the following instruction:

> The evidence has raised the issue of whether [the alleged victim] consented to the sexual act(s) . . . . Evidence of consent is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt.[23]

In cases where the evidence raised the issue of whether the accused mistakenly believed the alleged victim consented, the *Benchbook* provided similar guidance.[24] In these cases, an instruction on mistake of fact should be given that includes the following:

> The evidence has raised the issue of mistake on the part of the accused whether [the alleged victim] consented . . . . Mistake of fact as to consent is a defense . . . . The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist.[25]

The CAAF provided additional guidance in *United States v. Prather*[26] and *United States v. Medina*.[27] In each of these cases, the accused was convicted of aggravated sexual assault under the 2007 version of Article 120(c)(2), an offense involving the substantial incapacitation of the victim. Under these circumstances, the CAAF found that the terms "substantially incapacitated" and "consent" *are* "two sides of the same coin."[28]

In *Prather*, the trial judge followed the statutory double-burden shift when instructing the panel.[29] The CAAF found that this double-burden shift "results in an unconstitutional burden shift to the accused."[30] The court ruled that the second burden shift is a "legal impossibility . . . . If the trier of fact has found that the defense has proven an affirmative defense by a preponderance of the evidence, it is legally impossible for the prosecution to then disprove the affirmative defense beyond a reasonable doubt and there must be a finding of not guilty."[31] The CAAF found that once an instruction under the statutory scheme was given, no other instruction could resolve or cure this unconstitutional burden shift.[32]

The trial judge in *Medina* followed the *Benchbook* instructions, treating consent as a traditional affirmative defense.[33] In *Medina*, since the members were never instructed in accordance with the unconstitutional statutory scheme, the CAAF found that the accused was not prejudiced.[34] The CAAF ruled that "in the absence of a legally sufficient explanation, it was error for the military judge to provide an instruction inconsistent with the statute,"[35] but that the error was harmless.[36] Thus, it affirmed the decision of the trial judge, who had instructed in accordance with the *Benchbook*.

In response to *Medina*, the USATJ amended the *Benchbook* to provide a "legally sufficient explanation":

> This court is aware of the Court of Appeals for the Armed Forces cases interpreting the statutory burden shift for Article 120, UCMJ, affirmative defenses. Although Article 120(t)(16) places an initial burden on the accused to raise these affirmative defenses, Congress also placed the ultimate burden on the Government to disprove them beyond a reasonable doubt. The CAAF has determined the Article 120(t)(16) burden shift to be a legal impossibility. Therefore, to constitutionally interpret Congressional intent while avoiding prejudicial error, and applying the rule of lenity, this court severs the language "The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden," in Article 120(t)(16) and will apply the burden of

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[23] U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 10-01 VERSION 2, effective 16 Jul. 2010, para. 3-45-3 n.11.1, *available at* https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA.

[24] U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 10-04, effective 24 May 2010, para. 3-45-3, n. 11.1, *available at* https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA.

[25] *Id.*

[26] 69 M.J. 338 (C.A.A.F. 2011).

[27] 69 M.J. 462 (C.A.A.F. 2011).

[28] 69 M.J. at 342–43.

[29] *Id.* at 340.

[30] *Id.*

[31] *Id.* at 345.

[32] *Id.*

[33] United States v. Medina, 69 M.J. 462, 464 (C.A.A.F. 2011).

[34] *Id.* at 466. The CAAF found that "[t]he instruction that was given was clear and correctly conveyed to the members the Government's burden." *Id.* at 465.

[35] *Id.*

[36] *Id.*

> proof in accordance with the recommended instructions in the Military Judge's Benchbook, DA Pam 27-9.[37]

The CAAF has not ruled whether this note constitutes a "legally sufficient explanation," but if the judge instructs the panel in accordance with the *Benchbook* on consent and mistake of fact as to consent, a conviction will not be overturned due to unconstitutional burden shifting of Article 120 as it stood between 1 October 2007 and 27 June 2012.[38]

B. 2011 Revisions to Sex Offense Statute

In 2011, Congress amended the statute again,[39] removing the affirmative defense of consent and its unconstitutional burden shift. The new statute reduced the total number of sex offenses from fourteen to ten and changed a number of the names and definitions of the offenses. To avoid confusion, the new statute retained four adult sex offenses in Article 120: rape, sexual assault, aggravated sexual contact and abusive sexual contact.[40] All sex offenses involving children were moved to a new article: Article 120b.[41] The new statute only provides for three such offenses: rape of a child, sexual assault of a child and sexual abuse of a child. Three sex offenses—indecent viewing, recording or broadcasting; forcible pandering; and indecent exposure— were moved to a third article: Article 120c.[42]

The 2011 amendment of the sex offense statutes went into effect on 28 June 2012. Thus, the instructions to be given depend on the date the crime is alleged to have happened. In some cases, the trial judge must instruct on offenses under all three versions of the sexual offense statute: the statute effective prior to 2007, the statute effective between 2007 and 2012 and the statute effective from 2012 to the present.

For crimes alleged to have occurred on or after 28 June 2012, Congress did not restore lack of consent as an element of forcible rape or sexual assault in the new statute. However, consistent with the CAAF's decision in *Neal*,[43] the *Benchbook* currently instructs the panel that consent is relevant to the question of force or threat of force under the 2012 version of the rape statute:

> Evidence of consent to the sexual act is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in this case, may cause a reasonable doubt as to whether the accused used unlawful force . . . .[44]

Similarly, in accordance with *Prather*[45] and *Medina*,[46] the *Benchbook* currently instructs the panel that consent is relevant to the question of whether the accused knew the alleged victim was incapacitated under the 2012 version of the sexual assault statute:

> Evidence of consent to the sexual act is relevant to whether the prosecution has proven the elements of the offense beyond a reasonable doubt. Stated another way, evidence the alleged victim consented to the sexual act, either alone or in conjunction with the other evidence in this case, may cause a reasonable doubt as to whether the accused . . . (knew or reasonably should have known that the alleged victim was (asleep) (or) (unconscious) (or) (otherwise unaware that the sexual act was occurring)) (knew or reasonably should have known that the alleged victim was incapable of consenting to the sexual act due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)).[47]

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[37] U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 11-02A, paras. 3-45-3, 3-45-4, 3-45-5, 3-45-6, 3-45-7, 3-45-8, 3-45-11 n.1.1 (28 Apr. 2011), *available at* https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA.

[38] For one proposed alternative approach, see Clark, *supra* note 11, at 3. Mr. Clark proposed that military judges should "sever the provisions of Article 120 that create consent as an affirmative defense." *Id.* at 15. This proposal was based on an analysis of congressional intent. However, this proposal would sever clear language that is beneficial to the accused.

[39] *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (codified in UCMJ arts. 120, 120b and 120c (2012)).

[40] UCMJ art. 120 (2012).

[41] *Id.* art. 120b. Article 120a had already been designated for the new offense of stalking. UCMJ art. 120a (2006).

[42] UCMJ art. 120c (2012).

[43] 68 M.J. 289 (C.A.A.F. 2010).

[44] U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 11-11, paras. 3-45-13 n.8 (21 June 2012) [hereinafter 21 JUNE 2012 BENCHBOOK], *available at* https://www.jagcnet2.army.mil?Portals/USArmyTJ.nsf/6065c91f137aff3685256cbf0079f732/91971c8c7def592e852572b30063512c?OpenDocument. There is currently a debate on whether this instruction is necessary.

[45] 69 M.J. 338 (C.A.A.F. 2011).

[46] 69 M.J. 462 (C.A.A.F. 2011).

[47] 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.8. There is currently a debate on whether this instruction is necessary.

The 2012 version of the statute expressly restores lack of consent as an element in rape cases in which a substance causing the impairment is administered "without the knowledge or consent" of the victim.[48] The *Benchbook* provides for the following instruction when the accused is charged with this offense:

> [T]he accused is charged with the offense of rape by administering a drug, intoxicant, or other similar substance without the knowledge or consent of the alleged victim, thereby substantially impairing the ability of that other person to appraise or control conduct. For this offense, lack of consent to the administration of the drug, intoxicant, or other similar substance is an element of the offense.[49]

Under the 2012 version of the sexual assault statute, it is possible for the prosecution to make consent an element based on the way the charges are drafted. If sexual assault is alleged to be based on bodily harm,[50] consent ordinarily is not an element. However, it may become an element if the sexual act itself is also charged as the act that caused bodily harm. The following is an example of such a specification where the identical language in italics is charged as both the sexual act and the bodily harm:

> In that John Doe, U.S. Army, did, at or near Baumholder, Germany, on or about 6 September 2013, commit a sexual act upon Anne Victim, to wit: *penetrating her vulva with his penis*, by causing bodily harm to her, to wit: *penetrating her vulva with his penis*.

Similarly, it is possible for the prosecution to make consent an element of an abusive sexual contact by causing bodily harm[51] if the act that constitutes the sexual contact is also charged as the act that caused bodily harm. These unusual charges contain consent as an element because the 2011 statute defines bodily harm as "any offensive touching of another, however slight, including any *nonconsensual* sexual act or *nonconsensual* sexual contact."[52] The definition specifically includes consent where the bodily harm and the sexual act or contact are identical. A simple way for prosecutors to avoid this trap is to list some bodily harm other than the sexual act or contact. The following specification is an example of how to do this:

> In that John Doe, U.S. Army, did, at or near Baumholder, Germany, on or about 6 September 2013, commit a sexual act upon Anne Victim, to wit: *penetrating her vulva with his penis*, by causing bodily harm to her, to wit: *holding her down with his hands and body*.

For crimes that occurred on or after 28 June 2012, mistake as to consent may still be an issue. In these cases, the *Benchbook* advises that the judge must decide "whether, based upon the evidence presented and the elements of the offense charged, mistake of fact as to consent to the sexual act is an applicable defense."[53] In these cases, the judge should provide an instruction on mistake of fact that includes the following language:

> The evidence has raised the issue of mistake on the part of the accused whether [the alleged victim] consented . . . . Mistake of fact as to consent is a defense . . . . The prosecution has the burden of proving beyond a reasonable doubt that the mistake of fact as to consent did not exist . . . .[54]

Only time will tell if the new *Benchbook* instructions adequately address the issues raised by the 2012 version of the sex offense statute, especially the issue of consent. As the courts issue opinions interpreting the 2012 version, the *Benchbook* instructions will change in response. It is important for practitioners to keep track of changes in case law and to ensure that they have the most up-to-date version of the *Benchbook*.

C. Consensual Sodomy Under Article 125

In *United States v. Castellano*,[55] the CAAF again discussed the constitutional protections provided for consensual sodomy under Article 125 of the UCMJ.[56] In *Lawrence v. Texas*,[57] the Supreme Court overruled a Texas law criminalizing consensual homosexual sodomy, recognizing a constitutional liberty interest for such conduct

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[48] UCMJ art. 120a(5) (2012).

[49] 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.9.

[50] UCMJ art. 120b(1)(B).

[51] *Id.*

[52] *Id.* art. 120(d) (emphasis added).

[53] 21 JUNE 2012 BENCHBOOK, *supra* note 44, para. 3-45-13 n.10.

[54] *Id.* The U.S. Army Trial Judiciary (USATJ) is currently considering changes to the Article 120 instructions. Practitioners are advised to consult the USATJ link on JAGCNeT for the most current approved changes to the *Benchbook*, available at https://www.jagcnet2.army.mil/sites/trialjudiciary.nsf/homeContent.xsp?open&documentId=DE67163596F12C3F85257B48006915EA (follow JAGCNet; USALSA; Trial Judiciary; Resources; then DA Pam 27-9 and Approved Interim Updates).

[55] 72 M.J. 217 (C.A.A.F. 2013).

[56] UCMJ art. 125 (2012).

[57] 539 U.S. 558 (2003).

under the Due Process Clause.[58] In *United States v. Marcum*,[59] the CAAF applied this ruling to consensual sodomy in the military context under Article 125 of the UCMJ. In *Marcum*, the court ruled that certain factors, such as coercion, can remove consensual sodomy from the protections provided by *Lawrence*.[60] *Castellano* made it clear that in a trial by members, the trier of fact (the members), rather than the judge, decides whether these *"Marcum"* factors exist.[61]

The accused in *Castellano* was charged with forcible sodomy with his next-door neighbor, another service member, but was found guilty by a panel of only the lesser included offense of consensual sodomy. The trial judge essentially instructed the members that they could find the accused guilty of this lesser offense if they determined that the accused engaged in consensual sodomy; he did not instruct the panel on the *Marcum* factors. The CAAF found that this instruction was in error. While not elements of the offense, the *Marcum* factors were critical because they help determine what made the accused's conduct criminal. Therefore, the existence of these factors was a question for the trier of fact, rather than simply a question of law to be determined by the judge.

In response to *Castellano*, military judges should instruct the members on the *Marcum* factors in all consensual sodomy cases. The *Benchbook* contains the appropriate language, including the following explanation:

> Not every act of adult consensual sodomy is a crime. Adult consensual sodomy is a crime only if you find beyond a reasonable doubt that the sodomy alleged: was public behavior; was an act of prostitution; involved persons who might be injured, coerced or who are situated in relationships where consent might not easily be refused; or implicates a unique military interest.[62]

D. Insanity Defense

In *United States v. Mott*,[63] the CAAF dealt with the insanity defense. Although reversing the accused's conviction on other grounds, the court upheld the trial judge's instruction that the accused's ability to appreciate the wrongfulness of his conduct should be determined based on an objective standard of the term "wrongfulness."

The accused in *Mott* allegedly thought that the victim, another crew member on board his vessel, had threatened to kill him. The accused approached the victim from behind, slashed his throat and repeatedly stabbed him. It was subsequently determined that the accused suffered from paranoid schizophrenia. The psychiatrist who conducted a mental responsibility examination of the accused[64] concluded that the accused believed he was acting in self-defense and that the only way to stop the victim from killing the accused was to attack him. At trial, the defense raised the insanity defense and the judge provided the members with the standard instructions on this defense from the *Benchbook*, including the instruction that "[i]f the accused was able to appreciate the nature and quality or the wrongfulness of his conduct, he is criminally responsible . . . ."[65] When a member asked for a definition of "wrongfulness," the judge departed from the *Benchbook* by giving an instruction that included the following language:

> When the law speaks of wrongfulness[,] the law does not mean to permit the individual to be his own judge of what is right or wrong. What is right or wrong is judged by societal standards. The standard focuses on the accused's ability to appreciate that his conduct would be contrary to public or societal standards.[66]

In upholding this instruction, the CAAF examined the military insanity statute,[67] which was based on the federal insanity statute.[68] The court pointed out that prior military and federal case law interpreting both statutes were based on the insanity test laid out in M'Naghten's Case.[69] This nineteenth century case stood for the proposition that the accused must be laboring under "such a defect of reason . . .

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[58] U.S. CONST. amend. V.

[59] 60 M.J. 198 (C.A.A.F. 2004).

[60] *Id.* at 207.

[61] United States v. Castellano, 72 M.J. 217, 219 (C.A.A.F. 2013).

[62] U.S. ARMY TRIAL JUDICIARY, MILITARY JUDGES' BENCHBOOK, APPROVED INTERIM CHANGE 13-06, para. 3-51-1 n.3 (7 Aug. 2013), *available at* https://www.jagcnet2.army.mil/Portals/USArmyTJ.nsf/60655c91f137aff3685256cbf0079f732/91971c8c7def592e852572b30063512c?OpenDocument. The Fiscal Year 2014 National Defense Authorization Act (NDAA), as agreed upon by the House and Senate Armed Services Committees, contains a provision that would repeal the offense of consensual sodomy under the Uniform Code of Military Justice if the defense bill is approved. For additional information on how the NDAA could affect military justice, see Zachary D. Spillman, *Military Justice Reforms in the FY14 Compromise NDAA*, NATIONAL INSTITUTE OF MILITARY JUSTICE BLOG – CAAFLOG (Dec. 12, 2013), http://www.caaflog.com/2013/12/12/military-justice-reforms-in-the-fy14-compromise-ndaa/.

[63] 72 M.J. 319 (C.A.A.F. 2013).

[64] The examination was conducted pursuant to Rule for Courts-Martial 706. MCM, *supra* note 1, R.C.M. 706.

[65] BENCHBOOK, *supra* note 4, paras. 6-3, 6-4, 6-6 and 6-7.

[66] *Mott*, 72 M.J. at 323.

[67] UCMJ art. 50a (2012).

[68] 18 U.S.C. § 17 (2012). This law was enacted in response to the use of the insanity defense in the acquittal of John Hinkley, who attempted to assassinate President Reagan. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, sec. 402 § 20, 1937, 2057.

[69] 8 Eng. Rep. 718 (H.L.) (1843).

as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[70] The majority of courts interpreting this standard have concluded that "wrongfulness" should be determined using an objective standard.[71] The CAAF adopted this majority view.[72]

Judges instructing on the insanity defense should follow the *Benchbook* instructions.[73] Additionally, the instruction used in *Mott* may be helpful when a further definition of wrongfulness is necessary.

