

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 5 • 2019



## Soldiers & Civilians

One Team, One Fight

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## AROUND THE CORPS

Circa 1946 judge advocate colonel's uniform. Known as the "pinks and greens." (Credit: Lt Col Anthony Burgos)



# Army Lawyer

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On the cover: Mr. Fred Borch, the regimental historian of the JAG Corps, walks with then-MAJ Corey Thomas down the second floor hallway at TJAGLCS. LTC Thomas now works as an administrative law attorney for the Office of the Chief of the National Guard Bureau.

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(Credit: istockphoto.com/siraanamwong)

# Court Is Assembled

## Soldiers and Civilians One Team, One Fight

By Rebecca E. Ausprung

**This edition of *The Army Lawyer* is devoted to the Judge Advocate General's (JAG) Corps Civilian.** There are nearly 1,500 Civilians, attorneys and paraprofessionals, across all components of our Corps. Many JAG Corps Civilians have spent time in uniform, but many have not. I have served in both capacities and experienced the culture from what can sometimes be two very different perspectives. The challenge for all of us, both Soldier and Civilian, is to figure out how to bridge the gap between the two cultures, leverage all that we have in common, and form successful teams ready to meet the future needs of the Army.

There was a time when being a federal civilian employee meant a steady, predictable job for life. The last decade has called this security into question. Being a federal

civilian employee during the last decade has meant contending with government shutdowns, furloughs, and downsizing. On top of that, being an Army Civilian employee brings ever-changing supervisors, ever-changing missions and priorities, and a regimented environment.

The Soldiers reading this article may be a bit surprised by the reference to a regimented environment. You may not think much about how the Army workplace differs from others, particularly if you have spent your entire career in uniform. A simple example: in the Army, we prepare memos in accordance with Army Regulation 25-50, and the format is predetermined down to the smallest detail. Outside of the military, with a few exceptions, you can draft a memo in any professional-looking format, and no one

cares how many spaces you put before your signature block. There is a culture in the Army that is quite unlike the culture in other workplaces, be it private sector or other federal agencies. Adapting to our culture, especially for those who have not previously served, can present a steep learning curve.

For the Civilians, you need to understand what Soldiers contend with:

- 18 years of war—often bringing multiple deployments and separation from loved ones.
- An extremely competitive promotion process.
- The need to quickly attain leadership positions to achieve promotion.
- An “up or out” promotion system.
- Work may not be limited to the duty day.

The pace has been relentless for many of the Soldiers in your office, and they face intense pressure to succeed, coupled with uncertainty about the future. Many Civilians lament the scarcity of promotion opportunities as a Civilian. The military has a robust promotion system, but Soldiers can lose their career if they fail to progress.

Still, what Soldiers and Civilians have in common is a commitment to service. The vast majority of Soldiers and Civilians choose the Army because of a desire to serve and a commitment to the protection of the United States. There are many other places, many other federal agencies, where they could choose to work. They chose us.

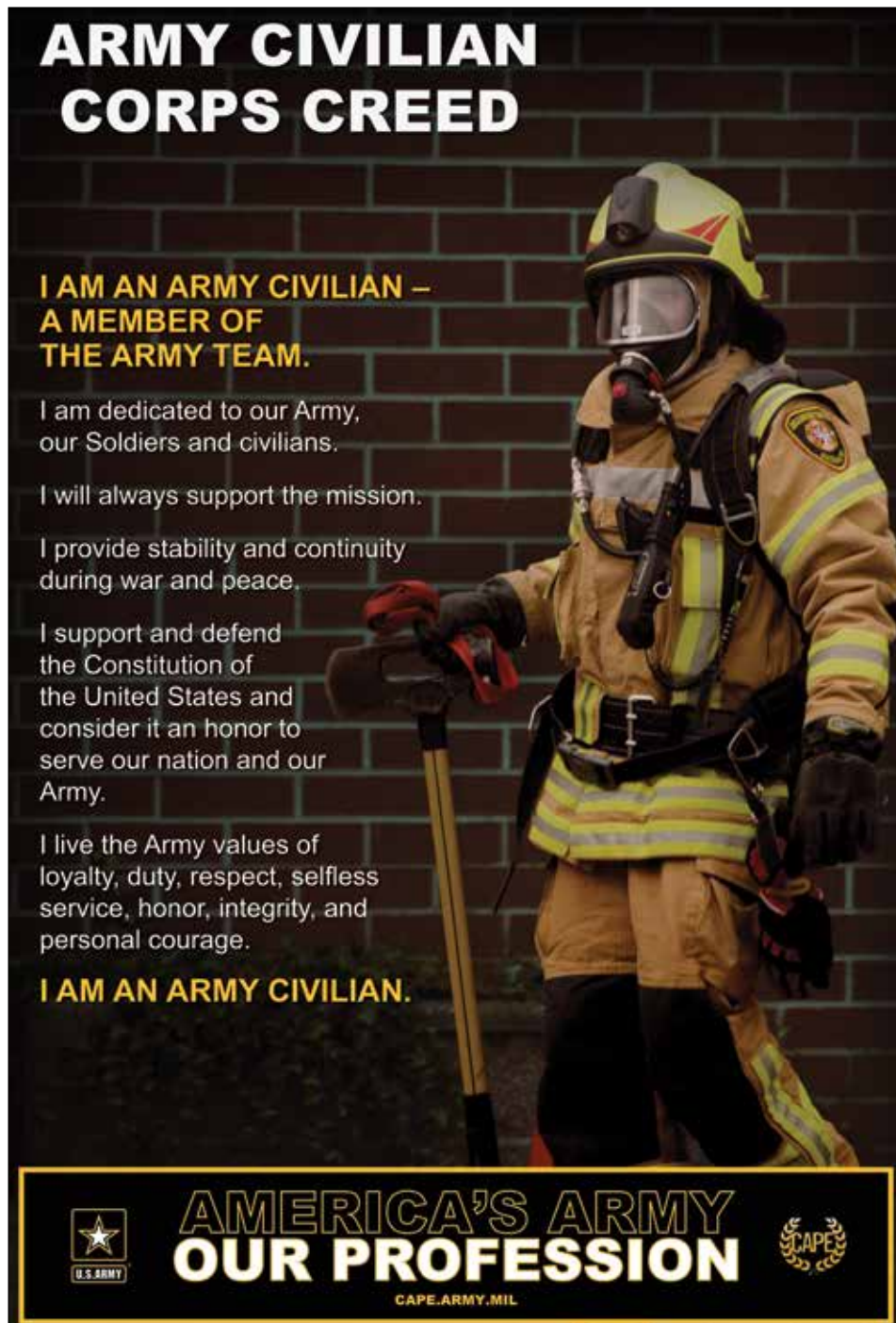
For Soldiers, ask yourself, are you leveraging your Civilians to their full capability? I challenge you to lead your Civilians. Resist the temptation to place them on autopilot. People rise, or fall, to your expectations. If you expect little, you will likely get little. Conversely, if you expect great things from your people, you will get them. Have a vision of what you want your Civilians to be, and communicate your vision. My vision for the Army Civilian is to serve as a mentor. Civilians tend to stay in one job for a long time and are able to develop a depth of expertise in their job. Soldiers tend to rotate through many jobs and develop a breadth of experience. Breadth and depth put together are unstoppable. The connection between the breadth and the depth will not happen on its own. Developing this

connection requires persistent, deliberate effort. You must consciously decide each day how you are going to bring together every member of your team.

For military leaders, understand when you take over an office and announce: “Stand by for broad, sweeping changes!” For many Civilians, you may be one of many leaders who have charted a different course. Every office has a culture, and that culture is often set by the Civilians because they are the ones who stay. If the culture is not healthy and productive, then by all means, change it! However, know that many leaders come to their position with a brilliant strategy that fails because it is overcome by the existing culture. The old saying is true: culture eats strategy for breakfast . . . and lunch . . . and dinner. Spend the first thirty days in the office listening, and then revisit your contemplated strategy. Ask yourself if what you thought you needed to accomplish is what your team really needs. Then, assess how you can leverage the existing culture to accomplish the goal, while shifting the culture to your desired end state.

For my fellow Civilians, understand how the phrase “this is the way we have always done things” is often received by your military counterparts. You are part of a dynamic organization that is becoming ever-more dynamic. We are an “Army in Renaissance” right now. As Charles Darwin taught us, creatures that do not adapt to change become extinct. I challenge you to stay open to change and evolution, and to prepare yourself for what the future might require. Along with the continuity you offer, add flexibility, and you will be viewed as truly indispensable.

I sometimes hear Civilians express confusion about why they are being supervised by a Soldier who lacks the same depth of expertise in their practice area. I tell them three things. First, leadership is a completely different skillset from technical expertise. The best technical experts do not always make the best leaders. Second, the Army is designed to grow leaders, and Soldiers are placed in leadership positions to help them develop their leadership skills. Third, true leadership is not about your title or position, it’s about your ability to *influence*. The lowest-ranking person in an office might be the true leader because they are the one with the



# ARMY CIVILIAN CORPS CREED

**I AM AN ARMY CIVILIAN –  
A MEMBER OF  
THE ARMY TEAM.**

I am dedicated to our Army,  
our Soldiers and civilians.

I will always support the mission.



I provide stability and continuity  
during war and peace.

I support and defend  
the Constitution of  
the United States and  
consider it an honor to  
serve our nation and our  
Army.

I live the Army values of  
loyalty, duty, respect, selfless  
service, honor, integrity, and  
personal courage.

**I AM AN ARMY CIVILIAN.**

**AMERICA'S ARMY**  
**OUR PROFESSION**

U.S. ARMY    
CAPE.ARMY.MIL

A U.S. Army poster depicting the Civilian Corps Creed.

greatest ability influence. Seek out training and update your skills. Initiate performance discussions with your supervisors instead of waiting for them to seek out you. Be an active part of the team. Whether you are a long-term Civilian who has “seen it all,” or a new employee from the private sector, you can have significant influence, regardless of your grade or duty position.

As members of the nation’s biggest, oldest, and best law firm, I have no doubt that each and every one of you is up to the challenge. Be Ready! **TAL**

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*Ms. Ausprung is the Director, Civil Law and Litigation at U.S. Army Legal Services Agency at Fort Belvoir, Virginia.*

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This flag in front of the home of John Rodgers welcomed reunion attendees.

# News & Notes

## 101st Airborne Division (Airmobile) SJA Office Vietnam Reunion

*By Colonel (Retired) Thomas M. Strassburg and Colonel (Retired) Michael B. Kennett*

In June 2018, lawyers who served in Vietnam with the 101st Airborne Division (Airmobile) reunited in Dallas. There had been previous reunions, but this was the largest gathering of those who served from 1969–1971, despite the increasing number of deceased comrades from that era.

Most of the lawyers in attendance were not career judge advocates. In fact, many were not Judge Advocate General's (JAG) Corps officers at all. The Military Justice Act of 1968 (effective in August 1969) extended the accused's right to a lawyer as counsel at special courts-martial. There simply were not enough judge advocates authorized or assigned to the division to handle the case load. Fortunately, the

command supported the need for additional resources by screening files of incoming officers for qualified non-JAG Corps lawyers and assigning those acceptable to the Office of the Staff Judge Advocate. They served with distinction and were quickly made part of the group.

Bill Fanter was a primary organizer of the reunion. The reunion was held at the Dallas home of John Rodgers, a judge advocate who left active duty after his initial obligation and eventually became general counsel of two large corporations. He went on to establish his own very successful business. Both Bill and John served with the 101st Airborne Division (Airmobile) during a period in which their tours overlapped

with those of many who served during 1969–1971. They were ideally positioned to bring together so many lawyers who served in what were quite distinct eras, defined largely by the personalities of the staff judge advocates (SJAs) at the time.

Then-Lieutenant Colonel (LTC) Carl ("Mad Dog") Welborn served as the SJA from September 1969 to September 1970. His motto of "work hard, play hard" (which he followed to perfection) inspired deep-seated loyalty in subordinates, four of whom (three captains and a warrant officer) had accompanied him from Fort Campbell to Camp Eagle. Rather than leaving Camp Eagle after six months for more friendly surroundings, all four chose to stay the full year with "Mad Dog."

Then-LTC Richard Hawley was assigned as the SJA in September 1970. "Love" is perhaps the best word to describe the relationship of LTC Hawley and his young lawyers. He taught, inspired, and mentored his charges, but most importantly, he had their backs. Reunion attendees who served under him made sure they took the time to sign the 101st flag and participated in a video for him. The video turned out to be a great tribute to his leadership. Unfortunately, he died shortly before the flag, video, and a memory book were delivered, but his family appreciated the tribute.

The Camp Eagle lawyers reminisced about their fascinating experiences with the 101st Airborne Division (Airmobile), including such things as the prosecution of the first helicopter hijacking case in Vietnam; the in-person payment of a large foreign claim that resulted from a vehicle running over Vietnamese children; conducting an Article 32 investigation on a destroyer in the South China Sea (manslaughter case involving a 101st Airborne Division (Airmobile) helicopter pilot); the misplacement of evidence during the course of a trial (C-4 explosive); and the December 1969 fool-hardy foray to the A Shau Valley to procure a Christmas tree for the office Christmas party.

Many of those attending the reunion had not seen one another since they left Vietnam some forty-eight years earlier. And they enjoyed meeting and learning



Camp Eagle veterans and their wives gathered in the pool and garden area.

more about the lawyers with whom their tours did not overlap. A number of the lawyers' wives attended the reunion and shared their common experiences.

Many Camp Eagle lawyers went on to distinguished careers as trial lawyers prosecuting terrorism cases and representing well-known celebrities, judges presiding over landmark cases, and corporate counsel. It was uplifting to experience the humility, gratitude, gentleness, and kindness of all these super-lawyers. That is no doubt attributable, at least in part, to their experience as a "band of brothers" at Camp Eagle, Vietnam. **TAL**

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*COLs (Ret.) Strassburg and Kennett are both retired judge advocates and members of RAJA.*

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From 1970 to 1971, then-Captain Strassburg served at Camp Eagle, Vietnam, with the 101st Airborne Division (Airmobile). He was a defense counsel, trial counsel, and part-time military judge.





The Library of Congress in Washington, D.C.

## Library of Congress Military Legal Resources

### A Valuable Source for Judge Advocates, Legal Administrators, and Paralegal Specialists

By Fred L. Borch III

Since 2002, The Judge Advocate General's Legal Center and School (TJAGLCS) librarian has worked with the Library of Congress (LOC) Federal Research Division (FRD) in creating a special website devoted to military legal resources. For many years, this was an ad hoc project. Last year, however, Brigadier General R. Patrick Huston signed a Memorandum of Agreement (MOA) that established a more formal relationship with the LOC. The intent of the MOA is for the Regiment to provide historically important law-related documents, photographs, and printed materials to the LOC that are scanned, uploaded, and hosted permanently on the free and publicly-accessible LOC FRD website.

Today, and given this special relationship with the LOC, everyone in the

Regiment should know about the wealth of military legal resources on the website. Located at [https://www.loc.gov/rr/frd/Military\\_Law/military-legal-resources-home.html](https://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html), the website is especially important because, as a public website, it is outside "the wire." There is no need to "CAC-in" or go through any security protocols when accessing digitized materials. But, just as important, the website contains a tremendous amount of law-related materials in one place.

