



# THE ARMY LAWYER

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## Lore of the Corps

### Misbehavior Before the Enemy and Unlawful Command Influence in World War II: The Strange Case of Albert C. Homcy

Fred L. Borch

*Regimental Historian and Archivist*

Question (Trial Counsel): “Do you recall, sir, whether you were receiving enemy fire at this time?”

Lieutenant Colonel (LTC) Bird: “Yes, sir.”

Question: “Were you in contact with the enemy?”

LTC Bird: “You bet we were.”

Question: “On or about 27 August 1944, did you give the accused a mission to accomplish?”

LTC Bird: “Yes.”

Question: “What was that mission?”

LTC Bird: “That mission was to accompany a patrol to seek out and destroy one or more self-propelled guns or tanks.”

\* \* \* \*

Question: “Did the accused carry out this mission as ordered?”

LTC Bird: “No, sir.”<sup>1</sup>

On 27 August 1944, LTC William A. Bird, the commanding officer of the 1st Battalion, 141st Infantry Regiment, 36th Infantry Division, was in his battalion’s command post, located near Concourdia, France. Bird and his staff were under fire from German tanks or self-propelled artillery, and something had to be done to stop the murderous fire. Lieutenant Colonel Bird assigned the mission to seek out and destroy these German guns to 28-year-old Second Lieutenant (2LT) Albert C. Homcy, an anti-tank platoon leader in his battalion. Homcy was to accompany a hastily assembled unit of cooks, bakers and orderlies on a “strong patrol” to “destroy, with bazookas or grenades, those guns or whatever they were, as soon as possible.”<sup>2</sup>

Lieutenant Homcy refused LTC Bird’s order and, despite entreaties from Bird, 2LT Homcy persisted in

declining to obey him. As a result, 2LT Homcy was relieved from command and court-martialed for “misbehavior before the enemy.” On 19 October 1944, a panel of five officers convicted him as charged and sentenced him to be dismissed from the Army, to forfeit all pay and allowances, and to be confined at hard labor for fifty years.<sup>3</sup>

What follows is the story of Homcy’s court-martial, the role played by unlawful command influence in it, and the strange resolution of his case many years later.

Born on 25 April 1916 in New Jersey, Albert C. Homcy was a high school graduate who was working as a forester and machinist when he enlisted in the New Jersey Army National Guard on 25 January 1938. After Congress authorized the induction of reservists in August 1940 and enacted the nation’s first peacetime draft the following month, Homcy was called into federal service.<sup>4</sup>

In November 1942, after satisfactorily completing Officer Candidate School, then Sergeant Homcy was discharged to accept a commission as a 2LT. Almost one year later, on 21 August 1943, Homcy landed with the 36th Infantry Division in North Africa. He performed well in combat and, while in Italy in December 1943, was “commended for exceptionally meritorious conduct.”<sup>5</sup> According to the official citation, 2LT Homcy “was second in command of a group assigned the task of carrying ammunition, food, water and clothing to front-line troops.” Despite being “subjected to almost constant enemy artillery and mortar fire, sometimes crawling on their hands and knees to achieve their objective,” Homcy and his men accomplished their mission “without losing a single load of vital supplies.”<sup>6</sup> In July 1944, Homcy’s regimental commander, Colonel Paul D. Adams, likewise lauded Homcy’s “exemplary courage and determination” in combat,

<sup>3</sup> Headquarters, Mediterranean Theatre, Promulgating Order No. 92 (21 Nov. 1944) [hereinafter Promulgating Order No. 92].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers).

<sup>6</sup> Transcript of Record at 8, *supra* note 1. Commendation, 2d Lt. Albert C. Homcy, Headquarters, 36th Infantry Division (n.d.) (Allied Papers). Until the creation of the Bronze Star Medal in late 1944, Soldiers like Homcy who committed acts of bravery for exceptionally meritorious conduct in combat received written commendations from their regimental or higher commanders.

<sup>1</sup> Transcript of Record at 8, *United States v. Albert C. Homcy*, CM 271489 (19 Oct. 1944) (on file with Regimental Historian).

<sup>2</sup> *Id.*

which Adams acknowledged had contributed “materially to the success of our operation.”<sup>7</sup>

On 15 August 1944, 2LT Homcy and the 36th Infantry Division landed in southern France as part of Operation Dragoon. Twelve days later, on 27 August, Homcy was with the division as it advanced through the Rhone River Valley. According to testimony presented at his general court-martial, Homcy was the battalion’s anti-tank officer and had received an order from LTC Bird, relayed to Homcy through the battalion adjutant, Captain (CPT) John A. Berquist, to accompany eleven or twelve Soldiers on a patrol. Their mission: locate and then use bazookas to destroy German guns firing on the battalion command post.

Homcy refused to obey this order. He explained his reasons in his sworn statement at trial:

Q: Did you have a conversation with Colonel Bird on this date?

A: Yes, sir. I called Colonel Bird by telephone approximately forty-five minutes after I received the initial order from Captain Berquist and I told Colonel Bird that I couldn’t take those men on patrol as they weren’t qualified to do the work and I didn’t think they were capable. He said he would have to prefer charges and placed me under arrest.

Q: Are you sure you told him that you couldn’t take those particular men?

A: Yes, I am positive. I told him I didn’t think those men were qualified and I couldn’t take those particular men.

Q: So as far as you know, had any of these men who came from the kitchen—the cooks and orderlies—done any patrolling?

A: They had never done any patrolling to the best of my knowledge.

Q: With those men under those conditions did you believe it was possible for you to accomplish your mission?

A: No, sir. It was quite impossible. The mission itself was quite impossible but

with men like that it made it so much more impossible.<sup>8</sup>

Under cross-examination, 2LT Homcy further explained that the cooks, bakers, ammunition handlers, and orderlies that he had been ordered to lead into combat were so unqualified that he “would jeopardize their lives if I took them on a patrol of that nature.”<sup>9</sup> Since he did not want to take Soldiers on a patrol where “they would get killed doing something they knew nothing about,” 2LT Homcy refused to obey LTC Bird’s order.<sup>10</sup>

The fluid tactical situation meant that it was not until 10 September 1944 that LTC Bird preferred a single charge of misbehavior before the enemy against 2LT Homcy. Major General John E. Dahlquist, the 36th Infantry Division commander, referred the charge to trial by general court-martial on 18 September and, on 19 October 1944, a five-officer panel consisting of one major, three captains, and one first lieutenant convened to hear the evidence. While the trial counsel, CPT John M. Stafford, was a member of the Judge Advocate General’s Department, the defense counsel, Major Benjamin F. Wilson, Jr.,<sup>11</sup> was not a lawyer. But this was not unusual and, in any event, legally qualified counsel for an accused was not required by the Articles of War.<sup>12</sup> The charge and its specification read as follows:

#### Violation of the 75th Article of War.

In that 2d Lt. Albert C. Homcy . . . did, in the vicinity of La Concourdia, France, on or about 27 August 1944, misbehave himself while before the enemy, by refusing to lead a patrol on a mission to detect the presence of two enemy tanks or self-propelled guns, after being ordered to do so by Lt. Col. William A. Bird, his superior officer.<sup>13</sup>

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<sup>8</sup> Transcript of Record at 26, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 27.

<sup>11</sup> Benjamin F. Wilson, Jr., was a Field Artillery officer and had completed two years of law school prior to entering the Army. He had considerable experience, especially when measured by today’s standards of practice. Before defending Second Lieutenant Homcy, Major (MAJ) Wilson had served as a panel member in more than 100 general and special courts-martial. He had been detailed as the defense counsel at between 50 and 100 general courts-martial and between 50 and 100 special courts-martial. Finally, Wilson also had served as the prosecutor at between 50 and 100 special courts-martial. Transcript of Record, *supra* note 1, Questionnaire for Benjamin F. Wilson, Jr. (25 Apr. 1968), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

<sup>12</sup> Articles of War, 2 Stat. 359 (1806), reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint).

<sup>13</sup> *Id.* at 4.

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<sup>7</sup> 1st Indorsement, Colonel Paul D. Williams, to 2d Lt. Albert C. Homcy (14 July 1944) (Clemency Matters).

While testimony about LTC Bird's order was uncontradicted, 2LT Homcy sealed his own fate when he admitted, under oath, that he had intentionally disobeyed the order to lead the combat patrol. Not only did he refuse Bird's order, but Homcy admitted to a most aggravating factor:

Q: Lieutenant . . . is it not true that you received an order to accompany a patrol of men on a mission to detect the presence of two enemy tanks or self-propelled guns?

A: I received an order to take certain men up on a patrol after certain self-propelled guns.

Q: Is it not true that having received this order that you refused to obey the order in *the presence of the enemy*?<sup>14</sup>

A: Yes, sir.<sup>15</sup>

Homcy's trial, which had started at 1450 on 19 October, finished just two-and-one-half hours later, at 1735. The panel found 2LT Homcy guilty as charged. The members sentenced him to forfeit all pay and allowances and to be dismissed from the service. They also sentenced him to fifty years' confinement at hard labor.<sup>16</sup> Although the record does not reflect Homcy's reaction, the twenty-eight year old officer must have been shocked at the lengthy term of imprisonment.

But then a curious thing happened. On 23 October 1944, all five panel members signed a letter requesting clemency for 2LT Homcy, which they forwarded to Major General Dahlquist. The panel members wrote that Homcy's "announcement on the witness stand that he did in fact commit the offense" meant that the punishment that they had

imposed was "commensurate with the offense."<sup>17</sup> But, the panel nevertheless believed that 2LT Homcy could "be rehabilitated" and could "be of value to the Service." Consequently, the members recommended to Dahlquist that he reduce Homcy's confinement to ten years and that Dahlquist suspend the execution of the sentence so that Homcy could be "returned to a duty status through reassignment in a non-combat unit."<sup>18</sup>

Lieutenant Colonel Stephen J. Brady, the division's staff judge advocate, reviewed Homcy's record of trial on 23 October 1944. In a memorandum for Major General Dahlquist, LTC Brady agreed "that the sentence adjudged is unnecessarily severe." But, wrote the staff judge advocate, "even if activated by the desire to protect his untrained men," 2LT Homcy's misbehavior before the enemy in refusing to obey a lawful order to lead a combat patrol required that "some punishment should be given." Consequently, LTC Brady recommended that Dahlquist approve the sentence as announced by the court-martial panel, except that the fifty years' confinement be reduced to ten years' imprisonment.<sup>19</sup> Major General Dahlquist concurred with Brady's recommendation when he took action on Homcy's case the next day. Shortly thereafter, Homcy was shipped to Oran, Algeria, where he was confined in the Army's Disciplinary Training Center located there. A three-member Board of Review subsequently confirmed the findings and sentence on 21 November 1944 with the result that, on 5 December 1944, Homcy ceased to be an officer of the Army.

Shortly thereafter, "General Prisoner" Homcy left Algeria and was confined at the U.S. Disciplinary Barracks in Stormville, New York. Unhappy with his circumstances, he began to look for ways to overturn his court-martial conviction. On 27 July 1945, Mr. A.S. Hatem wrote to the Secretary of War on Homcy's behalf, insisting that Homcy had been wrongfully convicted because he "had no knowledge of his trial and was unable to make any preparations for his defense."<sup>20</sup> After an investigation, the War Department replied to Hatem that the record in Homcy's case showed that Homcy "was ably defended at his

<sup>14</sup> Under the 75th Article of War, a conviction for "misbehavior before the enemy" required some nexus between the accused's acts and the enemy forces. In discussing the offense, the 1928 *Manual for Courts-Martial (MCM)*, which controlled the proceedings in Homcy's case, noted that "whether a person is 'before the enemy' is not a question of definite distance, but is one of tactical relation." *MANUAL FOR COURTS-MARTIAL, UNITED STATES* para. 141a discussion (1928) (emphasis added). Consequently, explained the *Manual*, where an accused was in the rear echelon of his battery (some 12–14 kilometers from the front line), if the forward echelon of his battery was engaged with the enemy, the accused was guilty of misbehavior before the enemy if he left the rear echelon without authority—even though this rear echelon was not actually under fire. It follows that when Homcy admitted that he had been in the "presence of the enemy" at the time he disobeyed LTC Bird's order, Homcy was admitting to an element of the offense. *Id.*

<sup>15</sup> Transcript of Record at 4, *supra* note 1.

<sup>16</sup> Promulgating Order No. 92, *supra* note 3.

<sup>17</sup> Transcript of Record, *supra* note 1, Letter, Major Harry B. Kelton, CPTs Isadore Charkatz, Elden R. McRobert, Lowell E. Sutton, & 1LT Charles Hickox, to Commanding General, 36th Infantry Division, subject: Clemency (24 Oct. 1944), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Memorandum to Accompany the Record of Trial in the Case of 2d Lt. Albert C. Homcy (23 Oct. 1944) (Allied Papers).

<sup>20</sup> *Id.* Letter A.S. Hatem, to Sec'y of War Robert P. Patterson (27 July 1945) (Allied Papers).

trial” and that “there is no indication of any inability in his part to prepare properly for trial.”<sup>21</sup>

Homcy’s fortunes did change somewhat in January 1946 when, as part of a comprehensive decision by the Army to reduce the sentences of certain categories of prisoners, Homcy received additional clemency “by direction of the President.” In return for agreeing to re-enlist as a private in the Army, the government would remit the unserved portion of his confinement. No doubt wanting to avoid serving any more time in jail, Homcy reenlisted on 7 January 1946.<sup>22</sup> He was honorably discharged eight months later, on 24 August 1946, and returned home to Clifton, New Jersey, and life as a civilian.

In the years that followed, Mr. Homcy began a lengthy struggle to clear his military record. In May 1951, he hired a Washington, D.C., attorney to file a petition asking that the findings be set aside and that he receive a new trial. Homcy’s principal argument was that the findings were “contrary to the weight of the evidence” and that he was not “legally responsible for his acts” because he did not “comprehend and understand the meaning of the order” given by LTC Bird.<sup>23</sup>

Major General Ernest M. Brannon, The Judge Advocate General, denied Homcy’s petition on 5 August 1951. As Brannon explained in his decision:

It appears from the record of trial, and it is not now denied, that the accused willfully violated the order of his battalion commander while his unit was in contact with the enemy on the field of battle. The legality of the order is not questioned, and there is presented no persuasive evidence which would indicate that the petitioner was not responsible for his refusal to obey the order.

\* \* \* \*

The entire record of trial has been carefully reviewed, but there is disclosed no error prejudicial to the substantial rights of the accused. The court had jurisdiction

<sup>21</sup> *Id.* Letter from Edward S. Greenbaum, to A.S. Hatem (14 Aug. 1945) (Allied Papers).

<sup>22</sup> Headquarters, E. Branch, U.S. Disciplinary Barracks, Green Haven, N.Y., Special Orders No. 7 (7 Jan. 1946).

<sup>23</sup> Transcript of Record, *supra* note 1, Letter from Thomas H. King, to Major General E. M. Brannon (9 July 1951) (Allied Papers); NME Form 219, Petition for New Trial Under Article of War 53, Albert C. Homcy (4 May 1951) (Allied Papers).

over the petitioner and over the offense of which he was convicted, the evidence in the record supports the findings and sentence, and the sentence is not excessive.<sup>24</sup>



Major General Ernest M. “Mike” Brannon

Unwilling to surrender to the Army’s legal bureaucracy, Homcy wrote to the Secretary of the Army on 29 May 1951, complaining that he “was brought to trial by an INCOMPETENT, tried and convicted by an illegal, unfair and unjust courts-martial [sic] on foreign soil.”<sup>25</sup> The gist of Homcy’s argument was that absence of a “law member”<sup>26</sup> at his court-martial meant that the proceedings were illegal and should be overturned. The Army informed Homcy that it had been within Major General Dahlquist’s discretion as the general court-martial convening authority “not to specifically direct the presence of a law member during the trial proceedings.”<sup>27</sup> Consequently, Homcy again did not see any relief.

<sup>24</sup> Transcript of Record, *supra* note 1, E.M. Brannon, Action Upon Application of Albert C. Homcy for Relief under Article of War 53 (6 Aug. 1951) (Allied Papers).

<sup>25</sup> *Id.* Letter from Albert C. Homcy, to Sec’y of the Army (29 May 1951) (Allied Papers) (all capital letters in original).

<sup>26</sup> The law member was a quasi-judicial officer under the Articles of War and was the forerunner of the law officer created by the Uniform Code of Military Justice in 1950 and the military judge created by the Military Justice Act of 1968. His powers were limited in that, while he advised the court-martial panel on the law, this advice was binding on that panel. Articles of War, art. 8 41 Stat. 788 (1920); MANUAL FOR COURTS-MARTIAL, UNITED STATES, paras. 40, 51*d* (1928).

<sup>27</sup> Transcript of Record, *supra* note 1, Letter from Francis X. Plant, Special Assistant, Undersecretary of the Army, to Sen. Harrison A. Williams, Jr. (15 Nov. 1965), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).



On 21 June 1961, after filing an application with the Army Board for Correction of Military Records (ABCMR), Mr. Homcy appeared in person before the Board. Assisted by counsel furnished by the American Legion, Homcy once again argued that he had not been ably defended, lacked adequate time to prepare for trial, and that his court-martial conviction was unjust. His requested relief was that the ABCMR substitute an honorable discharge for the dismissal imposed by the general court-martial. The ABCMR denied his application. As Francis X. Plant, the special assistant to the ABCMR, wrote:

[Homcy] was given every opportunity to argue his contentions and to present all additional evidence available to him. Apparently feeling that the evidence was indisputable that he refused to obey an order from his superior officer while in the presence of the enemy and that he fully understood the consequences of his actions, the Board voted unanimously to deny Mr. Homcy's application.<sup>28</sup>

On 1 March 1967, the ever-persistent Homcy filed yet another application with the ABCMR. This time, however, he alleged new grounds for relief: unlawful command influence (UCI). Homcy apparently had first become aware of UCI in his case in January 1966, when gathering affidavits from officers who had participated in his court-martial in 1944. Two of the five panel members claimed UCI. Then CPT Elden R. McRobert, who had served as a panel member, alleged that Major General Dahlquist "called all the members of the General Court-Martial Board for our division . . . and there gave all of us a very strong verbal reprimand for the way in which we had been fulfilling our responsibilities as members of the Board."<sup>29</sup> Another panel member, then CPT Lowell E. Sitton, wrote in a 20 January 1966 affidavit that "severe pressures were applied to court-martial boards in his division at or about the time of [Homcy's] trial to make findings of guilty 'for the good of the service' without regard to the rights of the individual or the merits of the particular case in question."<sup>30</sup> But the claimed UCI was not specifically directed toward 2LT Homcy, since neither McRobert or Sitton remembered participating in the case.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* Questionnaire from Captain (CPT) Elden R. McRobert, Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (1 Mar. 1967) (included in the allied papers) (on file with Regimental Historian).

<sup>30</sup> *Id.* Sworn Statement of CPT E. Lowell (20 Jan. 1966) (on file with Regimental Historian).

As to UCI generally, however, Homcy learned from the trial counsel who had prosecuted him, then CPT John M. Stafford, that:

There was command pressure on the Court-Martial Boards of the 36th Division, as there were in many of the Divisions at the time. Usually the pressure was not to make findings of "guilty," but went to the matter of the sentences given.

\* \* \* \*

After the 36th Division was committed to combat, [Dahlquist], the Commanders, and members of the Court-Martial Board had a feeling that when a person was guilty of misbehavior before the enemy, that he should receive a severe sentence. This was a general feeling. The combat troops also had this view. At the time I prosecuted Lt. Homcy, I had no doubt he was guilty of direct disobedience of orders and misbehavior before the enemy.<sup>31</sup>

Despite this new evidence indicating UCI, the ABCMR denied Homcy's application without a hearing on 27 April 1967. Having failed once more to get relief from the Army, Homcy now took his campaign into the courts. On 22 December 1967, he filed suit against the Secretary of the Army in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that his court-martial lacked jurisdiction (and that his conviction should be overturned) and a mandatory injunction ordering the ABCMR to correct his military records. Just as he had claimed in his latest ABCMR application, Homcy alleged in his suit against the Secretary of the Army that constitutional defects in his 1944 court-martial meant he had been deprived of a fair trial.<sup>32</sup>

Presumably so as to have an administrative record upon which to base its response to Homcy's civil suit, the Army now ordered a formal hearing before the ABCMR on Homcy's application. In April 1968, at the request of the Board, COL Waldemar A. Solf, then Chief, Military Justice Division, Office of The Judge Advocate General, examined the legal issues raised by Homcy in his latest application. Solf, in line with earlier legal opinions, rejected Homcy's claim that the absence of a law member had adversely affected his trial. Colonel Solf also rejected any asserted

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<sup>31</sup> *Id.* Questions for John M. Stafford, Assistant Staff Judge Advocate and Trial Counsel (26 Mar. 1968), United States v. Albert C. Homcy, CM 271489 (19 Oct. 1944) (Allied Papers).