III. Lesser Included Offenses After *Jones*

After years of applying subjective and often confusing tests for determining if one offense is a lesser included offense of another, the CAAF made an abrupt and decided shift back to the "elements test" in April 2010 when it issued its opinion in the case of *United States v. Jones*.[74] In doing so, the CAAF expressly overruled all of its prior cases that had applied tests not in strict accord with the elements test. The court noted the elements test was "fully consonant with the Constitution, precedent of the Supreme Court, and another line of [their] own cases."[75] It also had the added benefit of moving away from the more subjective tests the court had applied in the past and adopting a more objective test.

In its simplest form, the elements test requires that one offense's elements be a subset of another offense's elements before it can be considered "necessarily included"[76] in that greater offense. The CAAF provided additional guidance when comparing the elements of offenses whose statutory language is similar, but not identical. In *United States v. Alston*,[77] the court stated there was no requirement the elements contain identical language. Rather, the meaning of an element is determined by applying the "normal principles of statutory construction."[78] These principles include "[a]pplying the common and ordinary understanding of the words in the statute."[79] If an uncharged offense is determined to be necessarily included in a charged offense, an accused is deemed on notice that he may be convicted of this uncharged offense.

Following the release of *Jones* and *Alston*, the CAAF seized several opportunities to apply the elements/statutory construction test to cases brought before it. Leading up to its 2013 Term of Court, the CAAF ruled: assault consummated by a battery (Article 128) is necessarily included in wrongful sexual contact (1 October 2007–27 June 2012 version of Article 120);[80] negligent homicide (Article 134) is *not* necessarily included in premeditated murder (Article 118),[81] nor is it necessarily included in involuntary manslaughter (Article 119);[82] and housebreaking (Article 130) is necessarily included in burglary (Article 129).[83] During its 2013 Term of Court, the CAAF continued to develop this area of the law through two additional opinions.

In the first opinion, the CAAF addressed the issue of whether abusive sexual contact is a lesser included offense of aggravated sexual assault under the 2007 version of Article 120.[84] The appellant in *United States v. Wilkins*[85] had been charged, inter alia, with committing aggravated sexual assault on a fellow sailor by "placing his fingers or another object in the anus of [victim] . . . ."[86] The military judge sua sponte found appellant not guilty of the charged offense, and instructed the members to determine whether the appellant was nonetheless guilty of the lesser included offense of abusive sexual contact. This instruction was given without defense objection.

In conducting its lesser included offense analysis, the court compared the statutory elements and definitions of the two offenses in question, noting the key distinction between the two offenses is that aggravated sexual assault requires the commission of a "sexual act," whereas abusive sexual contact requires "sexual contact" to occur. The court then compared the definitions of these two terms.

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[70] *Id.* at 722.

[71] *Mott*, 72 M.J. at 325–26.

[72] *Id.* at 326.

[73] BENCHBOOK, *supra* note 4, para.6-4 n.2. "Lack of mental responsibility (insanity) at the time of the offense is an affirmative defense which must be instructed upon, sua sponte, when the military judge presents final instructions . . . . The following instruction is suggested . . . ." *Id.*

[74] 68 M.J. 465 (C.A.A.F. 2010).

[75] *Id.* at 468.

[76] UCMJ art. 79 (2012) ("An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.").

[77] 69 M.J. 214 (C.A.A.F. 2010).

[78] *Id.* at 216.

[79] *Id.*

[80] United States v. Bonner, 70 M.J. 1 (C.A.A.F. 2011).

[81] United States v. Girouard, 70 M.J. 5 (C.A.A.F. 2011) (emphasis added).

[82] United States v. McMurrin, 70 M.J. 15 (C.A.A.F. 2011).

[83] United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011).

[84] UCMJ art. 120 (2008).

[85] 71 M.J. 410 (C.A.A.F. 2012).

[86] *Id.* at 412.

Sexual Act Under Aggravated Sexual Assault	Sexual Contact Under Abusive Sexual Contact
contact between the penis and the vulva . . .; or the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.	the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.

The CAAF noted that in some cases, abusive sexual contact could be a lesser included offense of aggravated sexual assault. This could include cases where an accused was charged with committing aggravated sexual assault by penetrating the genital opening of another. This penetration would necessarily include a touching of the genitalia, as required for a sexual contact. In the instant case, however, the problem lay in the plain language of the specification, which the court noted constituted a legal impossibility.[87]

The CAAF stated the appellant's act of digitally penetrating the anus of his fellow Soldier could not constitute a "sexual act" because a sexual act is limited to penetrations of genital openings. Since the charged offense was inherently defective, instructing the members to consider abusive sexual contact as a lesser included offense was also in error. Having found error, the court then tested for prejudice to the appellant.

The CAAF determined the appellant's due process right to notice was not violated since the defective specification provided him notice of all of the elements of abusive sexual contact he needed to defend against at trial, and he did in fact employ a defense strategy to defend against this charge. Finding no prejudice, the CAAF affirmed the decision of the lower appellate court.

The second opinion the court released addressing lesser included offenses also related to sexual offenses. In *United States v. Tunstall*,[88] the CAAF granted review to determine whether the offense of indecent acts was a lesser included offense of aggravated sexual assault under the 2007 version of Article 120.[89] Among other charges, the appellant had been charged with aggravated sexual assault for digitally penetrating the vagina of a fellow airman while she was vomiting into a sink from excessive alcohol consumption. The appellant committed this act while in the presence of two other airmen. The government charged the appellant under the theory that his actions were criminal because the victim was "substantially incapable of declining participation."[90]

At trial, the military judge sua sponte instructed the members that the offense of indecent acts was a lesser included offense of aggravated sexual assault. The military judge went on to inform the members that an act may be indecent when it is done in an "open and notorious" manner, that is, when the participants know that someone else is present or could be reasonably present. The military judge did not inform the members that indecent acts could include engaging in sexual activity with a person substantially incapable of declining participation. The defense did not object to this instruction.

In reaching its decision, the CAAF first compared the elements of the two offenses at issue.

Elements of Aggravated Sexual Assault by Substantial Incapacitation	Elements of Indecent Acts
(1) The accused engaged in a sexual act with another person	(1) The accused engaged in certain conduct
(2) The other person was substantially incapable of declining participation in the sexual act	(2) The conduct was indecent

As charged in this case, the court determined the first element of both offenses rested on the same facts. That is, both the "sexual act" and the "certain conduct" refer to the digital penetration of the victim's vagina. The court noted the second element of both offenses also relied on the same set of facts. The fact that the victim was substantially incapable of declining participation not only meets the plain language of the second element of aggravated sexual assault, it is also what makes the conduct indecent, as required by the second element of indecent acts.

The court concluded the relationship between the two offenses at issue was not one of greater/lesser, but rather one of alternative offenses aimed at criminalizing the same conduct. This is because there is no "additional fact that the members would need to find in order to convict for the offense of aggravated sexual assault which would be unnecessary to convict for the offense of indecent acts. Neither requires a factual finding that the other does not."[91] In addition to finding the military judge committed plain error when he gave the lesser included offense instruction, the CAAF concluded the judge compounded his first error with his instruction regarding what constituted an indecent act.

[87] *Id.* at 413.

[88] 72 M.J. 191 (C.A.A.F. 2013).

[89] UCMJ art. 120 (2008).

[90] *Tunstall*, 72 M.J. at 193.

[91] *Id.* at 195.

The government had charged the appellant under the theory that his conduct was wrongful because it was done with a person who was substantially incapable of declining participation. However, the military judge informed the members the conduct at issue could be indecent only if it was done in an "open and notorious" manner. This was the first mention at trial of the "open and notorious" theory of criminality. By doing this, the military judge "essentially took the 'substantially incapable of declining participation' theory for the offense of indecent acts off the table . . . ."[92] Having found error, the court turned its attention to the issue of prejudice.

The CAAF started by recognizing the notice requirement mandates that an accused know not only of what offense, but also under what legal theory he can be convicted.[93] In the present case, the appellant was neither charged with, nor ever put on notice until the judge's instructions, that he could be found guilty of committing indecent acts under an "open and notorious" theory of criminal liability. As such, the court determined the appellant's due process right to fair notice was violated. Accordingly, the CAAF set aside the finding of guilty of an indecent act.

Although not dealing with instructions to the members, both the CAAF and the Army Court of Criminal Appeals decided cases involving lesser included offenses of which practitioners should be aware. The CAAF ruled that assault consummated by battery is a lesser included offense of indecent assault,[94] and the Army court decided indecent exposure was a lesser included offense of indecent liberties, given the facts of the particular case.[95]

IV. Evidence

A. Demonstrative Evidence

In *United States v. Pope*,[96] the CAAF considered whether it was error for the military judge to fail to give a limiting instruction on the use of demonstrative evidence.

As a result of a random urinalysis, Airman First Class (A1C) Pope's urine tested positive for the metabolite of cocaine.[97] At trial, her former roommate testified that A1C Pope admitted that she sometimes got "messed up" and that her brother provided her with a "green drink" to "clean out [her] system" when "she would get messed up."[98] The roommate also testified that she had seen bottles of the green drink in their shared refrigerator.[99] In conjunction with the roommate's testimony, the trial counsel introduced a representative sample of a green detoxifying drink (purchased by a government investigator) as a demonstrative exhibit, which the roommate testified looked substantially like the green drinks she had seen in the refrigerator.[100] Despite the trial counsel's representation at an Article 39(a) hearing that the panel would be instructed that the drink was being admitted solely as an illustration, the military judge gave no such instruction to the panel.[101]

Demonstrative evidence is admitted at the discretion of the military judge when it "illustrates or clarifies the testimony of a witness."[102] As previously recognized by the Navy-Marine Court of Criminal Appeals, as well as other federal jurisdictions, demonstrative evidence requires "limited handling," to include instructions to the panel about the use of the evidence.[103] In *Pope*, the CAAF affirmed this proposition by requiring the military judge to "properly instruct the members that the evidence is for illustrative purposes only."[104] Despite this requirement, the CAAF determined that the error was harmless, as there was sufficient testimony from the government investigator who purchased the drink to make it clear to the panel members that the green drink was not substantive evidence and was intended solely as demonstrative evidence.[105]

The direction provided by the CAAF in *Pope* concerning demonstrative evidence is clear: when such evidence is admitted, the military judge must give a proper limiting instruction.

B. Expert Testimony

In *United States v. Lusk*,[106] the CAAF reiterated its previous position concerning the use of limiting instructions when an expert witness relies on inadmissible evidence as a basis for his expert opinion.

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[92] *Id.* at 196.

[93] *Id.* at 192.

[94] United States v. Gaskins, 72 M.J. 225 (C.A.A.F. 2013).

[95] United States v. St. John, 72 M.J. 685 (A. Ct. Crim. App. 2013).

[96] 69 M.J. 328 (C.A.A.F. 2011).

[97] *Id.* at 331.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] United States v. Heatherly, 21 M.J. 113, 115 n.2 (C.M.A. 1985).

[103] United States v. Knox, 46 M.J. 688, 694 (N-M. Ct. Crim. App. 1997). *See also* United States v. Gonzalez, 933 F.2d 417, 427 (7th Cir. 1991); Harvey By and Through Harvey v. Gen. Motors Corp., 873 F.2d 1343, 1356 (10th Cir. 1989); Veliz v. Crown Lift Trucks, 714 F. Supp. 49, 53 (E.D.N.Y. 1989).

[104] *Pope*, 69 M.J. at 333.

[105] *Id.* at 333–34.

[106] 70 M.J. 278 (C.A.A.F. 2011).

As a result of a urinalysis pursuant to a unit inspection, Staff Sergeant (SSgt) Lusk's urine tested positive for the metabolite of cocaine.[107] Two different laboratories—the Air Force Drug Testing Laboratory (AFDTL) and the Armed Force Institute of Pathology (AFIP)—tested SSgt Lusk's urine sample, with the same results.[108] At trial, the military judge admitted the AFDTL report of results without defense objection.[109] Upon defense motion, the military judge excluded the AFIP report as testimonial hearsay which would deny the defense the right of confrontation guaranteed by the Sixth Amendment.[110]

The government called an expert witness who testified as to the reliability of the AFDTL report.[111] During extensive cross-examination, the defense attacked the reliability of the AFDTL report.[112] In response, the government asked permission to question the expert about whether he used the results from AFIP when forming his opinion as to the reliability of the AFDTL report.[113] The military judge granted the request, indicating that he would then "need to craft an instruction that [the panel members] are not to consider that for the truth of the matter asserted but rather for the manner in which the expert witness went about reaching his conclusion which he is allowed to do under [the] Military Rules [of] Evidence."[114] Following the trial counsel's redirect examination, which included questions about whether the expert considered the AFIP results and what those results were, the defense counsel again conducted extensive cross-examination, this time attacking the expert's reliance on the AFIP by questioning him about the specific numerical results of the AFIP test.[115]

When the military judge discussed instructions with counsel, he stated that although he had previously intended to give a limiting instruction concerning the AFIP results, he believed that the evidence was already before the members through the redirect and extensive cross-examinations, and that there would be no benefit in giving an instruction.[116] The defense counsel objected, but the military judge gave no limiting instruction concerning the AFIP results.[117]

Military Rule of Evidence (MRE) 703 permits facts or data that are otherwise inadmissible to be presented at trial if the "military judge determines that their probative value in assisting the members to evaluate the expert's opinion substantially outweighs their prejudicial effect."[118] When this type of testimony is permitted by the military judge, MRE 105 requires him to restrict the evidence to its proper scope and instruct the members accordingly.[119] In *United States v. Neeley*,[120] the CAAF had previously made clear that MRE 105 applies to otherwise inadmissible evidence relied upon by expert witnesses when forming their opinions and that the military judge should give a limiting instruction concerning this type of evidence.[121] In *Lusk*, the CAAF reiterated its holding in *Neeley* and emphasized the importance of limiting instructions.

United States v. Lusk serves as a reminder to military judges that limiting instructions must not be overlooked. In the cases in which an expert refers to matters that would otherwise be inadmissible, the *Benchbook* provides recommendations for drafting an appropriate instruction.[122] Whether following these drafting recommendations or not, military judges should always craft a limiting instruction to ensure the panel members understand the permissible use of the evidence and ensure that the evidence is not inadvertently relied upon as substantive evidence.[123]

V. Sentencing

The one instructions case the CAAF released relating to sentencing dealt not with actual sentencing evidence, but rather with the procedures for reconsideration of a sentence by the members. In *United States v. Garner*,[124] the military judge provided the members, prior to their deliberations, with the standard instructions on sentencing and also a sentencing worksheet to aid them in putting their sentence in a proper form. When the members returned from their deliberation, the military judge reviewed the worksheet and noted the members recorded the sentence to confinement as both 35 years and confinement for life without eligibility for parole.[125]

After discussing the issue with counsel during an Article 39(a) session, the military judge recalled the members and

[107] *Id*. at 279.

[108] *Id*.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 280.

[115] *Id*.

[116] *Id*. at 281.

[117] *Id*.

[118] MCM, *supra* note 1, MIL. R. EVID. 703.

[119] *Id*. MIL. R. EVID. 105.

[120] 25 M.J. 105 (C.M.A. 1987).

[121] *Lusk*, 70 M.J. at 281 (citing United States v. Neeley, 25 M.J. 105, 107 (C.M.A. 1987)).

[122] BENCHBOOK, *supra* note 4, para. 7-9-1.

[123] *Lusk*, 70 M.J. at 282.

[124] 71 M.J. 430 (C.A.A.F. 2013).

[125] *Id* at 432.

informed them the sentencing worksheet was ambiguous, in that it could not include both a term of years and confinement for life without eligibility for parole. She then repeated the instructions she had previously provided them regarding confinement options, provided them a clean sentencing worksheet and once again placed them in deliberations. She did not provide any instructions on the procedures for reconsidering a sentence found in Rule for Courts-Martial (RCM) 1009(e).[126] When the members completed their second deliberation, they returned with a sentence of confinement for life.[127] This new sentence was different from both the 35 years and the confinement for life without the possibility of parole the members had previously returned.

In addressing this issue, the CAAF determined the sentence to confinement as recorded on the first worksheet was clearly ambiguous, and as such, the military judge acted properly in returning the members to clarify their sentence. However, once the members returned with a new sentence that differed completely from those reflected in the first sentencing worksheet, it was clear they had reconsidered their initial sentence. In discussing the proper procedures for handling such a situation, the CAAF noted the requirement that a military judge "shall" instruct the members on the procedure for reconsideration "[w]hen a sentence has been reached by members and reconsideration has been initiated."[128] In this case, the judge erred when she accepted the new sentence instead of providing the members the instruction on reconsideration and returning them to deliberate once more.

The CAAF went on to say that although there was error, they were not convinced it was plain or obvious. They were, however, convinced there was no prejudice to the appellant in this case. The court reached this conclusion by examining the reconsideration procedures in RCM 1009(e)(3). They noted the rule stated "[the] members may reconsider a sentence with a view of increasing it only if at least a majority vote for reconsideration."[129] Of significance, the military judge had informed the members in her initial instructions that a sentence to confinement for life required the concurrence of at least three-fourths—in this case, six members. Since the "new" sentence returned by the members was for confinement for life, they could have only reached this decision if at least six members concurred. This required concurrence of three-fourths (six of seven) exceeded the simple majority required for reconsideration (four of seven);[130] therefore, there was no prejudice to the appellant.