Interested in the older (now superseded) *Manuals for Courts-Martial (MCMs)*? You can find the 1890, 1901, 1905 *MCMs*, as well as every *MCM* published after the enactment of the Uniform Code of Military Justice (UCMJ) in 1950—from the first 1951 *MCM* to the 2019 *MCM*.

For those doing research on war crimes, a huge number of digitized records of trial and other related materials are available. The intent is for the LOC website, in concert with the library at TJAGLCS, to become the top war crimes research center in the United States, if not the world. Consequently, the website contains thousands and thousands of pages on the "My Lai Massacre," including the official investigation conducted by Lieutenant General William Peers. Complete records of trial are also online, such as *United States v. Valentin Bersin et al.*,<sup>1</sup> the prosecution of Waffen-SS soldiers accused of murdering eighty-four American prisoners of war at Malmedy, Belgium, in December 1944. The most recent addition to the LOC website is the complete 39-volume record of *United States v. Tomoyuki Yamashita*.<sup>2</sup>

What else is on the LOC's Military Legal Resources webpage? Select Graduate Course theses; the legislative history of the UCMJ; law-related War Department and Department of the Army pamphlets, Field Manuals, Training Circulars; Judge Advocate General's School scrapbooks from the University of Michigan 1942-1946; and the papers of Major General Thomas H. Green, the senior judge advocate in Hawaii after the declaration of martial law in the islands in December 1941.

In the coming years, more and more materials will continue to be added to the LOC, so members of the Regiment should know about it, and start to use it now. **TAL**

*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

#### Notes

1. *Malmedy Massacre Record of Trial: United States vs. Valentin Bersin et al.*, LIBR. CONGRESS, [https://www.loc.gov/rr/frd/Military\\_Law/Malmedy\\_trial.html](https://www.loc.gov/rr/frd/Military_Law/Malmedy_trial.html) (last visited Sept. 12, 2019).

2. *United States of America vs. Tomoyuki Yamashita. Record of Trial*, LIBR. CONGRESS, [https://www.loc.gov/rr/frd/Military\\_Law/Yamashita\\_trial.html](https://www.loc.gov/rr/frd/Military_Law/Yamashita_trial.html) (last visited Sept. 12, 2019).





**Photo 1:** Members of the 116th Cavalry Brigade Combat Team (CBCT) Brigade Legal Section (BLS), Idaho Army National Guard take a quick pause in the action during National Training Center (NTC) Rotation 19-08 to grab a group picture. The 116th CBCT BLS participated in NTC Rotation 19-08 from 24 May to 20 June 2019. Special thanks to the Bronco Team legal trainers, CPTs Deanna Tran and Jason Juch for their guidance and mentorship. Pictured from left to right are CPT Nathaniel Peterson, CPT Michael Winchester, MAJ Steve Stokes, 1LT Anil Kimball, and SGT Kenneth Kalim. SSG Peter Scheri is not pictured.

**Photo 2:** The Office of the Staff Judge Advocate, 167th Theater Sustainment Command, conducted the Alabama





National Guard's fifth annual mock court-martial. Colonel Brian Howell (Military Judge and Presiding Circuit Judge) generously hosted trial proceedings at the Calhoun County Courthouse. Participation in the exercise was amazing, with personnel from multiple states training together and learning valuable lessons. Kudos to the defense team (including the Florida Army National Guard) for helping their client escape the government's clutches. There are no losers in this exercise, but next year's government team is hungry for victory!

**Photo 3:** Major General Stuart W. Risch, the Deputy Judge Advocate General, cuts the Judge Advocate General's (JAG) Corps birthday cake with Office of The Judge Advocate General's youngest Soldier, Specialist Matthew Borja, at the 244th JAG Corps birthday celebration at The Pentagon on 29 July 2019.

**Photo 4:** Colonel Matthew Scalia, left, U.S. Army Garrison Fort Benning Garrison Commander, and Colonel Jackie Thompson, right, Staff Judge Advocate, cut the ribbon on the newly consolidated Office of the Staff Judge Advocate (OSJA). The Fort Benning OSJA officially opened their new location on main post 29 July 2019. The opening marks the first time the different legal services have shared a roof since 2009, when an arsonist burned down the OSJA's historic building.

**Photo 5:** The judges of the Army Court of Criminal Appeals (ACCA) welcome Brigadier General Susan Escallier as she assumes her new role as the Commander, U.S. Army Legal Services Agency and Chief Judge for ACCA.







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**Photo 6:** Congratulations to Major Wayne Janoe for receiving the Outstanding Young Military Lawyer Award at the ABA Young Lawyers Division Assembly at the 2019 ABA Annual Meeting in San Francisco on 9 August 2019. Major Janoe exemplifies the expertise and versatility that are the hallmarks of our practice



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**Photo 7:** On 26 July 2019, members of the Joint Force Headquarters–National Capitol Region and U.S. Army Military District of Washington Office of the Staff Judge Advocate conducted a 4-mile run through D.C. to the United States Supreme Court. Pictured here are SGT Antaun Johnson, MAJ Scott Goble, SFC Darren Peterson, LTC Ali McFeatters, COL Tom Schiffer, CW2 Geo Suarez, MAJ Rob Meek, MAJ Ben Owens-Filice, CPT Dru Foster, CPT Kyle Yoerg, CPT Kelsey Mowatt-Larsen, 1LT Monplaisir Hamilton, SGT Torie Tucker, Mr. John Antishin, CPT Anthony Kratz, and SSG Adam Barnes.

**Photo 8:** Brigadier General Joseph Berger, the Commander of The Judge Advocate General's Legal Center and School, administers the oath of office to the 121 newest lawyers in our unique practice of law, prior to them starting their journey at Fort Benning, Georgia.



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**Photo 9:** Congratulations to Specialist Dawon David, a paralegal specialist assigned to the National Training Center/Fort Irwin Office of the Staff Judge Advocate, who won both the Battalion and Brigade Soldier of the Quarter boards! Specialist David received two Army Achievement Medals for this tremendous achievement! Please join us in congratulating this outstanding Soldier for his inspiring performance and accomplishments!



Army Judge Advocates at a National Bar Association meeting, circa 1983. Left to right are: MAJ Levator Norsworthy Jr., CPT Blake D. Morant, LTC Frances Rice, COL Ned Felder, CPT Rickey G. Young, CPT Carolyn Washington, CPT Theophilse Twitty.

# Lore of the Corps

## A Brief History of African Americans in the JAG Corps

By Fred L. Borch III

**While African Americans have fought in every major American conflict except the Mexican-American War,** widespread racial prejudice in U.S. society meant that African Americans served in segregated units in the Army until the Korean War.<sup>1</sup> Given this history, it comes as no surprise that opportunities for African Americans to serve as officers in The Judge Advocate General's (JAG) Corps were very limited in the past. That said, African Americans have proudly worn the crossed-pen-and-sword insignia since World War I, and have rendered outstanding service to this nation as judge advocates. What follows is a brief history of the service of a few of these African American members of our Corps.<sup>2</sup>

### Early Judge Advocates

#### *Major Adam E. Patterson and Captain Austin T. Walden*

The first African American judge advocates were Major (MAJ) Adam E. Patterson and Captain (CPT) Austin T. Walden. Patterson was the senior of the two officers and also more experienced, as he had practiced law in Oklahoma and Illinois for more than fifteen years before being appointed the Division Judge Advocate, 92d Division, American Expeditionary Force (AEF), by General John J. Pershing on 5 October 1918. But, Walden was an outstanding officer and lawyer as well. He served as Patterson's assistant in the 92d Division.

Born at Walthall, Mississippi, on 23 December 1876, Adam E. Patterson went to high school in Kansas City, Kansas, and Pueblo, Colorado. After graduating in 1897, he attended the University of Kansas and earned his LL.B. in 1900.

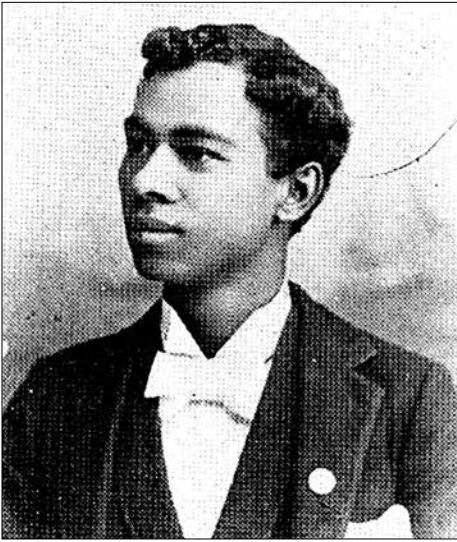
After being admitted to the Illinois bar, 24-year-old Patterson began practicing law. He also was active in Democratic Party politics, and was "conspicuous" in supporting Woodrow Wilson in the 1912 elections.<sup>3</sup> He subsequently was elected president of the National Colored Democratic League and, in 1916, "managed the national campaign for [the] Democratic Party among colored voters."<sup>4</sup> He also had an active civil and criminal law practice and took on a number of high-profile cases. On one occasion, Patterson worked alongside the famous lawyer Clarence Darrow<sup>5</sup> in defending Oscar S. De Priest, an African American Republican and Chicago alderman who was being prosecuted for graft; De Priest was acquitted.<sup>6</sup>

In 1917, after America's entry into World War I, Patterson joined the Officers Training Camp at Fort Des Moines, Iowa. He spent ten months as an infantry captain and was an instructor in the 4th Officers Training Camp, Camp Dodge, Iowa. Then, on 5 October 1918, Patterson was promoted to major and appointed Division Judge Advocate, 92d Division.

This all-black division, which had been created by General Pershing in the AEF in 1917, had four infantry battalions, three field artillery battalions, and three machine gun battalions. It also had an engineer regiment, an engineer train, a signal corps and a trench mortar battery.<sup>7</sup> While most officers were African American, they could not outrank white officers, which meant that African American officers generally were unable to attain a rank higher than lieutenant. This meant that Patterson was truly unique—one of only a handful of African American majors in the Army and the first African American lawyer to wear the crossed-pen-and-sword insignia on his collar.

At the time of his appointment as Division Judge Advocate, the 92d Division





Adam E. Patterson

was already in existence. Consequently, Patterson sailed to France, joined the unit, and then remained in France until at least February 1919. As for what he did as the senior lawyer in the division, Patterson wrote in 1925 that he “personally handled all offenses committed by the soldiers from A.W.O.L. to murder.”<sup>78</sup> Additionally, he provided legal advice to commanders and their staffs, and almost certainly was available if Soldiers in the 92d Division needed legal assistance.<sup>9</sup>

Assisting Patterson with his legal duties was CPT Austin T. “Thomas” Walden, the Assistant Judge Advocate. Born at Fort Valley, Georgia, in 1885, Walden received his law degree from the University of Michigan in 1911 and practiced law in Macon, Georgia, prior to being commissioned as a captain on 15 November 1918 and ordered to duty as the Assistant Judge Advocate, 92d Division.

Walden returned to Georgia after World War I and became a prominent member of the African American community in the Atlanta area. He also was active in politics. He was a Republican until 1940, when he switched his allegiance to the Democratic Party and founded the Atlanta Negro Voters League. Walden pushed for increases in African American voter participation and also fought against segregation in Atlanta public schools in a series of lawsuits. When appointed to a judgeship on the Atlanta Municipal Court in 1964, he became the first African American judge in Georgia



Thomas Walden

since Reconstruction. That same year, he also was a delegate to the Democratic National Convention in Atlantic City, which meant that Walden was the first African American member of any Georgia Democratic delegation to a national Democratic convention. Walden died in 1965.<sup>10</sup>

There apparently were no African American lawyers in the Corps between the world wars, but as the Army was small (between 1922 and 1935, the Army’s strength did not exceed 150,000) and racially segregated, this was not surprising in the era of Jim Crow. In any event, The Judge Advocate General’s Department (as the Corps was then known) also was quite small; even as late as 1938, the entire department consisted of ninety active duty judge advocates.<sup>11</sup>

#### **Rufus Winfield Johnson**

After the Japanese attack on Pearl Harbor, and the subsequent dramatic expansion of the Army (and Army Air Forces) from 1.6 million in December 1941 to eight million by the end of 1945, it was once again possible for African American lawyers to serve in the armed forces. Notable among African American attorneys who served was Rufus Winfield Johnson. He served as a butler in President Franklin D. Roosevelt’s White House in the 1930s. Johnson graduated from law school and passed the bar examination in the District of Columbia in 1942, but he did not formally join the JAG Corps until the late 1950s. But that did not prevent him from serving as a defense counsel



Rufus W. Johnson

at general and special courts-martial in both World War II and the Korean War.<sup>12</sup>

Born on a farm in Montgomery County, Maryland, on 1 May 1911, Johnson was the seventh son of a seventh son. His mother died when Johnson was four years old. He was raised by an aunt and uncle in Coatesville, Pennsylvania. According to an obituary published in 2007, Johnson first faced racial discrimination when he was a Boy Scout: he needed a swimming badge to make Eagle Scout, but could not earn that badge because African Americans were prohibited from using the local whites-only swimming pool.<sup>13</sup>

After finishing high school in 1928, Johnson attended Howard University in Washington, D.C., graduating in 1934. He subsequently completed law school at Howard in 1939 and then went to work at the White House. Although he was relatively short at five feet, six inches tall, Johnson was exceptionally athletic and qualified as a lifeguard while participating in the Army Reserve Officer Training Corps (ROTC) program in college. That explains why he was asked to watch over President Franklin D. Roosevelt as he exercised his polio-afflicted legs in the White House pool. Later, Johnson served as the White House butler.

Eleanor Roosevelt took a liking to Johnson. When she learned that he was studying for the bar exam at the end of his 12-hour workday at the White House, she arranged for Johnson to serve her tea in the

afternoons. Mrs. Roosevelt then instructed Johnson that he was to use these two hours to study. Her kindness meant that Johnson was able to take the District of Columbia bar exam in October 1941.<sup>14</sup>

The following month, Johnson was ordered to active duty. Having been commissioned as a Reserve infantry officer in 1934 (through ROTC at Howard), now-First Lieutenant Johnson reported to Fort Dix, New Jersey. After a short assignment at that location—and promotion—Johnson reported to the all-black 92d Infantry Division. When that unit sailed for Italy in 1944, CPT Johnson sailed with it.