<sup>32</sup> *Id.* Petition for Correction of Military Record from Albert C. Homcy, to Army Bd. for Correction of Military Records (1 Mar. 1967) (Allied Papers) (on file with Regimental Historian).

denial of effective assistance of counsel. On the issue of UCI, however, Solf carefully considered the affidavits provided by then CPTs McRobert and Sitton. Since Homcy had “made a full and unambiguous judicial confession” to misbehavior before the enemy, Solf concluded that there was no UCI issue as to findings. On the contrary, the real issue was whether “unlawful command control infected the sentence adjudged in Homcy’s case.”<sup>33</sup>

As Solf noted, however, the “standard to be applied is the law as recognized in 1944” and not the test for UCI that exists under the UCMJ.<sup>34</sup> After discussing the law on UCI as it existed in 1944, Solf wrote:

In 1944, it was lawful for the convening authority, before any case was referred to trial, to provide court-martial members with information as to the state of discipline of the command, as to the prevalence of offenses which had impaired discipline, and command measures which had been taken to prevent offenses. Such instruction could also lawfully present the view of the War Department as to what were regarded as appropriate sentences for designated classes of offenses.<sup>35</sup>

Colonel Solf ultimately concluded in his memorandum that the evidence on the issue of UCI in Homcy’s trial was “not conclusive” and it was up to the ABCMR to find the facts in the case.



Colonel Waldemar “Wally” Solf

<sup>33</sup> *Id.* Memorandum from The Judge Advocate Gen., for Army Board for Correction of Military Records (Waldemar A. Solf), subject: Comment and Legal Opinion, Albert C. Homcy, JAGJ 1967/8153, at 5 (1 May 1968) (Allied Papers).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7.

So what did the Board do? After holding a formal hearing in Homcy’s case on 10 July 1968, the ABCMR again recommended denying his application and the Under Secretary of the Army so directed on 20 August 1968.

In early 1969, while his case was pending in the U.S. District Court, Homcy filed a “prayer for relief” with the Court of Military Appeals (COMA), arguing yet again that the absence of a law member at his court-martial meant that the proceedings were defective and that he also had been denied the effective assistance of counsel. Homcy also raised the issue of UCI before COMA insisting, as he had in his last ABCMR application, that the court members in his case had been “subjected to severe command pressure by the convening authority.” The Court of Military Appeals, however, did not reach the merits of Homcy’s petition, ruling that it lacked jurisdiction over Homcy’s court-martial because the proceedings in his case were finalized before 31 May 1951, the effective date of the Uniform Code of Military Justice (UCMJ).<sup>36</sup>

With the ABCMR decision before him as the agency’s administrative record (and with COMA’s decision behind him), U.S. District Court Judge John Smith now considered Homcy’s case. The Army had moved for dismissal or, alternatively, for summary judgment. Homcy also had filed a motion for summary judgment based on the record of the ABCMR.

After considering all the evidence presented to him, Judge John Smith agreed with Homcy, and entered summary judgment in his favor. Judge Smith held that Homcy had been denied effective assistance of counsel. Relying on the affidavits from McRobert, Sitton, and Stafford, the judge also held that Homcy’s court-martial sentence “was illegal because it was based on improper command influence.”<sup>37</sup>

Interestingly, Judge Smith did not overturn the court-martial conviction. Rather, he only granted a limited records correction—and the ABCMR, acting pursuant to the district court’s order, corrected Homcy’s military records to show an honorable discharge. Later, the Court of Appeals (D.C. Circuit), affirmed in *Homcy v. Resor*, but solely on the basis of improper command influence.<sup>38</sup>

<sup>36</sup> *Id.* United States v. Homcy, Misc. Docket 69-35, Memorandum Opinion and Order (15 Aug. 1969) (Allied Papers). In *United States v. Sonnenschein*, 1 C.M.R. 64 (C.M.A. year) and *United States v. Musick*, 12 C.M.R. 196 (C.M.A. year), COMA ruled that it had no jurisdiction to review court-martial proceedings completed prior to the effective date of the UCMJ.

<sup>37</sup> *Homcy v. Resor*, 455 F.2d 1345, 1348 (D.C. Cir. 1971).

<sup>38</sup> *Id.* at 1345. The Court of Appeals rejected the District Court’s finding that Homcy had been deprived of fair trial because his defense counsel was ineffective. It noted that the Articles of War did not require defense counsel to be a “licensed attorney” and, based on Major Wilson’s considerable experience, concluded that Wilson in fact was “much better qualified to

Amazingly, this success in federal court was not enough for Albert Homcy. He now filed a claim with the Army Finance Office for back pay, allowances, and other benefits—which had been taken from him as the result of the total forfeitures punishment imposed by the court-martial panel on 19 October 1944. In particular, Homcy argued that he was due pay and allowances from the date Major General Dahlquist took action in his case. The Army referred Homcy's claim to the Comptroller General. The General Accounting Office subsequently denied Homcy's claim, reasoning that Homcy had received everything he had requested from the U.S. District Court. Homcy now went back into Judge Smith's court and moved to reopen his case in order to obtain a judgment for back pay. The district court denied the motion 12 October 1973.<sup>39</sup>

Homcy then "shifted his efforts to the United States Court of Claims" and hired the Washington, D.C., law firm of Spaulding, Reiter and Rose to attempt to obtain back pay. On 16 June 1976, that court put an end to Homcy's lengthy battle with the Army when it ruled that his claim was barred by the statute of limitations. Homcy's claim for relief, ruled the Court of Claims, "initially accrued on the date he was improperly dismissed from the service."<sup>40</sup> Since that date was 5 December 1944, he had only six years to file any money damage claim. The court expressly declined to revive Homcy's money damage claims based on his recent success at the district court and ABCMR.<sup>41</sup>

So ended the strange case of 2LT Albert C. Homcy. An amazing legal saga that demonstrates, at least in part, that the old saying "persistence wins the prize" very much has some truth in it. Or, as Winston Churchill put it in a speech he gave in October 1941: "Never, never, in nothing great or small, large or petty, never give in except to convictions of honour and good sense. Never yield to force; never yield to the apparently overwhelming might of the enemy."<sup>42</sup> There is no question that Homcy "never gave in." But whether or not justice was served as a result of his success in civilian court is very much an open question.

As for Albert C. Homcy? He spent his last days living in Washington, D.C., at the Soldiers' and Airmens' Home. He died when his heart stopped beating on 1 April 1987. Homcy was 71 years old.<sup>43</sup>

*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>*

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defend an accused in a court-martial proceeding than many fully licensed lawyers." *Id.* at 1347.

<sup>39</sup> *Id.* at 1357.

<sup>40</sup> Homcy v. United States, 536 F. 2d 360, 363 (Ct. Cl. 1976).

<sup>41</sup> *Id.*

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<sup>42</sup> THE CHURCHILL CENTRE, <http://www.winstonchurchill.org/learn/speeches/quotations/quotes-faq> (last visited Feb. 21, 2014).

<sup>43</sup> Bart Barnes, *World War II Army Officer Albert C. Homcy Dies at 71*, WASH. POST, Apr. 3, 1987.

# The Subpoena Duces Tecum and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process

Major Chris W. Pehrson\*

"No witness—military or civilian—may be allowed to thumb his nose at the lawful process of a court-martial."<sup>1</sup>

## I. Introduction

Following your appointment as an Article 32 investigating officer, you call a preliminary meeting with the trial and defense counsel in a case involving a sexual assault. The trial counsel informs the parties that the government plans to subpoena the accused's credit card records for the purpose of examining the date- and time-stamped transactions on the day in question and the contents of the accused's personal Yahoo email account. In response, the defense has a request of their own: the defense seeks the government's assistance in obtaining the victim's psychotherapist-patient records from a civilian healthcare provider. The defense proffers that there is reason to believe this evidence will show the victim gave inconsistent accounts of the offense. You agree that the requested information could be relevant to the investigation and three subpoenas are issued.

Before January 2012, this evidence would most likely have been beyond the reach of the Article 32. With the 2012 congressional amendments to Article 47 of the Uniform Code of Military Justice (UCMJ), however, this evidence is now potentially available to an Article 32. Proposed changes to Rules for Court Martial (RCM) 405 and 703 will grant authority to Article 32 officers and the trial counsel to issue subpoenas pre-referral.<sup>2</sup>

The above hypothetical is a typical situation Article 32 officers are likely to confront, and raises some interesting questions for military justice practitioners as they begin to grapple with issuing subpoenas under their new compulsory process powers. For instance, what are the limits of the

Article 32 subpoena power and how does the military enforce such an order? This article will examine these types of questions with the aid of the above hypothetical and in the context of three types of evidence: banking records, the contents of stored e-mail communications, and psychotherapist records. While most non-military entities will likely recognize and comply with a valid *subpoena duces tecum*, these three common types of evidence represent areas where military practitioners could encounter resistance. This article will discuss the enforcement options for a pre-referral subpoena and provide some navigation aids to help determine when evidence is not reasonably available for purposes of the Article 32.

Part II of this article outlines the legislative background which led Congress to authorize the *subpoena duces tecum* at an Article 32 investigation.<sup>3</sup> Part II also discusses the proposed changes to RCMs 405 and 703, which have not yet been approved by the President.<sup>4</sup> Part III examines a hypothetical fact pattern in terms of the statutes and issues involved when a *subpoena duces tecum* directs the production of bank records, psychotherapist-patient records, and the contents of a personal e-mail account.<sup>5</sup> Part IV discusses the grounds for challenging a *subpoena duces tecum* and the two remedies available to enforce the subpoena if a party refuses to comply.<sup>6</sup> Part V highlights some of the concerns with delaying the Article 32 to seek enforcement of the *subpoena duces tecum*, and discusses the three options for finding evidence unavailable for purposes of the Article 32.<sup>7</sup> Part VI concludes that after the President approves the proposed changes to the RCM, the new Article 32 subpoena power will significantly improve access to evidence during the Article 32 investigation when non-

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<sup>1</sup> United States v. Hinton, 21 M.J. 267, 271 (C.M.A. 1986) (discussing remedies for civilian witness refusal to obey military subpoena).

<sup>2</sup> See 10 U.S.C. § 847 (2012).

<sup>3</sup> See *infra* notes 8–22 and accompanying text (discussing legislative context behind the amendment of Article 47, Uniform Code of Military Justice (UCMJ) (2012)).

<sup>4</sup> See *infra* notes 23–55 and accompanying text (explaining the Department of Defense's (DoD's) proposed changes to Rules for Courts-Martial (RCM) 405 and 703).

<sup>5</sup> See *infra* notes 56–90 and the corresponding text (illustrating some of the practical issues which may arise if a *subpoena duces tecum* is issued pre-referral for bank records, internet service provider e-mail content, and psychiatrist-patient records).

<sup>6</sup> See *infra* notes 91–135 and accompanying text (detailing procedures to content and enforce *subpoena duces tecum*).

<sup>7</sup> See *infra* notes 136–148 and the corresponding text (explaining factors an Article 32 investigating officer will need to consider before finding evidence is not reasonably available).

military entities are cooperative, but may be a power which, practically speaking, is difficult to enforce pretrial when entities are noncompliant.

## II. Background

### A. Legislative History

Prior to 1 January 2012, the power to compel witnesses and the production of evidence by subpoena was limited to depositions, courts of inquiry, and post-referral courts-martial.<sup>8</sup> The convening authority may not refer charges to a court-martial until they conclude there are “reasonable grounds” to believe the accused committed the offense.<sup>9</sup> In making that determination, the convening authority usually relies on a preliminary inquiry<sup>10</sup> or directs an Article 32 pretrial investigation.<sup>11</sup> In many cases, this meant the first opportunity to subpoena evidence occurred after the investigation had already determined reasonable evidence existed to believe the accused committed the charges.

Interest in granting military authorities pre-referral subpoena power grew alongside the congressional focus on sex crimes in the military and the increasing complexity of crimes prosecuted at courts-martial.<sup>12</sup> The Office of the Deputy Assistant Inspector General for Criminal Investigative Policy and Oversight (CIPO) studied the problem for the Department of Defense (DoD). The CIPO surveyed military criminal investigators and judge

advocates. Analyzing the participant’s responses, CIPO concluded that military investigators did not have adequate subpoena authority to compel the production of evidence during crucial stages of the investigative process.<sup>13</sup> The DoD General Counsel and the service component judge advocate leadership concurred with CIPO’s findings and assigned the matter to the Joint Services Committee (JSC) on Military Justice<sup>14</sup> for review and study.<sup>15</sup>

The JSC played a significant role in persuading Congress to change the law to permit the issuance of subpoenas pre-referral.<sup>16</sup> Although there is little in the way of substantive discussion of the legislative intent behind the change, the DoD Office of Legislative Counsel’s (OLC) 2011 legislative proposal provides some useful background.<sup>17</sup> The legislative proposal identified the lack of pre-referral subpoena power within the military system as a problem in cases where investigators needed to collect evidence like “telephone, Internet Service Provider, bank records, and similar records, because these institutions face potential civil liability if they release records without a subpoena.”<sup>18</sup> The proposal recommended amending 10

<sup>8</sup> See UCMJ art. 47 (2008), amended by 10 U.S.C. § 847 (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(e)(2), 703(f)(4)(B) (2012) [hereinafter MCM] (discussing limitations on subpoena of civilian witnesses and evidence).

<sup>9</sup> See MCM, *supra* note 8, R.C.M. 601(d)(1).

<sup>10</sup> See *id.*, R.C.M. 303.

<sup>11</sup> See 10 U.S.C. § 832 (2012); MCM, *supra* note 8, R.C.M. 405.

<sup>12</sup> See NAT’L ACAD. OF PUB. ADMIN. (NAPA), ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 8 (1999) (summarizing findings of larger published report), available at [http://www.dtic.mil/dtfs/doc\\_research/p18\\_15.pdf](http://www.dtic.mil/dtfs/doc_research/p18_15.pdf); OFFICE OF INSPECTOR GEN., U.S. DEP’T OF DEF., CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 1 (2001) [hereinafter CIPO STUDY] (discussing NAPA report’s findings and recommendations), available at <http://www.dodig.mil/Inspections/IPO/reports/subpoena.pdf>; Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, ARMY LAW., Sept. 2003, at 15 (discussing NAPA report). According to its website, NAPA is “an independent, non-profit, and non-partisan organization established in 1967 to assist government leaders in building more effective, efficient, accountable, and transparent organizations.” See *Who We Are*, NAT’L ACAD. OF PUB. ADMIN., <http://www.napawash.org/about-us/who-we-are.html> (last visited Feb. 24, 2014). Chartered by Congress, NAPA advertises that it “helps the Federal government address its critical management challenges through in-depth studies and analyses, advisory services and technical assistance, Congressional testimony, forums and conferences, and online stakeholder engagement.” *Id.*

<sup>13</sup> See CIPO STUDY, *supra* note 12, at 2–10 (scoping problem with lack of access to subpoena during pre-referral military criminal investigative process). To obtain evidence such as bank, telephone, and civilian medical records before the referral of charges, investigators were turning to a variety of ad hoc arrangements such as partnering in joint investigations with state and local police, relying on other federal law enforcement entities to obtain subpoenas through the federal court system, or requesting a DoD Inspector General administrative subpoena. The success of these approaches varied. See *id.* at 5–9. The office of Criminal Investigations Policy and Oversight (CIPO) noted that both investigators and judge advocates surveyed overwhelmingly believed that pre-referral military subpoena authority “would enhance the military justice system.” See *id.*

<sup>14</sup> See U.S. DEP’T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE para. 3 (3 May 2003) [hereinafter DODD 5500.17] (“Under the direction of the General Counsel of the Department of Defense, the JSC is responsible for reviewing [the MCM] and proposing amendments to it and, as necessary, to [the UCMJ].”), available at <http://www.dod.gov/dodgc/images/dodd5500.pdf>.

<sup>15</sup> See CIPO STUDY, *supra* note 12, at 10–11, 15–24 (summarizing findings, making recommendations to improve access to subpoenas during preliminary investigations, and including service component and agency concurrence with recommendations).

<sup>16</sup> CODE COMM., ANNUAL REPORT SUBMITTED TO COMMITTEE ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2010 TO SEPTEMBER 30, 2011 § 1 (2011) (summarizing testimony of Colonel Charles Pede, U.S. Army, Exec. Sec. of the JSC), available at <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf>.

<sup>17</sup> See OFFICE OF LEGISLATIVE COUNSEL, U.S. DEP’T OF DEF., SIXTH PACKAGE OF LEGISLATIVE PROPOSALS SENT TO CONGRESS FOR INCLUSION IN THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 § 532 (2011) [hereinafter OLC LEG. PROPOSAL], available at <http://www.dod.gov/dodgc/olc/docs/15April2011LP.pdf>.

<sup>18</sup> See *id.* (referencing section-by-section analysis).

U.S.C. § 847 to permit the issuance of a *subpoena duces tecum* for investigations to bring military practice into conformity with “federal criminal procedure” where prosecutors have access to federal grand jury subpoenas.<sup>19</sup>

The DoD’s legislative proposal envisioned expanding 10 U.S.C. § 847 to provide broad authority to issue *subpoenas duces tecum* after preferral of charges. The version of the bill approved by the Senate contained the DoD’s proposed text.<sup>20</sup> The Conference Report, however, indicates that Congress ultimately opted for a more subdued version of the amendment.<sup>21</sup> Concern over how recipients could challenge a pre-referral subpoena led Congress to limit the authority to Article 32 investigations, where the convening authority would have cognizance over the case and the power to quash or modify the subpoena.<sup>22</sup>

#### B. Changes to Article 47, UCMJ, in 2012 NDAA

The power of compulsory process in the military court system is contained in Articles 46, 47, and 48 of the UCMJ.<sup>23</sup> Article 46, UCMJ, guarantees that “the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence” and that “[p]rocess issued in court-martial cases . . . shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States or the Commonwealths and possessions.”<sup>24</sup> Article 47, UCMJ, addresses the military court system’s power to compel persons not subject to the UCMJ to appear and testify or produce evidence at courts-martial, as well as criminally punishes those who refuse to produce subpoenaed evidence.<sup>25</sup> Article 48, UCMJ, gives military judges the power to punish any person for contempt of court.<sup>26</sup> Article 48, however, does not apply at an Article

32 because a military judge does not have cognizance over the case at this stage in the military judicial process.<sup>27</sup>

Congress granted the power to issue *subpoenas duces tecum* at an Article 32 by changing Article 47, UCMJ, the enforcement mechanism of compulsory process in the military.<sup>28</sup> Specifically, Congress struck the word “board” in Article 47(a)(1) and replaced it with the words “board, or has been duly issued a *subpoena duces tecum* for an investigation pursuant to section 832(b) of this title (article 32(b)).”<sup>29</sup> In addition to making some minor changes to the subsections dealing with fees and mileage, Congress’s only other substantive change was to amend Article 47(c), UCMJ, to add convening authorities to the list of military entities permitted to initiate prosecution with a United States Attorney against a person who refuses to comply with a valid military subpoena.<sup>30</sup> Although these changes granted a new and substantial power to the Article 32, the lack of implementing guidance left significant questions unanswered. For instance, who has the power to issue the *subpoena duces tecum* at an Article 32? And, does the *subpoena duces tecum* permit an Article 32 to compel the attendance of a witness, such as a records custodian? Leaving these types of questions open ended for the time being, the amendments to Article 47, UCMJ, became effective on 31 December 2011, when the President signed the 2012 NDAA into law.<sup>31</sup>

#### C. Proposed Changes to RCMs 405 and 703

The President will implement the changes to Article 47, UCMJ, through his administrative rule making powers.<sup>32</sup> Under the supervision of the General Counsel of the DoD, the JSC conducts an annual review of the Manual for Courts-Martial and “propos[es] amendments to it.”<sup>33</sup> As part

<sup>19</sup> See *id.*

<sup>20</sup> Compare OLC LEG. PROPOSAL, *supra* note 17, § 532 (detailing “Changes to Existing Law”), with National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 552 (as passed by the Senate 1 December 2011).

<sup>21</sup> See H.R. REP. NO. 112-329, at 626–27 (2011) (Conf. Report).

<sup>22</sup> Compare S. 1867 § 552, with 10 U.S.C. § 847 (2012); see also OLC LEG. PROPOSAL, *supra* note 17, § 532 (referencing section-by-section analysis); E-mail from Lieutenant Colonel Christopher A. Kennebeck, Deputy, Crim. Law Div., Office of the Judge Advocate Gen., U.S. Dep’t of Army, to author (Dec. 7, 2012, 18:39 EST) (on file with author) (describing legislative compromise which led to authority to issue *subpoena duces tecum* as part of Article 32 investigation).

<sup>23</sup> See generally 10 U.S.C. §§ 846–848 (2012).

<sup>24</sup> *Id.* § 846 (“Opportunity to obtain witnesses and other evidence”).

<sup>25</sup> *Id.* § 847 (“Refusal to appear or testify”).

<sup>26</sup> *Id.* § 848 (providing authority for military judge to punish for contempt).

<sup>27</sup> See MCM, *supra* note 8, R.C.M. 503(b), 504, and 601 (discussing rules for convening courts-martial, detailing of military judges, and referral of charges).

<sup>28</sup> See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 543, 125 Stat. 1298 (2011) (describing changes to 10 U.S.C. § 847); see also National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. , 113-66, § 1702 (2013) (implementing changes to form and function of Article 32). Although the pending changes to the Article 32 will transform the Article 32 into a preliminary hearing, eliminating much of the opportunity for discovery that was available in the traditional Article 32, the changes will not affect the previously granted power to issue *subpoenas duces tecum*, and the defense may find it useful to subpoena evidence to show inconsistencies in the victim’s version of events, given that the victim may not testify at the Article 32.

<sup>29</sup> See *id.* (detailing changes to existing law).

<sup>30</sup> *Id.*

<sup>31</sup> See 10 U.S.C. § 847 (2012).

<sup>32</sup> See *id.* § 836 (giving President power to regulate procedures of courts-martial).