VI. Conclusion

The past year yielded many new developments in the law. As discussed above, many of these developments had significant impact on the instructions judges provide to members. Some of these developments, such as the enactment of a new sex offense statute in 2012 and the CAAF's new approach to lesser included offenses, will take time to become fully developed. However, one principle remains constant: the importance of the *Benchbook*. Many of the developments discussed in this article have already been addressed by appropriate changes in the *Benchbook*. Judges and counsel who follow these changes and keep abreast of new developments in statutory and case law should be able to successfully navigate the ever-changing landscape of instructions to members.

[126] "When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration." MCM, *supra* note 1, R.C.M. 1009(e)(1). The rule dictates how votes should be taken and the number of votes required to reconsider a sentence. *Id*.

[127] *Id.*

[128] *Id.* at 433.

[129] *Id.* at 434.

[130] *Id.*

Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military

Major Temidayo L. Anderson[*]

I. Introduction

In the early hours of 6 November 2009, Private Jonathan Law murdered Corporal Jonathan Hartzell outside his barracks room in Camp Lejeune, North Carolina.[1] Corporal Hartzell was a stranger to Private Law. Corporal Hartzell was simply talking to his girlfriend on his cellular phone when Private Law came across the courtyard and beat Hartzell's head repeatedly with a ten-pound jack hammer spike. Private Law then dragged Corporal Hartzell's lifeless body across the road, through a parking lot, and into the woods, where he partially covered him with pine straw. The military police apprehended Private Law in the bathroom of his barracks room with self-inflicted injuries to his wrist, neck, and lower abdomen. Moments before this deadly incident, Private Law told his friend, Private RT, that he wanted to kill someone. Private RT dismissed his comment as just the typical unusual behavior of Private Law.[2] To him, this was just Law being Law.

Private Jonathan Law had a long history of self-mutilation, substance abuse, and mental illness dating back to his teen years. This erratic behavior continued during his time in the Marine Corps. In the months preceding the murder, Private Law drank profusely, used controlled substances, "and was seen more than ten times at the Naval Hospital Camp Lejeune Mental Health Clinic."[3]

In hindsight, greater communication between the command and mental health providers may have led to high-risk mitigation strategies targeted at stopping Private Law's downward spiral toward homicide. Prior to the murder, Private Law was on suicide watch and expressed a need for psychological help.[4] The command knew that Private Law was acting strangely, but were simply unaware of Private Law's rapidly deteriorating mental condition in the months preceding the murder. His mental condition made him a homicidal or suicidal risk.

High risk indicators are critical information for a commander. Military commanders assume great responsibility for the servicemembers entrusted to them by the mothers and fathers of America. Commanders want to guard against preventable deaths, but are often unaware of the tools available to identify and manage individuals at high risk for homicidal/suicidal acts. Astute commanders may seek answers from the physicians treating their Soldiers. Consequently, judge advocates routinely face questions regarding the acquisition, use, and release of medical records in these cases.

The Health Insurance Portability and Accountability Act (HIPAA) governs the use and disclosure of protected health information.[5] The mere mention of HIPAA strikes fear in the minds of many health care professionals cautiously navigating inquiries that may result in HIPAA violations. As a result, many are reluctant to discuss patient issues with commanders. In the military context, however, HIPAA is not as restrictive. In fact, HIPAA can help foster greater coordination between commanders and mental health professionals when used correctly. The HIPAA and the Department of Defense (DoD) Health Information Privacy Regulation[6] recognize the unique nature of the military and grant commanders limited access to Soldiers' protected health information (PHI)[7] without their consent in certain

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[1] Carly Swain, *Marine Facing Murder Sentence*, WCTI12.COM (Jan. 19, 2011), http://www.wcti12.com/Marine-Facing-Murder-Sentence/-/13530288/13642870/-/mia1f5/-/index.html.

[2] United States v. Law, NMCCA 201100286, 2012 WL 4342068 (N-M. Ct. Crim. App. Sept. 21, 2012).

[3] *Id.* at 1.

[4] Hope Hodge, *Killer of Marine from Hamilton Admits Guilt*, DAYTON DAILY NEWS (Dec. 14, 2010), http://www.daytondailynews.com/news/news/crime-law/killer-of-marine-from-hamilton-admits-guilt/nMmZ2/.

[5] Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996) [hereinafter HIPAA].

[6] U.S. DEP'T OF DEF. REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION (23 Jan. 2003) [hereinafter DODR 6025.18-R]. This regulation prescribes the uses and rules for disclosure of protected health information. *Id* at 2. The regulation is based on HIPAA requirements. *Id.*

[7] Protected Health Information (PHI) is "individually identifiable health information" held or transmitted by a covered entity or its business associate in any form. U.S. DEP'T OF HEALTH & HUM. SERVS., OFFICE OF CIVIL RTS., Summary of the HIPAA Privacy Rule 4 (2003), *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf [hereinafter HHS HIPAA Summary].

> "Individually identifiable health information" is information, including demographic data, that relates to: the individual's past, present or future physical or mental health or condition; the provision of health care to the individual; or the past, present, or future payment for the provision of health care to the individual, and that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual. Individually identifiable health information includes many common identifiers (e.g., name, address, birth date, [s]ocial [s]ecurity [n]umber).

circumstances. The military exception may grant commanders limited access to high-risk Soldiers' PHI so that they can develop proactive risk mitigation strategies when there is a threat to the life or health of a servicemember. Interdisciplinary risk mitigation strategies can be used to avoid homicides and suicide attempts like those of Private Law. Commanders, however, must conscientiously balance the Soldier's right to the privacy of her PHI with mission requirements and the commander's right to know. "It would be counterproductive for Soldiers to perceive increased stigma, or not seek medical care, because of the inappropriate release of PHI."[8]

This article provides judge advocates, commanders, and medical providers with an overview of the relevant portions of HIPAA related to PHI. It outlines various methods available to access PHI that will help identify high-risk Soldiers before they engage in a harmful act. Parts II and III of this article provides judge advocates with an overview of the relevant portions of HIPAA; the scope of the suicide issue; the type of information that commanders are likely to request for high-risk Soldiers; guidance regarding HIPAA's application within the DoD and the Department of the Army; and current restrictions regarding PHI.

Part IV discusses methods for properly requesting PHI from military and civilian facilities, focusing on cases when a commander recognizes high-risk behavior that is likely to result in a suicidal or homicidal act. The sections that follow expand on this issue by addressing PHI request authority and limits related to disclosure of this information from the provider and commander's perspective. The article concludes with the proper format for drafting a PHI request and guidance on developing multi-discipline high-risk boards to analyze high-risk behavior and develop risk mitigation strategies, and provides examples of how multi-discipline high-risk boards can function successfully within the limits of HIPAA.

II. Background: HIPAA and the Privacy Rule

A. Legislative History

In 1996, America witnessed the landmark evolution of patient rights with the enactment of HIPAA and the corresponding Privacy Rule.[9] Before 1996, there was no national healthcare privacy law and there were no limits on how healthcare providers, employers, and insurers shared healthcare information.[10] Although some state regulations existed, requirements varied, and there were far too many cases of providers failing to safeguard PHI, such as leaving medical records lying around on fax machines and publicizing employees' mental health issues to employers.[11]

Congress enacted HIPAA primarily to increase the portability and continuity of health insurance, to simplify administrative procedures, and to reduce health care costs.[12] The cornerstone of HIPAA's "administrative simplification" provision was the electronic record, "believed in the 1990s to be the future key to the efficient delivery of health care."[13] Consequently, HIPAA mandated national standards for electronic medical data management.[14] Americans perceived the shift from paper-based to systematized electronic records as a threat to the confidentiality of sensitive patient information.[15] As a result, HIPAA also authorized the Secretary of the U.S. Department of Health and Human Services (HHS) to promulgate standards governing disclosure of PHI in the event Congress "did not pass privacy legislation within three years of HIPAA's enactment."[16] Due to congressional inactivity, HHS

Id. *See infra* Part II (discussing covered entities).

[8] Press Release, Jerry Harben, Release of Protected Health Information, WWW.ARMY.MIL (Oct. 18, 2010), http://www.army.mil/article/46691/ (quoting then Vice Chief of Staff of the Army, General Peter W. Chiarelli).

[9] The HIPAA created new rules that limited the disclosure of protected health information, but did not include an enforcement provision. HHS HIPAA Summary, *supra* note 7. As a result, the U.S. Department of Health and Human Services (HHS) issued the Privacy Rule to implement HIPAA's requirements. *Id*. The Standards for Privacy of Individually Identifiable Health Information (Privacy Rule) established a "set of national standards for the protection of certain health information." *Id*. The Privacy Rule addresses the use and disclosure of individuals' health information by organizations subject to the rule. Such organizations are called covered entities. *Id*. Within HHS, the Office for Civil Rights (OCR) implements and enforces the Privacy Rule through "voluntary compliance activities and civil money penalties." *Id*.

[10] Deven McGraw, *HIPAA and Health Privacy: Myths and Facts*, CTR. FOR DEMOCRACY & TECH. 2 (Jan. 2009), *available at* https://www.cdt.org/healthprivacy/20090109mythsfacts2.pdf.

[11] Major Kristy Radio, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, ARMY LAW., Dec. 2011, 1 at 4. Marianne Lavelle, *Health Plan Debate Turning to Privacy; Some Call for Safeguards on Medical Disclosure. Is a Federal Law Necessary?*, NAT'L L.J., May 30, 1994, at A1. A Midwestern banker and member of the local county health board cross-referenced a health board's lists of patients suffering from various diseases with a list of the bank's customers. The banker then accelerated the mortgages of anyone suffering from cancer, thus requiring the borrower to pay off the loan immediately; *see also* Christina A. Samuels, *Allen Makes Diagnosis of Depression Public*; *Medical Records Mailed Anonymously*, WASH. POST, Aug 26, 2000, at V1 (discussing privacy violations that followed the enactment of HIPAA). An anonymous person sent a Maryland School Board member's medical records to the school board, revealing that he had been treated for depression, along with a note that read, "Is this the kind of person we want on the School Board?" *Id*.

[12] HIPAA, *supra* note 5.

[13] Diane Kutzko, Gilda L. Boyer, Deborah J. Thoman & Nicholas L. Scott, *HIPAA in Real Time: Practical Implications of the Federal Privacy Rule*, 51 DRAKE L. REV. 403, 407 (2003).

[14] Arons v. Jutkowitz, 9 N.Y.3d 393, 412 (2007).

[15] *Id*.

[16] *Id.*

promulgated the Privacy Rule: the HIPAA enforcement regulation.[17]

B. The Privacy Rule and Penalties for Not Complying

The Privacy Rule defines and limits the circumstances in which an individual's PHI may be used or disclosed by covered entities. A covered entity is any health care provider, health plan,[18] or clearinghouse that transmits health information in electronic form.[19] The general rule is that covered entities may not use or disclose PHI, except either: (1) as the Privacy Rule permits or requires; or (2) as the individual who is the subject of the information (or the individual's personal representative) authorizes in writing.[20] The Privacy Rule was designed to be flexible enough to permit the flow of health information needed to promote high quality health care and protect the public's health, but structured enough to guard against business practices that threaten patient privacy.[21] The Physician's Hippocratic Oath serves as an underlying tenet: "All that may come to my knowledge in the exercise of my profession . . . which ought not be spread abroad, I will keep secret and will never reveal."[22] In essence, the law recognizes the fiduciary relationship between medical providers and patients and seeks to facilitate greater trust through regulation.

The HIPAA provides civil and criminal penalties for entities that violate this fiduciary duty. The Director of HHS is charged with monitoring compliance. There is no private cause of action for a HIPAA violation because HIPAA confers "benefits" or "interest" upon individuals, not rights that grant parties standing to sue in court.[23] Notably, HHS may impose civil money penalties on a covered entity of $100 per failure to comply with a Privacy Rule requirement.[24] The penalty cannot exceed $25,000 per year for multiple identical violations of the Privacy Rule.[25] A civil money penalty cannot be imposed under special circumstances, such as when the violation is due to reasonable cause, did not involve willful neglect, and the covered entity corrected the violation within thirty days of when it knew or should have known of the violation.[26]

Violations of the Privacy Rule can also result in criminal penalties. The Department of Justice prosecutes such violations, but cannot request both civil and criminal penalties for the same act.[27] A person who knowingly obtains or discloses individually identifiable information in violation of HIPAA faces a fine of $50,000 and up to one year of imprisonment.[28] If the wrongful act involves false pretenses, the penalty increases to $100,000 and up to five years of imprisonment.[29] The Privacy Rule's military exception provides commanders with valuable options that can prevent these violations when exercised properly. Leaders can use these exceptions to facilitate greater communication with medical providers when they observe individuals with high-risk traits that make them a suicide or homicide risk.

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[17] Jennifer Gunthrie, *Time Is Running Out–The Burdens and Challenges of HIPAA Compliance: A Look at Preemption Analysis, the "Minimum Necessary" Standard, and the Notice of Privacy Practices*, 12 ANNALS HEALTH L.J. 143, 145 n.8 (2003). The HHS issued the final regulation on 28 December 2003 after reviewing over 52,000 public comments. HHS HIPAA Summary, *supra* note 7, at 2.

[18] A group health plan "with less than 50 participants administered solely by the employer that establishes and maintains the plan is not considered a covered entity." HHS HIPAA SUMMARY *supra* note 7, at 2. Two types of government-funded programs are also not covered entities: (1) programs whose principal purpose is not providing or paying for health care, such as food stamp programs; and (2) those whose principal activity is directly providing health care, such as a community health center, or making of grants to fund the direct provision of health care. *Id.*

[19] *Id.*

[20] 45 C.F.R. § 164.502(a) (2013).

[21] HHS HIPAA Summary, *supra* note 7, at 1.

[22] S*ee* STEDMAN'S MED. DICT. 650 (5th ed. 1982) (defining the Hippocratic Oath).

[23] While there are statutes that do not specifically provide for a private cause of action, 42 U.S.C. § 1983 (2006) may provide a vehicle to bring a civil cause of action for violations of federal rights. 42 U.S.C. § 1983 allows plaintiffs to sue parties who deprive them of federally secured rights. *Id*. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id. In *Gonzaga University v. Doe*, the Supreme Court significantly limited a civil right plaintiff's ability to bring a private action under § 1983, stating that a violation of a "federal right," not merely a violation of a "federal law," is required to establish an action under § 1983. Gonzaga Univ. v. Doe, 536 U.S. 282 (2002) (quoting Blessing v. Freestone, 520 U.S. 329, 340 (1997)). For a statute to confer a right upon an individual, it must be "phrased in terms of the person benefited," rather than the institution that it seeks to regulate. *Id.* at 284 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 692 n.13 (1979)). Unambiguous congressional intent dictates whether a case is actionable under § 1983. *Id*. The Privacy Rule enforcement provisions "unquestionably fail to confer enforceable rights" because they focus on regulating covered entities rather than describing the rights available to health care consumers. *Id*. at 287. The language used in HIPAA implies that Congress never intended to confer rights upon health care consumers. *Id.* Thus, §1983 does not grant consumers a private cause of action for a HIPAA violation. *Id.*

[24] HIPAA, *supra* note 5, § 1176(a)(1).

[25] *Id.*; *see also* 42 U.S.C. § 1320d-5.

[26] HHS HIPAA Summary, *supra* note 7, at 17.

[27] *Id.*

[28] *Id*. at 18.

[29] *Id*.

III. The Suicide Problem in the Military

Since the appearance of Durkheim's *Le Suicide*[30] in 1897, sociologists have developed studies to understand suicide patterns and rates across society.[31] Suicide is a devastating event that affects everyone. What was once considered a private affair or family matter now threatens military readiness.[32] Equally alarming is the increasing number of Soldiers who engage in high-risk behavior.[33]

Few could have foreseen the impact of eleven years of war on our Soldiers. The last decade revealed that equivocal deaths, deaths by drug toxicity, accidental deaths, attempted suicides, and drug overdoses reduced the ranks and negatively affected the Army's ability to engage in contingency operations in Iraq and Afghanistan.[34] The reality of multifaceted war is that leaders must focus on the next deployment to maintain the pace of intense and protracted engagements.[35] Consequently, enforcement of good order and discipline atrophies while high-risk behavior increases, eroding the health of the force.[36] Understanding and taking steps to identify high-risk behavior and risk mitigation strategies is one way to curb this alarming trend. Society benefits from risk management because as in Private Law's case, high-risk behavior can transcend harm to the servicemember.