A member of the 3d Battalion, 371st Infantry Regiment, CPT Johnson excelled as an infantry officer and took command of Company I in early 1945. According to a questionnaire he completed in 1997, Johnson remembered telling newly arrived Soldiers:

I am Capt. Johnson, your new company commander. My job is getting the enemy killed and you home in one piece. I can get these two things done only if you follow my orders promptly, without hesitation, or question, and use everything you were taught to do during your training.<sup>15</sup>

Johnson saw hard combat in the Rome-Arno River, North Apennine, and Po Valley campaigns. While his duties as an infantry officer took the majority of his time in Italy, Johnson did serve as counsel at a number of courts-martial held in Italy. He “personally defended 11 cases involving capital crimes including 5 murders and three rapes.”<sup>16</sup>

Johnson was discharged from the Army in February 1946. He was excited to be back on American soil, but this homecoming was bittersweet:

Released from active duty in Virginia; refused service at lunch counter in every bus station on way to D.C.; had to ride in the back of the bus; upon arrival in D.C., I tried to buy a milk shake at the lunch counter in my uniform as a captain; was told, ‘Sorry, but we don’t serve colored.’ That was in the Greyhound bus station.<sup>17</sup>

After a short association with another Washington, D.C., lawyer, Johnson opened his own office. His specialty was criminal law, and he “handled every type of case individually from minor police infractions . . . including manslaughter, rape and robbery.”<sup>18</sup> He also was “associate counsel” on several murder cases.<sup>19</sup>

In 1949, Johnson moved to San Bernardino, California, took and passed the bar exam, and opened a private law practice. A year later—in October 1950—he was recalled to active duty as part of a general mobilization of Reservists during the Korean War. Captain Johnson was assigned briefly to Fort Knox, Kentucky, where he was a battalion executive officer and summary court officer. Although still an infantry officer, his legal background soon came to the attention of his superiors and resulted in Johnson also being detailed to serve as a trial and defense counsel at both general and special courts-martial. He also worked as an “Assistant Legal Assistance Officer.”<sup>20</sup>

After CPT Johnson was assigned to the Far East Command and deployed to Korea in September 1951, he was appointed as an Assistant Staff Judge Advocate at Headquarters, 2d Logistical Command. In this duty position, Johnson reviewed general court-martial records, examined boards and reports, and conducted staff visits to units.<sup>21</sup> He also served as a defense counsel at special courts-martial held in Korea. Johnson was successful in this defense work—he obtained a number of acquittals for his clients—and consequently requested a transfer to the JAG Corps. But his request was denied because the Infantry Branch wanted to retain him as a combat unit commander.<sup>22</sup>

Despite the Army’s decision to keep crossed rifles on CPT Johnson’s collar, his superiors permitted him to continue working as a lawyer: in his last assignment before leaving active duty in April 1953, Johnson served as “Assistant Staff Judge Advocate and Assistant Legal Assistance Officer” for Headquarters, III Corps and Fort MacArthur, located in Los Angeles, California. He also was the Chief of the Military Justice Branch. His rater, Colonel (COL) Doane F. Kiechel, then serving as III Corps Staff Judge Advocate (SJA), wrote the following on Johnson’s Officer Efficiency Report:

One of the finest officers and gentlemen of my acquaintance. Possesses unimpeachable character and integrity, high intelligence and a broad background of military-legal training and experience. Has a fine sense of ethical values. Outstanding in loyalty and devotion, with a particular aptitude for working calmly and efficiently under stress.<sup>23</sup>

His senior rater, COL Norman B. Edwards, wrote: “An outstanding officer. Well liked, competent, efficient, courteous and hard working. I concur fully with the comment of the rating officer.”<sup>24</sup>

After leaving active duty, CPT Johnson remained in the Army Reserve and, during his yearly two weeks of “USAR active duty for training,” he served as an instructor for the “Advanced JAGC Course” at the Presidio of San Francisco. Then-MAJ Johnson was finally able to transfer to the JAG Corps—on 20 February 1959—becoming one of the few African American judge advocates in the Army.<sup>25</sup> After he completed the “USAR School Associate Judge Advocate Advanced Officer Course” in 1961, MAJ Johnson received “equivalent credit” for the Judge Advocate Officer Advanced Course.<sup>26</sup> He served another ten years in the Army Reserve before retiring as a lieutenant colonel (LTC) in 1971.

During these years, Johnson made legal history. In April 1962, a group of Navajos met in the California desert and performed “a religious ceremony which included the use of peyote.”<sup>27</sup> Police officers, who had watched part of the ceremony, arrested these Native Americans for illegally possessing the substance, which was outlawed because of its hallucinogenic qualities. The Navajos were later convicted in state court, and they appealed to the California Supreme Court—with Johnson representing them on appeal.

Johnson argued that the possession of peyote by his client, Jack Woody, and the other Navajos, should be lawful because the peyote was being used for bona fide religious reasons, and consequently was protected by the First Amendment. The California Supreme Court agreed with Johnson, ruling that



any state interest in proscribing the use of peyote was insufficient to overcome the right to religious freedom guaranteed by the U.S. Constitution. On 24 August 1964, the court, sitting *en banc* and by a vote of six to one, announced that it was reversing Woody's criminal conviction. *People v. Woody* continues to be cited in legal cases involving Native American religious freedom and the name "Rufus W. Johnson, Anaheim, for defendants and appellants" will forever be associated with this decision.<sup>28</sup>

Johnson closed his law practice in 1978 and moved to Fayetteville, Arkansas. In 1995, he moved to Mason, Texas, to live with his step-daughter. Lieutenant Colonel Johnson died on 1 July 2007 at the age of ninety-six. In accordance with his wishes, he was buried at the Arlington National Cemetery.

### **African American Judge Advocates from the 1950s to 1990s**

After World War II, a handful of African American attorneys joined the Corps and stayed for a career.

#### **Joseph Bailey**

After serving in a variety of increasingly important positions, Joseph Bailey finished his career as a full colonel and senior judge on the Army Court of Military Review.

#### **Talmadge L. Bartelle**

Another notable African American jurist was Talmadge L. Bartelle, a career Army lawyer who retired as a lieutenant colonel in 1971 and then joined General Mills in Minnesota as senior associate counsel.<sup>29</sup> During the Reagan administration, Bartelle also served on the Board of Directors of the Equal Employment Advisory Council.<sup>30</sup>

With Jim Crow firmly in place in South Carolina in the late 1940s and 1950s, Bartelle's path to the Corps was not an easy one. He could not attend the University of South Carolina's all-white law school, but after South Carolina was forced to open a law school for African American students at South Carolina State College in 1947, he graduated with an LL.B. in 1952. He then embarked on a successful career as an Army lawyer.<sup>31</sup>



J. Clay Smith, pictured left.

#### **John Clay Smith Jr. and Togo D. West**

In the 1960s and 1970s, while African Americans struggled for civil rights and racial justice in America, the JAG Corps began focusing on recruiting and retaining African American judge advocates. Among those who joined the Corps were John Clay Smith Jr. and Togo D. West. Both attorneys graduated from the Judge Advocate Officer Basic Course in the late 1960s.

Born in Omaha, Nebraska, in April 1942, John Clay Smith Jr. attended Creighton University, where he participated in the ROTC program and was commissioned as a second lieutenant in the Adjutant General's Corps after graduating in 1964. He then entered Howard University's law school, where he was class president and graduated in 1967.

After serving four years of active duty as a judge advocate, Smith left active duty in 1973. The following year, he joined the Federal Communications Commission, and later served as associate general counsel. In 1978, President Jimmy Carter named him to the Equal Employment Opportunity Commission (EEOC). He made a name for himself supporting guidelines that protected underrepresented populations in the workplace. Dr. Smith (in addition to his law degree, he had a doctorate from George Washington University) was particularly concerned about sexual harassment in the workplace, which he insisted was "not a figment of the imagination," but a "real problem."<sup>32</sup>



Togo West

After leaving the EEOC, Smith joined Howard University's law faculty and served as law school dean from 1986 to 1988. He worked tirelessly to enhance Howard's reputation in the legal community and brought in much-needed financial support for the law school. Smith also wrote a book about early African American lawyers titled *Emancipation: The Making of the Black Lawyer, 1844-1944*. Dr. Smith retired from Howard in 2004. He died in Washington, D.C., on 15 February 2018. He was 75 years old.<sup>33</sup>

Another Howard University alum, Togo Dennis West Jr., was born in 1942. He graduated from Howard University in 1965. After receiving his law degree from that same institution in 1968, West clerked for a federal judge in New York before joining the Corps in 1969. He did not, however, spend any time in the field. Rather, then-CPT West spent his entire tour of duty in the Honors Program in the Department of the Army Office of the General Counsel.<sup>34</sup>

When he finished his active duty obligation in 1973, West entered the civilian world. He returned to government service under President Jimmy Carter, when he was the top lawyer in the Department of the Navy and the Defense Department.

In 1993, President Bill Clinton chose West to be the Secretary of the Army. It was a turbulent period in Army history, as the Army was reducing from eighteen to ten active divisions, reorganizing the Army Reserve, and implementing the Clinton administration's "Don't Ask, Don't Tell" policy.<sup>35</sup>

Secretary West received much praise for his work as the top Army official and this no doubt played a part in his selection to be the Secretary of Veterans Affairs (VA) in 1998. His tenure at the VA, however, was controversial and West resigned in 2000.<sup>36</sup>

In 2007, following a series of highly critical articles published in the *Washington Post*, Mr. West returned to government service as part of an investigation into mismanagement at Walter Reed Army Medical Center. West died at age 75 on 8 March 2018, while on a cruise in the Caribbean.<sup>37</sup>

While Clay Smith and Togo West did not stay in the Corps beyond their first tours of duty, four African American lawyers of this era who did make a career in our Corps were Ned E. Felder, Kenneth D. Gray, William P. Greene Jr., and Robert C. Handcox.

#### **Ned E. Felder**

Born in 1937, Ned E. Felder received both his undergraduate and law degrees from South Carolina State College. Felder initially served as an officer in the Finance Corps before transferring to the JAG Corps in 1963. Then-CPT Felder served at the 4th Infantry Division at Fort Lewis, Washington, and deployed with that division to Vietnam. He subsequently had an additional tour in Vietnam at II Field Force from 1966 to 1968, and his work as an Army lawyer in this unit was featured in an *American Bar Association (ABA) Journal* article published in 1968.<sup>38</sup>

From 1969 to 1973, Felder served in Europe with VII Corps and also was the Deputy Staff Judge Advocate (DSJA), Berlin Brigade. He qualified as a military judge in 1973 and, except for a three-year tour as the SJA at Fort Meade, Maryland, from 1981 to 1984, COL Felder spent the remainder of his career in the judiciary. His last assignment before retiring in 1988 was as a senior judge on the Army Court of Military Review.<sup>39</sup>

#### **Kenneth D. Gray**

Born in West Virginia in 1944, Kenneth D. "Ken" Gray graduated from West Virginia State College before earning a law degree at West Virginia University in 1969. Having already been commissioned in the Army through ROTC, Gray transferred to the JAG Corps and, after a year at Fort Ord,



CPT Ned E. Felder II

California, deployed to Vietnam, where he served at U.S. Army Support Command, Da Nang, Vietnam, until 1971. Like all Army lawyers serving in Southeast Asia during this period, much of then-CPT Gray's work involved prosecuting accused Soldiers at courts-martial. But, he also successfully defended a Soldier charged with attempting to murder his company commander by "fragging" him by placing a grenade under the "hooch" where the officer lived.<sup>40</sup>

In 1972, Gray was back in the United States and received an important assignment that would affect the future of African Americans in the Corps: he was tasked with implementing and coordinating the newly-created Minority Lawyer Recruiting Program. Gray's mission was to spearhead recruiting efforts to bring more African American and more female lawyers into a Corps that was predominately white and male. These recruiting efforts included a special focus on law schools with substantial minority enrollments and a print advertising campaign depicting the role of African American and female judge advocates as counsel or judges.<sup>41</sup> The newly established summer intern program also aggressively recruited first- and second-year African American law students to fill the one-hundred available slots. Finally, the Corps made certain that African American line officers already on active duty knew about the Excess Leave Program, under which selected officers went into an extended leave status without pay and attended law school



MG Kenneth Gray

at their personal expense and then, after graduating and passing a bar examination, transferred to the Corps.<sup>42</sup>

Before being promoted to brigadier general in April 1991, Gray served in a variety of assignments, including: Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army (TJAGSA); SJA, 2d Armored Division (he was the first African American judge advocate to serve as an SJA at a numbered Army division); and SJA, III Corps (he was the first African American SJA at a corps). Major General Gray completed his career as The Assistant Judge Advocate General (today's Deputy Judge Advocate General) from 1993 to 1997.<sup>43</sup>

#### **William P. Greene Jr.**

Born in Bluefield, West Virginia, William P. "Bill" Greene Jr. graduated from West Virginia State College in 1965. Having completed ROTC as a Distinguished Military Graduate, Greene was commissioned as an Armor officer in the Regular Army. He never served in that branch, however, as he was selected for the Excess Leave Program and, went to law school at Howard University. After passing the bar in 1968, he transferred to the JAG Corps.<sup>44</sup>

Bill Greene served in a variety of locations until retiring as a colonel in 1993, including Hawaii, Germany, and Korea. His assignments included: Department Chair of the Criminal Law Division at TJAGSA (he was the first African American judge





Judge William P. Greene

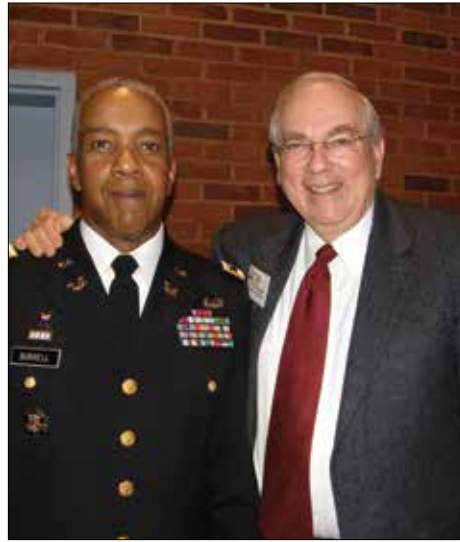
advocate to head a teaching department at the school); and DSJA, 3d Infantry Division. Colonel Greene served three times as an SJA: 2d Infantry Division (he was the second African American SJA at a numbered division, with then-LTC Ken Gray being the first), U.S. Military Academy, and Fort Leavenworth, Kansas.

In 1993, then-COL Greene was appointed as a U.S. immigration judge by the U.S. Attorney General. He held that position until 1997, when the president appointed him as a judge of the U.S. Court of Appeals for Veterans Claims for a term of fifteen years. In 2005, Judge Greene assumed the responsibilities of Chief Judge of the Court. Although he officially retired from the court almost ten years ago, Bill Greene retains senior judge status and serves in a recall capacity.

The JAG Corps honored Bill Greene in 1997 when the Secretary of the Army designated him as the Honorary Colonel of the Regiment. He was also recognized as a Distinguished Member of the Regiment in 2000.<sup>45</sup>

#### **Robert Clark Handcox**

Robert Clark “Bob” Handcox had a distinguished career as an officer that began when he graduated from the U.S. Military Academy in 1963. Commissioned in the Infantry, Handcox completed flight school at Fort Rucker and then served as a helicopter pilot in Vietnam from 1967 to 1968. After two years in Washington, D.C.,



COL Robert Burrell, pictured left.

he entered the Excess Leave Program to attend George Washington University’s law school, from which he graduated in 1973. After transferring to the JAG Corps, COL Handcox served in a variety of assignments, including SJA, 21st Support Command, Kaiserslautern, from 1983 to 1986. He finished his career on the faculty at the U.S. Military Academy, from which he retired in 1988. Colonel Handcox made history as the first African American judge advocate selected to attend a Senior Service School; he attended the National War College at Fort McNair from 1982 to 1983.<sup>46</sup>

While the number of African American judge advocates in the late 1970s and early 1980s was relatively small, the 1990s saw a significant increase in both male and female African American judge advocates. Many deserve mention, but here are five luminaries in alphabetical order: Robert Burrell, Calvin L. Lewis, Musetta “Tia” Johnson, Levator Norsworthy, and Frances Rice.