<sup>33</sup> See DoDD 5500.17 *supra* note 14, para. 3 (describing mission of JSC).

of this process, on 23 October 2012, the JSC published a notice in the Federal Register soliciting public comment on their recommendations to change the 2012 MCM to incorporate the statutory changes to Article 47, among other provisions.<sup>34</sup> The DoD then incorporates this feedback into a proposed Executive Order. Once the President signs the Executive Order, the DoD will publish it in the Federal Register.<sup>35</sup> Although the proposed changes discussed below have not been approved at this time, barring significant changes during the staffing process, they are likely to be presented to the President for the most part in their proposed form.<sup>36</sup> Even though Article 47 has been amended and is in force, until the President signs the Executive Order enacting the proposed changes to the RCM, trial counsel and investigating officers may lack the necessary authority to issue a *subpoena duces tecum* for an Article 32 at this time and could expose their service to civil liability if they issued a subpoena before the changes to the RCM become effective.<sup>37</sup>

### 1. Proposed Changes to RCM 405

The JSC is proposing minimal changes to RCM 405 regarding the issuance of *subpoenas duces tecum*. The major substantive change involves subdividing RCM 405(g)(2)(C), the section dealing with evidence, into two sub-sections: (i) evidence under the control of the government; and (ii) evidence not under the control of the government.<sup>38</sup> The rules dealing with evidence under government control have not changed. However, RCM 405(g)(2)(C)(ii) will be an entirely new subsection that will read as follows:

Evidence not under the control of the  
Government may be obtained through

<sup>34</sup> See Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.); Notice of Public Meeting, 77 Fed. Reg. 64854 (proposed Oct. 23, 2012) [hereinafter Proposed MCM Amendments].

<sup>35</sup> See *What Is the JSC and its Mission?*, JOINT SERVS. COMM. ON MIL. JUST., [http://www.dod.gov/dodgc/images/jsc\\_mission.pdf](http://www.dod.gov/dodgc/images/jsc_mission.pdf) (last visited Feb. 24, 2014) (“Summary of Review and Executive Order Procedures”).

<sup>36</sup> See Notice of Response to Public Comments on Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.) (MCM), 78 Fed. Reg. 14271-2 (Mar. 5, 2013) (discussing Joint Service Committee on Military Justice response to public comments received for proposed changes to Rules for Courts-Martial).

<sup>37</sup> See Captain Michael B. Magee, *Article 32 Subpoena Power (or the lack thereof)*, Headquarters Marine Corp, Judge Advocate Division, Trial Counsel Assistance Program, (Dec 20, 2013) <https://ehqmc.usmc.mil/org/sja/TCAP/Lists/Posts/Post.aspx?ID=17> (last visited Mar. 1, 2014) (taking position that despite changes to Article 47, subpoena cannot be “duly issued” until President grants authority through changes to RCMs) (login required).

<sup>38</sup> See Proposed MCM Amendments, *supra* note 34, at 64854–855 (publishing recommended changes to RCM 405(g)(2)(C)).

noncompulsory means or by *subpoena duces tecum* issued pursuant to procedures set forth in RCM 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under RCM 906(b)(3).<sup>39</sup>

The rule serves two functions. First, it provides guidance on the procedural requirements for obtaining a *subpoena duces tecum* by directing counsel to RCM 703. Second, it establishes that the investigating officer’s determination is not immediately appealable and can only be challenged in court if the case is referred to a court-martial.

If an accused disagrees with the investigating officer’s determination of the reasonable availability of evidence, first, the accused must protest to the investigating officer by filing an objection and requesting the objection be noted in the report of investigation.<sup>40</sup> The Article 32 officer may require that the objection be submitted in writing.<sup>41</sup> If the accused is still dissatisfied with the investigating officer’s determination and intends to preserve the error for the trial court to review, the accused should then raise the issue a second time by filing a written objection to the report of investigation within five days of receiving the Article 32 report.<sup>42</sup> Provided the case is referred to court-martial, RCM 906(b)(3) provides the avenue for an accused to seek a motion for appropriate relief for a defective Article 32.<sup>43</sup> An accused is generally required to raise this matter in the form of a motion before entry of pleas.<sup>44</sup> If the motion is granted, the discussion to the rule provides that “military judges should ordinarily grant a continuance so the defect may be corrected.”<sup>45</sup> As the United States Court of Appeals for the Armed Forces (CAAF) explained in *United States v. Davis*, “[t]he time for correction of such an error is when the military judge can fashion an appropriate remedy under RCM 906(b)(3) before it infects the trial.”<sup>46</sup> Ordinarily, the

<sup>39</sup> See *id.* at 64855 (inserting new provision).

<sup>40</sup> See Major John R. Mahoney, *Litigating Article 32 Errors After United States v. Davis*, ARMY LAW., Sept. 2011, at 9–10 (explaining process for preserving error in Article 32); MCM, *supra* note 8, R.C.M. 405(h)(2) (handling objections).

<sup>41</sup> See MCM, *supra* note 8, R.C.M. 405(h)(2) (Objections).

<sup>42</sup> See Mahoney, *supra* note 38, at 10 (explaining how to preserve error for trial court); MCM, *supra* note 8, R.C.M. 405(j)(4) (outlining procedure for objecting to report of investigation).

<sup>43</sup> See MCM, *supra* note 8, R.C.M. 906(b)(3) (dealing with “[c]orrection of defects in the Article 32 investigation”).

<sup>44</sup> See *id.* R.C.M. 905(b)(1) (providing for timing of motions).

<sup>45</sup> See *id.* R.C.M. 906(b)(3) discussion (quoting guidance).

<sup>46</sup> See *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (discussing appellate standard of review for allegations of defect at Article 32).

military judge would correct such an error by reopening the investigation or ordering a new investigation.<sup>47</sup>

The proposed discussion to RCM 405 also provides some helpful instruction to military justice practitioners. The discussion recommends investigating officers prepare for the investigation by considering what, if any, evidence they might need to obtain by subpoena. It directs investigating officers to inquire whether the defense requests the production of witnesses or evidence, “including evidence that may be obtained by *subpoena duces tecum*.”<sup>48</sup> As some commentators have noted, the expansion of Article 47, UCMJ, represents a significant increase in the government’s powers to conduct pretrial investigation, but is equally beneficial to the defense, because it provides them access to evidence that previously was unattainable at an Article 32.<sup>49</sup>

## 2. Proposed Changes to RCM 703

Rule for Courts-Martial 703 details the procedural requirements for issuing, serving, and enforcing subpoenas. For the most part, the proposed amendments make only minor administrative changes to the rule. For instance, RCM 703(e)(2)(B), dealing with the contents of subpoenas, added “data” and “electronically stored information” to the enumerated list of evidence the government can seek to compel with a subpoena.<sup>50</sup>

The most significant change occurs to RCM 703(f)(4)(B). This section answers the questions: who can issue a subpoena at an Article 32 and what evidence can they compel? The rule states in pertinent part that “following the convening authority’s order directing such pretrial investigation” either “counsel representing the United States” or the “investigating officer” may issue a *subpoena duces tecum*.<sup>51</sup> Thus, the section is a rule of limitation confining the compulsory power to the trial counsel or the Article 32 officer and proscribing that the power does not vest until the convening authority directs an Article 32.

<sup>47</sup> See Mahoney, *supra* note 38, at 10–11 (explaining remedies for defective Article 32).

<sup>48</sup> See Proposed MCM Amendments, *supra* note 34, at 64873 (analyzing discussion for RCM 405(g)(1)(B)).

<sup>49</sup> Andrew Tilghman, *DoD Aims to Better Protect Rights of Rape Defendants*, MARINE TIMES, Nov. 19, 2012, at 12 (quoting Michael Navarre, “former Navy judge advocate who now works in private practice in Washington [D.C.],” and Victor Hansen, “a retired Army judge advocate who is now a professor at New England Law”).

<sup>50</sup> Compare MCM, *supra* note 8, R.C.M. 703(e)(2)(B), with Proposed MCM Amendments, *supra* note 34, at 64855 (changing section dealing with content of subpoena).

<sup>51</sup> See Proposed MCM Amendments, *supra* note 34, at 64855.

The rule also prevents using an Article 32 *subpoena duces tecum* to compel the attendance of a civilian witness. This is a unique feature of the Article 32 subpoena. Traditionally, a *subpoena duces tecum* commands a person bring the requested evidence before the proceeding.<sup>52</sup> In contrast, RCM 703(f)(4)(B) permits the government to seek production of “books, papers, documents, data, or other objects or electronic information,” but expressly states that “[a] person in receipt of a *subpoena duces tecum* . . . need not personally appear in order to comply.”<sup>53</sup> The discussion to RCM 703(e)(2)(B) similarly states that “a subpoena may not be used to compel a witness to appear . . . before trial,” except in cases of “a deposition or a court of inquiry.”<sup>54</sup> Read together, these two provisions make clear that the government may only subpoena tangible evidence for an Article 32.<sup>55</sup> In practical terms, this means the government can order the production of civilian records for an Article 32, but cannot compel the attendance or testimony of the record’s custodian.

## III. Analyzing the Hypothetical: Three Potential Issues

Using a subpoena to obtain evidence sometimes implicates other legal requirements such as the law of privileges, federal statutes, and the U.S. Constitution. This hypothetical seeks to answer what is required to obtain three common forms of evidence: bank records, the contents of a personal e-mail account, and psychotherapist-patient records. Practitioners should be aware, though, that there are other types of evidence which may have other unique requirements. For instance, subpoenas to attorneys,<sup>56</sup> foreign corporations,<sup>57</sup> consumer credit reporting agencies,<sup>58</sup> and the media<sup>59</sup> are a few areas of potential concern which should be examined thoroughly before proceeding.

<sup>52</sup> See BLACK’S LAW DICTIONARY 1563 (9th ed. 2009) (explaining meaning of *subpoena duces tecum*).

<sup>53</sup> See Proposed MCM Amendments, *supra* note 34, at 64855.

<sup>54</sup> See *id.* at 64873.

<sup>55</sup> See also MCM, *supra* note 8, R.C.M. 405(g)(2)(B) discussion (stating that there is no subpoena authority to compel a civilian witness “to appear and provide testimony or documents” at Article 32).

<sup>56</sup> See *id.* MIL. R. EVID. 502 (dealing with lawyer-client privilege).

<sup>57</sup> See 1 ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION GRAND JURY PRACTICE MANUAL, at III-12 to III-13 (1991) (explaining scope of Department of Justice grand jury subpoena power and dealing with international agreements requiring notice of judicial process).

<sup>58</sup> See 15 U.S.C. § 1681(b) (2012) (limiting distribution of consumer credit reports to “court orders” and “federal grand jury subpoenas”).

<sup>59</sup> Although the military courts have rejected incorporating a reporter’s privilege into the Military Rules of Evidence (MREs), the recognition of such a privilege by various district and circuit courts and the media interests involved could result in protracted litigation which might unnecessarily



Another problem practitioners should be aware of is that the DoD has not updated Department of Defense Form 453 (DD Form 453) for subpoenas since 2000.<sup>60</sup> It currently does not reflect the new power of the Article 32 to issue process, nor does it account for some of the nuances particular to the Article 32 subpoena. For instance, DD Form 453 commands a person “to testify as a witness” and to bring specified evidence “with them” to the proceeding. This language contradicts RCM 703(f)(4)(B), which permits a person to comply with the Article 32 subpoena without having to personally appear. This conflicting language could result in confusion if practitioners opt to use this form in its present state.<sup>61</sup>

#### A. Bank Records

Once the President enacts the changes to the RCMs, an Article 32’s power to subpoena the accused’s bank records pre-referral will be unquestioned. The Right to Financial Privacy Act of 1978 (RFPA) governs the release of this information.<sup>62</sup> Under the Act, a financial institution will turn over financial records in response to a “judicial subpoena.” Before obtaining the records, RFPA and implementing service regulations require the government serve a copy of the subpoena on the customer, notify them of “the nature of the law enforcement inquiry,” and inform them of their right to challenge the subpoena.<sup>63</sup> The customer has between ten and fourteen days to raise an objection by filing a motion with the appropriate tribunal.<sup>64</sup> Failure to comply with the notice requirement can expose the bank and the military service to financial liability.<sup>65</sup>

Although one can make an argument that an Article 32 *subpoena duces tecum* is not a “judicial subpoena” within the meaning of RFPA, there is persuasive authority to the contrary. Relying in part on the power of compulsory process contained in Article 46 of the UCMJ, the CAAF previously held in *United States v. Curtin* that a post-referral subpoena issued by a trial counsel qualifies as a “judicial subpoena” under RFPA.<sup>66</sup> While the courts have not specifically addressed RFPA’s application to pre-referral subpoenas, it stands to reason that the *Curtin* ruling is still good law and equally applicable to Article 32 subpoenas, since Congress affirmatively extended the power of compulsory process contained in Article 46, UCMJ, to the pretrial investigation. Although the military judge is absent from the Article 32 stage, military law recognizes that Article 32 officers and convening authorities, while not labeled as judges, perform judicial functions.<sup>67</sup> This principle, in conjunction with the change to Article 47, UCMJ, demonstrates congressional intent to bring Article 32 subpoenas within the meaning of RFPA’s “judicial subpoenas.”<sup>68</sup>

#### B. Personal E-mail

Another unresolved issue revolves around whether or not an Article 32 officer can subpoena the contents of an accused’s personal e-mail account. The answer depends on the application of the Stored Communications Act (SCA).<sup>69</sup> The SCA governs the disclosure of personal information held by internet service providers, telephone companies, and electronic e-mail providers.<sup>70</sup> The SCA requires law enforcement to use specific procedures to gain access to

burden the Article 32 process. See *United States v. Wuterich*, 68 M.J. 511, 516–24 (N-M. Ct. Crim. App. 2009).

<sup>60</sup> See Appendix A (displaying U.S. Dep’t of Def., DD Form 453, Subpoena (May 2000)).

<sup>61</sup> Compare Appendix A, with Proposed MCM Amendments, *supra* note 34, at 64855.

<sup>62</sup> See Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, §§ 1100–1122, 92 Stat. 3641 (1978) [hereinafter RFPA]; Major Scott A. McDonald, *Follow the Money: Obtaining and Using Financial Information in Military Criminal Investigations and Prosecutions*, ARMY LAW., Feb. 2012, at 12 (detailing five methods for obtaining financial data under RFPA).

<sup>63</sup> See 12 U.S.C. § 3407 (2012); U.S. DEP’T OF DEF., INSTR 5400.15, GUIDANCE ON OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (2 Dec. 2004) [hereinafter DODI 5400.15]; U.S. DEP’T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (9 Feb. 2006) [hereinafter AR 190-6].

<sup>64</sup> See 12 U.S.C. § 3407 (2012).

<sup>65</sup> See Litigation Division, Legal Service Agency, U.S. Dep’t of Army, Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35, 38 [hereinafter Lit. Div. Note] (referencing 12 U.S.C. § 3417 (2012)).

<sup>66</sup> See McDonald, *supra* note 60, at 16 (citing *United States v. Curtin*, 44 M.J. 439, 441 (C.A.A.F. 1996)).

<sup>67</sup> See *United States v. Payne*, 3 M.J. 354, 355 (C.M.A. 1977) (recognizing an Article 32 officer has judicial role); *United States v. Ellsey*, 37 C.M.R. 75, 77 (C.M.A. 1966) (“The convening authority’s function in military justice is judicial in nature.”); *United States v. Nix*, 36 C.M.R. 76, 78–80 (C.M.A. 1965) (discussing judicial role and function of convening authority).

<sup>68</sup> See Lit. Div. Note, *supra* note 63, at 38 n. 47 (stating that Army contemplating recommending changes “that would give trial counsel limited subpoena power to obtain evidence for presentation at Article 32 investigations” in response to U.S. Ninth Circuit Court of Appeals ruling in *Flower v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002)). In *Flowers*, the Ninth Circuit found an Army trial counsel had violated the RFPA by issuing a pre-referral subpoena during the Article 32 investigation, because the trial counsel lacked statutory authority to subpoena the records. See *Flowers*, 295 F.3d at 974.

<sup>69</sup> See 18 U.S.C. § 2701–2712 (2012).

<sup>70</sup> Lieutenant Colonel Thomas Dukes, Jr. & Lieutenant Colonel Albert C. Rees, Jr., *Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. REV. 103, 106 (2009) (discussing scope of SCA). The article provides a detailed description of the SCA’s application to military investigations and its implications for military subpoenas. It is extremely helpful to the military practitioner’s understanding of the SCA.

certain stored wire and electronic data, communications, and content.<sup>71</sup>

The SCA divides the content of e-mail and other stored files into three categories:

- (1) retrieved communications and the content of other stored files; (2) un-retrieved communications that have been in electronic storage for one hundred eighty one days or more; and (3) un-retrieved communications that have been in electronic storage for one hundred eighty days or less.<sup>72</sup>

The SCA treats each category differently. Law enforcement can obtain categories (1) and (2) by providing notice to the customer and sending an administrative, grand jury, or trial subpoena to the service provider.<sup>73</sup> The SCA treats category (3) as a special protected class of communication. Obtaining category (3) evidence requires a search warrant issued by a federal or state court.<sup>74</sup> The SCA is also controversial. The United States Sixth Circuit Court of Appeals recently held in *United States v. Warshak* that, irrespective of the SCA, the government's use of a subpoena to obtain the contents of e-mail stored with a service provider violates the Fourth Amendment.<sup>75</sup> *Warshak* prompted the DoD Inspector General's Office to temporarily suspend using administrative subpoenas to obtain private e-mail content and to require its agents to pursue search warrants instead.<sup>76</sup>

Obtaining the victim's e-mails in the hypothetical case would depend upon the service provider's interpretation of a subpoena under the SCA and its position on *Warshak*. The SCA permits the government to obtain category (1) and (2) evidence with an administrative, grand jury, or trial subpoena and notice to the customer.<sup>77</sup> The pre-referral subpoena does not fit neatly into any one of these definitions, although it is probably closest to the trial subpoena. A service provider, though, might argue that a strict reading of the SCA does not permit disclosure for an

Article 32 subpoena, since it is issued pre-referral and therefore is not the equivalent of a trial subpoena. In addition, some providers might take the position that *Warshak* controls and requires a valid search warrant to disclose any e-mail content. Either way, the best an Article 32 could hope to obtain is a portion of the stored e-mail content. Any recent, un-retrieved e-mails under the SCA would be beyond the Article 32's compulsory power.

### C. Psychotherapist-Patient Records

Subpoenaing records that are protected by the psychotherapist-patient privilege also poses some challenges at the Article 32 stage. Defense attorneys are likely to request these records in cases where victims have received counseling related to the charged offense. Now that Article 32s have the power to obtain these records pre-referral from civilian providers, defense attorneys are likely to ask for them earlier in litigation. The problem lies in how to respect and handle the patient's privilege pre-trial. Military Rule of Evidence (MRE) 513 details a procedure for handling claims of psychotherapist-patient privilege at trial, but does not give any attention to the procedures to use at an Article 32.<sup>78</sup>

The proposed framework for handling MRE 412 issues at an Article 32 provides one possible roadmap for handling issues of privilege.<sup>79</sup> While not addressed in case law or officially sanctioned, the following are some general ideas based on RCM 405's proposed approach to accommodating MRE 412 at an Article 32.

- (1) In anticipation of a privilege issue, the subpoena should direct that the requested records be sealed and delivered unopened to the investigating officer personally. If the investigating officer is not a judge advocate, they should "seek legal advice from an impartial source concerning the admissibility, handling, and reporting of any such evidence" before ordering the production of the documents or ruling as to their admissibility.<sup>80</sup>

<sup>71</sup> See *id.* at 105–06 (discussing general purpose and methodology of SCA).

<sup>72</sup> See *id.* at 107 (citing 18 U.S.C. §§ 2703(a), 2703(b) (2012)).

<sup>73</sup> See *id.* at 107–08 (citing 18 U.S.C. §§ 2703(a), 2703(b) (2012)). But see *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) (limiting use of subpoena to obtain e-mail content).

<sup>74</sup> See *id.* at 108, 117–18 (discussing requirement for search warrant).

<sup>75</sup> See *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) (finding subscribers have expectation of privacy in e-mail stored with service provider).

<sup>76</sup> See OFFICE OF INSP. GEN., DEP'T OF DEF., U.S. v. WARSHAK DECISION MEMO, available at [http://www.dodig.mil/programs/subpoena/pdfs/Warshak\\_AgentMemo.pdf](http://www.dodig.mil/programs/subpoena/pdfs/Warshak_AgentMemo.pdf) (last visited Feb. 24, 2014).

<sup>77</sup> See 18 U.S.C. § 2703(b) (2012).

<sup>78</sup> See MCM, *supra* note 8, MIL. R. EVID. 513 (outlining psychotherapist-patient privilege).

<sup>79</sup> See Proposed MCM Amendments, *supra* note 34, at 64855 (establishing procedures for handling MRE 412 issues at Article 32).

<sup>80</sup> See *id.* (discussing inadmissibility of certain evidence covered by MRE 412). Article 32 officers must exercise caution in seeking outside legal advice. It is generally legal error for an Article 32 officer to seek advice from anyone serving in a prosecutorial function. See *United States v. Rushatz*, 30 M.J. 525, 532 (A.C.M.R. 1990); *United States v. Grimm*, 6 M.J. 890, 893 (A.C.M.R. 1979). It is also error to seek substantive legal advice from a non-prosecutor without providing notice to the parties. See *id.* at 893. For guidance on properly seeking legal advice, see U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER § 1-2 (16 Sept. 1990); NAVAL JUSTICE SCH., U.S. DEP'T OF NAVY, ARTICLE 32 INVESTIGATOR'S GUIDE 3 (Nov. 2001).