A. The Suicide Rate in the Military During Peak Deployments: Rates and Statistics 2001–2008

Suicide rates are typically reported by listing the number of cases per 100,000 people. A 2011 study by RAND Corporation reviewed suicide statistics from 2001 to 2008. In 2008, the suicide rate across DoD was 15.8, up from 10.3 in 2001—an increase of about fifty percent.[37] Commanders may be interested in how these figures compare with the rest of America. From 2001–2006, the suicide rate in America was about 10 cases per 100,000.[38] The adjusted rate for Americans during the same period was twice as much.[39] Although the number of suicides in the general public was significantly greater than those in the DoD, the gap between the civilian and military suicide rate that began closing in 2007 is now closed, as the military suicide rate has increased.[40]

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[30] French sociologist Émile Durkheim published *Le Suicide* (*Suicide*) in 1897. *Le Suicide* was a case study of suicide; a publication unique for its time, as it provided an example of the sociological monograph of the late eighteenth century. His controversial findings, geared toward classifying suicide based on social causation, were as follows:

> Suicide rates are higher in men than women.
>
> Suicide rates are higher for those who are single than those who are married.
>
> Suicide rates are higher for people without children than people with children.
>
> Suicide rates are higher among Protestants than Catholics and Jews.
>
> Suicide rates are higher among Soldiers than civilians.
>
> Suicide rates are higher in times of peace than in times of war (the suicide rate in France fell after the *coup d'etat* of Louis Bonaparte, for example. War also reduced the suicide rate; after war broke out in 1866 between Austria and Italy, the suicide rate fell by 14% in both countries).
>
> Suicide rates are higher in Scandinavian countries.
>
> The higher the education level, the more likely it was that an individual would commit suicide; however, Durkheim established that there is more correlation between an individual's religion and suicide rate than an individual's education level; Jewish people were generally highly educated but had a low suicide rate.

EMILE DURKHEIM, LE SUICIDE: A STUDY IN SOCIOLOGY 186, 153–57, 233–64 (George Simpson ed. & John A. Spaulding trans., The Free Press 1979).

[31] Daniel S. Hamermesh & Neal M. Soss, *An Economic Theory of Suicide*, 82 J. POL. ECON. 83, 83 (1974) (discussing the economic implications of suicide and whether suicide involves individual decision making).

[32] VICE CHIEF OF STAFF, U.S. DEP'T OF ARMY, ARMY HEALTH PROMOTION RISK REDUCTION SUICIDE PREVENTION REPORT 1 (2010) [hereinafter ARMY SUICIDE PREVENTION REPORT].

[33] *Id.* at 1.

[34] *Id.* at 1.

[35] Press Release, Office of the Chief of Pub. Affairs, Army Health Promotion, Risk Reduction and Suicide Prevention Report, WWW.ARMY.MIL (July 28, 2010), http://www.army.mil/article/42934 [hereinafter Press Release, Army Suicide Prevention Report].

[36] *Id.*

[37] Thus, 15.8 and 10.3 deaths per 100,000 people, respectively. RAJEEV RAMCHAND ET AL., THE WAR WITHIN: PREVENTING SUICIDE IN THE U.S. MILITARY, at xiv (RAND Corporation ed., 2011). In 2008, the U.S. Marine Corps (USMC) and the U.S. Army reported the highest rates of suicide, 19.5 and 18.5, respectively. *Id.* The Air Force and the Navy had the lowest rates at 12.1 and 11.6, respectively. *Id.* The study revealed that among the services, Army suicides showed a steady increase from 2001 to 2008. *Id.*

[38] *Id.* at xv. This figure, however, includes a demographic profile that is not consistent with the typical age and gender composition of the military. *Id.* Americans with a similar demographic composition (predominantly males aged eighteen to twenty-five) were twice as likely to commit suicide from 2001–2006. *Id.*

[39] *Id.* The adjusted rate refers to the use of a civilian demographic that matches the military demographic. *See id.*

[40] *Id.* Between 2006 and 2008, the gap narrowed significantly. The most notable increase in DoD suicide statistics occurred between the years 2007 and 2008. *Id.*

B. Military Intervention: Recent Suicide Statistics

Committed to suicide prevention, the Secretary of Defense established the Defense Suicide Prevention Office (DSPO) in November 2011.[41] The DSPO now spearheads all DoD suicide prevention programs, policies, and surveillance activity.[42] Every servicemember death is reviewed by the Armed Forces Medical Examiner System (AFMES).[43] When the AFMES rules a death a suicide, a service professional reviews records, conducts interviews, and responds to DoD Suicide Event Report (DODSER) requests via a secure web-based DODSER application.[44] A 2012 study provided updated statistics for each service for calendar year 2011.[45] In 2011, AFMES found that 301 servicemembers died by suicide (Air Force = 50, Army = 167, Marine Corps = 32, Navy = 52).[46] What is even more striking is the number of suicide attempts. In 2011, 915 servicemembers attempted suicide (Air Force = 241, Army = 432, Marine Corps = 156, Navy = 86).[47] Many of those who attempted suicide did so for the first time, and 40% had a history of multiple deployments.[48] In 2012, the military suicide rate reached a record high of 349.[49] The 2012 rate exceeds the number of Americans who died fighting in Afghanistan in 2012—295.[50] The 2012 figure is the equivalent of 17.5 cases per 100,000.[51]

C. Who Is at Risk?

The RAND Study found that those with the highest suicide risk fell into the following categories: prior suicide attempts; mental disorders;[52] substance-abuse disorders;[53] head trauma/traumatic brain injury (TBI); those suffering from hopelessness, aggression and impulsivity, and problem-solving deficits; those suffering from acute stressful life events; those with firearm access; and teens influenced by excessive coverage of another person's suicide.[54]

D. Dispositional and Personal Factors Related to Suicide

The 2011 DODSER report indicated that servicemembers who were non-Hispanic Caucasian "or Latino, under the age of twenty-five, junior enlisted (E-1 to E-4), or high school educated" had an increased risk of suicide relative to other demographic groups.[55] Divorced servicemembers had a 55% higher suicide rate than those who were married.[56] In addition, female servicemembers "accounted for 5.32% of suicides and 26.52% of suicide attempts in 2011."[57] Across the United States, American Indian/Alaskan Native males have an increased risk of suicide followed by non-Hispanic White males.[58] The

[41] Laura Junor, Deputy Assistant Sec'y of Def. (Readiness), *Introduction* to NAT'L CTR. FOR TELEHEALTH AND TECH., U.S. DEP'T OF DEF., DODSER DEP'T OF DEFENSE SUICIDE EVENT REPORT: CALENDAR YEAR 2011 ANNUAL REPORT (2011) [hereinafter DOD SUICIDE EVENT REPORT].

[42] *Id.*

[43] *Id*. at 1.

[44] *Id*. The secure DODSER application is available at https://dodser.t2.health.mil. *Id.* (login required).

[45] *Id.*

[46] *Id*. This number includes deaths with a strong probability of suicide that are still awaiting final determination. *Id.*

[47] *Id.*

[48] *Id.* at 1–4.

[49] Bill Chappell, *U.S. Military's Suicide Rate Surpassed Combat Deaths in 2012*, THE TWO-WAY: BREAKING NEWS FROM NPR (Jan. 14, 2013), http://www.npr.org/blogs/thetwo-way/2013/01/14/169364733/u-s-militarys-suicide-rate-surpassed-combat-deaths-in-2012.

[50] *Id.*

[51] *Id.* "While some of the deaths can be linked to the stresses of being deployed in a war zone, a third or more of those who killed themselves were never deployed." *Id.*

[52] RAMCHAND, ET AL., *supra* note 37, at xvi–xvii ("Certain mental disorders that carry an increased risk of suicide, such as schizophrenia, are of minimal concern to the military because many learning, psychiatric, and behavioral disorders warrant rejection at enlistment and training."). Frequent deployments to Iraq and Afghanistan highlight new specific mental health concerns relevant to the military population. *Id.* These include "depression and anxiety disorders (including post traumatic stress disorder, or PTSD)." *Id*. at xvi. The Institute of Medicine (IOM) estimates that approximately four percent of those suffering from depression will die by suicide and, "though the same figure is not yet known for those with PTSD, community-based surveys indicate that PTSD patients are more likely than those without the disorder to report past suicide attempts and ideations." *Id.*

[53] *Id*. Heavy alcohol use and certain types of drug abuse place individuals at greater risk of suicide if they also possess other disorders. *Id.* Drug abuse is not common in the military due to routine testing and a culture based on strict disciplinary standards. *Id.* However, approximately twenty percent of servicemembers report heavy alcohol use (consuming five or more drinks per drinking occasion at least once a week). *Id.*

[54] *Id.* at xvii. There is a new effort to combat the suicide issue. President Barack Obama supports ending "this epidemic of suicide among our veterans and troops." Moni Basu, *Why Suicide Rate Among Veterans May Be More Than 22 a Day*, CNN U.S. (Nov. 14, 2013), http://www.cnn.com/2013/09/21/us/22-veteran-suicides-a-day/m. President Obama signed "an executive order calling for stronger suicide prevention efforts. A year later, he announced $107 million in new funding for better mental health treatment for veterans with post-traumatic stress and traumatic brain injury, signature injuries of the wars in Afghanistan and Iraq." *Id.* Note that most people with military service never consider suicide; only thirty percent of veterans consider suicide. *Id.*

[55] DOD SUICIDE EVENT REPORT, *supra* note 41.

[56] *Id.*

[57] *Id*. at 2.

[58] Nat'l Suicide Statistics at a Glance: Suicide Rates Among Persons Ages 10–24 Years, by Race/Ethnicity and Sex, United States, 2005–2009, CTR. FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/Violence Prevention/suicide/statistics/rates03.html (last visited Nov. 5, 2013).

military generally follows this trend.[59] Studies have also revealed an increase in the number of suicides committed by African-American males.[60]

E. Suicide Methods

Death by firearms is the number one cause of military suicides, accounting for 59.93% of all suicides in 2011, followed by hanging at 20.56%.[61] Easy access to firearms is a key component of this figure.[62] Servicemembers who merely attempted suicide used other methods. Those who attempt suicide frequently overdose on drugs or injure themselves with a sharp or blunt object.[63] As some might suspect, alcohol and drug use were common factors in many nonfatal events.[64] In line with national drug statistics, prescription drugs were frequently misused when drugs were a factor.[65] The majority of servicemembers who committed or attempted suicide did not communicate their intent to harm themselves to others.[66] Those who do communicate most frequently do so with spouses, friends, and other family members.[67] Communication is normally oral, but other modes include text messages and *Facebook*.[68] Recognizing that warning signs are displayed via different means is a great first step in prevention.

IV. Information Commanders May Require to Avert Harmful Behavior

Army leaders are committed to "promoting resiliency, coping skills, and help-seeking behavior across our force."[69] Many regard the Army as a reflection of society, "but we have [S]oldiers today who are experiencing a lifetime of stress during their first six years of service."[70] Like war, suicide factors are complex. Commanders look for key indicators that their Soldiers are a harm to themselves or others. Leaders desire immediate access to accurate, relevant, and timely information regarding Soldier behavior and performance to manage risk within their organizations.[71] Commanders look for risk or stress indicators like law enforcement contacts, family problems, substance abuse, legal issues, indebtedness, and accidents.[72] Commanders look carefully at such documents such as blotter reports,[73] Army Substance Abuse Program (ASAP) admissions, and Army Emergency Relief (AER) loans to assess risk. They will also carefully examine prolonged profiles and systemic injuries that may signal pain management issues.[74] Data that

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[59] RAMCHAND ET AL., *supra* note 37, at 21.

> For example, between 1999 and 2007, suicide rates were highest in the Navy among Native Americans (19.3 per 100,000) and among non-Hispanic Whites (11.9 per 100,000), whereas the rate in all other racial and ethnic groups was at or under 10 per 100,000. The rate in the Marine Corps for the same period was highest among those indicating that their race was "other or unknown" (25.0 per 100,000) and was also noticeably high among non-Hispanic Whites (16.2 per 100,000) and Asians/Pacific Islanders (15.2 per 100,000). In 2006 and 2007, there was a slightly higher proportion of white suicide cases than in the Army overall (in 2006, 64% compared with 62%; in 2007, 67% compared with 63%).

Id.

[60] *Id.* at xv.

[61] DOD SUICIDE EVENT REPORT, *supra* note 41, at 2.

[62] *Id*. Over 50% of suicide decedents had firearms in their home or immediate environment. *Id.*

[63] *Id*. Drug overdoses accounted for 59.93% of all suicide attempts, while injury with a sharp or blunt object occurred in 11.98% of these cases. *Id.*

[64] *Id.* Drugs were involved in 598 (63.96%) suicide attempts, while alcohol was involved in 292 (31.23%) attempts. *Id.*

[65] *Id.* Among servicemembers who attempted suicide with known drug use, prescription drugs were involved in 63.88% of those cases. *Id.* In 2007, fatal prescription drug overdoses surpassed car crashes as the leading cause of accidental death in the United States. Dr. Joseph M. Mercola, *Suicide Overtakes Car Accidents as Leading Cause of Injury Related Death*, MERCOLA.COM: TAKE CONTROL OF YOUR HEALTH (Oct. 11, 2012), http://articles.mercola.com/sites/articles/archive/2012/10/11/suicide-and-poisoning-rate-increased.aspx. Many prescription drug overdoses involved the use of opioid painkillers; there were more opioid overdose deaths than cocaine and heroin combined. *Id.* Opioid painkillers include opium-like prescription drugs that include morphine, codeine, and hydrocodone. Dr. Joseph M. Mercola, *The Silent Epidemic—Legal Prescription Drug Abuse*, MERCOLA.COM: TAKE CONTROL OF YOUR HEALTH (May 25, 2010), http://articles.mercola.com/sites/articles/archive/2010/05/25/the-silent-epidemic--legal-prescription-drug-abuse.aspx. The only thing that distinguishes some prescription drugs from street drugs is their legal status. *Id*. Actor Heath Ledger "had Vicodin (hydrocodone), OxyContin (oxycodone), Valium (diazepam), and Xanax (alprazolam) in his bloodstream when he died. All are legal opiates." Nancy Rosen-Cohen, *The Quiet Epidemic: Prescription Drug Abuse Destroys Millions of Lives*, BALTIMORE SUN (April 21, 2010), http://articles.baltimoresun.com/2010-04-21/news/bs-ed-prescription-drug-abuse-20100421_1_prescription-drugs-opiates-addictive.

[66] DOD SUICIDE EVENT REPORT, *supra* note 41, at 2. In fatal events, 73.87% of decedents were not known to have communicated suicidal intent. *Id.* Seventy-five percent of servicemembers who attempted suicide did not communicate their intent to harm themselves. *Id.*

[67] *Id.*

[68] *Id.*

[69] Press Release, Army Suicide Prevention Report, *supra* note 35 (quoting then Vice Chief of Staff of the Army, General Peter W. Chiarelli).

[70] *Id.*

[71] ARMY SUICIDE PREVENTION REPORT, *supra* note 32, at 203.

[72] *Id.*

[73] Blotter reports contain information related to misconduct or serious incidents within the command.

[74] Judge advocates are encouraged to review Department of Defense Health Information Privacy Regulation (DODR 6025.18-R). This regulation provides guidance similar to the Privacy Rule that focuses on the military healthcare system. DOD HEALTH PRIVACY REGULATION, *supra* note 6. There are, however, instances in which the Department of Defense must

may be simply compiled for a weekly unit readiness review can enable high-risk intervention.[75]

V. HIPAA's Application in High-Risk Cases Like Private Law's

Assume that Private Law's commander, Captain (CPT) Jones,[76] learned from the rumor mill that Private Law was drinking heavily, cutting himself, and seeing a psychiatrist. He also noticed that Private Law recently made several unusual outbursts in formation. Captain Jones may want more information about his mental condition to fully understand the scope of the problem and assess risk. A straight-laced commander like CPT Jones would probably pick up the phone and call a mental health provider, or perhaps ask the brigade's surgeon to screen Private Law's records. The response from the medical community might surprise you. As a general rule, PHI is confidential and will not be released to anyone unless:

a. The patient authorizes release, or
b. An exception to HIPAA applies.

Captain Jones could certainly ask Private Law for authorization to view his behavioral health records. However, the commander might be reluctant to do so for obvious reasons.[77] In this case, CPT Jones will naturally look for an alternative. The Privacy Rule of the HIPAA provides standards for the disclosure of PHI to DoD or Armed Forces members without their authorization.[78] Congress created exceptions to support the unique needs of the military.[79] Disclosures under the military exception are permitted, although not required, because Congress recognized the important contributions that health information can make outside of the health care context.[80] Specific limitations apply, striking the balance between an individual's privacy interest and the public's interest in this information.[81] Army regulations describe the relevant exceptions to the Privacy Rule.[82]

VI. Army Regulations: Disclosure Without Patient Consent

In certain limited circumstances, the military treatment facility (MTF) or dental treatment facility (DTF) may, subject to certain terms and conditions, disclose PHI to DoD employees who have an official access requirement[83] in the performance of their duties.[84] Examples of key exceptions that allow commanders to access PHI without patient authorization include the following circumstances: medically administering flying restrictions,[85] allowing senior commanders to review a Soldier's medical information to assess Warrior Transition Unit (WTU) eligibility, and to "avert a serious threat to health or safety."[86] Many key exceptions are related to uses that comport with the regulatory command program.[87] The key is to respect the

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follow state law, such as in cases of protected health information regarding a family member or minor. U.S. DEP'T OF ARMY, REG. 40-66, MEDICAL RECORD AND ADMINISTRATION AND HEALTHCARE DOCUMENTATION para. 2-6a(1) (17 June 2008) [hereinafter AR 40-66].

[75] ARMY SUICIDE PREVENTION REPORT, *supra* note 32, at 203.

[76] Captain Jones is not actually the name of Private Law's commander. Captain Jones is a fictional character used for demonstrative purposes only.

[77] Captain Jones may choose not to address the issue with Private Law because he does not want to incite or embarrass the Soldier.