#### **Robert Burrell**

Robert Burrell graduated from Hampton-Sydney College in 1978 and, after finishing his legal studies at the College of William and Mary three years later, he entered the JAG Corps. His initial assignment was to the 2d Armored Division, Fort Hood, Texas, where he served as a legal assistance attorney, administrative law attorney, and trial counsel. After a brief assignment to the Defense Appellate Division, then-CPT

Burrell joined the JAG Corps Recruiting Office as a recruiting officer. After completing the 37th Graduate Course in 1989, he was assigned to the 25th Infantry Division, but left Hawaii almost immediately to join the Office of the Staff Judge Advocate, U.S. Central Command, as part of Operation Desert Shield/Desert Storm. After this deployment to Southwest Asia, Burrell held a series of increasingly important assignments, including: DSJA, 101st Airborne Division; SJA, 2d Infantry Division; and SJA, U.S. Army Field Artillery Center and Fort Sill. Burrell also had three tours of duty in Charlottesville, two in the Criminal Law Division and a final assignment as Dean, TJAGSA. Prior to retiring, COL Burrell was the Special Assistant to The Judge Advocate General for Business Transformation.

#### **Calvin Lionel Lewis**

Calvin Lionel “Cal” Lewis earned his B.A. at Norfolk State University and his J.D. at the University of Virginia. He then served as a judge advocate from 1978 to 2003, when he retired as a colonel. During his career, COL Lewis served in positions of increasing responsibility, including: Instructor, Criminal Law Division, TJAGSA; Officer in Charge, Augsburg Legal Center, Germany; Chief of Justice, VII Corps, Germany (including a deployment to Saudi Arabia as part of Operation Desert Shield/Desert Storm); DSJA, Fort Bliss, Texas; Command Judge Advocate, Army Human Resources Command, Virginia; and SJA, 21st Theater Support Command, Germany. After qualifying as a military trial judge, COL Lewis served as the Chief Military Judge, Far East Circuit, Korea, from 2000 to 2001, before beginning his final tour of duty as the Deputy Commandant and Director of Academics (today’s Dean), TJAGSA.

After retiring in 2003, Lewis taught immigration and criminal law as an Associate Professor of Law, Texas Tech University School of Law. He also taught trial advocacy and coached law student moot court teams. Colonel Lewis was honored four times as Professor of the Year—once by the Black Law Students Association, twice by the Hispanic Law Students Association, and once by a vote of the entire law student body at Texas Tech School of Law.

Today, COL Lewis works in the Department of Justice, Executive Office for U.S. Attorneys, as an Affirmative Employment Program Manager. In this position, he assists U.S. Attorney's offices nationwide with Equal Employment Opportunity and diversity-related training, and with attorney and non-attorney recruitment.<sup>47</sup>

### **Savella Jackson**

In 1974, Savella Jackson made history as the first African American female to be commissioned in the Corps. That same year, the total number of female judge advocates also increased from 21 to 45. Today, there are 507 African American females as of the publication of this article.

### **Musetta Tia Johnson**

In 2002, Musetta Tia Johnson made history as the first African American female in the Corps to be promoted to the rank of colonel.<sup>48</sup> A little more than ten years earlier, when she completed the 39th Graduate Class, she had achieved another "first" as the first African American female to earn an LL.M. at TJAGSA.

Born in 1959, M. Tia Johnson obtained her undergraduate education at Hampton Institute (now Hampton University) before completing a law degree at Temple University and entering the JAG Corps in 1984. During her career as a judge advocate, COL Johnson also earned an LL.M. from TJAGSA, an LL.M. from the University of Virginia, and a Masters of Strategic Studies from the Army War College.

In her nearly thirty years of outstanding service as an Army lawyer (she retired from active duty in 2013), COL Johnson specialized in international and national security law, and served in a variety of overseas locations, including Bosnia, Cuba, Italy, and Korea. She was the top Army lawyer in Korea from 2008 to 2010. In her final assignment in the JAG Corps, Johnson was the Senior Military Assistant to the Department of Defense General Counsel, Mr. Jeh Johnson.<sup>49</sup>

In retirement, COL Johnson first served as the Senior Advisor to the Director, U.S. Immigration and Customs Enforcement, and then as the Assistant Secretary for Legislative Affairs, U.S.



Musetta Tia Johnson

Department of Homeland Security. In this latter position, she was the Department's principal liaison with Congress, where she worked closely with authorization, appropriation, and oversight committees in both the House and Senate.<sup>50</sup> She currently has a position as a Visiting Professor of Law, and Director, National Security Law LL.M. Program at Georgetown University.<sup>51</sup>

In addition to her many military awards, COL Johnson was a joint recipient of the ABA's Hodson Award for Outstanding Public Service<sup>52</sup> in 1995, and she was named the ABA's Outstanding Military Service Career Judge Advocate in 2005.

### **Levator Norsworthy Jr.**

Levator "Vate" Norsworthy Jr. entered the JAG Corps in 1973, after completing his undergraduate studies at the University of Dayton and his legal education at the University of Cincinnati. After assignments at Fort Belvoir and at Office of The Judge Advocate General's (OTJAG) Litigation Division, Norsworthy completed the 28th Graduate Class in 1980. He subsequently developed an expertise in contract and fiscal law, and headed TJAGSA's Contract Law Division (1988-1990) before becoming a senior trial attorney at OTJAG's Contract Appeals Division (1990-91). He then served as Command Counsel, U.S. Army Contracting Command-Europe (1991-1995) and completed his military career as the Chief Counsel for the Washington



COL (Ret.) Levator Norsworthy Jr.

Office of the U.S. Army Communications and Electronics Command, from which he retired in 1997.

While practicing contract and fiscal law were the hallmarks of his career in the JAG Corps, then-LTC Norsworthy did find time to serve as the SJA, 10th Mountain Division and Fort Drum from 1985 to 1987. He was the third African American to be the SJA of a numbered Army division (after COLs Ken Gray and Bill Greene).

After retiring as a colonel, Norsworthy began a distinguished career as a civilian attorney, and in 1998 was appointed to the Senior Executive Service and assumed duties as Deputy General Counsel (Acquisition) in the Army's Office of General Counsel. This means that he provided advice and counsel to all Army Secretariat officials, to include federal procurement law, major weapons systems acquisition, military construction, research and development, international cooperative programs, and contingency contracting. He was the first African American lawyer to serve in this capacity.

In addition to his many military awards, Norsworthy has twice been given a Presidential Rank Award—Distinguished Executive (2010, 2016).

### **Frances P. Rice**

Born in April 1944, Frances P. Rice enlisted in the Army in 1964. After completing Woman's Army Corps (WAC) Officer Candidate School at





MAJ Frances P. Rice

Fort McClellan in 1967, and being commissioned in the Army Reserve, then-Lieutenant Rice commanded a WAC company in Pirmasens, Germany, from 1968 to 1970. She was then assigned to Fort Leonard Wood, Missouri, where she served as an adjutant and assistant Inspector General in the early 1970s. She also completed a degree in business administration at Drury College. Her next move was to the Presidio of San Francisco, where she was the Chief, Race Relations Division. While in California, she was accepted into the Excess Leave Program and earned her J.D. at the Hastings College of Law in 1977.

After joining the Minnesota bar, now-MAJ Rice reported to the 87th Basic Class and, after graduating in October 1978, reported for her first duty assignment as an Army lawyer at Fort Meade, Maryland. When she was promoted to lieutenant colonel a few years later, Rice made history as the first African American female judge advocate to achieve that rank. She retired from active duty in 1984.

In retirement, LTC Rice has been active in national politics. In 2005, she founded the National Black Republican Association (NBRA). This organization's mission "is to be a resource for the black community on Republican ideals and promote the traditional values of the black community which are the core values of the Republican Party."<sup>53</sup> Rice is currently the chairman of the NBRA.



LTC Kirsten Brunson, right.

### **African American Judge Advocates in the New Century**

As the second decade of the 21st century comes to an end, the number of African American lawyers in Army uniform has increased dramatically. Here are just five more short biographical sketches of distinguished men and women of color, in alphabetical order: Kirsten Brunson, Ural D. Glanville, Njeri Hanes, Robert Rigsby, and Stephanie Sanderson.

#### ***Kirsten Brunson***

Colonel Kirsten Brunson was the first African American female in the JAG Corps to qualify and sit as a military trial judge. Born in 1966, she graduated from the University of Maryland in 1987 and, having been cross-enrolled in Howard University's ROTC program, was commissioned into the Military Police Corps. But, Brunson received an educational delay and obtained her law degree from the University of California, Los Angeles, in 1991.

Colonel Brunson joined the Corps and served in a variety of assignments, including: V Corps and XVIII Airborne Corps; Defense Appellate Division, USALSA; 101st Airborne Division; and U.S. Special Operations Command. After completing the Military Judge Course in 2008, she served as a trial judge at Fort Hood, Texas, before retiring from active duty.

In an unusual coincidence in 2011, Brunson was promoted from LTC to COL on the same day that her husband, Xavier



BG Ural D. Glanville

T. Brunson, was promoted from LTC to COL. Xavier Brunson ultimately "passed" his JAG Corps spouse in rank; an infantry officer; he is now a major general and slated to take command of the 7th Infantry Division in the near future.<sup>54</sup>

#### ***Ural D. Glanville***

Brigadier General Ural D. Glanville began his Army career in 1982, when he enrolled in ROTC at the University of Georgia. Commissioned in the Army Reserve when he graduated, Glanville took an educational delay to obtain his law degree and then transferred to the JAG Corps in 1990. He then served three years in Germany as a trial and defense counsel before leaving active duty in 1993.

Returning to Georgia, he entered the civilian practice of law until 1996, when he began judicial service as a magistrate judge in Fulton County. Eight years later, he became a superior court judge in the same county. Judge Glanville oversees felony criminal trials as well as civilian proceedings involving family law.

In the Army Reserve, Glanville held positions of increasing responsibility in the JAG Corps, including serving as the SJA, 335th Signal Command. In this capacity, he deployed to Iraq as part of Operation Iraqi Freedom. After his promotion to brigadier general, he served as Assistant Judge Advocate General for Military Law and Operations Individual Mobilization Augmentee and as the Commanding



Then-MAJ Njeri "Jeri" Hanes.

General, U.S. Army Reserve Legal Command. His last assignment prior to retiring was as the General Officer Support for the Office of the Chief, Army Reserve.

**Njeri Hanes**

Lieutenant Colonel Njeri "Jeri" Hanes, a graduate of the U.S. Military Academy and Harvard Law School, most recently served as the SJA, Fort Meade, Maryland. In the fall of 2019, now-LTC Hanes became a student at the Eisenhower School, National Defense University. Then-MAJ Hanes made history in May 2010 when she graduated first in the 58th Graduate Class—the first time an African American had achieved the highest academic standing in the ten-month LL.M. program at The Judge Advocate General's Legal Center and School (TJAGLCS).

**Robert R. Rigsby**

In 2009, Robert R. Rigsby made history as the first sitting judge from the District of Columbia to deploy as a military trial judge to Afghanistan, Iraq, and Kuwait. Born in California, COL Rigsby received his education at San Jose State University and the Hastings College of Law. He entered our Corps in 1987, and served on active duty in Kentucky and Tennessee until 1992, when he transitioned to the Army Reserve.

In March 2002, President George W. Bush nominated him to be an associate judge of the District of Columbia Superior



COL Robert R. Rigsby, right.

Court, and he was unanimously confirmed by the U.S. Senate in July.<sup>55</sup>

**Stephanie D. Sanderson**

Directly commissioned in our Corps in 1998, Stephanie Denise Sanderson obtained both her undergraduate and legal education from the University of Alabama. She also has an LL.M. from TJAGSA and a Masters of Strategic Studies from the Army War College.

Now-COL Sanderson has served in numerous positions, including: Legal Assistance Attorney and Trial Counsel, Fort Benning; Appellate Attorney, Defense Appellate Division, USALSA, and Commissioner, U.S. Army Court of Criminal Appeals; Chief of Military Justice, Legal Services Activity—Korea, Eighth U.S. Army; Brigade Judge Advocate, 2d Brigade Combat Team, 1st Cavalry Division, Fort Hood, and Baghdad, Iraq; DSJA, U.S. Military Academy; Assistant Executive Officer to TJAG; DSJA and Acting Rear-SJA, 4th Infantry Division, Fort Carson; and Chief, Fiscal Law, U.S. European Command, Germany. She made history in 2017 when she became the first African American Chief of Staff at TJAGLCS.<sup>56</sup>

**Conclusion**

As the second decade of the 21st century draws to a close, the number of African American judge advocates has increased significantly in the Army, with African



COL Stephanie D. Sanderson

American male and female lawyers now constituting seven percent of the active component JAG Corps. (By comparison, five percent of the American Bar Association membership is African American.)

As the JAG Corps enters the third decade of this century, there is no doubt that African American attorneys will continue to make history in our Corps and in the delivery of legal services to the Army. **TAL**

*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

**Notes**

1. For more on African Americans in the U.S. armed forces, see BERNARD C. NALTY, STRENGTH FOR THE FIGHT (1986); see also GAIL L. BUCKLEY, AMERICAN PATRIOTS: THE STORY OF BLACKS IN THE MILITARY FROM THE REVOLUTION TO DESERT STORM (2001).
2. Special thanks to Colonels (Ret.) William P. Greene Jr., Calvin L. Lewis, Levator Norsworthy Jr., and Richard D. Rosen for their help in preparing this article. Special thanks also goes to Colonel Tania Martin for her comments and Major Earl M. Wilson for suggesting that it was time for a "Lore of the Corps" on this important topic.
3. THE CRISIS 227 (Sept. 1913).
4. Adam E. Patterson, Questionnaire for the Judge Advocates Record of the War, at National Archives and Records Administration (NARA), Records of the Office of The Judge Advocate General [hereinafter Patterson Questionnaire].
5. Clarence Darrow (1857-1938) is perhaps the most famous trial lawyer in U.S. history and was known for taking unpopular cases. He gained national prominence when defending John T. Scopes at the so-called "Scopes Monkey Trial" in Tennessee in 1925. For



more on Darrow, see IRVING STONE, CLARENCE DARROW FOR THE DEFENSE: A BIOGRAPHY (1941).

6. Oscar Stanton De Priest (1871-1951) was the first African American to be elected to Congress from outside the southern states. He served as a Republican in the House of Representatives from 1929 to 1935; he was the only African American in Congress during these years. *De Priest, Oscar Stanton*, HIST., ART & ARCHIVES: UNITED ST. HOUSE REPRESENTATIVES, <http://history.house.gov/People/Detail/12155?ret=True#biography> (last visited Aug. 8, 2019).

7. STEVEN D. SMITH & JAMES A. ZEIDLER, A HISTORIC CONTEXT FOR THE AFRICAN-AMERICAN MILITARY EXPERIENCE 156 (1998).

8. *92d Division Officer Nails Bullard's Lie*, CHICAGO DEFENDER 3 (June 13, 1925).