(2) Before examining the documents, the Article 32 officer must hold a hearing at which the patient should be afforded an opportunity to attend and be heard.<sup>81</sup> Since the Article 32 lacks the authority to compel the attendance of civilian witnesses, it may be difficult to obtain the voluntary presence of a civilian witness or medical provider. After hearing the parties' arguments, the Article 32 officer should review the documents, in private if necessary, to decide the matter.

(3) If the investigating officer determines any of the documents are relevant for a purpose under MRE 513(d) and not cumulative, then they should provide the identified documents to the defense and specify "the areas with respect to which the victim or witness may be questioned." The Article 32 report should include any documents that the Article 32 officer determined were admissible under MRE 513. The Article 32 officer should seal and safeguard any evidence deemed inadmissible to preserve the evidence for later judicial review, but the sealed evidence should not be appended to the Article 32 report.<sup>82</sup>

(4) If the victim or psychotherapist opposes the release of their records, the custodian of the evidence can request relief from the subpoena to the convening authority on the grounds that compliance would be "unreasonable or oppressive."<sup>83</sup> A patient would also have standing to request relief since their rights would be affected by the psychotherapist's compliance with the subpoena.<sup>84</sup> The convening authority has the authority to modify or withdraw a pre-referral subpoena.<sup>85</sup>

#### D. *United States v. Harding*<sup>86</sup>

Obtaining records from civilian providers might be easier said than done. *United States v. Harding* shows some of the difficulties the military may encounter trying to

enforce a subpoena to a civilian psychotherapist. *Harding* dealt with an allegation of rape. The victim sought counseling with a civilian social worker. Based on a defense request, the military judge issued a subpoena ordering the production of the civilian's psychotherapist-patient records for *in camera* review. The civilian provider refused to comply with the request to surrender her records. In response, the military judge issued a warrant of attachment authorizing the United States Marshals to seize the records. The civilian provider attracted a significant amount of media attention to her case.<sup>87</sup> She also sought unsuccessfully to block the warrant of attachment in the United States District Court and Tenth Circuit Court of Appeals. Describing the sequence of events after the Tenth Circuit ruled in favor of the government, the CAAF wrote:

Despite receiving this green light from the court of appeals, the United States Marshals did not enforce the warrant of attachment. Instead, they simply asked her to produce the documents, and took no further action when she declined to do so.<sup>88</sup>

Based on the government's lack of enforcement of the warrant of attachment, the military judge abated the rape charge, severed the offense, and went forward on an adultery charge, which did not involve the victim.<sup>89</sup> *Harding* is one of the only examples in case law of the practical problems encountered when enforcing military process over evidence which is in the hands of civilians.<sup>90</sup>

#### IV. Challenging & Enforcing Article 32 Subpoenas

Rule for Courts-Martial 703 and Article 47, UCMJ, are the primary legal authorities for challenging and enforcing military subpoenas.

##### A. Challenging an Article 32 Subpoena

As previously discussed, the custodian of the evidence can challenge an Article 32 subpoena by petitioning the

<sup>81</sup> See MCM, *supra* note 8, MIL. R. EVID. 513 (discussing procedure for admission of psychotherapist records).

<sup>82</sup> See Proposed MCM Amendments, *supra* note 34, at 64855 (detailing new procedures for RCM 405(i) and 405(j)(2)(C) for MRE 412 evidence); see also *id.* at 64873 (amending RCM 405(i) discussion to explain procedures for handling private information related to MRE 412).

<sup>83</sup> See MCM, *supra* note 8, R.C.M. 703(f)(4)(C) (providing procedure for requesting relief from a subpoena).

<sup>84</sup> See *United States v. Johnson*, 53 M.J. 459, 461 (C.A.A.F. 2000) ("[F]ederal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought" and finding "no reason why a third-party challenge . . . to a subpoena *duces tecum* . . . could not be raised during an Article 32 investigation if a sufficient basis were provided to establish standing.").

<sup>85</sup> See MCM, *supra* note 8, R.C.M. 703(f)(4)(C).

<sup>86</sup> 63 M.J. 65 (C.A.A.F. 2006).

<sup>87</sup> See Miles Moffeit, *Military, Civilian Law Clash at Trial*, DENV. POST, June 16, 2005, [http://www.denverpost.com/news/ci\\_2804826](http://www.denverpost.com/news/ci_2804826); Karen Abbott, *Therapist's Backers Gather*, ROCKY MTN. NEWS, June 14, 2005, <http://m.rockymountainnews.com/news/2005/Jun/14/therapists-backers-gather/>.

<sup>88</sup> See *Harding*, 63 M.J. at 66.

<sup>89</sup> See *id.*

<sup>90</sup> See generally, Kathleen A. Duignan & David P. Sheldon, *The Power to Compel: Is the Ability to Subpoena Evidence a Toothless Right in Military Courts-Martial? The Potential Impact of United States v. Harding*, FED. LAW., June 2006, at 40 (discussing *Harding* and its implication for compulsory process).

convening authority “to modify or withdraw” the subpoena.<sup>91</sup> The standard for challenging a subpoena is that compliance would be “unreasonable or oppressive.”<sup>92</sup> This is the same standard which appears in the Federal Rules of Criminal Procedure for federal subpoenas.<sup>93</sup>

Subpoenas cannot be used to engage in a “fishing expedition.”<sup>94</sup> Nor can they be used to harass or intimidate.<sup>95</sup> A subpoena should describe the evidence sought with reasonable particularity and not be unreasonably broad in scope or time.<sup>96</sup> A pre-referral *subpoena duces tecum* should be reasonable, provided it seeks unprivileged materials that are “relevant and not cumulative.”<sup>97</sup> The RCM 405 standard is slightly broader than the “relevant and necessary” standard required for production of evidence at trial.<sup>98</sup> Applying a broader standard to the production of evidence at an Article 32 is consistent with the Supreme Court’s finding in *United States v. R. Enterprises, Inc.*, in which the Court determined that grand jury subpoenas deserve more latitude than trial subpoenas because of their investigative purpose.<sup>99</sup>

<sup>91</sup> See MCM, *supra* note 8, R.C.M. 703(f)(4)(C). See also *supra* notes 83–85 and accompanying text.

<sup>92</sup> See MCM, *supra* note 8, R.C.M. 703(f)(4)(C) (outlining standard for challenging subpoena).

<sup>93</sup> See FED. R. CRIM. P. 17(c)(2).

<sup>94</sup> See *Fed. Trade Comm’n v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924) (“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize . . . fishing expeditions into private papers on the possibility that they may disclose evidence of crime.”) (emphasis added).

<sup>95</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972) (stating that there is no justification for using grand jury process to harass); *In re Grand Jury Proceedings*, 486 F.2d 85, 91 (3d Cir. 1973) (noting courts will not enforce subpoena if grand jury “is not pursuing an investigation in good faith or is motivated by a desire to harass”).

<sup>96</sup> See *Application of Certain Chinese Family Benevolent & Dist. Ass’n*, 19 F.R.D. 97, 101 (N.D. Cal. 1956) (finding *subpoena duces tecum* too broad in application).

<sup>97</sup> See Proposed MCM Amendments, *supra* note 34, at 64854 (updating RCM 405(g)(1)(B)). The proposed amendment deletes the words “which is under the control of the Government” from the previous RCM, thereby making the provision applicable to all evidence. Relevant evidence is “evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” See MCM, *supra* note 8, MIL. R. EVID. 401.

<sup>98</sup> See MCM, *supra* note 8, R.C.M. 703(f)(1) discussion. “Relevant evidence is necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue.” *Id.* See also *United States v. Rodriguez*, 57 M.J. 765, 770 (N-M. Ct. Crim. App. 2002) *aff’d*, 60 M.J. 239 (C.A.A.F. 2004) (using RCM 703 to analyze military judge’s decision to quash trial subpoena).

<sup>99</sup> See SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE* § 6:21 (2d ed.) (discussing *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991)).

Before making a determination whether to modify or withdraw a subpoena, the convening authority may need to conduct an *in camera* review of the requested evidence.<sup>100</sup> If the case is ultimately referred to trial, the accused can challenge the convening authority’s decision to quash or modify a subpoena with the military judge.<sup>101</sup>

Given the legal distinctions and issues involved with a request to quash or modify a subpoena, convening authorities may find the need to consult with an independent legal advisor. Staff Judge Advocates (SJAs) who provide advice to convening authorities about the legal merits of a motion to quash or modify a pretrial subpoena need to be especially wary of the effect that advice may have on their subsequent pretrial and post-trial advice. The SJA could be disqualified from providing the pretrial advice if their pretrial action calls into question their ability “to make an independent and informed appraisal of the charges and evidence” in rendering their advice.<sup>102</sup> Similarly, the SJA may be disqualified from providing post-trial advice if they must review “their own pretrial action . . . when the sufficiency or correctness of the earlier action has been placed in issue” or they have testified about an issue in controversy.<sup>103</sup> While advising the commander or convening authority of their court-martial responsibilities is normally within the purview of the SJA,<sup>104</sup> a decision to quash or modify a subpoena could become the subject of litigation at a later court-martial if it affects a substantial right of the accused. In such situations, assigning an independent judge advocate to provide legal advice to convening authorities confronted with a motion to quash or modify a subpoena is one way to avoid the issue of an improper referral or an allegation of defective post-trial advice.

## B. Enforcing an Article 32 Subpoena

The decision whether or not to enforce an Article 32 subpoena resides with the convening authority or the General Court-Martial Convening Authority (GCMCA) with jurisdiction over the case. Under Article 47, UCMJ, the convening authority can initiate proceedings with the United

<sup>100</sup> See *United States v. Wuterich*, 67 M.J. 63, 78–79 (C.A.A.F. 2008) (finding military judge abused discretion by quashing subpoena without conducting *in camera* review).

<sup>101</sup> See MCM, *supra* note 8, R.C.M. 906(b)(3) (providing relief for “defects in the Article 32 investigation”).

<sup>102</sup> See *id.* R.C.M. 406(b) discussion (describing requirement for SJA pretrial advice and grounds for disqualification).

<sup>103</sup> See *id.* R.C.M. 1106(b) discussion (explaining how SJA disqualified from providing post-trial recommendation).

<sup>104</sup> See *United States v. Willis*, 46 C.M.R. 112, 114 (C.M.A. 1973) (“Whatever one may think of the wisdom of multiple investiture, military law constitutes the staff legal officer the adviser to the convening authority in regard to his court-martial functions.”).

States Attorney's office to prosecute the civilian recipient of a military subpoena who willfully fails to comply.<sup>105</sup> Through RCM 703, the President has also granted the convening authority the power to issue a warrant of attachment "to compel the appearance of a witness or production of documents."<sup>106</sup> Although there is some ambiguity in the rule, in the case of an Article 32 subpoena, the proposed changes to the RCM appear to limit the authority to issue a warrant of attachment to the GCMCA with jurisdiction over the case.<sup>107</sup>

### 1. Warrants of Attachment

The warrant of attachment is designed to secure the cooperation of the subject of a subpoena.<sup>108</sup> Its purpose is to compel the production of the requested evidence, rather than to punish the transgressor.<sup>109</sup> A warrant of attachment is comparable in civilian jurisdictions to a bench warrant, but is broader in scope.<sup>110</sup> Not only can a warrant of attachment authorize an official to detain a civilian who has failed to appear and bring them before the tribunal, but they can also command the seizure of evidence that a duly subpoenaed individual has failed to turn over.<sup>111</sup> The federal courts have recognized the warrant of attachment as a lawful court order which derives its authority from Article 46, UCMJ.<sup>112</sup>

In the case of an Article 32, the GCMCA with jurisdiction over the case may issue the warrant of attachment. Before issuing such a warrant, however, the GCMCA must be satisfied there is probable cause to believe: (1) the subject of the subpoena "was duly served with a subpoena"; (2) the "subpoena was issued in accordance with" the RCM; (3) the evidence is material; (4) the subject of the subpoena "refused or willfully neglected to provide the evidence on the time and place specified in the subpoena"; and (5) that "no valid excuse reasonably

appears" for the failure to comply.<sup>113</sup> Evidence should be material if it meets the RCM 405 requirement of being "relevant and not cumulative."<sup>114</sup>

Unlike the production of witnesses, the requirement that appropriate fees be tendered probably does not apply to the production of evidence. Article 47, UCMJ, states that the witness be "provided a means for reimbursement from the Government for fees and mileage."<sup>115</sup> On its face, this provision appears to apply only to witnesses who actually travel to the tribunal and does not include costs incurred when no travel is required. This provision mirrors the Federal Rules of Criminal Procedure, which also provides for travel reimbursement of actual witnesses.<sup>116</sup> The recipient of an Article 32 *subpoena duces tecum* is not required to travel to the Article 32 and can satisfy the subpoena by simply producing the evidence. Nevertheless, a witness could claim that expenses for copying and mailing materials to the Article 32 are "unreasonable and oppressive." In the federal courts, generally speaking, the government is not obligated to pay the recipient's costs of complying with a grand jury *subpoena duces tecum*.<sup>117</sup> However, in some cases, courts have modified or quashed subpoenas due to the extreme cost of compliance.<sup>118</sup>

Rule for Courts-Martial 703 indicates that a convening authority should issue a warrant of attachment on a DD Form 454 (Appendix B).<sup>119</sup> Similar to the problem previously discussed with using DD Form 453 for subpoenas, DD Form 454 has not been updated to reflect the Article 32 authority to issue subpoenas. Although the form does instruct counsel to line out inapplicable language, the form is designed for use by a military judge at a court-martial. It does not provide options for failing to obey a subpoena issued by an Article 32, deposition, or court of inquiry. It only speaks in terms of apprehending a witness and does not offer contingency language for the seizure of

<sup>105</sup> See 10 U.S.C. § 847(c) (2012) (explaining what is required to initiate federal prosecution for failure to obey military subpoena).

<sup>106</sup> See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) (providing for the issuance of warrants of attachment).

<sup>107</sup> See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

<sup>108</sup> See *id.* (explaining purpose of warrant of attachment).

<sup>109</sup> See *id.* (explaining purpose of warrant of attachment).

<sup>110</sup> See Major Calvin M. Lederer, *Warrants of Attachment-Forcibly Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1, 4 (1982) (defining a bench warrant and explaining its relevance to warrant of attachment).

<sup>111</sup> See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) (defining parameters of warrant of attachment).

<sup>112</sup> See *id.* R.C.M. 703(e)(2)(G)(i) analysis at A21-38 (citing *United States v. Shibley*, 112 F. Supp. 734 (S. D. Cal. 1953) (court of inquiry); Lederer, *supra* note 110, at 11 (discussing authority for warrant of attachment).

<sup>113</sup> See MCM, *supra* note 9, R.C.M. 703(e)(2)(G)(ii) (enumerating probable cause requirements).

<sup>114</sup> See *supra* notes 97-99 and accompanying text (providing standard for production of evidence at an Article 32).

<sup>115</sup> See 10 U.S.C. §847 (2012).

<sup>116</sup> See FED. R. CRIM. P. 17(d) ("The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance.").

<sup>117</sup> See Andrew D. Leipold & Peter J. Henning, 2 FED. PRAC. & PROC. CRIM. § 276 (4th ed.); *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973) (finding government not required to reimburse costs associated with litigating unless statute mandates).

<sup>118</sup> See Leipold & Henning, *supra* note 117, § 276.

<sup>119</sup> See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) discussion.

evidence, which would be more appropriate to an Article 32 subpoena duces tecum.<sup>120</sup>

Service regulations express a preference for using the U.S. Marshals Service to execute a warrant of attachment.<sup>121</sup> According to RCM 703, though, the issuing authority may direct anyone greater “than 18 years of age” to serve the warrant,<sup>122</sup> and 28 U.S.C. § 566 is the statutory authority for the U.S. Marshals to execute warrants on behalf of the military.<sup>123</sup> In addition to the written warrant of attachment, the Air Force Instruction recommends providing the Marshals with: (1) a copy of the subpoena; (2) a copy of the certificate of service or receipt; and (3) an affidavit indicating the reasons the evidence is material; and why it is believed the recipient refuses or willfully neglects to comply. “The U.S. Marshals Service General Counsel’s Office will review the [w]arrant of [a]ttachment and determine the appropriate executing office.”<sup>124</sup>

Service regulations may place other requirements on the issuance of warrants of attachment. In the case of the Navy and Marine Corps, trial counsel or the cognizant Staff Judge Advocate must notify the Judge Advocate of the Navy (Code 20) or the Commandant of the Marine Corps (JAM) of the issuance of a warrant of attachment.<sup>125</sup> If a higher headquarters directs a subordinate convening authority not to issue a warrant of attachment in response to a defense request for the production of evidence, the risk of failing to produce the evidence falls on the government.<sup>126</sup> A warrant of attachment also cannot compel a person to leave the United States,<sup>127</sup> but the court has indicated it could be used

to seize an overseas dependent U.S. citizen and bring them before a military tribunal sitting in the same country.<sup>128</sup>

The real benefit of the warrant of attachment is that the GCMCA can issue it without having to go before a court.<sup>129</sup> The problem lies in the execution of the warrant. The GCMCA faces a dilemma. If the GCMCA takes the preferred route and authorizes the U.S. Marshals to serve the warrant, then the GCMCA must wait for them to act. If the Marshals refuse to seize the evidence, the GCMCA is powerless to intervene and the failure to act can result in the abatement of the proceedings, as occurred in *Harding*, or dismissal of the charges with prejudice.<sup>130</sup> On the other hand, if the GCMCA authorizes military members to seize the evidence, there can be significant public relations concerns. Using military members or military law enforcement to serve a warrant of attachment may be an appropriate option in some circumstances. Generally speaking, though, the idea of using the military to detain or seize civilians and their property runs counter to modern notions of the military’s place in civil society.<sup>131</sup>

## 2. Contempt

The convening authority’s other option is to forward the case to the U.S. Attorney for prosecution in the federal courts under 10 U.S.C. § 847. The convening authority does this by providing “a certification of the facts” to the U.S. Attorney. The statute implies the U.S. Attorney does not have discretion to decline to prosecute and must “file an information against and prosecute” the offender if the convening authority properly requests assistance.<sup>132</sup> Unfortunately, this does not appear to be the case in practice. There are few examples of successful prosecutions in case law.<sup>133</sup> The penalty for disobeying a military subpoena is

<sup>120</sup> See Appendix B (displaying U.S. Dep’t of Def., DD Form 454, Warrant of Attachment (May 2000)).

<sup>121</sup> See U.S. DEP’T OF NAVY, OFFICE OF JUDGE ADVOCATE GEN. INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0147 (26 June 2012) [hereinafter JAGMAN]; U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE § 5-22(b) (3 Oct. 2011) [hereinafter AR 27-10]; U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE § 6.4.3 (3 Feb. 2010) [hereinafter AFI 51-201]; see also U.S. COAST GUARD, COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL § 3.N.2(d) (13 Apr. 2011).

<sup>122</sup> See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(iv) (covering execution of warrants of attachment).

<sup>123</sup> See 28 U.S.C. § 566 (2012).

<sup>124</sup> See AFI 51-201, *supra* note 121, § 6.4.3.

<sup>125</sup> See JAGMAN, *supra* note 121, § 0147.

<sup>126</sup> See *United States v. Hinton*, 21 M.J. 267, 271 (C.M.A. 1986) (explaining that earlier version of JAGMAN, which required approval of Judge Advocate General before issuance of warrant of attachment could result in penalties for government at trial).

<sup>127</sup> See *Lederer*, *supra* note 110, at 12 (citing *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) as authority).

<sup>128</sup> See *United States v. Ortiz*, 35 M.J. 391, 394 (C.M.A. 1992) (holding military judge should have granted continuance and ordered warrant of attachment to bring United States civilian witness before court-martial in Germany).

<sup>129</sup> See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

<sup>130</sup> See, e.g., *United States v. Harding*, 63 M.J. 65, 67 (C.A.A.F. 2006) (affirming military judge’s decision to abate the proceedings with respect to most serious charge due to failure to enforce warrant of attachment).

<sup>131</sup> See *Lederer*, *supra* note 110, at 42–44 (discussing background behind shift from using military to enforce warrants of attachments to U.S. Marshals).

<sup>132</sup> See 10 U.S.C. § 847 (2012).

<sup>133</sup> See *Lederer*, *supra* note 110, at 5 n. 12 (noting reluctance of military to pursue contempt cases once court-martial is concluded); see also *United States v. Praeger*, 149 F. 474, 486 (W.D. Tex. 1907) (ruling civilian defendant not guilty of contempt for refusing to answer questions or provide evidence at court-martial).

left to the discretion of the federal judge and may involve a fine, imprisonment, or both.<sup>134</sup>

The criminal prosecution of a civilian will not necessarily result in their providing the requested evidence or agreeing to testify. The purpose of the warrant of attachment is the production of the requested evidence. It accomplishes this by authorizing an official to seize the relevant evidence or bring the reluctant witness before the tribunal. In contrast, the primary purpose of prosecuting a person for failing to obey a subpoena is the punishment of the offender and the vindication of “the military interest in obtaining compliance with its lawful process.”<sup>135</sup> Initiating a prosecution against a civilian might encourage them to produce the requested evidence, but they might also be willing to face punishment rather than comply with the subpoena. Prosecuting civilians for failing to obey military subpoenas also relies on the cooperation of the U.S. Attorney and the timely adjudication of the case in the federal courts.