[78] HHS HIPAA Summary, *supra* note 7. Patient authorization is not required to use or disclose protected health information for certain essential government functions. *Id.* In the military context, those functions include: "assuring proper execution of a military mission, conducting intelligence and national security activities that are authorized by law, providing protective services to the President . . . protecting the health and safety of inmates or employees in a correctional institution, and determining eligibility for or conducting enrollment in certain government benefit programs." *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] AR 40-66, *supra* note 74, para. 2-4.

[83] *Id.* Army Regulation 40-66 defines official access requirements as:

> When required by law or Government regulation . . .
> For public heath purposes.
> Inquiries involving victims of abuse or neglect.
> For health oversight activities authorized by law.
> For judicial or administrative proceedings.
> Incidents concerning decedents in limited circumstances.
> For cadaveric organ, eye, or tissue donation purposes.
> For research involving minimal risk.
> To avert a serious threat to health or safety.
> For specialized Government functions, including certain activities related to Armed Forces personnel.

Id. Note that ordinarily, direct access to medical records is not permitted. *Id.* para. 2-4a(1) (without the individual's authorization or opportunity to object); *see also* DODR 6025.18-R, *supra* note 6.

[84] AR 40-66, *supra* note 74, para. 2-4a.

[85] *Id*, para. 2-4a(1)(a)(10). Flying restrictions must be executed IAW AR 40-8 and AR 40-501. *Id.*

[86] *Id.*

[87] *Id.* para. 2-4(1)(a). Examples of regulatory programs that do not require a Soldier's authorization for PHI disclosure include:

> 1. To coordinate sick call, routine and emergency care, quarters, hospitalization, and care from civilian providers using DD Form 689 (Individual Sick Slip) in accordance with this regulation and AR 40-400.
> 2. To report results of physical examinations and profiling according to AR 40-501.
> 3. To screen and provide periodic updates for individuals in special programs, such as those described in AR 50-1, AR 50-5, AR 50-6, and AR 380-67.
> 4. To review and report according to AR 600-9.

exception and protect it from abuse by complying with the requirement to disclose the minimum information necessary to answer key command questions related to deployability or fitness for service.[88]

A. Application: Private Law's Commander Calls a Provider

Returning to the example involving Private Law, if his commander, CPT Jones, requests information about Law's psychiatric condition (because he suspects that Private Law has a mental or medical condition) via telephone or in writing, he will have to articulate how the request is related to a regulatory command program.[89] If the request is connected with a regulatory command management program,[90] the MTF will honor the request.[91] In this case, Private Law's commander could indicate that Private Law's increased drinking, self-mutilation, and unusual outbursts make him a potential harm to himself or others, and that risk research is necessary to avert a serious threat to his or other's health or safety.[92] The MTF provider may agree that this request for PHI falls within the regulatory exceptions to the Privacy Rule, but require that CPT Jones document his request. Further, DOD personnel should submit PHI requests using the appropriate DA form.[93] The MTF should respond to PHI requests within thirty days.[94] Commanders and judge advocates should know that the MTF will provide the minimum information necessary to satisfy the intended purpose, and will only provide information to designated unit command officials.[95] Unit commanders must designate unit command officials in writing who will be responsible for requesting and receiving PHI.[96] Unit command officials include "commanders, executive officers, first sergeants, platoon leaders, and platoon sergeants."[97] The MTF is not required to provide information to others.

B. Application: Requests for PHI When There Is No Regulatory Purpose

An e-mail or phone request by DoD personnel that is not connected with a regulatory command program is a navigable obstacle. The MTF will honor the request, but limit the disclosure.[98] They will address only the Soldier's "general health status, adherence to scheduled appointments, profile status, and medical readiness requirements."[99] This

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5. To initiate line of duty (LOD) determinations and to assist investigating officers according to AR 600-8-4.
6. To conduct medical evaluation boards and administer physical evaluation board findings according to AR 635-40 and similar requirements.
7. To review and report according to AR 600-110.
8. To carry out activities under the authority of AR 40-5 to safeguard the health of the military community.
9. To report on casualties in any military operation or activity according to AR 600-8-1 or local procedures.
10. To medically administer flying restrictions according to AR 40-8 and AR 40-501. To participate in aircraft accident investigations according to AR 40-21.
11. To respond to queries of accident investigation officers to complete accident reporting per the Army Safety Program according to AR 385-10.
12. To report mental status evaluations according to guidance from MEDCOM (MCHO-CL-H).
13. To report special interest patients according to AR 40-400.
14. To report the Soldier's dental classification according to AR 40-3 and HA Policy 02-011.
15. To carry out Soldier Readiness Program and mobilization processing requirements according to AR 600-8-101.
16. To provide initial and follow-up reports according to AR 608-18.
17. To contribute to the completion of records according to AR 608-75 and MEDCOM (MCHO-CL-H) guidance.
18. To allow senior commanders to review Soldier medical information to determine eligibility of assignment/attachment to a warrior transition unit (WTU). (FRAGO 3 Annex A to EXORD 118-07, 010900Q JULN 2008).
19. According to other regulations carrying out any other activity necessary to the proper execution of the Army's mission.

Id.

[88] Policy Memorandum 12-062, Headquarters, U.S. Dep't of Army, Med. Command, subject: Release of Protected Health Information (PHI) to Unit Command Officials 3 (24 Aug. 2012) [hereinafter Release of PHI Policy Memorandum].

[89] AR 40-66, *supra* note 74.

[90] *Id.*

[91] Release of PHI Policy Memorandum, *supra* note 88.

[92] AR 40-66, *supra* note 74. Captain Jones should document his suspicions in a memorandum for record that includes witness sworn statements as allied documents. Sworn statements can be recorded on Department of the Army Form 2823.

[93] U.S. Dep't of Army, DA Form 4254, Request for Private Medical Information (Feb. 2003) [hereinafter DA Form 4254]. Most military treatment facilities require that units submit PHI requests on DA Form 4254. *See* Appendix A (providing a sample DA Form 4254). Department of the Army Form 4254 should normally be routed through hospital administration for action.

[94] *See* AR 40-66, *supra* note 75, para. 2-5. In urgent situations, disclosure requests may be faxed. *Id.* Oral requests for PHI disclosure in urgent cases of rape, assault, child abuse, or death may be submitted to the MTF for action. *Id.* Requesters should supplement the oral request with a written request in accordance with law and regulation at the first available opportunity. *Id.*

[95] *Id.* para. 2-4a(4).

[96] Release of PHI Policy Memorandum, *supra* note 88.

[97] *Id.*

[98] *Id.*

[99] *Id.*

means that if Private Law's commander wanted to know whether Private Law was diagnosed with post-traumatic stress or bipolar disorder, for example, the MTF would not normally provide a general diagnosis unless they found that his mental condition rendered him unfit for duty.[100] They would, however, mention whether he kept appointments, current profiles, and whether he is medically fit for deployment.[101] Commanders who require more information are encouraged to request additional PHI for a regulatory command function using the DA Form 4254.[102]

VII. Guidance for Providers

A. When to Proactively Inform a Commander of Medical Concerns

The unique nature of military service creates circumstances that may necessitate providers proactively "inform a commander of a Soldier's minimum necessary PHI or medical/behavioral health condition."[103] Those instances focus on cases where a Soldier's "judgment or clarity of thought may be suspect by the clinician."[104] This includes information that suggests the servicemember is a danger to himself or others.[105] A provider can give warnings to avoid a *serious* or *imminent* threat to the health or safety of a person, such as suicide or homicide.[106]

Providers may also disclose information that specifically relates to the patient's duty performance.[107] If a Soldier needs to be hospitalized or prescribed medication that affects his duty performance or mission, the provider has an "affirmative duty" to notify the unit of a change in duty status. [108] If, for example, the Soldier is a paratrooper and has an ankle injury that will affect his ability to jump out of airplanes, the provider will inform the unit of the medical issue.[109] Providers may also notify the unit if an individual is prescribed psychotropic drugs that affect mission readiness.[110] Significantly, providers must also alert the command of high-risk Soldiers who receive multiple behavioral health services when they require high-risk multidisciplinary treatment plans.[111]

There are certainly key considerations related to this proactive approach that are not well defined in current regulations. For example, it is not clear what conditions pose a *serious* risk.[112] Another issue is that providers are not aware of every mission requirement.[113] While brigade surgeons[114] attached to select units may have some operational knowledge, there are still information gaps that prevent consistent application of this rule. Advanced care is often executed by hospital providers outside the brigade. Hospital providers are detached from units and have little operational awareness.[115] One solution is for brigade surgeons to assess patient/candidate records prior to training and deployments. Commanders can also continually track Soldiers with a profile indicating they are medically non-deployable. The purpose of this data collection should be focused on adjusting the Soldier's mission to lower risk rather than creating barriers to promotion or ostracism.[116]

B. Limits on Disclosure

While the military exception does provide some latitude, providers must remain vigilant to avoid HIPAA violations. Providers should use screening procedures that will ensure disclosure of the minimum amount necessary to satisfy the request for information, in accordance with DoD

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[100] *Id.*

[101] *Id.*

[102] *Id. See* DA Form 4254, *supra* note 93.

[103] AR 40-66, *supra* note 74, para. 2-4(2).

[104] *Id.*

[105] *Id.*

[106] Telephone Interview with Charles Orck, Attorney Advisor, U.S. Army Medical Command (Oct. 17, 2012) [hereinafter Orck Telephone Interview].

[107] AR 40-66, *supra* note 74, para. 2-4(2)(c); *see also* Information Paper, U.S. Dep't of Army, Med. Command, MCJA, subject: HIPAA and Command Access to Soldier's Protected Health Information (PHI) (14 Mar. 2012) [hereinafter HIPAA and PHI Information Paper].

[108] HIPAA and PHI Information Paper, *supra* note 107, at 2.

[109] Orck Telephone Interview, *supra* note 106. Another example includes medications that could impair the Soldier's duty performance. AR 40-66, *supra* note 74, para. 2-4(2)(c). Lithium, for example, can reach toxic levels if a Soldier is dehydrated. *Id.* A Soldier cannot deploy if they are on lithium. *Id.*

[110] Orck Telephone Interview, *supra* note 107. Extended exposure to psychotropic drugs or sedatives may affect their judgment or reflexes. *Id.* Providers can also alert the unit when an injury indicates a safety problem or battlefield trend, there is a risk of heat or cold weather injury, a Soldier requires hospitalization, or the Solider is categorized as seriously ill or very seriously ill. AR 40-66, *supra* note 74, para. 2-4a(2).

[111] AR 40-66, *supra* note 74, para. 2-4a(2).

[112] Orck Telephone Interview, *supra* note 106.

[113] *Id.*

[114] U.S. DEP'T OF ARMY, FIELD MANUAL 4-02.21, DIVISION AND BRIGADE SURGEONS HANDBOOK HEADQUARTERS, DEPARTMENT OF THE ARMY: TACTICS, TECHNIQUES, AND PROCEDURES para. 2-1 (15 Nov. 2000) [hereinafter FM 4-02.21]. Division and brigade surgeons are attached to most forces command units. *Id.* The brigade surgeon is a medical corps officer on the special staff who plans and coordinates brigade combat health service activities with the brigade adjutant. *Id.* The brigade surgeon is assigned to the headquarters and headquarters company (HHC) of a maneuver brigade. *Id.* The surgeon maintains technical control of all medical activities in the command. *Id.*

[115] Orck Telephone Interview, *supra* note 106.

[116] U.S. DEP'T OF DEF., INSTR. 6490.08, COMMAND NOTIFICATION REQUIREMENTS TO DISPEL STIGMA IN PROVIDING MENTAL HEALTH CARE TO SERVICE MEMBERS 6 (17 Aug. 2011) [hereinafter DODI 6490.08].

regulations.[117] Covered entities should also follow the presumption that they should not notify a servicemember's commander when the servicemember obtains mental health care or substance abuse education services, unless this presumption is overcome by one of the notification standards in applicable guidance.[118]

VIII. Guidance for Judge Advocates: Issues with Disclosure to Commanders

One issue that judge advocates will encounter is that commanders may want to know too much.[119] For example, commanders may want to know whether a Soldier has been seen at behavioral health simply because they were prescribed an opioid or central nervous system drug.[120] A prescription alone is not a rational basis for PHI disclosure.[121] Drugs used to suppress the central nervous system are not solely administered for mental health issues; they are also used for allergies.[122] Judge advocates should also note that many instances require a proper mental health evaluation in accordance with DoD instructions (DoDI).[123] To that end, DoDI 6490.04, provides numerous due process rights[124] that should not be circumvented by using the military exception to the Privacy Rule. The bottom line is that commanders would love to data mine[125] information, but simply do not have the time or resources to commit to this arduous task.[126] Commanders often try to find out why Soldiers commit suicide, but there is often no single reason.[127] Typically, the issue is related to stress, but a stress reaction to one ubiquitous catalyst is often different for each servicemember.[128]

IX. Guidance for Commanders: A Duty to Safeguard Disclosed PHI

Commanders are not covered entities under HIPAA, but their conduct is still covered by the Privacy Act. Once information is transferred from the MTF to a commander, it is no longer governed by HIPAA, but it is governed by the Privacy Act of 1974 and should be safeguarded.[129] However, in May 2010, the Vice Chief of Staff of the Army determined that commanders have the same responsibilities as healthcare providers to safeguard PHI.[130] Information should be restricted to personnel who have a specific need to know within the scope of their official duties.[131]

X. High-Risk Panels

A multidisciplinary high-risk panel (High-Risk Panel) can be an effective tool in the fight against suicide,

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[117] U.S. DEP'T OF DEF., REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION para. C7 (23 Jan. 2003) [hereinafter DODR 6025.18-R].

[118] *See* Appendix B, Department of Defense Instruction (DODI) 6490.08, dated 17 August 2011.

[119] Orck Telephone Interview, *supra* note 106.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] A commanding officer or supervisor should refer a servicemember for an emergency mental health evaluation as soon as practicable whenever:

> (1) A Service member, by actions or words, such as actual, attempted, or threatened violence, intends or is likely to cause serious injury to him or herself or others.
> (2) When the facts and circumstances indicate that the Service member's intent to cause such injury is likely.
> (3) When the commanding officer believes that the Service member may be suffering from a severe mental disorder.

U.S. DEP'T OF DEF., INSTR. 6490.04, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE MILITARY SERVICES (4 Mar. 2013) [hereinafter DODI 6490.04]. Practitioners should note that DODI 6490.04 incorporates and cancels DoDD 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (1 Oct. 1997). Department of Defense Instruction 6490.04 also reissues DoDI 6490.4, *Requirements for Mental Health Evaluations of Members of the Armed Forces* (28 Aug. 1997). Department of Defense Instruction 6490.04 establishes policy, assigns responsibilities and prescribes procedures for the "referral, evaluation, treatment, and medical and command management of Service members who may require assessment for mental health issues." *Id.* The new instruction expands who can refer a servicemember for an emergency or non-emergency mental health evaluation. Department of Defense Directive 6490.1 only authorized commanders to take emergency action. Department of Defense Instruction 6490.04 now authorizes commanders and supervisors to do so. *Id. See also* U.S. DEP'T OF DEF., DIR. 6490.1, MENTAL HEALTH EVALUATIONS OF MEMBERS OF THE ARMED FORCES (1 Oct. 1997) [hereinafter DODI 6490.1] (consult DoDD 6490.1 to compare the old and new policy only).

[124] DODI 6490.04, *supra* note 123, at 9. Enclosure 3 of DoDI 6490.1 explains servicemember rights.

[125] Data mining is the practice of searching through large amounts of computerized data to find useful patterns or trends. MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/data%20mining (last visited Dec. 9, 2013).

[126] Orck Telephone Interview, *supra* note 106.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] All Army Activities (ALARACT) Message 160/210, 282049Z May 10, Vice Chief of Staff, Army, subject: VCSA Sends on Protected Health Information (PHI); *see also* U.S. DEP'T OF DEF., DIR. 5400.1, DEPARTMENT OF DEFENSE PRIVACY PROGRAM (7 May 2007).

[131] U.S. DEP'T OF DEF., INSTR. 6490.08, COMMAND NOTIFICATION REQUIREMENTS TO DISPEL STIGMA IN PROVIDING MENTAL HEALTH CARE TO SERVICE MEMBERS 6 (17 Aug. 2011) [hereinafter DODI 6490.08].

homicide, and high-risk activity.[132] A High-Risk Panel at the battalion level is most effective and will allow the Army to overcome current impediments created by the current data infrastructure.[133] Panels may be comprised of the brigade surgeon and physician's assistant, brigade judge advocate, chaplain, command financial specialist,[134] company commanders, first sergeants, unit social workers, and the battalion leadership. During the High-Risk Panel, company commanders nominate Soldiers to whom they assign a label of medium to high risk. Company commanders can use an index card with key historical data and proposed risk mitigation strategies related to that servicemember.[135]

Commanders may seek professional input from panel members based on the unique needs of each candidate. For example, if confronted with a Soldier who makes repeat suicide attempts, the brigade surgeon might recommend a command-directed mental health evaluation. The brigade judge advocate in turn could immediately educate the commander about the requirements for this action and the rights afforded servicemembers who are hospitalized or evaluated in accordance with DoDI 6490.04.[136] The unit first sergeant (1SG) could discuss relevant risk factors associated with the candidate, such as a history of underage drinking, absenteeism, and minor disciplinary issues. The 1SG might also suggest a buddy for the Soldier who has completed Applied Suicide Intervention Skills Training (ASIST).[137]

The brigade judge advocate may also discuss long-term risk aversion measures,[138] should the panel and medical professionals determine that the stress of military service presents harm to the servicemember that is beyond rehabilitation. If the candidate is diagnosed with a severe mental health condition, the brigade judge advocate may discuss the process and options available for discharge.[139] The battalion commander ultimately will determine, based on the facts and guidance provided, what risk level the candidate should be assigned. The battalion commander may choose whether to issue guidance directly to the company commander during the meeting.