9. After returning to Chicago from France in 1919, Patterson "became a major figure in the city's Democratic Party." FRED L. BORCH, LORE OF THE CORPS 97-98 (2018). In the 1920s and 1930s, Patterson served as assistant "corporation counsel for the City of Chicago," a prestigious and high-paying position. *Id.* In this job, Patterson defended the city in civil suits for money damages. He continued to use his military rank during this time, and is routinely identified in books and newspaper stories as "Major Adam Patterson." *Id.*

10. A. T. Walden, Questionnaire for the Judge Advocates Record of the War, at National Archives and Records Administration (NARA), Records of the Office of The Judge Advocate General; *A. T. Walden (1885-1965)*, NEW GA. ENCYCLOPEDIA, <http://www.georgiaencyclopedia.org/articles/history-archaeology/t-walden-1885-1965> (last visited Aug. 8, 2019); *A. T. Walden (1885-1965)*, BLACKPAST, <https://www.blackpast.org/african-american-history/walden-t-1885-1965/> (last visited Aug. 8, 2019).

11. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 151, 156 (1975).

12. Patricia Sullivan, *Lawyer and Lt. Col. Rufus W. Johnson*, WASH. POST B6 (July 10, 2007).

13. *Id.*

14. Johnson learned in 1942 that he had passed the bar examination, but since he was no longer in Washington, D.C., he was not able to personally appear in court and be admitted to practice until he was released from active duty in 1946.

15. Rufus W. Johnson, Questionnaire, at U.S. Military History Institute, Carlisle Barracks, Pennsylvania 6 (Aug. 20, 1977).

16. U.S. Dep't of Army, DA Form 1056, Legal Experience Statement, Rufus W. Johnson, Block 16 (May 24, 1951).

17. Patterson Questionnaire, *supra* note 4, at 14.

18. SMITH & ZEIDLER, *supra* note 7.

19. *Id.*

20. U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Rufus W. Johnson, 7 March 1951 to 18 July 1951 (July 24, 1951). Note that the Articles of War were still in effect during this period, which explains why Captain Johnson was permitted to serve as counsel at general courts-martial.

21. U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Rufus W. Johnson, 18 September 1951 to 8 January 1952 (Feb. 7, 1952).

22. *Id.*

23. U.S. Dep't of Army, DA Form 67-2, Officer Efficiency Report, Rufus W. Johnson, 1 March 1953 to 19 April 1953 (on file with author).

24. *Id.*

25. Johnson was promoted to major on 1 October 1953. U.S. Dep't of Army, DA Form 66, Officer Qualification Record, Rufus W. Johnson, Block 12 (on file with author).

26. Certificate of Completion, TJAGSA, Rufus W. Johnson (Aug. 1, 1961).

27. *People v. Jack Woody*, 61 Cal. 2d 716, 394 P. 2d 813 (1964).

28. *Id.*

29. Bartelle retired on 30 June 1971. *Personnel Actions: Retirements*, ARMY LAW. at 24 (Aug. 1971).

30. EQUAL EMPLOYMENT ADVISORY COUNSEL, ANNUAL REPORT 1982, <https://www.reaganlibrary.gov/sites/default/files/digitalibrary/smf/policydev/barr/box-005/40-035-21969590-005-023-2018.pdf> (last visited Aug. 25, 2019)

31. As a result of a civil lawsuit brought by an African American student who was denied admission to the University of South Carolina's law school because of his skin color, the U.S. District Court for the District of South Carolina gave the state government a choice: admit African Americans to the University of South Carolina or open a law school for African American students. Unwilling to desegregate, South Carolina opened a law school at South Carolina State College in Orangeburg in 1947. The underfunded and provisionally accredited school closed in 1966, having graduated a total of fifty-one students. But, despite these low numbers, graduates like Talmadge L. Bartelle did well. Ernest A. Finney Jr. became the first African American chief justice of the South Carolina Supreme Court and Matthew J. Perry Jr. was the first African American federal judge in South Carolina history. Alfred D. Moore III, *Thorn in the Side of Segregation: The Short Life, Long Odds, and Legacy of the Law School at South Carolina State College* (Doctoral dissertation, University of South Carolina), <https://scholarcommons.sc.edu/etd/3373> (last visited Aug. 25, 2019).

32. Adam Bernstein, *EEOC Leader Defended Protections Against Workplace Sexual Harassment*, WASH. POST B7 (Feb. 21, 2018).

33. *Id.*

34. Harrison Smith, *Investigated Army Sex Abuse and Fort Hood Shootings, Led Veterans Affairs*, WASH. POST B4 (Mar. 12, 2018).

35. *Id.*

36. *Id.*

37. *Id.*

38. Irvin M. Kent, Jon N. Kulish, Ned E. Felder, & Herbert Green, *A Lawyer's Day in Vietnam*, 54 A.B.A. J. 1177 (1968), reprinted in ARMY LAW. Sept.-Oct. 2018, at 37.

39. FREDERIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975, at 141 (2003).

40. *Id.* at 89. During the Vietnam War, some Soldiers killed or tried to kill their own officers and noncommissioned officers by using a fragmentation grenade. Drugs, alcohol, racism, indiscipline, and poor leadership were all factors in these murders or attempted

murders, called "fraggings" in the slang of the day. For an excellent study of fraggings in Vietnam, see GEORGE LEPRE, FRAGGING: WHY U.S. SOLDIERS ASSAULTED THEIR OFFICERS IN VIETNAM (2011).

41. JUDGE ADVOCATE GENERAL'S CORPS, *supra* note 11.

42. Prior to the establishment of a Funded Legal Education Program in 1974, the Army created by regulation an "Excess Leave Program" to help the Corps obtain and retain high quality officers. More than a few judge advocates who came into the Corps in the 1960s did so through the Excess Leave Program; in 1965, there were 144 officers in the program. *Id.* at 238.

43. General Officer Biography—Kenneth Darnell Gray (on file with author).

44. E-mail from William Greene to Fred L. Borch III (July 12, 2019, 10:25 AM) (on file with author).

45. Jeffrey C. Good, *Judicial Profile: Chief Judge William P. Greene, Jr. U.S. Court of Appeals for Veterans Claims*, FEDERAL BAR ASSOCIATION, [http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Military-Courts\\_1/Greene-Hon-William-P.aspx](http://www.fedbar.org/PDFs/Past-Judicial-Profiles/Military-Courts_1/Greene-Hon-William-P.aspx) (last visited Aug. 12, 2019).

46. ASSOCIATION OF GRADUATES, REGISTER OF GRADUATES AND FORMER CADETS 3-299 (2008).

47. Curriculum Vitae, Calvin Lionel Lewis (on file with author).

48. Other African American female judge advocates who have been promoted to colonel since Tia Johnson's era include COLs Kirsten Brunson, Jacqueline L. Emanuel, Danyele M. Jordan, Stephanie Stephens, Stephanie Sanderson, and Tysha L. Smith.

49. U.S. Dep't of Army, DA Form 4037, Officer Record Brief, Musetta Tia Johnson (27 June 2013).

50. *M. Tia Johnson*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/archive/person/m-tia-johnson> (last visited Aug. 12, 2019).

51. *M. Tia Johnson*, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/m-tia-johnson/> (last visited Aug. 12, 2019).

52. This prestigious award is named after Major General Kenneth J. Hodson, who served as TJAG from 1967 to 1971. It recognizes sustained, outstanding performance or a specific and extraordinary service by a government or public sector law office. *Hodson Award*, A.B.A., [https://www.americanbar.org/groups/government\\_public/awards/hodson\\_award/](https://www.americanbar.org/groups/government_public/awards/hodson_award/) (last visited Aug. 12, 2019). Eligible nominees include all government (including military) or public sector law offices (e.g., legal aid bureaus, public defender offices and other legal organizations funded by the Legal Services Corporation) at the federal, state, and local levels. To be eligible, nominees must receive funding from a government entity. Departments or units within offices are also eligible. *Id.*

53. BLACK REPUBLICAN BLOG, [www.blackrepublican.blogspot.com](http://www.blackrepublican.blogspot.com) (last visited Aug. 14, 2019).

54. Press Release, U.S. Department of Defense, General Officer Assignments (Apr. 16, 2019), <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1815168/general-officer-assignments/>.

55. *The Honorable Robert R. Rigsby, Associate Judge, District of Columbia Superior Court*, DISTRICT OF COLUMBIA COURTS, [https://www.dccourts.gov/sites/default/files/2018-09/DCSC\\_Bio\\_Rigsby.pdf](https://www.dccourts.gov/sites/default/files/2018-09/DCSC_Bio_Rigsby.pdf) (last visited Aug. 12, 2019).

56. Biography, COL Stephanie D. Sanderson (on file with author).

# Life Hack

## The Military Spouse Attorney Hiring Program

By Sarah P. Ford

**Secretary of Defense Dr. Mark T. Esper and the Chief of Staff of the Army General James C. McConville** recently emphasized their prioritization of stabilizing the Army Family. One of the initiatives discussed to achieve stabilization of the Army Family was quickening the pace for hiring spouses to Army civilian jobs.

Since 2014, The Judge Advocate General's (JAG) Corps has led the stabilization of the Army Family through military spouse employment. Five years ago, Lieutenant General (LTG) Flora Darpino, then-The Judge Advocate General (TJAG), and Ms. Diane Nugent, then-Director, Civilian Personnel, Labor, and Employment Law, created the Military Spouse Attorney Hiring Program.

The Military Spouse Attorney Hiring Program utilizes flexibilities in federal hiring authorities for excepted service employees to place qualified military spouse attorneys into vacant positions throughout the JAG Corps on an accelerated timeline. The Program accepts military spouse attorneys from all branches of the military and the Coast Guard. Currently, the Program boasts sixty spouse attorneys in positions throughout the world. Overall, spouse attorneys in the Program have contributed over 187 years of collective work to the JAG Corps. The JAG Corps has paid over \$18 million in salaries to military spouse attorneys, putting that money in the pocket of military Families.

The success of the Program is found in what it has done for the Army lawyers running legal offices; the Army Families searching for stability; and Army spouses

continuously seeking employment at each new duty location. I will use myself as a case study. Since August 2014, I have moved four times. I would not be writing this article but for the Military Spouse Attorney Hiring Program. My current position, as the Assistant Chief, Career Program 56 (Legal) and the Military Spouse Attorney Hiring Program Manager, is my fourth placement. Transitioning from a traditional career path to the uncertainty of life as a military spouse with a professional license was a daunting experience. However, this program's impact on my life has been substantial in that it has given me a profound understanding of the Army, my husband's career and passion. Employment as an Army attorney has also provided me with a community, an identity beyond myself, and an ease to the ever-gnawing burden of "what will I do next?" In my previous JAG Corps positions, the Military Spouse Attorney Hiring Program's flexibilities accelerated the timeline for my entrance on duty (besting the times for competitive actions), therefore providing necessary continuity, agility, and hard work. But I am only a small piece of the success of this Program. The evidence of the Program's impact was truly felt two months ago.

On 28 May 2019, Lieutenant General Charles N. Pede, TJAG, hosted the inaugural Military Spouse Attorney Day at the Pentagon. Approximately eighty attendees converged at the Vietnam Memorial Corridor to honor the Program, its impact, and standout military spouse attorneys, who have improved the quality of our Corps through their outstanding work. Ms. Alex-

andra McNeal, Ms. Ashley Stewart, and Ms. Nancy Sanchez were all recognized, in absentia, for their achievements. Ms. Christy Rogers, Ms. Heidi Moyer, and Ms. Heather Ingrum Gipson were present to accept the Certificates of Appreciation from TJAG. Each of these spouse attorneys exemplifies the qualities of a person committed to their community and to mission success. Lieutenant General Pede addressed an audience of forty military spouse attorneys and their service member spouses; TJAG for the Air Force; the Chairman of the Board of Veterans' Appeals; the Judge of the U.S. Court of Appeals for Veterans Claims; staff judge advocates; and other JAG Corps leaders, and he espoused the ongoing need for the Program and attention on military spouse employment. Lieutenant General Pede's speech underscored the resounding success of the Program and his ongoing commitment to an initiative that has supported the Army and the JAG Corps's readiness and retention. It is imperative we maintain this momentum with military spouse attorney hires and the positive impacts it brings to readiness, the JAG Corps, and to stabilizing the Army Family.

Ultimately, the Program's impact is driven by the spouse attorneys. Any spouse attorneys interested in the program or updating their information, should contact me by email at [sarah.p.ford3.civ@mail.mil](mailto:sarah.p.ford3.civ@mail.mil) or by phone at (571) 256-2868. **TAL**

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*Ms. Ford is the Assistant Chief, Career Program 56 (Legal) and the Military Spouse Attorney Hiring Program Manager at the Pentagon in Washington, D.C.*

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Ms. Halsey is the Chief of the OTJAG Legal Assistance Policy Division.

*assistance, an unusual path but one she requested after her first taste of it serving in Germany. Ms. Halsey sat down with The Army Lawyer to talk about her affinity for legal assistance and how she hopes to use her new role to shape the way the Army provides legal advice to its Soldiers.*

**TAL: So why all the interest in legal assistance?**

**MS. HALSEY:** You know, I just really took to it. You hear very compelling life stories from people. I like listening to people. And I like applying my legal skills to the facts that a client presents to help him or her come to a solution. Anybody that's done legal assistance knows that you will see something new every day. There's just a huge variety of practice. You have the traditional kind of work in estate planning, but you also have family law, tax law, consumer law, military administrative issues, immigration, and more.

**TAL: What are your priorities for legal assistance right now?**

**MS. HALSEY:** I knew coming back into the job that there was just a tremendous baseline of experience and knowledge and a program that had been working very well for a long time. You know, if you talk to people out in the legal assistance field, everyone knew my predecessor John Meixell and knew they could talk to him. And that he had just an amazing amount of institutional knowledge. So the groundwork is already there. The way I hope to expand on some of it is with innovative ideas and energy. For example, I'd like to help the field develop and grow robust Expanded Legal Assistance Programs (ELAP) and empower practitioners to take more complex cases in different legal areas.

**TAL: Are there other areas you think legal assistance needs to focus on? If I'm a judge advocate going into a legal assistance role, where are the biggest changes coming from?**

**MS. HALSEY:** A lot of the traditional areas we handle are becoming more complex

# Up Close

## Legal Assistance's Leader

By Sean P. Lyons

*Melissa J. Halsey, who was recently named Chief of the Office of The Judge Advocate General's Legal Assistance Policy Division, a civilian role, first joined the Judge Advocate General's (JAG)*

*Corps as a direct commissioned officer after earning her law degree at The University of California's Hastings College of the Law. She served for seven years—all of them in legal*



Melissa Halsey pats Bo, President Obama's dog.

and interesting. I think immigration is an area, for instance, where we've had a really kind of traditional practice in legal assistance offices that is now evolving. Lots of service members are stationed abroad and many of them get married to local nationals. Many service members are seeking citizenship themselves. Policies in this area are changing daily, and our legal assistance practitioners need to be prepared to deal

with new fact patterns, along with new policies, every day.