#### V. Evidence: Reasonably Available or Not?

Under the proposed changes to the RCMs, the Article 32 officer is still responsible for determining the reasonable availability of evidence for purposes of the Article 32. The Article 32 officer may determine evidence is not reasonably available if one of three circumstances exists:

[T]he subpoenaed party refuses to comply with the duly issued *subpoena duces tecum*; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence.<sup>136</sup>

Based on this standard, it makes sense for the Article 32 officer to delay making a determination until the custodian of the evidence indicates whether or not they will comply with the subpoena. The military judge may review the Article 32 officer’s decision with respect to the reasonable availability of evidence.<sup>137</sup> Therefore, it is important for the Article 32 officer to articulate in the Article 32 report the specific reasons for finding evidence not available.

<sup>134</sup> See 10 U.S.C. § 847 (2012).

<sup>135</sup> See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

<sup>136</sup> See *id.* at 64873 (changing RCM 405(g)(2)(C)(ii) discussion).

<sup>137</sup> See MCM, *supra* note 8, R.C.M. 906(b)(3); Proposed MCM Amendments, *supra* note 35, at 64855 (adding RCM 405(g)(2)(C)(ii) dealing with evidence not under the control of government).

The Article 32 officer is expressly permitted to treat a party’s refusal to comply with a subpoena as sufficient grounds in and of itself to find the evidence is not available. The Article 32 officer can also exclude evidence that is not subject to compulsory process, such as when a search warrant is required to obtain e-mail. If either of these circumstances exists, the inquiry is likely over, and there will be no need to pursue enforcement of the pre-trial subpoena for purposes of the Article 32.

In some cases, though, the significance of the requested evidence may justify delaying the proceeding. If more time is needed to try to obtain the evidence, the party seeking production of the evidence should consider requesting the convening authority grant pretrial, excludable delay.<sup>138</sup> Before acting on such a request, the convening authority should hear arguments from both parties and should fully document the decision to grant excludable delay in writing. Authorized periods of excludable delay do not count against the 120-day time limit established for bringing an accused to trial.<sup>139</sup>

Regardless of whether the convening authority authorizes excludable delay, though, postponing an Article 32 to seek production of evidence could still violate Article 10, UCMJ, if the accused is in pretrial confinement. Satisfying Article 10 does not require “constant motion” on the case, but depends on the government exercising “reasonable diligence” to bring an accused to trial.<sup>140</sup> “While ‘brief periods of inactivity in an otherwise active prosecution are not’” normally fatal, the accused can prevail in an Article 10 motion if they can show, among other factors, that the unreasonable delay was due to the government’s negligence or more sinister motives.<sup>141</sup> In examining a potential Article 10 violation, the courts apply the same framework developed to evaluate violations of the Sixth Amendment right to a speedy trial: (1) the length of delay; (2) the reasons for the delay; (3) whether the accused has made a demand for speedy trial; and (4) the prejudice to the accused.<sup>142</sup> None of the factors are dispositive on their own and Article 10, UCMJ, puts a greater burden on the government to show reasonable diligence than does the Sixth Amendment.<sup>143</sup> The court takes a holistic approach to

<sup>138</sup> See MCM, *supra* note 8, R.C.M. 707(c) (detailing procedures and authority to grant excludable delay).

<sup>139</sup> See *id.*

<sup>140</sup> See *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (discussing standard for analyzing Article 10 issues) (citing *United States v. Tibbs*, 15 C.M.A. 350, 353 (1965)).

<sup>141</sup> See *United States v. Simmons*, ARMY20070486, 2009 WL 6835721, at \*7 (A. Ct. Crim. App. Aug. 12, 2009) (quoting *United States v. Kossman*, 38 M.J. 258, 261–62 (C.M.A. 1993) (unpublished opinion)).

<sup>142</sup> See *id.* at \*8 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

<sup>143</sup> See *id.*

allegations of Article 10 violations by looking at the issue in context and balancing the government's conduct against the rights of the accused.<sup>144</sup>

A case like *United State v. Harding*<sup>145</sup> provides an illustrative example of how delaying a case to seek enforcement of a subpoena could potentially violate Article 10, UCMJ, if the accused had been in pretrial confinement and asserted his right to a speedy trial. In this case, a number of the factors used to analyze an Article 10, UCMJ, violation were present and weighed in favor of the accused. While the exact length of delay is not discussed in the opinion, the delay was due to the government's failure to enforce the warrant of attachment issued by the military judge. The government acknowledged that the U.S. Marshals had the authority to seize the evidence, but the U.S. Marshals refused to enforce the warrant of attachment.<sup>146</sup> The failure to comply with the court order appears, at the very least, to be negligence on the part of the government and was sufficiently egregious for the military judge to abate the proceedings.<sup>147</sup> Additionally, the evidence in question was requested by the accused based on the proffer that it was constitutionally required for his defense.<sup>148</sup> The failure to produce the evidence only prejudiced the accused. Although Article 10, UCMJ, was not actually at issue in *United States v. Harding*, if the accused had been in confinement, the accused would have had a good faith basis to allege that the government's failure to enforce the warrant of attachment resulted in an Article 10, UCMJ, violation.

## VI. Conclusion: What are Article 32 Subpoenas Really Good For?

The ability to subpoena evidence pretrial can only make the military justice system better from the standpoint of the government and the accused. The Article 32 subpoena will expand the scope of tangible evidence available to an Article 32. This will obviously improve the government's ability to investigate and prepare for cases pre-trial, but it will also aid the accused by giving them better access to potentially exculpatory evidence earlier in the litigation process.

Some improvements are still needed to effectively implement the Article 32 *subpoena duces tecum*. The DoD should consider updating DD Forms 453 and 454 to reflect the new Article 32 subpoena power. It would also be helpful if RCM 703 definitively addressed when the power to issue an Article 32 subpoena ends. Does the authority to issue a pretrial *subpoena duces tecum* merge into the power to issue trial subpoenas after referral of the charges? Or does the authority terminate when the investigation is complete and the Article 32 report is provided to the convening authority? This is something which is not explicitly spelled out and could cause problems for military justice practitioners seeking to enforce a pretrial subpoena.

As the military justice system trends towards trying more complex cases,<sup>149</sup> there is a corresponding need for access to evidence in the hands of civilians and civilian institutions during the investigative phases of a case. To this end, the pre-referral *subpoena duces tecum* will prove to be a useful instrument for obtaining less controversial evidence, such as bank records and financial data, by insulating civilian institutions from liability. The Article 32 is less suited, but capable of dealing with complex discovery issues such as psychotherapist-patient privilege. Requests for such materials should be approached with caution as well as respect for third party interests. While it may not be practical to delay an Article 32 to seek enforcement of a pretrial subpoena in many cases, the failure of a party to obey an Article 32 subpoena will put both sides on advance notice of potential litigation problems later at trial. This lead time should promote better negotiations with non-military entities and more efficient use of tools, such as the warrant of attachment and prosecutions for contempt, to encourage compliance with the military powers of compulsory process.

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<sup>144</sup> See *id.*

<sup>145</sup> 63 M.J. 65 (2006).

<sup>146</sup> See *id.* at 67 (stating that failure to enforce warrant of attachment attributable to "officers of the Executive branch").

<sup>147</sup> See *id.* at 66 (outlining procedural history of case).

<sup>148</sup> See *id.* at 65-66 (explaining accused request for psychotherapist-patient records).

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<sup>149</sup> See U.S. MARINE CORPS, MARINE CORPS LEGAL SERVICES MILITARY JUSTICE REPORT FISCAL YEAR 2012, Feb. 2013, at 6 (reporting that despite declining numbers of prosecutions, cases are becoming more complicated).



## Appendix A

### DD Form 453

SUBPOENA	
<p>The President of the United States, to _____  <small>(Name and Title of Person being Subpoenaed)</small></p> <p>You are hereby summoned and required to appear on the _____ day of _____, _____, at _____  o'clock _____ .M., at _____, (before _____  <small>(Place of Proceeding)</small> <small>(Name and Title of Deposition Officer)</small>  designated to take your deposition) (a _____ court-martial of the United States) (a court of inquiry),  appointed by _____, dated _____,  <small>(Identification of Convening Order or Convening Authority)</small>  _____, to testify as a witness in the matter of _____  <small>(Name of Case)</small>  (and bring with you _____).  <small>(Specific Identification of Documents or Other Evidence)</small></p> <p>Failure to appear and testify is punishable by a fine of not more than \$500 or imprisonment for a period not more than six months, or both. (10 U.S.C. § 847). Failure to appear may also result in your being taken into custody and brought before the court-martial ( _____ ) under a Warrant of Attachment (DD Form 454).  Manual for Courts-Martial R.C.M. 703(e)(2)(G).</p> <p>Bring this subpoena with you and do not depart from the proceeding without proper permission.</p> <p>Subscribed at _____ this _____ day of _____, _____.</p> <p style="text-align: right;">_____  <small>(Signature (See R.C.M. 703 (e)(2)(C))</small></p> <p>The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.</p> <p>I hereby accept service of the above subpoena.</p> <p style="text-align: right;"><small>Signature of Witness</small></p> <p><i>NOTE: If the witness does not sign, complete the following:</i></p> <p>Personally appeared before me, the undersigned authority, _____,  who, being first duly sworn according to law, deposes and says that at _____, _____,  _____, he personally delivered to _____ in person a duplicate of this subpoena.</p> <p>_____  <small>Grade</small> <span style="float: right;">_____  <small>Signature</small></span></p> <p>Subscribed and sworn to before me at _____, this _____ day of _____,  _____, _____.</p> <p>_____  <small>Grade</small></p> <p>_____  <small>Official Status</small> <span style="float: right;">_____  <small>Signature</small></span></p>	

DD FORM 453, MAY 2000

PREVIOUS EDITION IS OBSOLETE.

Appendix B

DD Form 454

WARRANT OF ATTACHMENT

\_\_\_\_\_ Court-Martial of the United States

UNITED STATES  
v.

)  
)  
)  
)  
)  
)

The President of the United States, to \_\_\_\_\_  
(United States, marshal or such other person as may be directed,

RCM 703(e)(2)(G)(iv), MCM, 1984)

WHEREAS, \_\_\_\_\_, of \_\_\_\_\_,  
was on the \_\_\_\_\_ day of \_\_\_\_\_,  
at \_\_\_\_\_, duly subpoenaed to appear and attend  
at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_ , \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m., before a \_\_\_\_\_  
court-martial duly convened by \_\_\_\_\_, dated \_\_\_\_\_,  
\_\_\_\_\_ , \_\_\_\_\_, to testify on the part of the \_\_\_\_\_  
in the above-entitled case; and whereas he/she has willfully neglected or refused (to appear and attend) <sup>1</sup>  
(to produce documentary evidence which he/she was legally subpoenaed to produce) before said  
\_\_\_\_\_ court-martial, as by said subpoena required, although sufficient time has elapsed  
for that purpose; and whereas he/she has offered no valid excuse for his/her failure to appear; and whereas  
he/she is a necessary and material witness in behalf of the \_\_\_\_\_  
in the above-entitled case:

<sup>1</sup> Line out inappropriate words.

Appendix B

DD Form 454

WARRANT OF ATTACHMENT

\_\_\_\_\_ Court-Martial of the United States

UNITED STATES  
v.

)  
)  
)  
)  
)  
)

The President of the United States, to \_\_\_\_\_  
(United States, marshal or such other person as may be directed,

RCM 703(e)(2)(G)(iv), MCM, 1984)

WHEREAS, \_\_\_\_\_, of \_\_\_\_\_,  
was on the \_\_\_\_\_ day of \_\_\_\_\_,  
at \_\_\_\_\_, duly subpoenaed to appear and attend  
at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_,  
\_\_\_\_\_ , \_\_\_\_\_, at \_\_\_\_\_ o'clock \_\_\_\_\_m., before a \_\_\_\_\_  
court-martial duly convened by \_\_\_\_\_, dated \_\_\_\_\_,  
\_\_\_\_\_ , \_\_\_\_\_, to testify on the part of the \_\_\_\_\_  
in the above-entitled case; and whereas he/she has willfully neglected or refused (to appear and attend) <sup>1</sup>  
(to produce documentary evidence which he/she was legally subpoenaed to produce) before said  
\_\_\_\_\_ court-martial, as by said subpoena required, although sufficient time has elapsed  
for that purpose; and whereas he/she has offered no valid excuse for his/her failure to appear; and whereas  
he/she is a necessary and material witness in behalf of the \_\_\_\_\_  
in the above-entitled case:

<sup>1</sup> Line out inappropriate words.

# A Big Change to Limitations on “Big T” Training: The New Authority to Conduct Security Assistance Training with Allied Forces

Major Ryan W. Leary\*

*The Army must change; this is a strategic and fiscal reality.*<sup>1</sup>

## I. Introduction

The Army’s mission is changing. In his October 2013 release of strategic priorities, Army Chief of Staff General Raymond Odierno directed that our leaders begin the process of transitioning from an Army fully engaged in counterinsurgency in the Middle East to an Army poised and ready to face our nation’s next conflict.<sup>2</sup> As part of his overall strategy, General Odierno wants to ensure our Army maintains a posture as a globally engaged, regionally aligned force.<sup>3</sup> As a result, our units will develop relationships, build trust, and expand the military capability of our allied forces.<sup>4</sup>

The recent conflicts in Iraq and Afghanistan involved building the capacity of and training host nation forces, while simultaneously staving off a complicated enemy employing insurgent tactics—not an ideal scenario in which to successfully train allied forces. In contrast, the implied vision of our Chief of Staff is to develop an international community of allied forces fully capable of responding to local crises.<sup>5</sup> This strategy avoids the complications

associated with training foreign forces while fighting an enemy and allows the United States to assume more of a supporting role in responding to regional crises.

To meet General Odierno’s goal of producing a globally responsive and regionally engaged Army, judge advocates (JAs) must be prepared to advise commanders who are seeking how best to implement this mission within the context of our reduced budgets and fiscal austerity. The key areas of concern for JAs are the authorities and sources of funding that exist to allow commanders to conduct foreign assistance missions, namely, security assistance missions that build the capacity of foreign allied forces (sometimes colloquially referred to as “big t” training).

Before 2014, commanders of general purpose forces<sup>6</sup>—forces not falling under the authority of the U.S. Special Operations Command—were only permitted to conduct security assistance with foreign forces in two circumstances:<sup>7</sup> (1) interoperability training; or (2) certain limited authorities that allowed some training of foreign forces, so long as the training was narrowly tailored through either a focus on a specific geographic area or training objectives that concentrated only on certain capabilities of the foreign force.<sup>8</sup> Congress broadened the authority to train

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<sup>1</sup> PowerPoint Presentation of General Raymond Odierno, United States Army Chief of Staff, on Strategic Priorities (Oct. 15, 2013) [hereinafter PowerPoint Presentation], available at <http://usarmy.vo.llnwd.net/e2?c/downloads/316390.pdf>. General Odierno’s five priorities are: adaptive Army leaders for a complex world; a globally responsive and regionally engaged Army; a ready and modern Army; Soldiers committed to our Army profession; and the premier all-volunteer Army. *Id.* at 3. See also *CSA Lays Out Strategic Priorities for Uncertain Future*, [www.ARMY.MIL](http://www.army.mil/article/113256/CSA_lays_out_strategic_priorities_for_uncertain_future/) (Oct. 16, 2013), [http://www.army.mil/article/113256/CSA\\_lays\\_out\\_strategic\\_priorities\\_for\\_uncertain\\_future/](http://www.army.mil/article/113256/CSA_lays_out_strategic_priorities_for_uncertain_future/).

<sup>2</sup> PowerPoint Presentation, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* In his command distribution, General Odierno specifically stated that to become a regionally engaged force, our Army must “shape and set theaters for regional commanders employing unique Total Army characteristics and capabilities to influence the security environment, build trust, develop relationships, and gain access through rotational forces, multilateral exercises mil-to-mil engagements, coalition training, and other opportunities.” *Id.* at 6.

<sup>5</sup> *Id.* General Odierno lists several directives related to the objective of being a globally responsive and regionally engaged Army (e.g., shaping and setting theaters, influencing the security environment, deepening regional understanding, protecting interests of our Allies, and leading multinational task forces). *Id.* at 4–6. Though not specifically stated within his strategic priorities, these directives, juxtaposed with the reduction of the Army’s end strength and funding, plainly imply that we are going to work with our allies to increase their capacity to respond to local threats.

<sup>6</sup> The phrase “general purposes forces” is a term specifically used by Congress in the text of section 1203 of the 2014 National Defense Authorization Act. This term distinguishes conventional forces from special operations forces that already possessed statutory authority permitting them to train with friendly foreign forces. This distinction is specifically discussed in Department of Defense’s (DoD’s) legislative proposal to Congress requesting the new authority for conventional forces. See Legislative Proposal for Inclusion in the National Defense Authorization Act for Fiscal Year 2014 from Dept. of Def. Office of Legislative Counsel, to Congress (May 15, 2013) [hereinafter Legislative Proposal] (on file with author).

<sup>7</sup> The Foreign Assistance Act of 1961 created the authority for the executive branch to conduct foreign assistance on behalf of the United States. See Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2000)); see also Exec. Order No. 10,973, 26 C.F.R. 639 (1961) (delegating the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State).

<sup>8</sup> For an example of when Congress provided the DoD with the authority to conduct security assistance training in a specific geographic area, see 10 U.S.C. § 1050 (2012), which permits the Secretary of Defense or Secretary of a military department to pay for certain expenses relating to the training and development of militaries in Latin American countries. For an example of when Congress provided the DoD with the authority to conduct security assistance for limited training objectives, see National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1206, 119 Stat. 3456–57 (2006), which allowed DoD to train foreign forces, but limited that training to preparing foreign militaries to conduct counterterrorist operations or support U.S. forces in stability operations in which the U.S. forces are a participant.

foreign military forces with a change in the 2014 National Defense Authorization Act (NDAA).<sup>9</sup> This change reflects a shift in our national strategy from a military at war in the Middle East to a military restructuring and projecting its influence globally among our allies.<sup>10</sup> To assist JAs in advising commanders on the authority to train foreign forces, this article first describes the previous limitations Congress placed upon the Department of Defense (DoD) when conducting foreign assistance. The article next describes the new broader training authority contained in the 2014 NDAA that changes the way the DoD can conduct security assistance in the future by allowing general purpose force commanders to provide security assistance training to foreign military forces.

## II. Historical Limitations on “Big T” Training

In 1961, Congress reorganized and defined the roles and responsibilities of the Department of State (DoS) via the Foreign Assistance Act (FAA).<sup>11</sup> This act identified the DoS as the lead agency for all foreign assistance activities. Therefore, and as a general rule, the DoD does not have the authority to conduct foreign assistance missions.<sup>12</sup> There are, however, two main exceptions that permit the DoD to conduct foreign assistance in limited circumstances: (1) interoperability training, which is sometimes referred to as “little t” training; and (2) express statutory authority.

### A. “Little t” Training

In Nicaragua in 1979, the Sandinista Front for National Liberation (FLSN), a guerrilla movement with ties to the Soviet Union, overthrew the sitting Nicaraguan dictator, General Anastasio Somoza Debayle.<sup>13</sup> Due to a concern over possible communist expansion by the FLSN movement into Honduras, U.S. forces began to conduct readiness exercises with the Honduran military in February 1983.<sup>14</sup> The initial exercise, named Operation Big Pine, consisted of 1,600 U.S. troops and 4,000 Honduran military members

with the objectives of improving deployment procedures and logistical support.<sup>15</sup> In Operation Big Pine II, the next iteration of the exercise that began in August 1983, the U.S. presence grew to over 5,000 U.S. ground forces and accompanying air and naval support conducting a myriad of activities in Honduras.<sup>16</sup> Congress, concerned with the national strategic implications of a military build-up along the Honduras–Nicaragua border, requested a comptroller general investigation into the validity of the military’s funding authority to conduct such an expansive operation.<sup>17</sup> Through its investigation and resulting opinion, the General Accounting Office (GAO)<sup>18</sup> identified a circumstance when the U.S. military forces have the authority to use their operations and maintenance (O&M) funds to conduct security assistance training with foreign forces for the purposes of interoperability, safety, and familiarization: “little t” training.<sup>19</sup>

The GAO investigation revealed that U.S. forces were furnishing training to the Honduran military in the form of: (1) combat medical training; and (2) artillery training on 105mm artillery pieces acquired by Honduras through the Foreign Military Sales program.<sup>20</sup> The GAO determined that these training activities constituted security assistance and were not properly funded by the standard DoD O&M accounts.<sup>21</sup> By way of distinction, however, the GAO

<sup>15</sup> *Id.* at 158.

<sup>16</sup> *Id.*; see also Hon. Bill Alexander U.S. House of Representatives, 63 Comp. Gen. 422, 426 (1984). The U.S. forces in Honduras participated in joint maneuvers with the Honduran military, constructed a 3500-foot dirt airstrip, expanded another dirt airstrip to 8000 feet in length, expanded an asphalt airstrip to 3500 feet in length, constructed approximately 300 wooden buildings for barracks, dining facilities, and office buildings, deployed radar systems, provided medical care to approximately 50,000 Honduran civilians, provided veterinary care to approximately 40,000 animals, built a school, and provided infantry, artillery, and medical training to the Honduran military. Hon. Bill Alexander, 63 Comp. Gen. at 426.