XI. Conclusion

Today we face an Army-wide problem "that can only be solved by the coordinated efforts of our commanders, leaders, program managers and service providers."[140] The suicide statistics paint a vivid picture of significant issues that leaders must address to reverse the trend. The good news is that military intervention is working because the suicide rate is leveling off. Between 2003 and 2010, the active duty suicide rate doubled from 10 per 100,000 to 21 per 100,000 troops.[141] In 2010, the suicide rate in the active Army leveled off, but the rate increased across the National

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[132] *Id.* Army leaders can effectively oversee health promotion, risk reduction, and suicide prevention by accessing relevant, timely, and actionable information regarding individual Soldier behavior and program performance. *Id.* Multidisciplinary panels are often a great way to assemble this information quickly.

[133] This assertion is based on the author's recent professional experiences working as brigade judge advocate for the 15th Sustainment Brigade, Fort Bliss, Texas, from 17 January 2011 to 7 July 2012 [hereinafter Professional Experiences]. At the battalion level, leaders and staff are often more closely acquainted with the circumstances related to individual servicemembers. *Id.* Company commanders can comment on key trends and generally know details related to each candidate. *Id.* Lieutenant Colonel Litonya J. Wilson, current Deputy Chief of Staff, 1st Armored Division and Fort Bliss, used this strategy effectively while serving as the Commander, 15th Special Troops Battalion, 15th Sustainment Brigade, Fort Bliss, Texas. *Id.* Today, Fort Bliss has the lowest suicide rate in the Army. Angela Kocherga, *Fort Bliss Suicide Rate Declines to Army's Lowest*, KVUE.COM (Feb. 5, 2013), http://www.kvue.com/news/189921231.html.

[134] The Command Financial Specialist (CFS) is normally a non-commissioned officer appointed by the commander to provide "financial education and training, counseling and information referral at the command level. Command Financial Specialists are trained to establish, organize and administer the command's personal financial management (PFM) program. The CFS should be the first stop for the military member who has questions or issues about financial readiness." Financial Specialists, COMMANDER NAVAL INSTALLATIONS COMMAND (CNIC), http://www.cnic.navy.mil/CNIC_HQ_Site/WhatWeDo/FleetandFamilyReadiness/FamilyReadiness/FleetAndFamilySupportProgram/CommandFinancialSpecialist/index.htm (last visited Dec. 11, 2013). The CFS can provide guidance to the multidisciplinary panel related to financial issues and programs available.

[135] *See* Appendix C (providing an example of the U.S. Army Soldier Leader Risk Reduction Tool and Guide (USA SLRRT) used at Fort Bliss). See also http://www.armyg1.army.mil/hr/suicide/spmonth/docs/Guide%20for%20the%20Use%20of%20the%20USA%20SLRRT.pdf for an implementation manual that provides guidance for the use of the USA SLRRT.

[136] DODI 6490.04, *supra* note 123.

[137] Applied Suicide Intervention Skills Training (ASIST) is a program offered quarterly on each post. As part of the U.S. Army's suicide prevention campaign, "gatekeepers" are trained and available in each unit to assist those experiencing thoughts of suicide and those attempting to help them. *Suicide Prevention Training*, ARMY G-1 ARMY SUICIDE PREVENTION PROGRAM, http://www.armyg1.army.mil/hr/suicide/training.asp (last visited Dec. 5, 2013). Like CPR-trained individuals for those with cardio-pulmonary difficulties, ASIST-trained individuals have been taught the signs and symptoms, how to assess the risk of suicidal behavior, and "how to appropriately intervene in an at-risk situation." *Id.*

[138] Long-term risk aversion measures could include assigning an ASIST trained buddy to the at-risk Soldier, promoting counseling, and other treatment.

[139] U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (5 June 2005) (RAR, 6 Sept. 2011).

[140] ARMY SUICIDE PREVENTION REPORT, *supra* note 32, at i.

[141] Elspeth Cameron Ritchie, *Suicide and the United States Army: Perspectives from the Former Psychiatry Consultant to the Army Surgeon General*, DANA FOUNDATION AND THE DANA ALLIANCE FOR BRAIN INITIATIVES (Jan. 25, 2012), http://www.dana.org/news/cerebrum/detail.aspx?id=35150 (The rate of suicide in the U.S. Army active-duty force remained relatively stable from 1990 to 2003, hovering at about 10 per 100,000 Soldiers per year. This is approximately half the civilian rate. But in 2004 it began to rise, and from 2003 to 2010 the suicide rate for this group doubled, to about 21 per 100,000 Soldiers.).

Guard.[142] More work is necessary. Currently, Army medical, legal, and law enforcement systems are not integrated.[143] A net-centric environment could integrate information capability, providing leaders with predictive analysis tools to inform proactive planning and risk mitigation measures, such as conducting high-risk panels.[144]

The benefits associated with a multidisciplinary High-Risk Panel are vast, but the opportunity for violations of the Privacy Rule is still present. Using the guidance included in this article, practitioners and leaders can avoid pitfalls on the road to successful risk mitigation. The aforementioned strategy is not perfect, but may help to avoid future incidents as that of Private Law. Preventing our servicemen and women from ever reaching the point of suicide or homicide is paramount and half the battle.

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[142] *Id.*

[143] ARMY SUICIDE PREVENTION REPORT, *supra* note 32, at 203.

[144] *Id.*

Appendix A

Sample DA Form 4254*

REQUEST FOR PRIVATE MEDICAL INFORMATION For use of this form, see AR 40-66; the proponent agency is the OTSG	1. Date *(YYYYMMDD)*
2. Patient's Name and SSN.	3. Medical Treatment Facility *(Name and Location)*
4. Reason for Request.	
5. Private Medical Information Sought *(Specify dates of hospitalization or clinic visits and diagnosis, if known)*	
6. Requestor's Name, Title, Organization and SSN.	
FOR USE OF MEDICAL TREATMENT FACILITY ONLY	
7. Check applicable box. ☐ Approved ☐ Disapproved *(State reason for disapproval)*	
8. Summary of Private Medical Information Released.	
9. Signature of Approving Official.	10. Date *(YYYYMMDD)*

DA FORM 4254, FEB 2003 DA FORM 4254-R, NOV 91, IS OBSOLETE. USAPA V1.01ES

*The social security number (SSN) field on DA Form 4254 may be eliminated pending the creation of new forms based on changes to the DoD's SSN policy. U.S. DEP'T OF DEF., INST. 1000.30, REDUCTION OF SOCIAL SECURITY NUMBER (SSN) USE WITHIN DOD (1 Aug. 2012) [hereinafter DoDI 1000.30]. Until then, good judgment requires that the SSN be eliminated in accordance with the guidance provided in the DoDI 1000.30.

Appendix B

DoDI 64590.08, August 17, 2011

ENCLOSURE 2
PROCEDURES

1. HEALTHCARE PROVIDERS.

a. Command notification by healthcare providers will not be required for Service member self and medical referrals for mental health care or substance misuse education unless disclosure is authorized for one of the reasons listed in subparagraphs 1.b.(1) through1.b.(9) of this enclosure.

b. Healthcare providers shall notify the commander concerned when a Service member meets the criteria for one of the following mental health and/or substance misuse conditions or related circumstances:

(1) Harm to Self. The provider believes there is a serious risk of self-harm by the Service member either as a result of the condition itself or medical treatment of the condition.

(2) Harm to Others. The provider believes there is a serious risk of harm to others either as a result of the condition itself or medical treatment of the condition. This includes any disclosures concerning child abuse or domestic violence consistent with DoD Instruction 6400.06 (Reference (f)).

(3) Harm to Mission. The provider believes there is a serious risk of harm to a specific military operational mission. Such serious risk may include disorders that significantly impact impulsivity, insight, reliability, and judgment.

(4) Special Personnel. The Service member is in the Personnel Reliability Program as described in DoD Instruction 5210.42, or is in a position that has been pre-identified by Service regulation or the command as having mission responsibilities of such potential sensitivity or urgency that normal notification standards would significantly risk mission accomplishment.

(5) Inpatient Care. The Service member is admitted or discharged from any inpatient mental health or substance abuse treatment facility as these are considered critical points in treatment and support nationally recognized patient safety standards.

(6) Acute Medical Conditions Interfering With Duty. The Service member is experiencing an acute mental health condition or is engaged in an acute medical treatment regimen that impairs the Service member's ability to perform assigned duties.

(7) Substance Abuse Treatment Program. The Service member has entered into, or is being discharged from, a formal outpatient or inpatient treatment program consistent with DoD Instruction 1010.6 (Reference (h)) for the treatment of substance abuse or dependence.

(8) Command-Directed Mental Health Evaluation. The mental health services are obtained as a result of a command-directed mental health evaluation consistent with DoD Directive 6490.1 (Reference (i)).

(9) Other Special Circumstances. The notification is based on other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notification, as determined on a case-by-case basis by a health care provider (or other authorized official of the medical treatment facility involved) at the O-6 or equivalent level or above or a commanding officer at the O-6 level or above.

c. In making a disclosure pursuant to the circumstances described in subparagraphs 1.b.(1) through 1.b.(9) of this enclosure, healthcare providers shall provide the minimum amount of information to satisfy the purpose of the disclosure. In general, this shall consist of:

(1) The diagnosis; a description of the treatment prescribed or planned; impact on duty or mission; recommended duty restrictions; the prognosis; any applicable duty limitations; and implications for the safety of self or others.

(2) Ways the command can support or assist the Service member's treatment.

d. Healthcare providers shall maintain records of disclosure of protected health information consistent with DoD 6025.18-R, DoD Health Information Privacy Regulation, January 24, 2003.

2. COMMANDER DESIGNATION. Notification to the commander concerned pursuant to this Instruction shall be to the commander personally or to another person specifically designated in writing by the commander for this purpose.

3. COMMANDERS. Commanders shall protect the privacy of information provided pursuant to this Instruction and DoD Directive 5400.11 as they should with any other health information. Information provided shall be restricted to personnel with a specific need to know; that is, access to the information must be necessary for the conduct of official duties. Such personnel shall also be accountable for protecting the information. Commanders must also reduce stigma through positive regard for those who seek mental health assistance to restore and maintain their mission readiness, just as they would view someone seeking treatment for any other medical issue.

Appendix C

U.S. Army Soldier Leader Risk Reduction Tools and Guides

U.S. ARMY SOLDIER LEADER RISK REDUCTION TOOL (USA SLRRT)

The Privacy Act prohibits use of the USA SLRRT as a form to collect and retain data on individuals. Leaders should document pertinent findings and plan of actions on the DA 4856 (Developmental Counseling Form) and not use the USA SLRRT for retaining information on individual Soldiers.

Frequency - Counseling sessions using the USA SLRRT should be conducted:

- Within 30 days of arrival at the current permanent duty station.

- Prior to attendance at Noncommissioned Officer Education System (NCOES), advanced leader courses (ALC) and senior leader courses (SLC), officer advanced courses (OAC), WOBC, and BOLC-B.

- Approximately 90 days prior to deployment.

- Within 30 days of returning to duty after deployment.

- When Soldiers are administratively removed from a school and returned to the unit or organization.

- When leaders determine the Soldier would benefit from an assessment because of changes or transitions in the Soldier's personal or professional life or when the leader identifies a risky behavior.

- At least annually to ensure that low risk Soldiers have not elevated to moderate or high risk.

Soldiers on Assignment:

Moderate/Medium Risk Soldiers - losing commanders (battalion level/equivalent or above) should inform gaining commanders via an encrypted email message no later than 30 days before the transfer.

High Risk Soldiers - Commanders (battalion level/equivalent or above) should work with Human Resource Command (HRC) to defer or delete assignment instructions. Once a battalion/equivalent or higher level commander determines that the Soldier's risk level has been mitigated to moderate or low risk, they should work with HRC on the Soldier's assignment instructions.

U.S. Army Soldier Leader Risk Reduction Tool (USA SLRRT)

INSTRUCTIONS FOR LEADERS

This tool is designed to help leaders identify potential risks among their Soldiers. If a Soldier has a concern or problem, provide him/her with options (suggestions are provided under "Leader Action" for each issue of concern), ensure that you follow up with him/her, and continue to address the plan of action as necessary. Document any pertinent issues of concern and the associated action plan on the Developmental Counseling Form, DA Form 4856.

Refer to Appendix B in the 'Guide for Use of the USA SLRRT' for a more complete list of resources available to assist Soldiers.

Leaders should consult with legal counsel if Article 31 rights may apply.

#	ISSUES OF CONCERN	LEADER ACTIONS
1	Has the Soldier been command referred for any assistance (e.g., legal, financial, spiritual, alcohol, family/relationship, behavioral health, other)? Does the Soldier wish to disclose receiving any similar types of assistance for which he/she was not command referred?	Refer Soldier to appropriate resources. Reserve Component (RC) ensure referral is with appropriate local resource.
2	Is the Soldier experiencing any difficulties getting the assistance he/she needs either on-post or off-post?	Refer Soldier to appropriate resources. RC ensure referral is with appropriate local resource. Follow-up with Soldier within 14 days to ensure that any difficulties have been overcome or resolved.
3	Has the Soldier been unsuccessful in meeting military requirements or standards (e.g., duty performance, PT, Battle Assembly participation (RC only), weight control, weapons qualification, MOS training)?	Develop and implement a plan of action to meet the requirements/standards. Closely monitor the Soldier's progress.
4	Has the Soldier received negative counseling or evaluations since arriving at the current unit or organization?	Determine if this is a current concern. Develop and implement a plan of action to meet the requirements/standards. Closely monitor the Soldier's progress.
5	Has the Soldier been denied promotion or attendance to schools, or barred from reenlistment for any reason?	Determine if this is a current concern. Develop and implement a plan of action to meet the requirements/standards. Closely monitor the Soldier's progress.
6	Is the Soldier currently undergoing a UCMJ action?	Ensure Soldier has adequate support, to include legal.
7	Does the Soldier have financial or employment concerns, such as inability to cover basic montly expenses, home foreclosure, difficulty meeting child support payments, or inability to repay loans?	Refer Soldier to unit or installation financial representative or Army Community Service Financial Readiness Program. RC ensure referral is with appropriate local resource.
8	Has the Soldier experienced an accident, injury, illness, or medical condition that resulted in current fitness for duty limitations?	Ensure Soldier has appropriate medical follow-up. Ensure updated medical profile in e-Profile.
9	Does the Soldier have a current medical profile (temporary or permanent)?	Ensure Soldier has appropriate medical follow-up. Ensure updated medical profile in e-Profile.
10	Does the Soldier have any concerns about medical care, medications or supplements he/she is taking?	Refer to Primary Care Manager or Military Treatment Facility (MTF). RC ensure referral is with appropriate local resource.
11	Is the Soldier currently experiencing problems related to sleep (e.g., trouble falling asleep, trouble staying asleep, performance problems related to sleep, consistently getting less than 7-9 hours of sleep, using alcohol or other substances to get to sleep)?	Refer to Primary Care Manager or MTF. RC ensure referral is with appropriate local resource.
12	Does the Soldier tend to withdraw or socially isolate himself/herself from others?	Refer to Unit Ministry Team (UMT), Primary Care Manager, MTF, or Unit Behavioral Health Team, as appropriate. RC ensure referral is with appropriate local resource.
13	Has the Soldier exhibited excessive anger or aggression in the past three months?	Refer to Unit Ministry Team (UMT), Primary Care Manager, MTF, Unit Behavioral Health Team, Anger Management, or other appropriate support. RC ensure referral is with appropriate local resource.
14	Is the Soldier experiencing serious marital/relationship issues, or immediate family concerns, such as a serious illness in a family member?	Refer to Army Community Services, Military Family Life Counselor, Military OneSource, Unit Ministry Team (UMT), or Unit Behavioral Health Team, or other appropriate support. RC ensure referral is with appropriate local resource.
15	Has the Soldier been involved in any incidents of domestic violence or child abuse/neglect?	Refer to Family Advocacy Program. RC ensure referral is with appropriate local resource.
16	Has the Soldier experienced any condition that may be considered cruel, abusive, oppressive, or harmful, to include hazing or assault?	Connect Soldier with appropriate support (e.g. SHARP, EO, Family Advocacy, Unit Ministry, Primary Care Manager, MTF). RC ensure referral is with appropriate local resource.
17	Has the Soldier received a citation for speeding (10 miles over the posted limit) or reckless driving in the past 6 months?	Provide appropriate counseling to ensure Soldier understands good driving habits.
18	Has the Soldier been cited for engaging in risky behavior while in a vehicle (e.g., texting while driving, not utilizing a hands-free cell phone while driving, riding without a seatbelt)? Has the Soldier been informed that such activities are inherently unsafe, in violation of law and policy, and potentially punishable under UCMJ?	Provide appropriate counseling to ensure Soldier understands good driving habits. Ensure the Soldier bas been informed that such activities are inherently unsafe, in violation of law and policy, and potentially punishable under the UCMJ.