**TAL: People are probably not aware of that.**

**MS. HALSEY:** Right. And the rules are narrowing for citizenship. So our legal assistance attorneys overseas are just going to need to know what to do. They're going

to need to make sure that their clients fill out the right paperwork on the front end, and if there is a mistake, help them fix it on the back end.

Estate planning is another example of an area that's changing. We've had the same estate planning software for probably over twenty years. That's going away. We are working with the other Services to develop a more technically sophisticated program to take the estate planning done by legal assistance into the 21st Century. It'll be a more streamlined product, easier for both the client and the practitioner to access.

Another area, and perhaps the area with the most attention, is with victims of domestic violence. I think that's where we, legal assistance practitioners, can step in and really make a difference—we are the area of the JAG Corps that's best poised to help that particular client population.

**TAL: How so?**

**MS. HALSEY:** Because in Legal Assistance, we are 100% dedicated to serving individual clients. We don't answer to the command; we respond to the needs of individual clients. And we have the experience and technical expertise to provide the services these clients most need. For example, we can advocate for support when a Soldier and Family separate; we can advise on property division and child custody—essentially, we can provide clients with a legal pathway to separate from an abuser. Sometimes clients can be skeptical of legal assistance attorneys at first, and tend to wonder, "Do you really work for me, or do you work for the command?" But I think in legal assistance we have a strong tradition and reputation of advocating for clients. And our Rules of Professional Responsibility make it clear that we owe our duty of loyalty to an individual client, and his or her interests are paramount.

**TAL: But how do you make that argument with that skepticism?**

**MS. HALSEY:** I think because legal assistance attorneys are so closely aligned with Special Victims Counsel, we're really sensitive to a victim's need to understand how the system works, all the services we



can provide, to whom they can make a report, etc. We can teach them about the laws in their state, and about how to move forward and try to get out of an abusive relationship. We can help get them the kind of economic support that they need, too. We can also help them deal with, prioritize, and triage those legal issues most immediately important to a victim of domestic violence.

**TAL: Each legal assistance office has differences—in the numbers of judge advocates, in their audiences, and in their focus. How do you keep everyone on the same page? How do you ensure some level of continuity despite those differences?**

**MS. HALSEY:** For one thing, I've restarted our Video Teleconference (VTC) program. It fell off a bit in recent years. We have had many different offices across the world participate. So far we've had two VTCs with over thirty offices across the world participating. The VTCs have been great opportunities for the different offices to hear what everybody else is doing. We talk updates but also try to get best practices and ideas from each office. I think that the VTCs were very well received and generated discussion about some of the really great ideas and work legal assistance attorneys are doing worldwide. Finally, I'm setting a goal to personally visit every legal assistance office across the Army JAG Corps.

**TAL: There are some revisions coming on legal assistance's regulations. Can you tell us more about that?**

**MS. HALSEY:** Yes, we are rewriting our three main legal assistance regulations: AR 27-3, our core regulation on how we operate; AR 27-55, which is the notary regulation; and AR 608-99, which is the family support regulation. That's an effort that's been in progress long before I came on board. But I hope to get those three regulations across the finish line and published in the next year, while making sure I've provided my own input and edits as the new Chief and proponent of these regulations.

**TAL: What will be their biggest impact?**

**MS. HALSEY:** The AR 27-3 rewrite includes the parameters of the SVC program. I think that is our biggest sea change in legal assistance—how we interact with our colleagues in the SVC program. The interdisciplinary relationship that legal assistance attorneys and the SVC program managers have now is very new. A client's eligibility to have a special victim counsel is closely tied to eligibility for legal assistance.

**TAL: What is your goal for moving legal assistance forward?**

**MS. HALSEY:** Overall, my big goal is to increase the prestige and reputation of legal assistance across the Army JAG Corps and the way people look at its unique and critical contribution to the Army, Soldiers, Families, and retirees.

**TAL: Do you think it suffers from a lack of that?**

**MS. HALSEY:** You know, I think there's kind of a traditional mindset that legal assistance is limited to the first assignment you get as a new judge advocate. But I think that mindset is changing, and leadership is recognizing the invaluable work done in Legal Assistance—just look at the recent winners of the JAG Corps' new regimental award—two of the five winners are legal assistance practitioners. I'm incredibly proud of that, but not surprised!

**TAL: So it's more of a pedestrian kind of —**

**MS. HALSEY:** Yes. And I think it is a great first assignment. It's a wonderful way to be introduced to the practice of law. It will show you the broadest variety of legal issues in the JAG Corps. But like I said, it is known as being the first assignment. I think our mission is vitally important, and I think it's getting a lot of attention. A good example of this is our work with SVCs, what we're doing already in legal assistance to help those clients, and potentially expanding that work to reach and help more victims.

**TAL: Given all these changes, all these moving pieces, whether it's the SVC side of things or increasingly complex cases, do you feel the JAG Corps has enough lawyers devoted to legal assistance?**

**MS. HALSEY:** I think everyone in the Department of Defense would say they want more people to help with their specific mission. That's natural. Of course, I'm no different given how vital I think legal assistance is to our Army, and to readiness specifically.

**TAL: So wave a magic wand, practically speaking. What would legal assistance benefit from?**

**MS. HALSEY:** One idea I'd like to see turn into reality is a growth in our ability to provide action officers—skilled legal assistance practitioners—who could help me stand up a training model to help our field develop best practices. Even without a magic wand, I think we can make this happen through the Expanded Legal Assistance Programs, and by assisting with either pro se work or even in-court representation.

I'd also want to help field offices develop practices to serve remote clients more effectively, and to leverage technology to do so. We always have clients who can't physically come to a legal assistance office. Either they're deployed or they're disabled, or for some other reason can't physically get into an office. I'd like to provide our technical expertise and policy guidance to make it much easier for those who are deployed or in a remote or austere area to receive legal assistance. They could reach back to a sophisticated in-place permanent legal assistance office and experience the appropriate level of service that every Soldier deserves.



(Credit: istockphoto.com/nullplus)

# Practice Notes

## The Army's Broken Personal Property Program

By Major Robert J. Juge III

### The Army Claims Personal Property Program Is Not Working

Anyone who has spent any time in the military realizes that personal property tends to get damaged or go missing with frequent Permanent Change of Station (PCS) moves. Lately, Soldiers and Family members have become increasingly frustrated—and many are not afraid to speak up, even to Army senior leadership. In October 2018, then-Secretary of the Army Mark Esper, then-Army Chief of Staff General Mark Milley, and then-Sergeant Major of the Army Daniel Dailey were peppered with complaints about the gross negligence of moving companies.<sup>1</sup> A recent *Time*

*Magazine* article highlighted the broken process causing one family over \$26,000 of property damage.<sup>2</sup> Additionally, a petition demanding military moving companies be held accountable has garnered over 103,000 signatures.<sup>3</sup>

In theory, Soldiers whose property is lost or damaged are not without a remedy. In fact, they have two: filing a claim directly with the Transportation Service Provider (TSP) under the Full Replacement Value Law (FRVL) or filing a claim with the U.S. Army Claims Service (USARCS) Center for Personnel Claims Support (CPCS) under the Military Personnel and Civilian Employees Claims Act (PCA).<sup>4</sup> While there

are numerous differences in the processes, the most important distinction is that PCA claims are paid at an often greatly-depreciated value, while FRVL claims are supposed to be paid at full replacement value.<sup>5</sup> Not surprisingly, the great majority of Soldiers file with a TSP under the FRVL.<sup>6</sup> Soldiers unhappy with a TSP's adjudication can subsequently transfer their claim to the CPCS under the PCA.<sup>7</sup> In the end, the Army can pay a depreciated amount, recoup the full replacement value from the TSP, and reimburse the Soldier the difference.<sup>8</sup> However, this process can be slow and frustrating. The Army personal property program should be modified to allow Soldiers a right to file a direct appeal of the TSP's adjudication with Army claims personnel during the FRVL claim.<sup>9</sup> This process would save the Army time and money, improve Soldier satisfaction, and eliminate most claims under the PCA and the resulting recoupment process.

Because of the complex nature of filing a claim and low likelihood of receiving full replacement value, many Soldiers opt out of the lengthy and cumbersome process entirely, going unreimbursed for damages.<sup>10</sup> Perhaps more troubling is that junior enlisted Soldiers—who are normally less able to absorb the financial loss associated with damaged or missing property—are significantly less satisfied with the FRVL claims process than senior enlisted personnel, officers, and Civilians, in that order.<sup>11</sup> Two purposes of the Army personal property program are to “maintain morale” and “prevent financial hardship.”<sup>12</sup> Unfortunately, when sixty percent of Soldiers feel they are not adequately reimbursed, those goals are not being met.<sup>13</sup>

### The Army Personal Property Program in Practice

The best way to understand the Army personal property program is as two independent, sequential processes. The FRVL was designed to fully reimburse Soldiers by holding TSPs directly responsible for damages.<sup>14</sup> A typical claimant starts the process by filing a claim with the TSP.<sup>15</sup> In fact, over ninety percent of claims are handled by the TSP.<sup>16</sup> However, that does not necessarily mean ninety percent of Soldiers are satisfied with the TSP's handling of their



claim. Unfortunately, many Soldiers unsatisfied with a TSP's denial or unsatisfactory offer do not file a second claim under the PCA.<sup>17</sup> The reasons Soldiers do not file a second claim include frustration with the process, little hope for better results, or worse, they do not realize there is another process available.<sup>18</sup>

When willing to file a claim, a Soldier normally initiates the TSP claims process by filing a notification of loss or damage (NOLD).<sup>19</sup> This can be done concurrently as the goods are delivered, or up to seventy-five days later; absent extraordinary circumstances, the TSP can deny the claim entirely if the Soldier misses the deadline.<sup>20</sup> Once a TSP receives an NOLD, the Soldier must file a claim within nine months of delivery to remain eligible for full replacement value.<sup>21</sup> If a Soldier files a claim between nine months and two years from the date of delivery, the TSP is liable for the depreciated value of the property instead of the full replacement value.<sup>22</sup> Notifications of loss or damage and claims are normally filed on the Defense Personal Property System (DPS) website.<sup>23</sup>

If a claim has not been fully satisfied by the TSP within thirty days, the Soldier can transfer their claim to the CPCS for adjudication under the PCA.<sup>24</sup> The CPCS will then adjudicate the claim, provided it is received within two years of the shipment's delivery.<sup>25</sup> Under the PCA, the CPCS is only authorized to pay depreciated value for the property, instead of the full replacement value Soldiers are supposed to receive from the TSP.<sup>26</sup> Regrettably, property value significantly depreciates each year—up to seventy-five percent—with rates varying based on the property's age and type.<sup>27</sup> After paying a claim, the Army can pursue an affirmative claim against the TSP under the Federal Claims Collection Act within four years, in theory recovering the full replacement value.<sup>28</sup> The TSP's liability is based upon the FRVL as implemented through the Business Rules.<sup>29</sup>

Under the Business Rules, TSPs have sixty days to pay, deny, or make a counteroffer on the recovery claim.<sup>30</sup> If the Army declines the counteroffer and the TSP fails to pay, the Army can withhold the amount from funds the government owes the TSP.<sup>31</sup> If the TSP continues to dispute the amount

of liability, it can file an appeal with the Defense Office of Hearings and Appeals (DOHA) or file suit in federal court.<sup>32</sup> If the Army successfully recovers funds from the TSP, it pays the Soldier the difference between the depreciated amount initially paid by the CPCS and the amount recovered from the TSP.<sup>33</sup> In effect, the Army is examining the claim the TSP received, evaluating it impartially, and determining whether or not the TSP did it correctly. If the TSP adjudicated the claim improperly, the Army requires the TSP to pay the correct amount through a recovery action.<sup>34</sup> Unfortunately, this entire process can take several years.<sup>35</sup>

Soldiers who file initially with the CPCS instead of the TSP follow a similar process, except they are not eligible for full replacement value.<sup>36</sup> The Army will still pursue a recovery action against the TSP for the depreciated value, and nothing else will be remitted to the Soldier.<sup>37</sup>

### **Soldiers Are Unsatisfied with the Full Replacement Value Claims Process**

Many Soldiers are unhappy with the FRVL claims process.<sup>38</sup> In 2010, USARCS commissioned a survey to gather information relating to Soldier satisfaction.<sup>39</sup> Despite its moniker, only forty percent of those surveyed felt they received full replacement value.<sup>40</sup> Only half were satisfied with the FRVL claims process,<sup>41</sup> and about half felt the PCA claims process worked better.<sup>42</sup>

Those statistics are not surprising, given the cumbersome, time-consuming, and frustrating process of filing an FRVL claim.<sup>43</sup> Of those who suffered damage but had not filed a claim, sixty percent either did not know how to file a claim through the DPS claims website or thought the filing process was too difficult or time-consuming.<sup>44</sup> The most troubling observation was that junior enlisted respondents were overwhelmingly unsatisfied with the FRVL claims process.<sup>45</sup> Forty-two percent of senior enlisted respondents were satisfied, and less than sixty percent of officers and Civilian employees were satisfied.<sup>46</sup> The process is complicated by the DPS website not being user-friendly or intuitive.<sup>47</sup> Another, perhaps more significant barrier for Soldiers is the monetary incentive for TSPs to deny or minimize liability.

### **Transportation Service Providers Are Not Playing by the Rules**

The adjudication authority is the most significant difference between the FRVL and PCA claims processes. Of note, PCA claims are adjudicated by Army claims personnel, while FRVL claims are adjudicated by claims adjusters employed by the TSP responsible for the shipment. Each claim a TSP pays reduces or even eliminates the profits made on that shipment.<sup>48</sup>

The TSP's direct control over the entire shipment process further aggravates this potential for bias. The DPS system empowers the TSP to manage PCS moves from pick-up through claims settlement, and the only likely interaction a Soldier has during an entire moving process will be with the TSP's agents.<sup>49</sup> This has the practical effect of eliminating Army claims oversight for most PCS shipments.<sup>50</sup> The TSP normally hires the moving company, which in turn hires the packers and drivers.<sup>51</sup> The packers or drivers then prepare the inventory, including notes on the condition of the Soldier's property.<sup>52</sup> On occasion, TSP agents exaggerate pre-existing damage or indicate property is non-functioning.<sup>53</sup> When not discovered and remedied by the Soldier *at origin*, this practice allows TSPs to deny a subsequent claim based upon "pre-existing damage."<sup>54</sup>

Even though most TSPs and their agents do not use these practices, the minimal and removed oversight of the DPS system incentivizes them to do so. Even without a TSP instructing its agents to exaggerate pre-existing damage or otherwise minimize liability, agents have an inherent duty of loyalty to the carrier that hired them, as well as a self-interest to secure future employment. The agent's actions and the inventory will be reviewed by the TSP, who will then adjudicate and pay or deny the claim using their own funds.<sup>55</sup> While the PCA empowers and favors the Soldier, the current FRVL process empowers and favors the TSP.<sup>56</sup> Consequently, it is not surprising that only forty percent of Soldiers would recommend their TSP to others.<sup>57</sup> While the system has an oversight mechanism, it is simply too complicated and time-consuming for many Soldiers to utilize; as a result, an incalculable amount of damages goes unreimbursed.<sup>58</sup>

Even when TSPs pay claims, a major frustration is that they generally only pay about half the amount claimed.<sup>59</sup> As an illustration of TSP underpayment, in the relatively rare instance when a Soldier files a PCA claim, the CPCS pays an average of about \$1,500 per claim.<sup>60</sup> Stated in other terms, USARCS usually recovers over \$1.5 million wrongfully or mistakenly withheld by TSPs each year.<sup>61</sup>

Regrettably, USARCS only recovers on claims filed with the CPCS under the PCA.<sup>62</sup> About forty thousand Army claims are filed each year with TSPs, but only about three percent of those are transferred under the PCA.<sup>63</sup> While that number may sound reassuring, it does not indicate that the TSPs adjudicate ninety-seven percent of claims fairly; Soldiers are often just frustrated with the process or ignorant of their options.<sup>64</sup> The 2010 USARCS Survey found that seventy-eight percent of Soldiers unsatisfied with a TSP's partial payment did not subsequently file under the PCA, thereby eliminating Army oversight.<sup>65</sup> While it is impossible to determine exactly how much damage goes unreimbursed, TSPs underpay Soldiers' claimed amounts by an average of over \$450 million a year.<sup>66</sup> The Army needs a better way to more actively monitor FRVL claims and simultaneously encourage Soldiers to use the process.