<sup>17</sup> Hon. Bill Alexander, 63 Comp. Gen. at 422.

<sup>18</sup> The General Accounting Office (GAO) was created by Congress in 1921 to review the propriety of expenditures drawn against congressional appropriations. In 2004, the GAO changed its name to its current title of Government Accountability Office (GAO).

<sup>19</sup> See Hon. Bill Alexander, 63 Comp. Gen. at 441.

<sup>20</sup> *Id.* Although this opinion also examined U.S. Special Forces personnel training Honduran forces, Special Operations forces have specific authorities and funding sources that permit them to train foreign military forces. This article is focused on the recent change in training authority for general purpose forces in the area of security assistance training. The foreign military sales program authorizes the President of the United States to sell defense article and services to foreign governments when the sale of such items will support the foreign policy interests of the United States. See 22 U.S.C. § 2778 (2012).

<sup>21</sup> Congress provides operations and maintenance (O&M) appropriations for the purpose of operating and maintaining U.S. forces. Thus, the DoD can appropriate funds from the O&M account, so long as the beneficiaries of the expenditure are U.S. forces. See Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-6, div. C, 127 Stat. 198, 281 (2013).

<sup>9</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 (2014).

<sup>10</sup> *Id.* § 1203.

<sup>11</sup> See The Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012)); see also Exec. Order No. 10,973, 26 C.F.R. 639 (1961); see also U.S. DEP’T OF DEF., 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL para. C1.1.2.2. (30 Apr. 2012) [hereinafter DoD 5105.38-M].

<sup>12</sup> *Id.*

<sup>13</sup> COMMUNISM IN CENTRAL AMERICA AND THE CARIBBEAN 53 (Robert Wesson ed. 1982); see also THOMAS M. LEONARD, THE HISTORY OF HONDURAS 156 (Greenwood Publishing Group 2011).

<sup>14</sup> LEONARD, *supra* note 13, at 156–58.

indicated that it is appropriate for U.S. forces to provide training to foreign military forces in certain limited circumstances:

Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e., to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department, some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure "interoperability" of the two forces.

At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress.<sup>22</sup>

Therefore, general purpose force commanders can perform limited interoperability, safety, and familiarization training with a foreign force for the purpose of preparing for combined military operations.<sup>23</sup> However, this level of training will not be sufficient authority for commanders to fully respond to the new challenge of becoming a globally responsive and regionally aligned military. Although "little t" training authority is a valid and useful means of training foreign forces, commanders will need authority that allows them to train and develop the capacity of foreign forces well beyond the minimal interoperability training contemplated by the GAO's "little t" training exception.

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<sup>22</sup> Hon. Bill Alexander, 63 Comp. Gen. at 441.

<sup>23</sup> *Id.* For example, the "little t" training exception would allow U.S. forces preparing to conduct a combined live-fire training exercise with a foreign allied force to provide training to the foreign force on the safety procedures to follow during the exercise to ensure the safety and interoperability of both forces.

## B. Express Statutory Authority

Aside from the above listed "little t" training exception that allows the DoD to conduct a minor amount of training with foreign forces, the only other time that U.S. forces can conduct security assistance training is when Congress provides express statutory authority. Prior to the 2014 NDAA, Congress only provided general purpose forces with the authority to conduct specialized training missions focusing on a specific geographic area, a specific training objective, or both.<sup>24</sup> Without additional statutory authority, our commanders cannot extensively train with allied forces to achieve the Chief of Staff's goal of becoming a globally responsive regionally aligned force. Recognizing this critical gap in authority, DoD leaders specifically requested that Congress augment our existing limited security assistance authorities with a broader authority that would permit our general purpose forces to train more comprehensively with friendly foreign forces.<sup>25</sup> Congress obliged our military with such authority in the 2014 NDAA.<sup>26</sup>

## III. New Security Assistance Authority—§1203 of the 2014 NDAA

The 2014 NDAA affords general purpose commanders a new authority to conduct training with friendly foreign forces. In relevant part, § 1203 of the 2014 NDAA provides that "general purpose forces of the United States Armed Forces may train with the military forces or other security forces of a friendly foreign country if the Secretary of Defense determines that it is in the national security interests of the United States to do so."<sup>27</sup> In addition, Congress also provided military commanders with the authority to pay for "the incremental expenses incurred by a friendly foreign country as the direct result of training with the general purpose forces of the United States."<sup>28</sup> Unlike previous grants of authority from Congress, the general purpose forces training authority (GPTA) does not limit commanders

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<sup>24</sup> See *supra* note 6 (discussing Congress's previous limitations on grants of authority for DoD to conduct security assistance).

<sup>25</sup> The DoD Office of Legislative Counsel submitted a legislative proposal to the Senate Armed Service committee requesting an authority for general purpose forces to conduct training with friendly foreign forces. In this request, the DoD identified a need to maintain and enhance the skills developed by U.S. forces in the recent conflicts in Iraq and Afghanistan—namely the ability to train foreign forces in an effort to prepare for and prevent future conflicts. Further, the DoD informed Congress that, without this new authority, general purpose forces would be limited in their ability to train with and develop relationships with foreign allied forces. See Legislative Proposal, *supra* note 6.

<sup>26</sup> National Defense Authorization Act for Fiscal Year 2014 § 1203.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

to training with foreign forces in specific geographic areas or require a specific training objective.<sup>29</sup>

Though the intended purpose of this authority is to provide general purpose forces with the opportunity to improve the skills required to train a foreign force during a future counterinsurgency, this training can and will have the dual benefit of improving U.S. military relationships with and the military capacity of allied forces.<sup>30</sup> The ability to engage in this type of “big t” training is precisely the authority commanders need to meet the Chief of Staff’s mission of becoming a globally responsive, regionally engaged military. Judge advocates advising commanders to utilize GPTA to conduct foreign assistance missions should consider the following special characteristics of this authority: (1) the requirement that training improve the mission essential tasks of U.S. forces; (2) the interplay between the DoD and DoS in providing training under this authority; (3) congressional reporting requirements; and (4) the limitation on incremental expenses.

#### A. Focus on Training of U.S. Forces

The specific language contained within GPTA requires the training to “support the mission essential tasks for which the training unit providing such training is responsible [and to] be with a foreign unit or organization with equipment that is functionally similar to such training unit.” Therefore, by way of example, the commander of a U.S. infantry unit can train an allied foreign military unit so long as the training promotes the U.S. unit’s mission essential tasks—infantry tasks—and the foreign unit being trained is a maneuver unit with similar organization and equipment.

Therefore, JAs advising commanders on employing GPTA for future missions should work closely with the staff during the military decision making and planning process to ensure that any recommended course of action is closely tied to the unit’s mission essential task list.<sup>31</sup> So long as there is a nexus with the unit’s essential tasks, U.S. forces can seek to train a friendly foreign force in a way that both builds the capacity of and strengthens the relationship with the allied force.

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<sup>29</sup> *Id.*

<sup>30</sup> See Legislative Proposal, *supra* note 6.

<sup>31</sup> When assisting the staff in developing training plans for any operations involving foreign allied forces, judge advocates (JAs) should focus the staff on the unit’s mission essential task list (METL). So long as the proposed training objectives are clearly linked to the units METL, the commander will have solid footing if asked to show how the training mission improves the mission essential tasks for the U.S. forces. To better understand the context and development of METL, see U.S. DEP’T OF ARMY, FIELD MANUAL 7-0, TRAINING FOR FULL SPECTRUM OPERATIONS (Dec. 2008).

#### B. Interplay Between the DoD and DoS

Prior to conducting any training with a foreign force under GPTA, Congress requires that “the Secretary of Defense . . . seek the concurrence of the Secretary of State in such training event.”<sup>32</sup> Currently, there are no regulations or guidance from the DoD with respect to how to implement GPTA in coordination with the DoS. Though such guidance should be forthcoming, JAs seeking to begin considering this authority for upcoming missions with regionally aligned units can compare the guidance and regulations governing similar previous grants of authority from Congress.

Using similar language to that contained in section 1203 of the 2014 NDAA, Congress previously provided authority for special operations forces to conduct training with friendly foreign forces, sometimes referred to as Joint Combined Exchange Training (JCET), in 10 U.S.C. § 2011.<sup>33</sup> The Security Assistance Management Manual (SAMM), promulgated by the Defense Security Cooperation Agency (DSCA), and Army Regulation 12-15, *Joint Security Cooperation Education and Training*, provide some guidance on the process of coordinating with DoS and DoD entities when planning training activities with friendly foreign forces under 10 U.S.C. § 2011.<sup>34</sup> Specifically, these authorities require that military departments intending to offer training to foreign forces obtain specific requests from foreign entities for training through the appropriate channels and approval at a certain level within the DoD. Army Regulation 12-15 requires training assistance “be provided in response to specific requests presented through appropriate channels by an authorized representative of the foreign government or international organization concerned.”<sup>35</sup> The SAMM states that “JCETs are planned two years before the event with concurrence from the Office of Secretary of Defense for Policy (OSD (P)) and DoS.”<sup>36</sup>

Therefore, using the JCET process as a guide, general purpose force commanders must likely receive a request from an allied foreign force for training and then forward that request through the appropriate command channel to the DSCA. As DSCA works closely with DoS in planning and coordinating security assistance activities, DSCA will likely be the entity that seeks the concurrence of the proper DoS authority before attempting to utilize GPTA to train foreign forces. Judge advocates involved in the planning of GPTA

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<sup>32</sup> National Defense Authorization Act for Fiscal Year 2014 § 1203(a)(2).

<sup>33</sup> 10 U.S.C. § 2011 (2012).

<sup>34</sup> See DoD 5105.38-M *supra* note 11; see also U.S. DEP’T OF ARMY, REG. 12-15, JOINT SECURITY COOPERATION EDUCATION AND TRAINING (3 Jan. 2011) [hereinafter AR 12-15].

<sup>35</sup> AR 12-15, *supra* note 34, para. 3-2.

<sup>36</sup> DoD 5105.38-M, *supra* note 11, para. 10.17.11.

training events should look for the publication<sup>37</sup> of more specific regulations on the topic to better inform their commanders of the proper procedures for executing any such training.<sup>38</sup>

### C. Congressional Reporting Requirements

The grant of GPTA comes with a considerable amount of congressional oversight. At least fifteen days prior to commencing any training activity under this authority, the Secretary of Defense must send notice to the House and Senate Armed Service Committees.<sup>39</sup> Additionally, Congress requires an annual detailed report on the use of GPTA, which will include a detailed description of any training activities conducted pursuant to GPTA, as well as a projection of future plans to conduct GPTA training exercises. The JCET program listed above has similar reporting requirements.

In 1999, the GAO conducted a comprehensive review of the special operations JCET program, which included a review and significant scrutiny of the congressional reporting requirements.<sup>40</sup> Though the GAO report on JCETs provides several areas that fell short in the congressional reporting process, one focus area from the GAO report that commanders at all levels can influence, and one that should be of particular interest to advising JAs, is accounting for the

costs associated with training missions.<sup>41</sup> The GAO report identifies the primary challenge to calculating and reporting JCET costs to Congress is a function of the special operations command's use of various appropriations to fund the JCETs, which includes defense wide O&M, service O&M, and combatant command O&M.<sup>42</sup> In particular, the report mentions that the DoD should have selected one appropriation to fund the JCET expenses and continued to use only that appropriation for the entirety of the fiscal year.<sup>43</sup> Based on the lessons learned from the JCET reporting procedures, JAs should take the following steps to ensure proper cost accounting for GPTA activities:

(1) work with their commanders and staffs to obtain clear guidance on which appropriation is proper for funding GPTA;

(2) certify that only the selected appropriation is used for all GPTA; and

(3) make sure that the resource manager is accurately accounting for these expenses for inclusion in the required congressional report on GPTA expenses.

### D. Limitation on Incremental Expenses

Congress, in authorizing general purpose forces to train friendly foreign forces, recognized the potential need to provide funding for some foreign allies who do not have the ability to pay for expenses related to training with U.S. forces. Congress, therefore, authorized the payment of incremental expenses "incurred by a friendly foreign country as the direct result of training with general purpose forces of the United States Armed Forces."<sup>44</sup> Unlike the JCET program, however, Congress placed a cap on the total amount of expenses that are permissible under the GPTA at \$10 million.<sup>45</sup> As a result of this limitation, JAs should work in coordination with their staffs to first determine whether

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<sup>37</sup> Judge advocates should look to the DoD Issuances website at <http://www.dtic.mil/whs/directives/> for initial regulatory guidance on the implementation of general purpose forces training authority (GPTA). Also, the Defense Security Cooperation Agency (DSCA) serves as DoD's lead agency on security assistance programs. In that capacity, DSCA may also have some initial guidance on GPTA that judge advocates may find useful when planning training activities under this new authority. DSCA publishes guidance and information on its website at <http://www.dscamilitary.com/>.

<sup>38</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1203(f) (2014). In section 1203 of the NDAA, Congress required the Secretary of Defense to publish regulations governing the conduct of training pursuant to this authority no later than 180 days after the enactment of the 2014 NDAA, or 26 June 2014. Based upon the traditional process of implementing regulations from DoD down to the service level, it is unclear when specific guidance on this authority will be available to practitioners. Consequently, it is important that JAs begin analyzing this statute to be in a position to rapidly advise commanders as the cascade of guidance regulations begins to work their way from the DoD level down to each specific service.

<sup>39</sup> National Defense Authorization Act for Fiscal Year 2014 § 1203(d).

<sup>40</sup> See GOV'T ACCOUNTABILITY OFFICE, GAO/NSIAD-99-173, MILITARY TRAINING: MANAGEMENT AND OVERSIGHT OF JOINT COMBINED EXCHANGE TRAINING (1999), <http://www.gao.gov/products/GAO/NSIAD-99-173>. This GAO report provides a comprehensive review of the JCET process from a congressional oversight perspective. In particular, the report focuses on how JCETs are properly focused on training U.S. Forces, the congressional reporting requirements, the level of oversight required to ensure JCETs are consistent with foreign policy, and the prevention of human rights abuses by foreign forces. This report is a good resource for JAs as they attempt to analyze the requirements and limitations of section 1203 of the 2014 NDAA.

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<sup>41</sup> *Id.* at 32.

<sup>42</sup> *Id.* at 37. In each year's appropriation act, Congress provides separate O&M appropriations for each separate service and one for DoD-wide expenditures; each Combatant Command requests annual O&M funding from the DoD based upon their budget. Each appropriation is to be used for the specific expenses related to operating and maintaining for the specified entity.

<sup>43</sup> *Id.* at 38; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, pt. B, sec. 2, at 2-23 (3d ed. 2004 & Supp. 2013).

<sup>44</sup> National Defense Authorization Act for Fiscal Year 2014 § 1203(c)(1). Examples of incremental expenses are food, fuel, training ammunition, transportation, and other goods and services a friendly foreign country incurred as a direct result of participating in combined training events with U.S. forces.

<sup>45</sup> *Id.* § 1203(c)(2). The congressional limitation applies to DoD-wide incremental expenses paid to any friendly foreign force in a given fiscal year.



the allied foreign force is one from a developing country that would require payment of incremental expenses. Then, if some incremental expenses are required to successfully complete the training mission, JAs should coordinate with members of the chain of command and technical chain to determine whether their particular training exercise has sufficient priority across the DoD to prevent any commitment of incremental expenses in excess of the congressional limitation.

The new GPTA authority is certainly something commanders will want to leverage as they prepare to meet the requirements of developing our foreign allies in preparation for any future conflicts. Judge advocates need to be aware of the limitations of this authority in an effort to provide comprehensive advice to commanders operating in this new operational environment.

#### IV. Conclusion

Changing the Army's mission from supporting the counterinsurgencies in the Middle East to developing relationships with and building the capacity of foreign allied forces during a time of limited fiscal resources will be a significant challenge to our leaders. Congress, through

section 1203 of the 2014 NDAA, provided our commanders with a substantial increase in foreign assistance authority required to meet the objectives of becoming a globally responsive, regionally aligned force. Though this new "big t" training authority will require specific guidance and direction from our leaders at the DoD, JAs should advise their commanders on both the utility and limitations on this authority as our units plan for future exercises with foreign allied forces. The approval to use these funds will likely be held at a high level; however, JAs can make their commanders aware of this authority by shaping any security assistance training plan to conform to the requirements of section 1203 of the 2014 NDAA.

## Rumsfeld's Rules<sup>1</sup>

Reviewed by Major Patrick M. McGrath\*

*Lawyers are like beavers. They get in the middle of the stream and dam it up.*<sup>2</sup>

### I. Introduction

There are few recent public figures that are as polarizing as Donald Rumsfeld. Many people blame him for the torture of prisoners by the United States,<sup>3</sup> or for the poor handling of the Iraq war,<sup>4</sup> while others credit him for changing the U.S. military into a more adapt, flexible, and lethal organization.<sup>5</sup> Regardless of one's personal opinion of Rumsfeld, his rules are valuable to any leader. Rumsfeld has a wealth of life experience—in the private sector, the military, and the government—to draw upon for his insights and thoughts about leadership and management. His rules are grounded in personal experience and incorporate truths about basic human nature that are vital to account for when leading people.<sup>6</sup>

Donald Rumsfeld is the only person to have twice served as the Secretary of Defense (SECDEF), and has the distinction of having been both the youngest and the oldest SECDEF.<sup>7</sup> In 1977, after his tenure as the thirteenth SECDEF, he was awarded the Presidential Medal of

Freedom, the highest award a civilian can receive.<sup>8</sup> Rumsfeld attended Princeton University where he participated in wrestling as team captain and Naval Reserve Officer Training.<sup>9</sup> He served in the U.S. Navy as a pilot and flight instructor, was elected to the House of Representatives four times, served as President Ford's White House Chief of Staff, and has been the CEO of Fortune 500 companies.<sup>10</sup> Over the course of his life, Rumsfeld has served in some capacity or another for five U.S. Presidents.<sup>11</sup>

This book is not the first time Donald Rumsfeld has collected his rules into a user friendly format. While working for President Gerald Ford, Rumsfeld maintained a collection of quotes and life lessons. Upon discovering and reviewing this collection, President Ford declared them "Rumsfeld's Rules" and directed that they be given to members of his senior staff.<sup>12</sup> Rumsfeld has been jotting down notes of interesting insights, thoughts, life lessons, and sayings for most of his life. It is the fruits of this labor that form the basis for *Rumsfeld's Rules*. Although titled *Rumsfeld's Rules*, he is the first to admit that most of the quotes and insights are not his, but instead belong to others who were inspiring enough to take notes on.<sup>13</sup>

Rumsfeld does not exceed the scope of the book's purpose. Considering that many of the rules can be applied to innumerable situations, *Rumsfeld's Rules* is well organized. Rumsfeld chooses to group the rules based on overarching management or leadership requirements, such as running a meeting or confronting a crisis.<sup>14</sup> This enables

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<sup>1</sup> DONALD RUMSFELD, *RUMSFELD'S RULES* (2013).

<sup>2</sup> *Id.* at 302.

<sup>3</sup> STAFF OF S. COMM. ON THE ARMED SERVICES, 110TH CONG., *INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY*, at xxix (Comm. Print 2008) (finding Secretary of Defense (SECDEF) Rumsfeld's approval of enhanced interrogation techniques precipitated the eventual abuses that occurred at Abu Ghraib).

<sup>4</sup> *Army Times*: "Time for Rumsfeld to Go," CNN.COM (Nov. 4, 2006), <http://www.cnn.com/2006/POLITICS/11/04/rumsfeld.departure/> ("[Secretary Donald Rumsfeld's] strategy has failed, and his ability to lead is compromised. And although the blame for our failures in Iraq rests with the secretary, it will be the troops who bear its brunt.") (quoting *Army Times* editorial).

<sup>5</sup> Paul C. Light, *Rumsfeld's Revolution at Defense*, *Brookings Policy Brief Series #142*, BROOKINGS INST. (Jul. 2005), <http://www.brookings.edu/research/papers/2005/07/governance-light> (noting Rumsfeld's ambitious reform of the military focused on "four . . . pillars of organizational robustness: (1) alertness to the future ahead; (2) agility in how the department responds to threats and opportunities; (3) adaptability in what the department actually does; and (4) alignment around a clear mission").

<sup>6</sup> RUMSFELD, *supra* note 1, at xiii. Rumsfeld believes his rules work well because they are "insights into human nature—timeless truths that have survived the changes in our culture and even the many efficiencies enabled by modern technology." *Id.*

<sup>7</sup> Donald H. Rumsfeld, *21st Secretary of Defense*, U.S. DEP'T OF DEF., <http://www.defense.gov/bios/biographydetail.aspx?biographyid=90> (last visited 21 Feb. 2014). Rumsfeld was forty-three years old when he became the thirteenth SECDEF, and sixty-nine years old when he became the twenty-first SECDEF. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See also RUMSFELD, *supra* note 1, at 170 (discussing his wrestling career).

<sup>10</sup> *Id.* Rumsfeld served as Chief Executive Officer for both G.D. Searle & Co., a worldwide pharmaceutical company, from 1977 to 1985, and General Instrument Corporation from 1990 to 1993. *Id.*

<sup>11</sup> *Id.* Rumsfeld has served in numerous public positions throughout his career, to include White House advisor under President Richard Nixon; Chief of Staff and SECDEF under President Gerald Ford; special envoy to the Middle East on behalf of President Ronald Reagan; chair of the bipartisan Commission to Assess the Ballistic Missile Threat to the United States under President Bill Clinton; and SECDEF under President George W. Bush. *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at xii ("Truth be told, I don't know if I've had a truly original thought in my life.").