Appendix D

High Risk Soldier Packet Assessment Template

DEPARTMENT OF THE ARMY
HEADQUARTERS, 2d BRIGADE COMBAT TEAM, 1st ARMORED DIVISION
20500 COLD WAR ROAD
FORT BLISS, TX 79918

REPLY TO
ATTENTION OF

AFAD-BCT-PE 5 February 2013

MEMORANDUM RECORD

SUBJECT: High Risk Soldier Commander's Assessment

- ☐ DD Form 2808, Report of Medical Examination (Page 1 and 3 only)
  - ☐ Provider will review medication profiles and document any polypharmacy issues
- ☐ DA Form, 3822, Report of Mental Status Evaluation (May utilize discharge evaluation if available)
- ☐ Criminal Background Check

The Soldier is:

- ☐ Fit for duty; no additional follow-up (must annotate below; BN CDR is the approval authority)
- ☐ Fit for duty; requires additional follow-up (see below)
- ☐ Not fit for duty; requires further action (see below)

The fit for duty follow up plan includes:

- ☐ Behavioral health
- ☐ Army Substance Abuse Program (ASAP)
- ☐ ACS
- ☐ WFC
- ☐ JAG/Legal
- ☐ Finance
- ☐ Other:_____

The not fit for duty follow up plan includes:

- ☐ Chapter Action: (Type)_____
- ☐ Medical Evaluation Board (MEB)
- ☐ Other:_____

First Sergeant Assessment: (Use additional sheets as necessary)

_____
_____
_____
_____
_____

Commander's Assessment: (Use additional sheets as necessary)

_____
_____
_____
_____
_____

_____
BN Commander Approval

Inquiries Regarding Off-Post Gun Ownership

On 2 January 2013, President Barack Obama signed into law the 2013 National Defense Authorization Act (NDAA), Public Law 112-239.[1] Its ostensible purpose, as indicated by its full title, is "to authorize appropriations for fiscal year 2013 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes."[2]

Among its voluminous provisions is section 1057, which specifically amends section 1062(c) of the Ike Skelton National Defense Authorization Act of 2011, Public Law 111-383.[3] Importantly, section 1057

> Authorize[s] a health professional that is a member of the Armed Forces or a civilian employee of the Department of Defense or a commanding officer to inquire if a member of the Armed Forces plans to acquire, or already possesses or owns, a privately-owned firearm, ammunition, or other weapon, if such health professional or such commanding officer has reasonable grounds to believe such member is at risk for suicide or causing harm to others.[4]

Therefore, section 1057 clarifies and delineates the limits under which commanders operate when dealing with off-post gun ownership by servicemembers who may cause harm to themselves or others.[5]

Under section 1062(a) of the 2011 NDAA, the Secretary of Defense was proscribed from prohibiting, issuing requirements relating to, collecting, or recording *any* information relating to the lawful acquisition, possession, ownership, carrying, or other use of a privately owned firearm, privately owned ammunition, or another privately owned weapon by a member of the Armed Forces or civilian employee of the Department of Defense (DoD) on non-DoD owned or controlled property (i.e., issuing orders regarding off-post ownership of firearms).[6] The Secretary of Defense was also called upon to destroy any such records then in existence within ninety days of the 2011 NDAA enactment.[7] In contrast, section 1062(c) allowed for the creation and maintenance of records relating to or regulating the possession, carrying, or other use of firearms by servicemembers when engaged in their official duties, while wearing the uniform, or with respect to matters "relating to an investigation, prosecution, or adjudication of an alleged violation of law . . . *including matters related to whether a member of the Armed Forces constitutes a threat to the member or others*."[8]

Section 1057 clarifies and expands the final clause of section 1062(c).[9] It does so by explaining:

> (1) only inquiries (not records) may be made regarding off-post firearms;
>
> (2) who may make these inquiries (commanders, health professionals that are members of the Armed Forces, or health professions that are civilian employees of the DoD);
>
> (3) when these inquiries may be made (when the health professional or commander has reasonable grounds to believe the servicemember is at risk for suicide or causing harm to others); and
>
> (4) what may be the subject of an inquiry (whether the servicemember plans to acquire, already possesses, or owns a privately owned firearm, ammunition, or other weapon).[10]

Section 1057 does not provide a commander the ability to prohibit the purchase of off-post firearms or to order their confiscation in the event a servicemember is perceived to be a danger to himself or others.[11] However, if a commander has knowledge that a servicemember owns or possesses

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[1] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, 1632–1714.

[2] *Id.*

[3] *See* § 1057, 126 Stat. at 1938 ("Rule of construction relating to prohibition on infringing on the individual right to lawfully acquire, possess, own, carry, and otherwise use privately owned firearms, ammunition, and other weapons.").

[4] *Id.*

[5] *Id.*

[6] *See* Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1062(a), 124 Stat. 4137, 4363.

[7] *See id.* § 1062(b), 124 Stat. at 4363.

[8] *See id.* § 1062(c), 124 Stat. at 4363 (emphasis added).

[9] *See id.* § 1057, 126 Stat. at 1938.

[10] *Id.*

[11] *Id.*

firearms at his off-post residence, the commander maintains the inherent authority to order the servicemember to relocate on-post until his mental state can be fully ascertained.[12] Therefore, section 1057 provides commanders some flexibility when dealing with issues associated with servicemember distress balanced against constitutional rights.

—MAJ T. Scott Randall

[12] *See generally* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 4 (18 Mar. 2008) (RAR, 20 Sept. 2012).

My Beloved World[1]

Reviewed by *Major Shaun Lister*[*]

"The quality of mercy: 'It blesseth him that gives and him that takes.'"[2]

I. Introduction

Justice Sotomayor's autobiography, *My Beloved World*, should be required reading by all new trial counsel and military justice supervisors. Besides being plainly written and easy to read, it is a narrative full of valuable lessons relating to the practice of law. Justice Sotomayor writes openly about her insecurities and fears that drove her, at an early age, to become self-reliant, independent, and hypercompetitive. Sotomayor weaves an uplifting story of her life and describes overcoming the adversity of childhood diabetes; growing up in Bronx housing projects surrounded by junkies, prostitutes, and gangs; and dealing with the prejudice that came with being admitted to the Ivy League during the age of affirmative action. Her experiences as a young prosecutor at the New York District Attorney's Office and later as a litigation attorney in a private law firm provide a bounty of lessons on prosecutorial discretion, the quality of mercy, and the meaning of justice that will resonate profoundly with military justice practitioners. If it does not, the judge advocate reader is in the wrong profession.

II. Background

Sotomayor currently serves as an Associate Justice on the U.S. Supreme Court. She attended Princeton University as an undergraduate, where she graduated Phi Beta Kappa[3] and won the Pyne Prize, the highest award a graduating senior at Princeton can receive. Sotomayor graduated from Yale Law School in 1979[4] where she served on the *Yale Law Journal*.[5] Serving as a federal district court judge in the Southern District of New York from 12 August 1992 to 13 October 1998,[6] she was the first Hispanic federal judge in New York history.[7] From 7 October 1998 until 7 August 2009, Sotomayor served as a judge on the U.S. Court of Appeals for the Second Circuit.[8] In *My Beloved World*, the author takes the reader on a highlight tour of her life, from her first indelible memory at age eight, to the initial moments of her first trial as a new U.S. District Court judge.

Any reader hoping to glean insight into Sotomayor's judicial philosophy will be disappointed. Sotomayor recognizes this from the outset and acknowledges, "I know that some readers will be inclined to read this chapter for clues to my own jurisprudence. I regret to disappoint them, but that's not the purpose of this book."[9] As a result, without resorting to cultural or racial stereotypes, it is impossible for any reader to determine Sotomayor's jurisprudential leanings from her autobiography. Just as Sotomayor notes, it is impossible to pick a jury based only on their cultural background,[10] it would be just as foolish to attempt to pinpoint Sotomayor's judicial leanings based on her cultural background. Others have had a difficult time determining her judicial approach other than to note that her opinions "belie easy categorization along any ideological spectrum."[11]

The self-described goal of *My Beloved World* is to write a memoir that will "allow [Sotomayor] to be judged as a human being."[12] What readers should take away from this book is an understanding that success is born of hard work, that one should make the most of opportunities given, and that the integrity of the criminal legal system must be upheld by practitioners who ensure that justice is served.

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[1] SONIA SOTOMAYOR, MY BELOVED WORLD (2013) (quoting WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.) (published in English and Spanish).

[2] *Id*. at 204.

[3] *Id*. at 161–62. Other inductees of Phi Beta Kappa, the oldest academic honor society in the United States, include President Bill Clinton, Condoleezza Rice, and Tom Brokaw. *Who Belongs to Phi Beta Kappa?*, PHI BETA KAPPA SOC'Y, http://www.pbk.org/infoview/PBK_InfoView.aspx?t=&id=59 (last visited Nov. 25, 2013).

[4] *History of the Federal Judiciary, Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., www.fjc.gov/public/home.nsf/hisj (last visited Nov. 25, 2013) [hereinafter *Biographical Directory*].

[5] SOTOMAYOR, *supra* note 1, at 179–80.

[6] *Biographical Directory*, *supra* note 4 (nominated by President George H.W. Bush).

[7] SOTOMAYOR, *supra* note 1, at 293.

[8] *Biographical Directory*, *supra* note 4.

[9] SOTOMAYOR, *supra* note 1, at 172.

[10] *Id.* at 211.

[11] ANNA C. HENNING & KENNETH R. THOMAS, CONG. RESEARCH SERV. R40649, JUDGE SONIA SOTOMAYOR: ANALYSIS OF SELECTED OPINIONS Summary (2009), *available at* http://www.fas.org/sgp/crs/misc/R40649.pdf.

[12] SOTOMAYOR, *supra* note 1, at viii.

III. Fear, Self-Awareness, and Hard Work

A recurring theme of *My Beloved World* is that Sotomayor was driven in much of her life by fear and a sense of insecurity. Her self-reliance resulted from her fear of dying. Her determination and work ethic resulted from her fear of failure and feelings of inadequacy at the beginning of each new challenge in her life.

Sotomayor's first turning point in her life occurred when she was eight years old. She recounts listening to her parents argue over giving her insulin injections after her diagnosis of childhood diabetes.[13] Her father was an alcoholic, incapable of caring for her, and her mother worked nights and weekends to avoid being at home.[14] As a result, young Sonia Sotomayor determined that if she wanted to live, she would need to learn to give herself insulin shots.[15] This one event, early in her life, serves as a lens through which to view Sotomayor's life and provides readers with an uplifting example of how to overcome adversity in their own lives. "There are uses to adversity, and they don't reveal themselves until tested. Whether it's serious illness, financial hardship, or the simple constraint of parents who speak limited English, difficulty can tap unsuspected strengths."[16]

Fear drove much of Sotomayor's success. With each new challenge, she felt insecure and afraid of failure. She describes her insecurities at college,[17] law school,[18] as a new prosecutor at the New York District Attorney's Office,[19] and as a new federal judge.[20] In these passages, Sotomayor illustrates an important lesson for trial lawyers: overcoming the natural fear that comes with presenting a case in court requires hard work, an understanding she attributes to her mother.[21] The candor with which Sotomayor writes about her own feelings of inadequacy and how she copes with those feelings should resonate with anyone who has ever faced new challenges, whether at work or in life.

IV. Affirmative Action and Political Reality

Sotomayor is candid in her writing concerning her alcoholic father, whose death led to a better life for the young Sonia, her brother, and mother;[22] her relationship with her mother, whom she blames for abandoning her during periods of her youth;[23] the many struggles she faced growing up in Bronx housing projects where encounters with junkies, prostitutes, gangs, and police corruption were frequent occurrences;[24] and her struggles to overcome her deficiency of her written English, such as buying and studying grammar and vocabulary books during summer vacations.[25] She also confronts another prevalent issue of the 1970s that played as big a role in her success as her self-reliance, hard work, and determination: affirmative action. Unfortunately, she does not give the political realities that led to her nomination to the federal bench the same level of analysis. Undoubtedly, this was as calculated as her refusal to provide any insight into her judicial philosophy.

Sotomayor's first encounter with affirmative action occurred when she was a senior in high school and learned that she was likely to be accepted to Princeton.[26] The school nurse confronted her, asking her to explain how she received a response to her application indicating likely admission when the two top-ranked students in the school only received "possible" responses.[27] Justice Sotomayor writes, "Her question would hang over me not just that day, but for the next several years, while I lived with the day-to-day reality of affirmative action."[28] Justice Sotomayor discusses affirmative action twice more in *My Beloved World*. Reactions from students at Princeton and letters to the editor

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[13] *Id.* at 3.

[14] *Id.* at 11–13.

[15] *Id.* at 4 ("It then dawned on me: if I needed to have these shots every day for the rest of my life, the only way I'd survive was to do it myself."). Sotomayor's mother worked nights and was not available to give the insulin injections; her father was an alcoholic and his hands trembled, making him afraid that he would hurt young Sonia. *Id.*

[16] *Id*. at 11.

[17] *Id.* at 144 ("The first year that I face the challenges of any new environment has always been a time of fevered insecurity, a reflexive terror that I'll fall flat on my face. In this self-imposed probationary period, I work with compulsive intensity and single-mindedness until I gradually feel more confident.").

[18] *Id.* at 173 (discussing feeling insecure at Yale Law School).

[19] *Id.* at 205 ("Fearing . . . humiliation, I prepared compulsively, the way I had in law school, and my reward was the chance to go out and risk it all again the next day. That I could never be sure of myself while doing it was a big reason I loved my work as a trial lawyer.").

[20] *Id.* at 297.

[21] *Id.* at 115. "Seeing my mother get back to her studies was all the proof I needed that a chain of emotions can persuade when one formed of logic won't hold. But more important was her example that a surplus of effort could overcome a deficit of confidence." *Id.* (discussing her mother returning to school to earn a nursing degree).

[22] *Id*. at 75. Sotomayor was nine years old when her father died. *Id*. at 40.

[23] *Id*. at 66 ("My anger still lingered at what I had perceived for so long as her abandonment and coldness toward us. It would take me many years to let go of that anger completely, and just as long for her to lose the last of her chill.").

[24] *Id*. at 94–95.

[25] *Id*. at 135.

[26] *Id*. at 119.

[27] *Id*.

[28] *Id.*

about the affirmative action minority students led to additional pressure to succeed and a feeling of "survivor's guilt," as she contemplated other minority students who were not so lucky.[29] Her last treatment of affirmative action comes as she recounts an encounter with a law firm partner during a dinner she attended while a student at Yale Law School. During a particularly distasteful line of questions from the partner, she maintained that students who are admitted to institutions through affirmative action can prove their qualifications by what they accomplish once there.[30] This is the truth of the matter, and it would be astonishing in today's world for a conversation like this to take place. Sotomayor tackles the issue with grace and aplomb, par for the course in *My Beloved World*.

Although she had proven her ability time and again, Sotomayor faced challenges at each step of the way. The lesson for the reader is that no matter how one arrives at the opportunity presented, one can make the most of those opportunities with hard work, dedication, and perseverance. Sotomayor reminds the reader that the measure of the person is not how they arrived at any particular point in their life, but what they do when they get there. She does not force this conclusion, however. Like any good lawyer, she tells a story, based on her own life experiences, and allows the reader to draw his own conclusions.

Perhaps she had already made the point, but her perspective on the political process that led to her nomination to the federal bench would have been welcome. A partner in Sotomayor's law firm asked her to complete the application form for the position of federal district court judge. He told her, "They're looking for qualified Hispanics. You're not only a qualified Hispanic but eminently qualified, period."[31] Although she was, no doubt, qualified in her own right, like the affirmative action that led to her admission into the Ivy League, there are people who will always wonder if she was selected for nomination to the federal bench primarily because of her cultural heritage. While Sotomayor's work-ethic allowed her to make the most of the opportunities provided to her, more discussion of these topics seemed warranted.

V. Lessons for the Field

What makes this book a must-read for military justice practitioners are Sotomayor's lessons learned during her years as a prosecutor at the New York District Attorney's Office and then as a litigation attorney in the New York City law firm, Parvia & Harcourt. Sotomayor gives a somewhat humorous rendition of her first few jury trials that show a growth in her ability, as well as her views of justice as a prosecutor. In her first trial, she did not know what the judge was talking about when he told her that they would convene for voir dire on the following Monday.[32] As soon as she left court, she hurried back to her office and asked her supervisor what voir dire meant. No doubt, many new trial counsel have had this same feeling of uncertainty at the beginning of their first trials. The case involved a charge for disorderly conduct against a young, black college student who had been involved in a fight. Sotomayor was well aware that any conviction would "destroy a black kid's future."[33] With no introspection and no apparent thought about how she could resolve the case in a way that would serve the interests of justice without destroying the defendant's future, she prosecuted the case and, fortunately, lost.[34] How many trial counsel wrestle with questions of justice when they are still learning the mechanics of trial work?