### **Many Soldiers Do Not Fully Utilize the Army Personal Property Program**

The claims process can be tedious and frustrating, and many Soldiers seem to perform a cost-benefit analysis before proceeding.<sup>67</sup> Simply filing a claim can take hours or even days, depending on several factors, including: the number of items damaged or missing; the photographic, video, and documentary evidence available; the Soldier's computer access, skill, and familiarity with the DPS claims website; and any other work or family obligations.<sup>68</sup> There can often be little perceived benefit to filing a claim, considering the cumbersome process, relatively high rate of denials, and low rate of reimbursement.

This cost-benefit analysis could explain why so very few Soldiers navigate the entire claims process, many giving up at each level. In the end, relatively few who

file a claim actually receive payment from a TSP.<sup>69</sup> Many Soldiers' property is lost or damaged during their move, but only a small portion of those provide timely notice.<sup>70</sup> Of those who provide notice, even fewer actually file a claim with the TSP.<sup>71</sup> For those who actually file a claim, less than forty percent receive satisfactory reimbursement from the TSP.<sup>72</sup> Most importantly, despite the ability to file a subsequent PCA claim to receive fair payment, only about one-fifth of those not satisfied actually do so.<sup>73</sup> Soldiers fall out of the process at each level, and very few who suffer loss or damage navigate the entire process to receive satisfactory reimbursement.<sup>74</sup>

In theory, the FRVL process should minimize the burden on the Army by shifting the workload from the Army to the TSPs. It certainly does, and the great majority of claims are never filed under the PCA; therefore, the Army has no real oversight on those claims.<sup>75</sup> In the rare instance when a Soldier does transfer a claim to the CPCS after a TSP denial or unsatisfactory offer, the result is an excessive amount of time and a substantial duplication of work.<sup>76</sup> While the FRVL claims process has been successful at minimizing the Army workload, Soldiers choosing to go unreimbursed for damages is likely a contributing factor.<sup>77</sup> Although this makes the Army personal property program manageable, the FRVL is not functioning as Congress intended. Solutions are needed to ensure Soldiers are properly reimbursed.

### **The Solution: A Direct Appeal**

The Army should establish a process for a direct appeal to the CPCS immediately following a TSP's adjudication—prior to any claim under the PCA. Ideally, all TSPs would adjudicate each claim fairly, based on the evidence with minimal Army oversight; however, in practice that has proven not to be the case.<sup>78</sup> Easier and streamlined access to Army oversight is necessary to ensure TSPs pay full replacement value.

A direct appeal would simplify the Army personal property program and greatly reduce the time required to settle claims. The current process is terribly inefficient; with a direct appeal, the number of steps required to navigate the claims process would be cut in half—reducing the

length of time from multiple years to about three months.<sup>79</sup> Instead of filing an entirely new claim under separate statutory authority, if a Soldier did not agree with the TSP's denial, the amount offered, or if a TSP failed to respond within thirty days, the Soldier would contact the CPCS by email or telephone. The CPCS personnel could then impartially evaluate the claim, weigh the evidence, and make determinations as to the amount of the TSP's liability, if any.<sup>80</sup>

Allowing a direct appeal immediately following the TSP's initial adjudication would enable Army claims personnel to quickly evaluate the claim almost concurrently with the TSP's adjudication. The CPCS could either request a copy of the claim or access the DPS claims website directly, and it would assess liability using the existing PCA claim adjudication guidelines, except for mandatory depreciation. If the CPCS assesses liability, it should notify the TSP and provide any additional documentary evidence considered. Adapting the current rules, the TSP would have sixty days to pay the claim, deny the claim, or make a settlement offer.<sup>81</sup> If no agreement is reached, the Army would collect the funds by administrative offset from amounts due the TSP.<sup>82</sup> If the TSP still disputes liability, it would utilize existing procedures to file a DOHA appeal or a suit in federal court.<sup>83</sup>

With a direct appeal, the shorter lapse of time between initial TSP adjudication and an ultimate USARCS liability determination would streamline the process to fully reimburse the Soldier quickly. Each claim satisfactorily paid by the TSP is one less claim filed under the PCA, sent to recovery, and then potentially disputed in DOHA or in federal court. Quicker access to impartial Army claims personnel would likely increase the number of Soldiers willing to file a claim. Soldiers would also be more likely to contact the CPCS because no duplication of effort is necessary with a direct appeal; CPCS personnel would use the claim data and substantiation already entered in the DPS claims website. The only thing required of a Soldier would be to make a phone call or send an email.

Most importantly, a direct appeal could be implemented without need for statutory or Army regulatory change. United States Transportation Command would simply



have to amend the Business Rules, which could take effect almost immediately.<sup>84</sup> Under the FRVL, TSPs are already liable for the full replacement value of lost or damaged items, so this change would not expose them to greater financial liability. The current system ends in the same way; a direct appeal just truncates the process, saving time and resources. A direct appeal would make it easier for and incentivize Soldiers to participate, thereby receiving full reimbursement for their losses. While there are existing systems to accomplish the same goal, they are too inefficient, difficult, and time-consuming for many Soldiers to use.<sup>85</sup> A direct appeal would provide the Army a faster, more convenient way to hold TSPs accountable for their mandated liability under federal law.<sup>86</sup> Furthermore, the availability of an easier review process could encourage TSPs to be fairer and more transparent in their adjudication.

## Conclusion

The Army personal property program is eroding morale and causing financial hardship effectively for many Soldiers.<sup>87</sup> Congress mandated that TSPs be held liable for the full replacement value resulting from the loss or damage of property in their care.<sup>88</sup> In reality, TSPs are not being held fully accountable, and Soldiers are bearing the financial burden.<sup>89</sup> While the current process affords some oversight, that oversight only works when Soldiers navigate the entire cumbersome process, which most Soldiers are unable or unwilling to do.<sup>90</sup> As a result, many TSPs escape full financial liability for damages incurred during moves.<sup>91</sup> Even when it works properly, the current design is slow, frustrating, and resource-intensive.<sup>92</sup>

A direct appeal would streamline the process and can be implemented by modifying the Business Rules. The TSPs should be encouraged that a direct appeal would not result in any increased liability, it would only improve the Army's ability to hold them accountable for their existing statutory obligation. Contrary to congressional intent, Soldiers and their Families do not receive full replacement value.<sup>93</sup> The Army must act to restore their faith in the program. **TAL**

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## Notes

1. See Otto Kreisher, *Family Members Voice Concerns with Army Leadership*, ASSOCIATION OF THE UNITED STATES ARMY (Oct. 9, 2018), <https://www.ause.org/news/family-members-voice-concerns-army-leadership>.
2. See Abby Vesoulis, *The Military Moves Hundreds of Thousands of Families Each Summer. Many of Them Don't Go Well*, TIME (Oct. 22, 2018), <http://time.com/5424172/military-family-moves/>.
3. See Karen Jowers, *After brutal PCS season, thousands sign petition to hold moving companies accountable for loss, damage*, MILITARYTIMES (Aug. 28, 2018), <https://www.militarytimes.com/pay-benefits/2018/08/28/after-brutal-pcs-season-thousands-sign-petition-to-hold-moving-companies-accountable-for-loss-damage/>.
4. See generally U.S. TRANSPORTATION COMMAND, DEFENSE PERSONAL PROPERTY PROGRAM CLAIMS AND LIABILITY BUSINESS RULES § 2.1 (Dec. 12, 2017) [hereinafter BUSINESS RULES].
5. See discussion *infra* The Army Personal Property Program in Practice.
6. *Id.*
7. See BUSINESS RULES, *supra* note 4, § 2.1.2.
8. *Id.* § 2.9.2.
9. As used in this article, "Army personal property program" refers to the processes and claims under the Military Personnel and Civilian Employees Claims Act (PCA) and the Full Replacement Value Law (FRVL), as well as their interplay as Soldiers seek reimbursement for lost or damaged property incident to service. The term "direct appeal" refers to the proposed process whereby a Soldier unhappy with a Transportation Service Provider's (TSP) adjudication could file an appeal of the TSP's decision directly with Army claims personnel, still operating under the FRVL, prior to any claim under the PCA.
10. See U.S. ARMY CLAIMS SERVICE, CLAIMS SERVICE FULL REPLACEMENT VALUE SURVEY (Nov. 2010) (on file with author) (e-mail surveying approximately 21,603 Soldiers and Civilians with Government-sponsored moves between 1 May 2008 through 30 September 2009, of which 1,598 responses were anonymous) [hereinafter FRV Survey].
11. *Id.*
12. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 11-10(a) (8 Feb. 2008) [hereinafter AR 27-20].
13. FRV Survey, *supra* note 10, at 40. According to the survey, only forty percent of claimants who filed a claim with a TSP felt they were adequately reimbursed. *Id.* at 8.
14. See generally BUSINESS RULES, *supra* note 4, §§ 1.1.1-2. The concept of holding TSPs accountable when goods are damaged while in their custody is not new; even without the FRVL, the Army pursued recovery actions against TSPs and other liable parties through the Federal Claims Collection Act. See 31 U.S.C. §§ 3701-20(e) (2018).

15. BUSINESS RULES, *supra* note 4, §§ 2.1.1-2. Soldiers are free to choose to file a claim under the FRVL, the PCA, or both. *Id.*
16. See Military Surface Deployment and Distrib. Command, Claims Data Pull, Fiscal Years 2014-16 (Oct. 20, 2016) (unpublished Excel document) (on file with author) [hereinafter SDDC Data].
17. FRV Survey, *supra* note 10, at 36.
18. See, e.g., U.S. Army Installation Mgmt. Command, Interactive Customer Evaluation Data, Fiscal Year 2014 (Oct. 19, 2016) (unpublished Excel document) (on file with author) [hereinafter FY14 ICE Data]; U.S. Army Installation Mgmt. Command, Interactive Customer Evaluation Data, Fiscal Year 2015 (Oct. 19, 2016) (unpublished Excel document) (on file with author) [hereinafter FY15 ICE Data]; U.S. Army Installation Mgmt. Command, Interactive Customer Evaluation Data, Fiscal Year 2016 (Oct. 19, 2016) (unpublished Excel document) (on file with author) [hereinafter FY16 ICE Data]. The U.S. Army Installation Management Command (IMCOM) provided all Interactive Customer Evaluation (ICE) comments for Fiscal Years 2014, 2015, and 2016. E-mail from Mr. Russell Matthias, Interactive Customer Evaluation Management Analyst, U.S. Army Installation Mgmt. Command., to author (Oct. 19, 2016, 15:30 EST) (on file with author).
19. See BUSINESS RULES, *supra* note 4, § 2.3.3.1. There are some situations in which spouses, survivors, or others can file a claim on behalf of a Soldier, but those instances are limited. See U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 11-4(h)(5) (21 Mar. 2008) [hereinafter DA PAM. 27-162]. Soldiers comprise the bulk of claimants, but Civilian employees and some others can also be proper claimants. *Id.* para. 11-4(a). In this article, "Soldier" and "claimant" are used interchangeably to mean any proper claimant.
20. See BUSINESS RULES, *supra* note 4, § 2.3.3.3. The U.S. Army Claims Service (USARCS) can grant extensions for "good cause for the delay." *Id.* § 2.3.3.3.
21. BUSINESS RULES, *supra* note 4, para. 1.1.3.
22. See generally BUSINESS RULES, *supra* note 4, § 1.5.4. This is the same type of reimbursement the claimant would receive if filing under the PCA. 31 U.S.C. § 3721 (2018).
23. See BUSINESS RULES, *supra* note 4, §§ 2.0, 2.13.3.
24. BUSINESS RULES, *supra* note 4, § 1.5.1.
25. See DA PAM. 27-162, *supra* note 19, para. 11-7(a)(1).
26. BUSINESS RULES, *supra* note 4, § 1.2.2.
27. See U.S. ARMY CLAIMS SERV., ALLOWANCE LIST DEPRECIATION GUIDE (2007), <https://www.jagcnet.army.mil/Sites%5C%5Cclaims.nsf/0/FEE2F6A5C1CE165585257B11004C26CE/%24File/2007%20ALDG.pdf> [hereinafter ALDG].
28. See generally 31 U.S.C. §§ 3701-3720(e) (2018); DA PAM. 27-162, *supra* note 19, ch. 11.
29. See BUSINESS RULES, *supra* note 4, § 2.9.1.
30. *Id.* § 2.9.1.
31. *Id.* § 2.9.2. The withholding process is referred to as an "administrative offset." *Id.*
32. *Id.* § 2.9.3. See also 31 U.S.C. § 3702.
33. 10 U.S.C. § 2636a(b) (2018).
34. See BUSINESS RULES, *supra* note 4, § 1.1.2.5.
35. E-mail from Mr. Leland Gallup, Chief, Recovery Branch, U.S. Army Claims Serv., to author (Dec. 1,

2016, 11:39 EST) (on file with author). See also CENTER FOR PERSONNEL CLAIMS SUPPORT, CLAIMS DATA PULL, CPCS STATS FY17 AND FY18 ARMY-WIDE (Oct. 29, 2018) (unpublished Excel document) (on file with author) [hereinafter CPCS Data]. This document contains statistics on the number of Army PCA claims filed for Fiscal Years 2017 and 2018, as well as the amounts paid for those claims. *Id.*

36. See generally DA PAM. 27-162, *supra* note 19, ch. 11.

37. *Id.* para. 11-23.

38. See FRV Survey, *supra* note 10, at 27. The survey indicates low satisfaction rates with the FRV program, including only nineteen percent of junior enlisted Soldiers, forty-two percent of senior enlisted Soldiers, fifty-seven percent of officers, and fifty-eight percent of Civilian employees. *Id.*

39. *Id.* The survey is old, but is relevant to this discussion because there have been no intervening substantive changes to the PCA or FRVL claims rules. The last changes to AR 27-20 and DA PAM 21-162 occurred in 2008. See generally AR 27-20, *supra* note 12; DA PAM. 27-162, *supra* note 19. The last substantive change to the FRVL was in 2000. See 10 U.S.C. § 2636a(b) (2018).