<sup>14</sup> Each chapter consists of a grouping of related rules—e.g., Starting at the Bottom; Picking People; Thinking Strategically; Planning for Uncertainty; The Unknown Unknowns; Meeting the Press; Battling Bureaucracy; Lessons from the World's Most Successful Leadership Organization; and The Optimism of Will.

readers to understand where best to incorporate the rule into their leadership style.

## II. Why *Rumsfeld's Rules* Is Not Your Typical Leadership Book

Rumsfeld's intent is to provide the reader with rules that can be applied by any leader, at any level of management, in any type of organization.<sup>15</sup> He includes some anecdotal examples from his personal experience to illustrate how applying or following certain rules can be beneficial. These stories help to illustrate the application of the rule, but on the whole tend to be very short—the majority are no longer than a single page. However, it is these personal stories that make the book enjoyable and give it substance—and at times more credibility—than other similar works.

For instance, Rumsfeld describes how Vice President Nelson Rockefeller, during a ride in a presidential motorcade, demonstrated the rule that “[p]eople respond in direct proportion to the extent you reach out to them.”<sup>16</sup> During the parade, Rockefeller at first just waved out the window; the few people who saw responded with a similar reserved wave back. Then as he gradually increased his enthusiasm, more and more of the crowd responded in kind.<sup>17</sup> The end result was Rockefeller standing up in the convertible car waving both arms, and the crowd matching his enthusiasm by waving back or flapping their small American flags in a blur of red, white, and blue.<sup>18</sup> This anecdote creates a strong visual image to reinforce the rule that people respond in kind to the level of attention you give them. The more leaders actively and enthusiastically engage their subordinates, the more enthusiasm for the mission they bring to the organization. It is this acute mixture of human insights, visual reinforcement, and quick digestible rules that make this a different kind of leadership book.

## III. Time: The Most Valuable Resource Your Subordinates Have

There are many resources that a leader must consider and balance when determining the priorities for his organization, but few of them are as important or have as much impact as time.<sup>19</sup> Rumsfeld understands the importance that time plays

in an organization's success, highlighting its impact in his chapter, *Running a Meeting*. One of his best recommendations is “whatever the size or purpose of [the] meeting, start and end it on time.”<sup>20</sup> This may seem obvious, but too often in organizations the norm is for meetings to start late or run long. Leaders either tolerate it or worse, are the cause of it. Rumsfeld is able to demonstrate the actual harm this can cause. He uses an example to show how five hours of productive time can be lost when a meeting starts fifteen minutes late and there are twenty people present.<sup>21</sup> Although fifteen minutes does not seem like much in isolation, the cumulative impact—five hours of lost productivity—can cause serious harm to an organization.

Managing your organization's time through effectively-run meetings is vital in today's military when we are facing budget crunches,<sup>22</sup> and the new mantra is “do more with less.” Leaders in the military must be cognizant of how they are employing their most precious resource—Soldiers—and must strive to maximize Soldiers' time and effort.<sup>23</sup> One way to do this is by looking at why, how often, and who participates in meetings.<sup>24</sup> Leaders commonly believe that the more people present during a meeting, the better the

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attend them are not thinking about time as their most valuable resource” or appreciate the finiteness of the resource because “[t]ime is the most perishable good in the world, and it is not replenishable”).

<sup>20</sup> RUMSFELD, *supra* note 1, at 31. Rumsfeld reinforces his recommendation to start and end meetings on time with the classic quote he attributes to drill sergeants: “[i]f you're five minutes early, you're on time. If you're on time, you're late. If you're late, you have some explaining to do.” *Id.*

<sup>21</sup> *Id.* At the same time, Rumsfeld stresses the importance of knowing when to end a meeting. “There were occasions when I abruptly ended a meeting in progress and advised the participants that we would reconvene when everyone had had time to fully prepare. The response was usually surprised looks all around. In my experience some leaders don't end meetings when it's clear they've become a waste of time. Instead they sit there and let the meeting experience a slow, painful death on its own.” *Id.* at 36.

<sup>22</sup> See Michelle Tan, *U.S. Army Forced Into 'Extreme Tiered Readiness,' Chief Says*, DEF. NEWS (Oct. 23, 2013), <http://www.defensenews.com/article/20131023/SHOWSCOUT/310230018/Army-Forced-Into-extreme-Tiered-Readiness-Chief-Says> (discussing the Army's current challenge to train and equip Soldiers due to limited resources caused by the recent government shutdown and fiscal crisis and the fallout from sequestration).

<sup>23</sup> See also U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 7-0, TRAINING UNITS AND DEVELOPING LEADERS para. 3-38 (23 Aug. 2012) (discussing the one-third/two-thirds rule when it comes to allocating time management between leaders and subordinates). “Leaders at all levels use no more than one-third of the training time available for planning and issuing their operation order (OPORD). They allocate two-thirds of the time remaining for subordinates to plan their own training.” *Id.* Although discussed in the context of training, this rule can be applied to time management involving any task.

<sup>24</sup> Rumsfeld is cognizant of this concern because his “first consideration for meetings is whether to call one at all” and warns to avoid the pitfall of believing that “[t]he act of calling a meeting about a problem . . . be confused with actually doing something” about the problem. RUMSFELD, *supra* note 1, at 27. See also Colonel Jack F. Lane, Jr., *Managing to Lead*, ARMY LAW., Nov. 1994, at 29 (“Managers should not have meetings just for the sake of meetings . . . [and] do not have people attend meetings if the subject is not of concern to them, because this wastes their time.”).

<sup>15</sup> RUMSFELD, *supra* note 1, at xiii. However, he is the first to admit, “[R]ules cannot be a substitute for judgment. That's what makes leadership so difficult and truly outstanding leaders so rare. Tough decisions involve weighing not just benefits and risks, but also competing principles and sometime even conflicting rules.” *Id.*

<sup>16</sup> *Id.* at 151–52.

<sup>17</sup> *Id.* at 151.

<sup>18</sup> *Id.* at 152.

<sup>19</sup> See also Reid Hastie, *Meetings Are a Matter of Precious Time*, N.Y. TIMES, Jan. 17, 2009, [http://www.nytimes.com/2009/01/18/jobs/18pre.html?\\_r=0](http://www.nytimes.com/2009/01/18/jobs/18pre.html?_r=0) (discussing that “[t]he people who call meetings and those who

information flows; but often this enables a meeting to get bogged down or meander into unintended areas.<sup>25</sup> Rumsfeld is right on point when he notes that “[a]t their worst, meetings can be both useless and mind-numbing,”<sup>26</sup> but that “[w]ell managed meetings can be valuable—indeed, indispensable”<sup>27</sup> to the success of an organization.

#### IV. Leaders Must Not Only Learn and Share from the Good, But Also from the Bad

What could have been a great book on leadership is instead only a good one because Rumsfeld chooses not to incorporate more of his personal experiences of what worked and what did not work during his time as SECDEF during the war on terror. The closest he comes to evaluating possible mistakes in leadership is a general statement that some mistakes occurred in Iraq and Afghanistan, but then minimizes any personal leadership fault by stating, “In the fog of war, miscalculations are of course inevitable.”<sup>28</sup> As a generalization, this is a true statement. However, the problem with dismissing any mistakes related to Iraq or Afghanistan so curtly is that some of those decisions had to have occurred outside the “fog of war.” While learning how to lead from the successes of others is valuable, often just as valuable, if not more, is learning from others’ mistakes or missteps. Good leaders learn from their mistakes, but excellent leaders enable *others* to learn from those same mistakes.

Through his book, Rumsfeld had an opportunity to share his mistakes and allow others to learn from them, but he chose not to. Although this book was not intended to focus on Rumsfeld’s time as SECDEF or to examine the war on terror, such a complex and difficult experience from both an intellectual and moral standpoint undoubtedly provided valuable leadership lessons to learn from. One of the only discussions about leadership mistakes involving the war in Iraq is when Rumsfeld offered his resignation to President George W. Bush following the disclosure of prisoner abuse at Abu Ghraib.<sup>29</sup> However, Rumsfeld uses this example to focus on subordinates’ communication failures concerning the extent of prisoner abuse.<sup>30</sup> By glossing over any

leadership issues or failures, he misses an opportunity to discuss unintended consequences and how decisions can take on a life of their own in a large organization. The Senate Arms Service Committee released a report on 21 April 2009 that concluded:

Secretary of Defense Donald Rumsfeld’s December 2, 2002, authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressures and degradation were appropriate treatment for detainees in U.S. military custody. What followed was an erosion in standards dictating that detainees be treated humanely.<sup>31</sup>

The report discusses how detainee treatment that was initially authorized for use only at Guantanamo Bay migrated out through Afghanistan, into Iraq, and eventually implemented in a twisted way at Abu Ghraib by personnel who did not understand what was in fact authorized.<sup>32</sup>

The Department of Defense is like no other organization in that the majority of its members are constantly moving from one unit and duty location to another. This level of turnover creates unique leadership issues not experienced elsewhere. Rumsfeld could have discussed the difficulties that arise when personnel turn over often and how it can create the opportunity for new personnel to incorporate norms from their previous unit into their new unit—norms that were never intended to be implemented somewhere else. Leadership does not occur in a vacuum. Leaders must

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became aware of the “sadistic behavior of a few prison guards wearing U.S. military uniform[s] . . . .” He states that “had [he] been told about the abuse the photos depicted when the investigation was first initiated, [he would have] informed the president . . . and been prepared with a more effective response. Instead [they] were blindsided.” *Id.*

<sup>31</sup> STAFF OF S. COMM. ON THE ARMED SERVICES, 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, at xxix (Comm. Print 2008).

<sup>32</sup> *Id.* at xxiv. See George R. Mastroianni, *Looking Back: Understanding Abu Ghraib*, 43 PARAMETERS: THE U.S. ARMY WAR COLL. Q. 2, 54 (Summer 2013) (outlining two competing narratives for what occurred at Abu Ghraib). One is the “bad apples” narrative, where what occurred was the actions of “a few bad Soldiers whose misconduct was their own invention and not a part of any officially sanctioned method of interrogation.” The second, and more accepted one, is the “bad barrel” narrative, where “the abuses were the result of migration of ‘enhanced interrogation procedures’ from Guantanamo Bay to Iraq.” *Id.* See also Lieutenant General Anthony R. Jones, Army Regulation 15-6 Report of Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade (n.d.), available at <http://www.defense.gov/news/aug2004/d20040825fay.pdf> (“Confusion about what interrogation techniques were authorized resulted from the proliferation of guidance and information from other theaters of operation; individual interrogator experiences in other theaters; and, the failure to distinguish between interrogation operations in other theaters and Iraq. This confusion contributed to the occurrence of some of the non-violent and non-sexual abuses.”).

<sup>25</sup> See RUMSFELD, *supra* note 1, at 28–30. Rumsfeld counsels finding a balance because “[y]ou want those who need to be there to contribute substance to the discussion. But it can also be useful to have people who may not be in a position to directly offer substantive input but will benefit from hearing how and why certain decisions are being reached.” *Id.*

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.* at 284.

<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.* Rumsfeld explains that it was “known” that some prisoners had been abused during the midnight shift at Abu Ghraib and that some photographs had been taken, but were being held as part of the investigation. Once he became aware that some of the photos were going to be aired on television he took the initiative to review them. It was not until this time that he

consider the second-, third-, and fourth-order effects before making a decision and understand how that decision is implemented and how it can evolve based on the organization and the environment.<sup>33</sup>

## V. Conflicting Rules

Rumsfeld posits that leadership within a large bureaucracy cannot be accomplished by issuing directives alone, but generally requires consent and persuasion as well.<sup>34</sup> He advocates for the use of the Socratic method, which he implemented most often through memos.<sup>35</sup> During his second stint as SECDEF, he was known for issuing twenty to sixty memos a day to subordinates<sup>36</sup>—what amounted to over 20,000 during his second tenure.<sup>37</sup> These memos became known as snowflakes because of the frequency with which they were issued.<sup>38</sup> Some of these were as short as two lines and provided little guidance to subordinates on what exactly was needed or wanted.<sup>39</sup> For example, one such memo asked about reducing troop commitments, stating that he needed to “understand stability operations better.”<sup>40</sup> However, other memos provided valuable insight. In an October 2002 snowflake known as

the Parade of Horribles, Rumsfeld listed potential problems subordinates needed to consider when planning the war with Iraq, such as the failure to find weapons of mass destruction or the possible ethnic strife among Sunnis, Shia, and Kurds.<sup>41</sup>

Rumsfeld believes that by issuing less orders and instead asking more general questions, leaders allow subordinates to feel they are involved in the process and “‘own’ the changes.”<sup>42</sup> In fact, when he did make a specific assertion, he would follow it with a question like “What do you think?” or “Why isn’t this right?”<sup>43</sup> There is debate as to how well his “Socratic method” worked,<sup>44</sup> but it is likely that it did not have the intended effect within the military.

Rumsfeld’s Socratic style of leadership would not be effective in the Army because it is counterintuitive to the way we train our leaders and execute our mission—to fight and win the Nation’s wars.<sup>45</sup> The U.S. Army defines leadership as “the process of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization.”<sup>46</sup> Leaders at every level of the military must communicate a “clear understanding of what needs to be done and why.”<sup>47</sup> Adopting wholesale Rumsfeld’s Socratic approach in the Army would wreak havoc. A mission statement must clearly define the objective and its purpose for subordinate leaders to properly prepare their units to accomplish the mission.<sup>48</sup> A company commander receiving a mission

<sup>33</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL, 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE para. 9-12 (Oct. 2006) (“Leaders should think through what they can expect to happen because of a plan or course of action. Some decisions may set off a chain of events that are contrary to the desired effects. Intended consequences are the anticipated results of a leader’s decisions and actions. Unintended consequences arise from unplanned events that affect the organization or accomplishment of the mission.”).

<sup>34</sup> RUMSFELD, *supra* note 1, at 198.

<sup>35</sup> *Id.* at 199. Rumsfeld’s method was to ask “a series of questions that help to move toward the preferred outcome.” Usually when he would make “a specific assertion it tended to be followed by something like ‘Would you let me know what’s wrong with this?’ or ‘Why isn’t this right?’ or ‘What do you think?’” as opposed to issuing a direct order. Rumsfeld states he “could probably count on two hands the number of times [he] issued a direct order other than an explicit command from the President of the United States” over his almost six years as SECDEF from 2001–2006. *Id.*

<sup>36</sup> Keach Hagey, *Rumsfeld Memo Laments Lazy Muslims*, CBS EVENING NEWS (Mar. 6, 2010), [http://www.cbsnews.com/8301-501203\\_162-3439642.html](http://www.cbsnews.com/8301-501203_162-3439642.html).

<sup>37</sup> RUMSFELD, *supra* note 1, at 199 (“Contained in those memos and notes was a great many more questions than instructions.”).

<sup>38</sup> Hagey, *supra* note 36.

<sup>39</sup> See, e.g., Memorandum from Sec’y of Def. Donald Rumsfeld (July 18, 2005), *available at* <http://library.rumsfeld.com/doclib/sp/4104/2005-07-18%20Re%20Mobilizing%20Moderate%20Muslims.pdf>. The memo, with the subject line Mobilizing Moderate Muslims, consisted of one sentence: “We need a plan to mobilize moderate Muslims now—in the U.S. and around the world.” *Id.*

<sup>40</sup> Memorandum from Sec’y of Def. Donald Rumsfeld (May 13, 2005), *available at* <http://library.rumsfeld.com/doclib/sp/4108/2005-05-13%20Re%20Troop%20Commitments.pdf>. The memo, with the subject line Troop Commitments, consisted of one line: “I’ve got to talk to somebody about pulling down troop commitments so they don’t last forever, and understanding stability operations better.” *Id.*

<sup>41</sup> Memorandum from Sec’y of Def. Donald Rumsfeld (Oct. 15, 2002), *available at* <http://library.rumsfeld.com/doclib/sp/310/Re%20Parade%20of%20Horribles%2010-15-2002.pdf#search=2002-10%20iraq>. Other potential problems Rumsfeld listed included: “[i]f U.S. seeks UN approval, it could fail, and without a UN mandate, potential coalition partners may be unwilling to participate;” “Syria and Iran could decide to support Iraq, complicating the war;” “U.S. could fail to find Saddam Hussein;” “[r]ather than having the post-Saddam effort require 2 to 4 years, it could take 8 to 10 years, thereby absorbing U.S. leadership, military and financial resources;” “[r]ecruiting and financing for terrorist networks could take a dramatic upward turn from successful information operations by our enemies, positioning the U.S. as anti-Muslim;” and “Iraq could successfully best us in public relations and persuade the world that the war is against Muslims.” *Id.*

<sup>42</sup> RUMSFELD, *supra* note 1, at 198.

<sup>43</sup> See Hagey, *supra* note 36.

<sup>44</sup> BOB WOODWARD, STATE OF DENIAL: BUSH AT WAR, PART III, at 34 (2006) (noting that Director of Joint Staff could not properly track all the memos issued by Rumsfeld that impacted the Joint Chiefs and the Joint Staff).

<sup>45</sup> ARMY MISSION STATEMENT, <http://www.army.mil/info/organization> (last visited Feb. 21, 2014).

<sup>46</sup> U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP 1 (1 Aug. 2012) [hereinafter ADP 6-22].

<sup>47</sup> *Id.* at 7.

<sup>48</sup> See U.S. DEP’T OF ARMY, TACTICS, TECHNIQUES AND PROCEDURES 5-0.1, COMMANDER AND STAFF OFFICER GUIDE para. 4-65 (14 Sept. 2011) (“A *mission statement* is a short sentence or paragraph that describes the organization’s essential task (or tasks) and purpose—a clear statement of the action to be taken and the reason for doing so. The mission statement

statement that states, “Take hill X” followed with, “Why isn’t this right?” would cause confusion and lack the required clarity of what needed to be done and why.

Another reason Rumsfeld’s Socratic leadership style may not have had the desired effect is because military personnel are trained to react quickly to inquiries from superior officers. A Rumsfeld rule points out that subordinates respond to the urgent issues—the boss’s need—to the detriment of the important issues—the primary mission of the unit or staff.<sup>49</sup> Simply scattering snowflakes with aplomb inside the Department of Defense would not seem to provide a clear mission statement and direction for the organization, especially when many of the memos are nothing more than thoughts or questions without context or a commander’s intent.<sup>50</sup>

## VI. Why These Rules Matter to Judge Advocates

Leadership skills are the unifying element of combat power.<sup>51</sup> Such skills are a force multiplier that every Army leader is capable of honing. Leadership enables and enhances other elements of combat power—information, mission command, movement and maneuver, intelligence, fires, sustainment, and protection—by motivating unit personnel, giving focus to the mission, and ensuring that resources are properly allocated so that units can accomplish their assigned tasks.<sup>52</sup> The Army does not believe that leadership is solely an innate ability that one either has or does not have.<sup>53</sup> Instead, the Army considers leadership to be a skill that can be nurtured and developed in anyone.<sup>54</sup>

Judge advocates straddle two professional spheres—one of the law and the other of the profession of arms—both of which are demanding and require specialized skills that are perishable if not properly maintained and improved upon.

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contains the elements of who, what, when, where, and why, but seldom specifies how.”).

<sup>49</sup> RUMSFELD, *supra* note 1, at 14 (“Don’t let the urgent crowd out the important.”).

<sup>50</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at II-8 (11 Aug. 2011) (defining commander’s intent as “the commander’s clear and concise expression of what the force must do and the conditions the force must establish to accomplish the mission. It is a succinct description of the commander’s visualization of the entire operation and what the commander wants to accomplish. It provides focus to the staff and helps subordinate and supporting commanders act to achieve the commander’s desired results without further orders once the operation begins, even when the operation does not unfold as planned.”). See also WOODWARD *supra* note 44, at 34 (stating Rumsfeld would send snowflakes to anyone in the Pentagon regardless of rank or position, which created confusion for the Joint Staff when trying to respond).

<sup>51</sup> U.S. DEP’T OF ARMY, DOCTRINE REFERENCE PUB., 3-0, UNIFIED LAND OPERATIONS, COMBAT POWER 3-1 (16 May 2012).

<sup>52</sup> ADP 6-22, *supra* note 46, at 1.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

This means that as leaders in the Army, judge advocates have a responsibility to maintain and develop their leadership skills in the same way they train to develop their skills for the courtroom. Reading and discussing books about leadership is one way for judge advocates to draw out new approaches and perspectives that will enable them to tackle future challenges.<sup>55</sup>

## VII. Conclusion

*Rumsfeld’s Rules*, despite some of its flaws, is a leadership book that judge advocates at every level will benefit from reading. Rumsfeld has effectively blended his unique personal experiences from the military, private sector, and government into an effective style of leadership worth examining, even if all the methods might not be worth adopting. The lessons he learned can provide valuable insight for judge advocates who must advise and interact with senior leaders and can enhance judge advocates’ ability to be force multipliers for their commanders.

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<sup>55</sup> See U.S. DEP’T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT 39-3 (1 Feb. 2010) (noting judge advocates should “dedicate time to professional reading to gain a historical perspective on tactical, legal and leadership challenges”).