Soon, however, she came to the understanding that "though [she] might win, justice would not be served."[35] She learned the important lesson that all prosecutors must understand: prosecutors must keep both sides in mind.[36] Although all judge advocates are taught during their instruction at the Judge Advocate Officer's Basic Course that trial counsel must serve the interests of justice, they must often be reminded of this tenet of military justice for fear it might be forgotten under the crush of their busy jobs and duties.

Fortunately for Sotomayor, she had mentors in John Fried and Warren Murray.[37] Of John Fried she writes, "Under an impossible caseload, his commitment to fairness was fundamental. If I believed in a defendant's innocence or doubted a witness's story, I would knock on John's door. We'd sit down together and analyze the evidence for as long as it took."[38] At the end of the conversation, if she could not "in good conscience" try the case, she had discretion to not

[29] *Id*. at 145 ("[T]he sentiment has been expressed countless times by minority students everywhere: by some accident of fate, we few among the great many had won the lottery.").

[30] *Id*. at 187 (claiming that affirmative action led to the hiring and admission of unqualified minorities, the partner asked Sotomayor, "Do you think you would have been admitted to Yale Law School if you were not Puerto Rican?").

[31] *Id*. at 286.

[32] *Id*. at 199.

[33] *Id*.

[34] *Id*. at 200.

[35] *Id*. at 205.

[36] *Id*.

[37] *Id*. at 202–07. John Fried and Warren Murray were the first two bureau chiefs for whom Sotomayor worked at the New York District Attorney's Office. *Id*.

[38] *Id*. at 205–06 (discussing mentoring she received from John Fried on prosecutorial discretion).

try it.[39] Her example provides lessons to both trial counsel and military justice supervisors. Trial counsel must be honest with themselves and their supervisors after they fully review the evidence and speak to all of the witnesses in the case. This preparation must be done early. Military Justice supervisors should be generous with their time and help trial attorneys work through these issues.

After she lost back-to-back trials, Warren Murray taught her that prosecutors must appeal to a jury's morality, not simply to logic.[40] Trial attorneys must argue with passion and moral certainty.[41] This premise presents a more practical reason that trial attorneys must believe in their cases. Juries and panels will sense if a prosecutor does not believe in the government's case and will be less likely to convict. This premise also leads to Sotomayor's point that trial attorneys must be attentive during trial, which "figures in upholding one of a litigator's paramount responsibilities: not to bore the jury."[42] Any trial attorney has heard these points before. The lessons are not new; nevertheless, hearing them in the context of real cases makes the lessons more meaningful.

Sotomayor also instructs on ways to make cases come alive for the panel. Charts, maps, and diagrams (in the pre-Power Point courtroom) are necessary to visually represent evidence and "prevent the jury from becoming overwhelmed by the dizzying minutiae."[43] She also insists that prosecutors must always visit the crime scene to take in all of the details of the location to "make the scene come to life in the minds of the jurors . . . ."[44] Likewise, Sotomayor provides sage advice regarding witness preparation. Her philosophy is that the lawyer's job is to assist the witness to understand the purpose of each question "so that you're working as a team to communicate their relevant knowledge to jurors."[45] Again, these are not new concepts. However, Justice Sotomayor provides this wisdom in the context of discussing cases she tried, thus bringing the information to life for the reader.

Lastly, Sotomayor imparts advice, learned from mentor Dave Botwinik, concerning "integrity, fairness, and professional honor."[46] She posits that while the written rules of professional conduct set a minimum standard, unwritten rules set a higher standard of ethical conduct, fair dealing, and human decency.[47] The idea some attorneys have that they should take advantage of any situation is antithetical to professional honor. This goes to the heart of the legal profession. Somewhere along the way it has become the norm to merely meet the standard. Ethical behavior is not a GO/NO GO station, a point Sotomayor successfully makes throughout *My Beloved World*.

VI. Conclusion

My Beloved World is a great read and a marvelous teaching tool for military justice supervisors. While some readers may desire more insight into Sotomayor's jurisprudence and views on the political landscape that led to her appointment to the nation's highest court, the book gives the reader exactly what Sotomayor promises, and more. In *My Beloved World*, Sotomayor takes the reader on a journey of her life, imparting along the way valuable lessons on overcoming adversity for the general reader, with a bonus of technical and ethical lessons for trial attorneys. *My Beloved World* should find its way onto the professional reading list of all judge advocates.

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[39] *Id*. at 206.

[40] *Id*. at 209 ("Since it is painful to most jurors to vote 'guilty' and send a human being to jail, you couldn't simply reason with them to do it; you had to make them feel the necessity.").

[41] *Id*.

[42] *Id*. at 210.

[43] *Id*. at 242. The Criminal Law Department at The Judge Advocate General's Legal Center and School also instructs students during Intermediate Trial Advocacy Course (ITAC) training to use visual aids such as Power Point, photographs, maps, or other items to give visual opening statements and closing arguments. *The Intermediate Trial Advocacy Course*, JAGCNET, https://www.jagcnet.army.mil/portals/jagc.nsf/homeDisplay.xsp?open&documentId=DB7E8C14A6D1F5D285257A37003AE8D1 (last visited 17 Dec. 2013).

[44] *Id.* at 243.

[45] *Id*. at 265.

[46] *Id*. at 261.

[47] *Id*. at 261–62 ("In the practice of law, there are rules that establish a minimum standard of acceptable conduct: what the law permits. This is the floor, below which one can't go. There are other rules, not formally encoded, which set the higher bar that defines what's ethical behavior, consistent with respect for the dignity of others and fairness in one's dealings with them.").

CLE News

1. Resident Course Quotas

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

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

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

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

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

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

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

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

2. Continuing Legal Education (CLE)

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

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

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

b. The Naval Justice School (NJS).

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

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

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

3. Civilian-Sponsored CLE Institutions

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

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

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

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

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

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

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

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC). Prior to enrollment in Phase I, 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 by 1 November all Phase I subcourses, to include all writing exercises, and have received a passing score 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. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

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

5. Mandatory Continuing Legal Education

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

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

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

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

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

Current Materials of Interest

1. 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.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

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

b. The faculty and staff of TJAGSA are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please

contact Information Technology Division Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

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

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

3. The Army Law Library Service

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

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

Author Index

-A-

Anderson, Major Temidayo L., *Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military*, Dec. 2013, at 15.

-B-

Brady, Colonel Brian H., *The North Atlantic Treaty Organization Legal Advisor: A Primer*, Oct. 2013, at 4.

-C-

Cowan, Major Bradley M., *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, Feb. 2013, at 4.

-D-

Dalrymple, Major Dan, *Make the Most of It: How Defense Counsel Needing Expert Assistance Can Access Existing Government Resources*, May 2013, at 35.

DeGaine, Major Jacqueline J., *Digital Evidence*, May 2013, at 7.

Durden, Major Jayson L., *Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law*, Nov. 2013, at 4.

-E-

Farrell, Major Jessica M., *Policing the Force: A Courtesy Patrol Primer for Judge Advocates*, July 2013, at 3.

-G-

Green, Jeffrey, *Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel*, June 2013, at 15.

-H-

Howard, Major Ryan A., *Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity*, Oct. 2013, at 26.

Hynes, Major Tom, *How the Brigade Judge Advocate Can Improve the Personnel Readiness Reporting Process for Flagged Soldiers*, Mar. 2013, at 18.

-J-

Jones, Major Michael, Jr., *A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Overhaul or a Little Tune-Up?*, July 2013, at 32.

-K-

Kapitan, Kevin W., *An Introduction to Intelligence Oversight and Security Information: The Department of Defense Rules for Protecting Americans' Information and Privacy*, Apr. 2013, at 3.

Kessinger, Major Christopher M., *Hitting the Cyber Marque: Issuing a Cyber Letter of Marque to Combat Digital Threats*, Aug. 2013, at 4.

-L-

Longley, Major John R., *Traditional Economy Act Transactions—A Hidden Opportunity for On–the-Job Training*, Mar. 2013, at 7.

Lykling, Major Aaron L., *The Disposition of Intoxicated Driving Offenses Committed by Soldiers on Military Installations*, Jan. 2013, at 5.

-M-

Masterton, Colonel R. Peter, Colonel David Robertson, and Colonel Wendy P. Daknis, *Annual Review of Developments in Instructions*, Dec. 2013, at 4.

McDonald, Major Edward B., *Protecting the Process: 10 U.S.C. § 1102 and the Army's Clinical Quality Management Program*, Sept. 2013, at 4.

Montalvo, Major Eric D., *When Did Imminent Stop Meaning Immediate?:* Jus In Bello *Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, Aug. 2013, at 24.

-N-

Neill, Major S. Charles, *A Primer on Trial* in Absentia, Aug. 2012, at 4.

-O-

O'Dea, Major David M., *Navigating the Restoration of Capacity and Civil Commitment of a Mentally Incompetent Accused*, June 2013, at 3.

-P-

Pope, Major M. Turner Jr., *PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families*, June 2012, at 5.

-R-

Randall, Major T. Scott, *Application of Article 2(c) of the UCMJ to Title 32 Soldiers*, Nov. 2013, at 29.

Randall, Major T. Scott, *Foreign Consequence Management: Humanitarian Assistance from a Bubble Suit*, Mar. 2013, at 27.

Randall, Major T. Scott, *Saturday Night Jurisdiction Over Reserve Soldiers*, June 2013, at 31.

-S-

Schauss, Major Michael E., *Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services*, Feb. 2013, at 17.

Shepard, Lieutenant Steven M., *Strategies for Presenting Unavailable Witness Testimony in Courts-Martial*, Sept. 2013, at 24.

Smith, Major Joshua J., *Staying Abreast of Separation Benefits*, Sept. 2013, at 17.

Sommer, Major Travis P., *Getting the Job Done: Meaningfully Investigating Organizational Conflicts of Interest*, Nov. 2013, at 16.

-T-

Tarin, Danielle, *Rules and Law Governing Flyers, Cleansed Charge Sheets, and Flimsies*, June 2013, at 25.

-W-

Williams, Major Winston S., Jr., *Multinational Rules of Engagement: Caveats and Friction*, Jan. 2013, at 24.

Subject Index

ADMINISTRATIVE AND CIVIL LAW

Application of Article 2(c) of the UCMJ to Title 32 Soldiers, Major T. Scott Randall, Nov. 2013, at 16.

Application of the Emoluments Clause to Department of Defense Civilian Employees and Military Personnel, Jeffrey Green, June 2013, at 15.

Foreign Consequence Management: Humanitarian Assistance from a Bubble Suit, Major T. Scott Randall, Mar. 2013, at 27.

Getting the Job Done: Meaningfully Investigating Organizational Conflicts of Interest, Major Travis P; Sommer, Nov. 2013, at 16.

How the Brigade Judge Advocate Can Improve the Personnel Readiness Reporting Process for Flagged Soldiers, Major Tom Hynes, Mar. 2013, at 18.

An Introduction to Intelligence Oversight and Security Information: The Department of Defense Rules for Protecting Americans' Information and Privacy, Kevin W. Kapitan, Apr. 2013, at 3.

Navigating HIPAA's Hidden Minefields: A Leader's Guide to Using HIPAA Correctly to Decrease Suicide and Homicide in the Military, Major Temidayo L. Anderson, Dec. 2013, at 15.

PCSing Again? Triggering Child Relocation and Custody Laws for Servicemembers and Their Families, Major M. Turner Pope, Jr., June 2012, at 5.

Putting Fire & Brimstone on Ice: The Restriction of Chaplain Speech During Religious Worship Services, Major Michael E. Schauss, Feb. 2013, at 17.

Saturday Night Jurisdiction Over Reserve Soldiers, Major T. Scott Randall, June 2013, at 31.

Staying Abreast of Separation Benefits, Major Joshua J. Smith, Sept. 2013, at 17.

Traditional Economy Act Transactions—A Hidden Opportunity for On-the-Job Training, Major John R. Longley, Mar. 2013, at 7.

CONTRACT AND FISCAL LAW

Acquisition and Cross-Servicing Agreements in an Era of Fiscal Austerity, Major Ryan A. Howard, Oct. 2013, at 26.
A Mechanic's View of the Government's Procurement Suspension and Debarment System: Time for a Major Overhaul or a Little Tune-Up?, Major Michael Jones, Jr., July 2013, at 32.

Protecting the Process: 10 U.S.C. § 1102 and the Army's Clinical Quality Management Program, Major Edward B. McDonald, Sept. 2013, at 4.

CRIMINAL LAW

Annual Review of Developments in Instructions, Colonel R. Peter Masterton, Colonel David Robertson, and Colonel Wendy P. Daknis, Dec. 2013, at 4.

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A Primer on Trial in Absentia, Major S. Charles Neill, Aug. 2012, at 4.

Rules and Law Governing Flyers, Cleansed Charge Sheets, and Flimsies, Danielle Tarin, June 2013, at 25.

Strategies for Presenting Unavailable Witness Testimony in Courts-Martial, Lieutenant Steven M. Shepard, Sept. 2013, at 24.

Where's the Sodomy? A Guide for Prosecuting Prejudicial Sexual Relationships After the Possible Repeal of Sodomy Law, Major Jayson L. Durden, Nov. 2013, at 4.

INTERNATIONAL & OPERATIONAL LAW

Hitting the Cyber Marque: Issuing a Cyber Letter of Marque to Combat Digital Threats, Major Christopher M. Kessinger, Aug. 2013, at 4.

Multinational Rules of Engagement: Caveats and Friction, Major Winston S. Williams, Jr., Jan. 2013, at 24.

The North Atlantic Treaty Organization Legal Advisor: A Primer, Colonel Brian H. Brady, Oct. 2013, at 4.
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MISCELLANEOUS

Policing the Force: A Courtesy Patrol Primer for Judge Advocates, Major Jessica M. Farrell, July 2013, at 3.

Book Reviews Index

The Beauty and the Sorrow: An Intimate History of the First World War I, Reviewed by Lieutenant Commander David M. Sherry, Jan. 2013, at 37.

Civilization: The West and the Rest, Reviewed by Captain Janet C. Eberle, July 2013, at 47.

The Execution of Private Slovik, Reviewed by Major Michael A. Rizzotti, Sept. 2013, at 39.

How Wars End: Why We Always Fight the Last Battle, Reviewed by Major David M. O'Dea, Apr. 2013, at 43.

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Lincoln on Leadership: Executive Strategies for Tough Times, Reviewed by Major Aaron L. Lykling, June 2013, at 36.

Little America: The War Within the War for Afghanistan, Reviewed by Major Temi Anderson, Oct. 2013, at 38.

Manhunt, the Ten-Year Search for Bin Laden from 9/11 to Abbottabad, Reviewed by Major Jonathon H. Cody, Feb. 2013, at 32.

A Month in the Country, Reviewed by Captain Joshua W. Johnson, Nov. 2013, at 33.

My Beloved World, Reviewed by Major Shaun Lister, Dec. 2013, at 35.

Power and Constraint: The Accountable Presidency After 9/11, Reviewed by Major Ryan A. Howard, July 2013, at 43.

Predators: Pedophiles, Rapists, & Other Sex Offenders: Who They Are, How They Operate, and How We Can

Protect Ourselves and Our Children, Reviewed by Major Alexander Farsaad, Mar. 2013, at 38.

In Search of Jefferson's Moose: Notes on the State of Cyberspace, Reviewed by Major Frank E. Kostik, Jr., Mar. 2013, at 43.

Secret and Sanctioned: Covert Opportunities and the American Presidency, Reviewed by Meghan M. Poirier, June 2013, at 40.

7 Deadly Scenarios: A Military Futurist Explores War in the 21st Century, Reviewed by Major John K. Suehiro, May 2013, at 45.

Start with Why: How Great Leaders Inspire Everyone to Take Action, Reviewed by Major Ryan Kerwin, Feb. 2013, at 28.

Notes from the Field

Making Justice Flat: A Challenge to the View That Deploying Commanders Must Relinquish Command and General Court-Martial Convening Authority Over Non-Deploying Forces, Colonel George R. Smawley, Jan. 2013, at 29.

Lore of the Corps Index

The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafter the Armistice Agreement That Ended the Korean War, Fred L. Borch, III, Aug. 2013, at 1.

Civilian Lawyers Join the Department: The Story of the First Civilian Attorneys Given Direct Commissions in the Corps, Fred L. Borch, III, May 2013, at 1.

Crime in Germany "Back in the Day": The Four Courts-Martial of Private Patrick F. Brennan, Fred L. Borch, III, June 2013, at 1.

A Deserter in France from 1944 to 1958: The Strange but True Case of Private Wayne E. Powers, Fred L. Borch, III, Nov. 2013, at 1.

From Cowboy and Tribal Lawyer to Judge Advocate and Secretary of War: The Remarkable Career of Patrick J. Hurley, Fred L. Borch, III, Oct. 2013, at 1.

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War Crimes in Sicily: Sergeant West Captain Compton and the Murder of Prisoners of War in 1943, Mar. 2013, at 1.

TJAGSLCS Features

New Developments

Administrative & Civil Law

Inquiries Regarding Off-Post Gun Ownership, Major T. Scott Randall, Dec. 2013, at 33.

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