# Bleeding Talent: How the U.S. Military Mismanages Great Leaders and Why It's Time for a Revolution<sup>1</sup>

Reviewed by Major Marcus Misinec\*

*Judge Advocates in the military, much like medical or other highly educated servicemembers, have several distinct decision points in their careers when they decide to remain in the military vice getting out to earn more money.*<sup>2</sup>

## I. Introduction

Tim Kane's Total Volunteer Force (TVF) would have future military officers asking, "What's in it for me?" rather than, "What can I do for my country?" Kane, a former Air Force intelligence officer, introduces himself by reminiscing about sipping Heinekens on the patio of his new San Diego home complete with a canyon view, as he celebrates the million-dollar sale of a software company that was "more of a hobby than a business."<sup>3</sup> The year was 1998, and Kane found himself in the highest tax bracket and thus, financially obligated to Uncle Sam for his newfound wealth.<sup>4</sup> Rather than convey ill will for his sizeable tax forfeiture, Kane couches his levy as a dutiful payback to the U.S. Government for its role in helping him meet people like Jim Coyer, his partner in the previously mentioned venture, while attending the Air Force Academy.<sup>5</sup> Coyer is the first of many successful friends and entrepreneurs Kane cites as

proof the military, to its detriment, has failed to keep quality leaders satisfied and in the ranks.<sup>6</sup>

Convinced that "[many], maybe most, of the best leaders leave" the military, Kane charges the reader to accept his market-based approach—the Total Volunteer Force (TVF)—as the way to stop the bleeding.<sup>7</sup> In *Bleeding Talent: How the Military Mismanages Great Leaders and Why It's Time for a Revolution*, Kane attempts to demonstrate the severity of the problem by providing both military officer attrition statistics and the results of his overly hyped poll—the West Point Survey.<sup>8</sup> He then begins his TVF quest by citing evidence that former military officers make successful Chief Executive Officers (CEOs) and, therefore, the military could easily implement his market-based principles.<sup>9</sup> Next, the author details several reasons why he believes quality military officers leave the military, which include tiring of coercion and becoming fed up with an evaluation system that fails to measure their true merit. All the above culminates with Kane eventually laying out his TVF solution.

## II. Background

If starting his crusade with a million-dollar "How you like me now?"<sup>10</sup> outlook directed at the Air Force does not

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<sup>1</sup> TIM KANE, BLEEDING TALENT: HOW THE U.S. MILITARY MISMANAGES GREAT LEADERS AND WHY IT'S TIME FOR A REVOLUTION (2012).

<sup>2</sup> Interview with Colonel James Garrett, Dean, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va., in Charlottesville, Va. (Sept. 11, 2013). Colonel (COL) Garrett recalled two occasions during his over twenty-five year judge advocate career when he contemplated leaving the military. The first was when he had the opportunity to return to his and his wife's hometown to practice as an assistant district attorney, and the second was when a family friend approached him about a high-paying position at a D.C. law firm. When asked what made him stay, COL Garrett responded, "The Army is like a football team. Not only do you have many players who must perform individually in order for the team to succeed collectively, but there is a camaraderie that cannot be replicated in the corporate world. The people we serve and serve with are a collection of like-minded Americans more interested in what role he or she can play in the betterment of our nation and its security and less in personal statistics and accolades." Colonel Garrett closed with, "I have had many military friends and peers that have chosen to get out and have gone on to incredibly successful and, in many cases, lucrative careers. But, for those of us who remain, I think the feeling of being part of something bigger and having the opportunity to mentor tomorrow's military leaders overtakes any desire to leave." *Id.*

<sup>3</sup> *Id.* at 1. The business the author refers to is NeocorTech LLC, a Japanese translation software company.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1–2.

<sup>6</sup> *Id.* at 3. The author names the following individuals as proof the military has failed to retain quality leaders: Dean Dorman, West Point graduate, CEO; Dan Beldy, F-18 aviator, venture guru; Kelly Perdew, West Point graduate, Trump apprentice; Mike Pompeo, Kansas congressman; Dawn Dunlop, F-15 squadron commander, White House fellow; and Dave McCormick, West Point graduate, undersecretary of the Treasury.

<sup>7</sup> *Id.* at 24, 33.

<sup>8</sup> *Id.* at 95, 217–34. The survey was comprised of thirteen questions and was completed by 250 West Point graduates from the classes of 1989, 1991, 1995, 2000, 2001, and 2004. Sixty-nine percent (172) of the West Point graduates who took the survey were no longer in the Army. *Id.*

<sup>9</sup> *Id.* at 25, 53, 57. The author mentions the following senior executives who attribute their leadership skills to their time in uniform: Ross Perot; Bill Coleman, Air Force Academy graduate; Sam Walton; and Bob McDonald, CEO of Procter and Gamble. Ross Perot enrolled at the United States Naval Academy in 1949 and served in the Navy until 1957. He worked for IBM for a few years before forming Electronic Data Systems, which he sold to General Motors in 1984 for \$2.5 billion. Ross Perot also ran for the U.S. presidency in 1992 and 1996 as an independent candidate. See Ross Perot, BIO. TRUE STORY, <http://www.biography.com/people/ross-perot-9438032> (last visited Feb. 20, 2014). Sam Walton founded Walmart after serving as an officer in the U.S. Army Intelligence Corps.

<sup>10</sup> THE HEAVY, *How You Like Me Now?*, on THE HOUSE THAT DIRT BUILT (Counter 2009). By starting *Bleeding Talent* with a story about his post-

already alienate the reader, the more patriotic reader may struggle to accept Kane's personal experience had nothing to do with authoring this book. Kane voluntarily resigned after five years of service because the Air Force, short on intelligence officers, declined his request to earn his Ph.D. in economics so he could become an Academy professor.<sup>11</sup> The result: Kane "went anyway—as a civilian."<sup>12</sup> Despite his personal fallout, Kane claims he still thought the military must be doing right by most of its best officers, since the friends he left behind were becoming commanders and test pilots in deployed areas while he pursued his business ventures.<sup>13</sup> According to Kane, it was not until 2008 when the Army failed to keep Lieutenant Colonel John Nagl beyond twenty years that Kane's "fantasy that all was well in the military snapped."<sup>14</sup> At that point, "a decade and a half wiser and armed with an advanced degree in economics," Kane decided he needed to rescue the military from its dysfunctional talent management system.<sup>15</sup>

### III. Entrepreneurs in Uniform

*Those who invented cannons won their wars; those who invented flanking maneuvers won theirs. Innovation is what defines the most famous entrepreneurs as well.*<sup>16</sup>

#### A. CEOs Are Wearing ACUs

Kane's assertion that a market-based system could be easily implemented thanks to the entrepreneurial nature of military leaders is probably valid. However, military leaders making solid CEOs should not be breaking news to the reader; higher-ranking officers have years of organized discipline and at least some experience in personnel management. If it is surprising, Kane cleverly educates the reader in merely two paragraphs, in which he presents CEO

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military business successes, it seems the author is suggesting that the Air Force made a mistake in not granting his request to earn his Ph.D. in Economics while in the military.

<sup>11</sup> KANE, *supra* note 1, at 12.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* "I was proud to know some of the pilots flying dangerous missions over Bosnia and Iraq . . . to know a few troops sent to Somalia, and to know my old friend John Nagl literally wrote the new army doctrine that was behind the surge in Iraq." *Id.*

<sup>14</sup> *Id.* Lieutenant Colonel John A. Nagl was one of three officers who wrote a foreword to the *Counterinsurgency Field Manual*. The other two officers were General David H. Petraeus and Lieutenant General James F. Amos. See THE U.S. ARMY, MARINE CORPS COUNTERINSURGENCY FIELD MANUAL foreword (2007).

<sup>15</sup> *Id.* at 13.

<sup>16</sup> *Id.* at 60.

statistical data using the State of North Carolina's population, and then revealing that his numbers actually come from the military.<sup>17</sup> Unfortunately, Kane, almost as if he believes he needs to oversell this less than novel concept, finds it necessary to take the reader on a historical, entrepreneurial, and page-padding voyage to discuss George Washington's fishery and Robert E. Lee's affinity for digging trenches.<sup>18</sup> Though potentially illuminating to the lay reader, military readers accustomed to efficient issue identification and resolution will choose to either dutifully trudge through the material like a twelve-mile ruck march or simply "cut sling load" and fast-forward to the next section. Choosing the latter is probably in the reader's best interest, time-wise.

#### B. "Proof" Military Leaders Are Trading Boots for Suits—The West Point Survey

The author cites dismal officer retention rates during Vietnam<sup>19</sup> as precedent for the continuing problem that "[t]he army is suffering a talent crisis, invisible to the public, but threatening to hollow out its ranks."<sup>20</sup> To bolster his contention, Kane proudly promotes the results of his West Point Survey. The survey, comprised of thirteen questions, involves 250 West Point graduates from the classes of 1989, 1991, 1995, 2000, 2001, and 2004 as respondents.<sup>21</sup> However, his over-inflation of the survey's importance potentially makes the reader skeptical of the conclusions Kane draws, especially when he discloses the ratio of former military to active duty respondents. Colonel Thomas Collins, chief spokesman for Army Public Affairs, who questioned whether a survey of only 250 people is sufficient, shares that skepticism.<sup>22</sup> In defense, the author submits that

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<sup>17</sup> *Id.* at 35. According to Kane, North Carolina has a population of 9.38 million people, and even though that only makes up three percent of the U.S. population, nine percent of CEOs of U.S. companies are from North Carolina. Therefore, North Carolina must be doing something to produce "highly savvy business leaders." *Id.* Kane then advises the reader to replace North Carolina with the U.S. military in order to gain an understanding of why corporations are constantly on the lookout for skilled officers. *Id.*

<sup>18</sup> *Id.* at 64, 65.

<sup>19</sup> *Id.* at 94. Retention rates for Officer Candidate School (OCS) officers dropped to 34 percent in 1969 and 11 percent for Reserve Officers' Training Corps (ROTC).

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 218–33. A few of the questions on the West Point Survey were: "Do the best officers leave the military early rather than serving a full career?"; "Does the current exit rate of the military's best young officers harm national security?"; and "Does the current exit rate of the military's best young officers lead to a less competent general officer corps?" *Id.*

<sup>22</sup> *Id.* at 100. During an interview with Eric Tegler about Kane's West Point Survey, COL Thomas Collins, noted, "I'm not sure that a survey of only 250 people is enough to make such a sweeping judgment. Personally, I simply don't believe the best are leaving." *Id.*



250 people are “in the same ballpark of national surveys that use three or four hundred respondents to measure the attitudes of the entire nation.”<sup>23</sup> What the author fails to point out in his response, perhaps deliberately, is that of the 250 individuals who took the survey, 172 (69 percent) are like him—former military members who left because *their* desires were not met or because they had a better career opportunity waiting in the “outside world.”<sup>24</sup>

The author argues that his survey questions are neutral, and that no one has taken issue with how they were designed.<sup>25</sup> This is hard for the reader to digest because the very first question, “Do the best officers leave the military early rather than serving a full career?” is extremely suggestive in nature, especially when the vast majority of respondents had already left military service.<sup>26</sup> Further, the e-mail Kane sent to prospective respondents most definitely elicited respondents who believed attribution of talented officers is an issue. It read in part, “Tim’s current project is to help the Army get better at retaining more of the amazingly talented officers that they have . . . .”<sup>27</sup> It is not a stretch to suggest quality active duty officers did not make it beyond Kane’s e-mail simply because they do not recognize the need to assist the Army in keeping officers around who voluntarily choose to leave. Even so, based on evidence of a past working relationship with the Pentagon<sup>28</sup> and the belief that his survey results were read by every active duty officer in the Army,<sup>29</sup> Kane could have achieved a stronger active duty contingent for his survey before *Bleeding Talent* was put to print. Instead, the author stood fast on the results most favorable to his position rather than encroach on the Pentagon’s “massive survey about letting homosexuals serve

openly.”<sup>30</sup> Consequently, the reader is left questioning what weight, if any, should be given to the lopsided West Point Survey that is the basis for Kane’s TVF.

### III. TVF—The End of Coercion, Promotion Boards, Year Groups, and Inflated OERs

Kane’s sections of *Bleeding Talent* addressing promotion boards, year groups, and inflated Officer Evaluation Reports (OERs) is by far the most compelling part of the book and will likely interest the judge advocate reader. Under Kane’s TVF model, military officers would not have to worry about filling the traditional assignments required for career progression.<sup>31</sup> They could remain in their (desired) positions longer or choose to apply for positions they may not have the rank to fill under the current system.<sup>32</sup> Additionally, an officer could turn down an assignment or shop it around to another officer who may want to trade.<sup>33</sup> Each of these changes would serve to eliminate the coercion of today’s All Volunteer Force (AVF). According to the author, the AVF is a subterfuge “because after men and women take their oath of office on the first day in uniform, the volunteerism ends.”<sup>34</sup> In fact, Kane goes as far as to argue that beyond day one, military officers are coerced to remain in the service primarily because retirement benefits do not vest until after twenty years of service.<sup>35</sup> The author presents valid evidence that the “cliff retirement at twenty years of service was a relic of an earlier area.”<sup>36</sup> However, to make a compelling argument, the author should have also discussed the benefits of the potentially flawed, but hugely enticing, service-above-self investment, especially as post-retirement life expectancy and medical costs continue to increase.

Another benefit to the individual under the TVF is the ability for the officer to leave the military to pursue outside

<sup>23</sup> *Id.* at 101.

<sup>24</sup> *Id.* at 218 (emphasis added).

<sup>25</sup> *Id.* at 101.

<sup>26</sup> *Id.* at 14–15, 219.

<sup>27</sup> *Id.* at 232.

<sup>28</sup> *Id.* at 7. In 2005, Kane asked the Pentagon for demographic data on every enlistee for the years 1999, 2001, 2002, and 2003 to conduct a study of recruit quality in the wake of the wars in Afghanistan and Iraq. The Pentagon provided him with the information and the results on the study were posted in “every major newspaper in America.” *Id.* See Tim Kane, Ph.D., *Who Are the Recruits? The Demographic Characteristics of U.S. Military Enlistment, 2003–2005*, THE HERITAGE FOUND. (Oct. 27, 2006), <http://www.heritage.org/research/reports/2006/10/who-are-the-recruits-the-demographic-characteristics-of-us-military-enlistment-2003-2005> (relying on Pentagon enlistee data).

<sup>29</sup> KANE, *supra* note 1, at 5. According to Kane, he was told that every officer in the Army had read his article about why so many talented officers are “abandoning military life.” See Tim Kane, *Why Our Best Officers Are Leaving*, THE ATLANTIC, <http://www.theatlantic.com/magazine/archive/2011/01/why-our-best-officers-are-leaving/308346/> (last visited Feb. 20, 2014).

<sup>30</sup> *Id.* at 14. Despite working with the Pentagon in the past as evidenced by his recruit quality study, Kane thought it would be better to conduct his West Point Survey independently rather than get formal approval from the Pentagon, which was dealing with a “monster of obtuseness” that was the survey about letting homosexuals serve openly. *Id.*

<sup>31</sup> *Id.* at 133. Pursuant to West Point Survey statistics, the greatest call for change is not to allow officers to get promoted faster, but rather for officers to be able to proceed through different ladders for promotions. *Id.*

<sup>32</sup> *Id.* at 134, 140. For example, “[a] 29-year-old Marine captain should be free to apply for an O-4 slot at the Pentagon or an O-2 slot in a Special Forces unit.” *Id.* at 140.

<sup>33</sup> See generally *id.* at 90–91, 177–79.

<sup>34</sup> *Id.* at 132.

<sup>35</sup> *Id.* at 28, 51.

<sup>36</sup> *Id.* at 181. The author recommends a terminal retirement package equal to the pro-rata portion of years served. For example, if a twenty-year vest yields a lifetime monthly payment equal to fifty percent of base pay, then a ten-year vest should yield a monthly payment of twenty-five percent of base pay. *Id.*

endeavors, and then rejoin the active-duty ranks via lateral entry.<sup>37</sup> For example, Captain Smith, a logistician trained by the military, could resign his commission to take a higher-paying job with the United Parcel Service (UPS), and then return to the military perhaps because he misses the camaraderie, or more likely because of an economic decline. Also pursuant to the TVF, today's military officers would have more freedom to "take time out of their careers for a full time graduate study" like the officers before them.<sup>38</sup> The author submits that in 1995, eleven out of thirty-six newly selected brigadier generals had attended full time graduate school at some point in their careers.<sup>39</sup> Conversely, only three of thirty-eight individuals selected to the same positions in 2005 had attended graduate school.<sup>40</sup> The author brushes over the drastic difference between the two year groups—the latter was either preparing to command during wartime or was already involved in multiple deployment rotations. Taking such high-ranking officers out of the fight to attend classes at the University of Virginia would be akin to a CEO letting his Chief Financial Officer (CFO) pursue his dream of teaching Economics 101 during the first year of a huge merger.

Perhaps the most agreeable of the author's suggestions to avoid bleeding talent is revamping current promotion rates and the Officer Evaluation Report (OER) process. However, the way the author couches the issue may alienate the active duty reader. For instance, on more than one occasion, Kane refers to a 2001 quote from a retired colonel, "If you breathe, you make lieutenant colonel these days."<sup>41</sup> Moreover, the author's assertion may be moot, as statistics show that promotions rates are decreasing dramatically after a decade's worth of higher percentages to fill vital wartime positions.<sup>42</sup> The author dutifully acknowledges that while he was writing *Bleeding Talent*, Army Human Resources Command (HRC) was implementing a new OER process, which complied with his stance that the military needed peer assessment (360-degree evaluation) and the return to required block rating of all officers.<sup>43</sup> However, so as to not

divert from his overarching theme that the military personnel system needs an extreme overhaul, Kane follows up his kudos with, "[I]t is a first step, but unfortunately it is so minor that advocates of the peer and subordinate review clearly lost to the old guard."<sup>44</sup>

#### IV. Conclusion

*Bleeding Talent's* historical and procedural anecdotes relevant to the military's personnel system make it an interesting read for those seeking such knowledge, but that was not Kane's purpose in writing it. The author struggles to fathom that a highly-talented military officer has the inner strength to deal with personal disappointment and put service to his country above himself. Although every military officer, both past and present, can relate to the sacrifice, not all of them chose or now choose to be a part of the exodus. Kane fails to address this fact in *Bleeding Talent*, a book that falls short of the potential to truly affect military retention efforts.<sup>45</sup> Despite his attempts to convince the reader of his ongoing respect for current military officers, Kane unquestionably believes today's active duty military leaders would be riding the bench if all those who voluntarily departed were still playing on the active duty team. Such an approach severely detracts from any merit his concepts have, and destroys the chances of implementation by those able to effect change in today's military—active duty leaders who shunned, "What's in it for me?" in favor of, "If I leave, who will lead?"

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<sup>37</sup> *Id.* at 133.

<sup>38</sup> *Id.* at 22.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 19 (quoting Andrew Tilghman, *The Army's Other Crisis: Why the Best and Brightest Young Officers Are Leaving*, WASH. MONTHLY, Dec. 2001, <http://www.washingtonmonthly.com/features/2007/0712.tilghman.html>).

<sup>42</sup> On 8 March 2012, the selection rate to lieutenant colonel dropped below 83% for the first time in a decade. The average primary zone rate for 2001–2011 was 94%. See Jim Tice, *O-5 Selections Plummet to Lowest Rate in Decade*, <http://www.armytimes.com/article/20120729/NEWS/201207290315/O-5-selections-plummet-to-lowest-rate-in-decade> (last visited on Feb. 6, 2014).

<sup>43</sup> *Id.* at 211–14. According to the U.S. Army Resources Command, the new Officer Evaluation Reporting (OER) system will be implemented on 1

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April 2014. It will be used to assess officers in the grades of Second Lieutenant through Brigadier General. In addition to requiring 360-degree peer evaluations, the implementation of Rater Profiles will preclude senior raters from placing everyone in the top box and requires raters to provide more succinct narrative comments. More information regarding the new OER system can be found at Evaluation Systems Homepage, U.S. ARMY HUMAN RESOURCES COMMAND WEBSITE, <https://www.hrc.army.mil/TAGD/Evaluation%20Systems%20Homepage> (last visited Feb. 20, 2014).

<sup>44</sup> *Id.* at 213.

<sup>45</sup> *Id.* book jacket cover.

## 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 ATRRS 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 ATRRS 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 ATRRS 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](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

NDAА: 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  
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(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. 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](http://www.clereg.org) (formerly [www.cleusa.org](http://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 USALSA Information Technology Division and JAGCNet.

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides 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 available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised, though, that in order to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer” and the “Military Law Review”, and the “Law Library”.

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: [itdservicedesk@jagc-smtp.army.mil](mailto:itdservicedesk@jagc-smtp.army.mil).

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>

(2) Fill out the form as completely as possible. Omitting information, or submitting an incomplete document will delay approval of your request.



(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

## **2. The Judge Advocate General's Legal Center and School (TJAGLCS).**

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at [jagsch@hqda.army.mil](mailto:jagsch@hqda.army.mil) or by accessing the JAGC directory via JAGCNet. If you have any problems, please contact the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS 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. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt cnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGLCS 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 TJAGLCS Information Technology Division at (434) 971 -3264 or DSN 521-3264.

## **3. Additional Materials of Interest**

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at [www.jagcnet.army.mil](http://www.jagcnet.army.mil).

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at [itdservicedesk@jagc-smtp.army.mil](mailto:itdservicedesk@jagc-smtp.army.mil).





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GERALD B. O'KEEFE  
*Administrative Assistant*  
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