40. FRV Survey, *supra* note 10, at 27. “[Forty percent] of respondents who submitted a claim received what they thought was a satisfactory settlement under the Full Replacement Value Program.” *Id.*

41. FRV Survey, *supra* note 10, at 8.

42. *Id.*

43. See generally *id.* at 9.

44. *Id.*

45. See *id.* at 27. Eighty-one percent of junior enlisted respondents were unsatisfied with the FRVL claims process. *Id.*

46. *Id.*

47. See, e.g., FY14 ICE Data, *supra* note 18; FY15 ICE Data, *supra* note 18; FY16 ICE Data, *supra* note 18.

48. See generally 10 U.S.C. § 2636a (2018).

49. See, e.g., *Tutorials*, MOVE.MIL, <https://move.mil/tutorials> (last visited Aug. 28, 2019). This assertion is based on the author’s experience as the Chief, Client Services Division and Claims Attorney for the U.S. Army Aviation Center of Excellence and Fort Rucker, Alabama, from 15 October 2014 to 11 August 2016 [hereinafter Professional Experiences].

50. See DA PAM. 27-162, *supra* note 19, para. 11-23.a. Normally, USARCS will not pursue a claim against a TSP unless the Soldier files a claim with the Army; without a PCA claim, TSP behavior goes mostly unsupervised. *Id.*

51. Professional Experiences, *supra* note 49.

52. U.S. DEP’T OF DEF., 4500.9-R, DEFENSE TRANSPORTATION REGULATION pt. IV-K1-20 (May 13, 2016) [hereinafter DTR] (providing that it is the TSP’s responsibility to “[p]repare an accurate and legible inventory”).

53. *Id.* See, e.g., *Handling PCS Claims During and After a Move*, MILITARY.COM, <http://www.military.com/money/pcs-dity-move/handling-pcs-claims-during-after-move.html> (last visited Aug. 28, 2019) (advising Soldiers to “[e]xamine preexisting damages carefully; if the movers have exaggerated the amount of preexisting damages, you should state your disagreement directly on the inventory. . . .”)

54. See BUSINESS RULES, *supra* note 4, § 1.3.2 (“The TSP shall not be liable for . . . pre-existing damage.”).

55. See generally BUSINESS RULES, *supra* note 4, § 2.3.

56. Compare DA PAM. 27-162, *supra* note 19, para. 11-1.b (“The Army Claims System intends that, within approved guidelines, Soldiers and civilian employees will be compensated for such losses to the maximum extent possible.”), with FRV Survey, *supra* note 10.

57. FRV Survey, *supra* note 10, at 39.

58. *Id.*

59. SDDC Data, *supra* note 16. See also FRV Survey, *supra* note 10, at 36 (providing that “[r]espondents receiving payment reported that on average, their payment covered [fifty-four percent] of their claim”).

60. See CPCS Data, *supra* note 35. In Fiscal Year 2017, the CPCS processed 2,631 claims, paying \$3,951,992. *Id.* In Fiscal Year 2018, the CPCS processed 1,742 claims, paying \$2,520,118. *Id.*

61. See U.S. Army Center for Personnel Claims Support, U.S. Army Statistics FY 14–FY 18 (Mar. 31, 2018) (unpublished PowerPoint presentation) (on file with author) [hereinafter CPCS Statistics]. U.S. Army Claims Service recovered over \$1.6 million in FY 14, \$1.8 million in FY 15, \$1.6 million in FY 16, and \$1.5 million in FY 17. *Id.* See also E-mail from Mr. Mark Edick, Operations Officer, CPCS, U.S. Army Claims Serv., to author (Oct 31, 2018, 16:02 EST) (on file with author). And USARCS recovered over \$1 million in FY 18. *Id.*

62. DA PAM. 27-162, *supra* note 19, para. 11-23.a. (providing that the “Army normally does not assert claims against carriers until the Army has received a claim from the owner . . .”).

63. SDDC Data, *supra* note 16.

64. See generally FRV Survey, *supra* note 10.

65. *Id.*

66. SDDC Data, *supra* note 16 (noting that \$451,138,155.50 is the average for Fiscal Years 2014, 2015, and 2016).

67. Professional Experiences, *supra* note 49.

68. *Id.*

69. FRV Survey, *supra* note 10, at 40. Only thirty-one percent of respondents who filed a claim received payment from the TSP. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Out of 467 respondents who filed a claim with the TSP, only 185 received satisfactory payment. *Id.*

73. *Id.* Of those surveyed, only twenty-two percent of claimants receiving partial payment submitted a claim under the PCA. *Id.*

74. FRV Survey, *supra* note 10, at 40. According to the FRV Survey, only about twenty percent of those who sustained damage during a move received satisfactory payment under the FRV Program. *Id.*

75. Compare CPCS Data, *supra* note 35, with SDDC Data, *supra* note 16.

76. See BUSINESS RULES, *supra* note 4, § 2.9. In the current system, the TSP’s liability for a lost or damaged item can be reviewed by the TSP’s adjudicator, the CPCS, the USARCS Recovery Branch, the Defense Office of Hearings and Appeals (DOHA), and even in a federal court. *Id.*

77. Professional Experiences, *supra* note 49. See also FRV Survey, *supra* note 10.

78. See generally CPCS Data, *supra* note 35.

79. This is the full process under the current system: (1) file Notice of Loss or Damage (NOLD), (2) TSP claim, (3) TSP initial written offer or denial, (4) TSP negotiation, (5) TSP final offer or denial. (6) PCA claim, (7) PCA adjudication and payment or denial, (8) PCA reconsideration request, (9) PCA reconsideration action, (10) TSP recovery action, (11) TSP negotiation, and (12) final remittance to claimant. See discussion *supra* The Army Personal Property Program in Practice. With a direct appeal, the process would be: (1) file NOLD, (2) TSP claim, (3) TSP written offer or denial, (4) CPCS assistance request, (5) TSP-ordered payment or offset action, and (6) final remittance to claimant. *Id.* Both processes would also include higher-level appeal rights to the DOHA or a suit in federal court, but those would be relatively rare. *Id.*

80. The CPCS functions as an online and call center resource. Headquarters, Office of the Judge Advocate Gen., 39-03 TJAG Sends (13 Aug. 2015) [hereinafter TJAG Sends]. The CPCS would be most effective in its review if its staff had direct access to view the claims files and supporting evidence that claimants entered into the DPS claims website. Alternatively, the claimant could send the file and substantiation directly to the CPCS using e-mail or the DoD SAFE (Secure Access File Exchange) large file sender.

81. See BUSINESS RULES, *supra* note 4, § 2.9.1.

82. This is the current process for the Army to recover funds from the TSP—it “offsets” against funds it owes the TSP on other shipping contracts; the difference is that the offset is currently not accomplished until much later in the recovery process. See BUSINESS RULES, *supra* note 4, § 2.9.2.

83. BUSINESS RULES, *supra* note 4, § 2.9.3; 31 U.S.C. § 3702 (2018).

84. While U.S. Transportation Command has the authority to make this change unilaterally, *Business Rules* are often promulgated after consultation with industry representatives. U.S. ARMY CLAIMS SERV., DEFENSE PERSONAL PROPERTY PROGRAM CLAIMS HANDBOOK 25 (Steven Kelly ed., 3d ed. 2014). The *Business Rules* are incorporated by reference into individual shipping contracts, and TSPs that choose to do business with the Army will be bound by any subsequent rule change. *Id.*

85. See discussion *supra* Many Soldiers Do Not Fully Utilize the Army Personal Property Program.

86. See generally SDDC Data, *supra* note 16. It appears that TSPs in general have been avoiding the full extent of the FRVL’s liability mandate, especially considering the \$685 average recovery and the fifty-five percent reimbursement rate. *Id.*

87. FRV Survey, *supra* note 10. According to the survey, only forty percent of claimants who filed a claim with a TSP felt they were adequately reimbursed. *Id.*

88. 10 U.S.C. § 2636a(a)–(b) (2018).

89. See SDDC Data, *supra* note 16.

90. See generally FRV Survey, *supra* note 10.

91. *Id.*

92. Professional Experiences, *supra* note 49.

93. See generally SDDC Data, *supra* note 16.





Members of LTC Albert Courie's OSJA office in Hawaii play Captain Sonar, a team-based game. (Credit: LTC Courie)

## Team Building Through Gaming

By Lieutenant Colonel Albert (Treb) Courie

"Head north."  
"Torpedo ready."  
"STOP!"

"Torpedo launched. Impact in H-2."  
"Direct hit, two damaged."

Cheers arise from one side of the conference table.

**This is not Navy training taking place aboard a U.S. Navy submarine at sea or on base in a simulated conning tower.** Instead, this is a group of U.S. Army judge advocates (JAs) and paralegals developing teamwork and leadership skills, as well as having fun, in their office law library. They are playing the tabletop game "Captain Sonar."

Captain Sonar is an innovative, award-winning, two-team game, centered on two submarines hunting each other. There is no game board, per se, because the location and status of each submarine is hidden from the opposing team. There

are two modes of play: turn-based and real-time. In the turn-based version, each team takes turns moving their submarine on a hidden map board, allowing all players to focus on the action and giving the captain and crew time to confer on strategy. In real-time play, the teams move as fast as the captain can call out movements and the crew members can react—a truly chaotic and exciting play.<sup>1</sup>

As designed, each team is composed of four players: the captain, the first officer, the radio operator, and the engineer, each with clearly defined roles. Each team sits across the table from the other team with a

large screen blocking the view of the opposing player sheets (that is, all information and moves by each submarine are hidden from the opposing team). The captain directs the submarine on a map, using a dry-erase marker to plot their course point-by-point, and the captain must announce loudly (for all playing to hear) the direction of each move. The submarine cannot reverse course, cross its own path, or cross one of the islands on the map. The first mate assists the captain by "powering up" systems on the submarine with each movement; the systems include sonar and drones, used to locate the opposing submarine, and torpedoes and mines, used of course to destroy the opposing submarine. The third member of the team, the engineer, must also "break down" a system with each move, depending on the direction of the move. There are various methods to repair the submarine systems or minimize/mitigate breakdowns.<sup>2</sup> Finally, the most valuable and challenged crew member is the radio operator. The radio operator tries to find the opposing submarine's position by listening to the opponent's moves and plotting those movements on a map.

The game only superficially resembles actual submarine tactics, and players should not expect to gain any understanding of naval tactics or replicate actual naval submarine combat. Instead, Captain Sonar players develop teamwork and leadership skills. They also learn to think, communicate, learn, and adapt to an unfamiliar system.

While the game appears complicated, the complexity and novelty of the system support the training goals. The gameplay mechanics are not nearly as important as the interplay among team members. Benefits of playing Captain Sonar include effective communication, clear intent, an understanding of the captain's intent, situational awareness, and also understanding and balancing competing and opposing priorities.

Leaders can use games, such as Captain Sonar, to develop teamwork, build esprit de corps, and teach Soldiers to thrive in ambiguity and chaos. These training

objectives are often difficult to achieve in an office environment. The Army already has ample training methods to meet these training objectives while going through Army schooling or when granted training days to go to an obstacle course, Leaders Reaction Course, or other established Army team building exercise; however, the reality is most JAs and paralegals will spend the vast majority of their garrison time in an office, and thus they may not have the ready opportunities to develop these goals outside of the normal course of daily work.

Using a tabletop game and a small amount of prior planning (for the first iteration), Soldiers in an Office of the Staff Judge Advocate (OSJA) can enjoy the benefit of this training in the office, in just one or two hours per session.

### **Gaming as Teaching**

Gaming can be an excellent method of teaching a variety of skills. In the military, most people associate gaming with wargaming. In Army doctrine, “wargaming” is Step 5 of the Army Military Decision-Making Process (MDMP) and allows the staff to test and refine various courses of action before presenting them to the commander for a final decision.<sup>3</sup> More colloquially, wargaming is a sub-genre of tabletop board gaming that generally focuses on historical military operations, recreating tactical battles or operations using counters representing military forces and played on a map game board. In this context, wargaming can serve as interpretive tools for military historians,<sup>4</sup> through the representation of the battlefield on a map and the opposing forces as units in the game. These wargames allow historians to posit and test counterfactuals, albeit within the framework of the wargame simulation they use to model these counterfactuals.<sup>5</sup> Wargames can be an excellent training method, are often used in military education,<sup>6</sup> and have been used by policymakers to better understand U.S. military capabilities.<sup>7</sup>

While MDMP wargaming and casual board game wargaming are military-focused, Captain Sonar does not simulate or recreate historical battles or teach the players military strategy. It is more like *Hasbro’s Battleship* meets *The Hunt for Red October*.<sup>8</sup> Although it does not accurately replicate

military conflict, Captain Sonar does help its players learn to work together as a team.

### **Team Building<sup>9</sup> Fundamentals**

Army team building enables groups to accomplish a mission or perform a collective task. In Captain Sonar, the collective task is locating and sinking the opposing submarine (while also preventing the same from happening to your submarine). That is, the team’s mission is to locate and destroy the enemy submarine. To do this, each crewmember must function as a member of the team.

“Army organizations rely on effective teams to complete tasks, achieve objectives, and accomplish missions.”<sup>10</sup> According to Army Techniques Publication 6-22.6, Army Team Building, the characteristics of effective teams are:

- Trust each other and predict what each will do.
- Work together to accomplish the mission.
- Execute tasks thoroughly and quickly.
- Meet and exceed the standard.
- Adapt to demanding challenges.
- Learn from experiences and develop pride in accomplishments.<sup>11</sup>

#### ***Trust Each Other and Predict What Each Will Do***

Each crewmember in Captain Sonar has a specific job. For three of the crew (the captain, the first mate, and the engineer), their actions and requirements directly link to the decisions that the captain makes. At times, the competing requirements of avoiding land, closing with the enemy submarine, and moving in a certain direction to repair systems (or not break the key systems) require the captain to trust the information he receives from his crewmembers, and they have to trust the captain’s decisions—and try to predict their team’s requirements over the next few turns.

#### ***Work Together to Accomplish the Mission***

Although this may sound trite, Captain Sonar is truly a team game. Each of the four crewmembers must do their job, do their job well, and communicate with the captain.

The radio operator must diligently record each move of the opposing submarine and communicate continually with the captain about the potential locations of the enemy submarine. The first officer must ensure that he is powering up the correct weapon or system based on the current situation and must work with the radio operator, captain, and engineer to make these determinations. For example, if the first officer is powering up a torpedo to launch at the enemy submarine, but the radio operator does not know where the enemy submarine is, then the first officer is wasting time and not working with the team; instead, the first officer should be powering up a detection system (sonar or drone). Meanwhile, the engineer has to manage the breakdowns and repairs of the systems, which happen with every move of the submarine. The engineer has to work with the captain to ensure that the engineer can forecast and plan for the upcoming breakdowns while also working with the other crew to understand which of the systems to repair and by when.

Then finally, the captain must ensure that all of the crew understand the situation and the priority of the submarine (locate the enemy, close with and destroy the enemy, evade the enemy to buy time, etc.). If all of the crew understand the current and future needs and plans of the captain, then they can better plan and advise their actions for each turn.

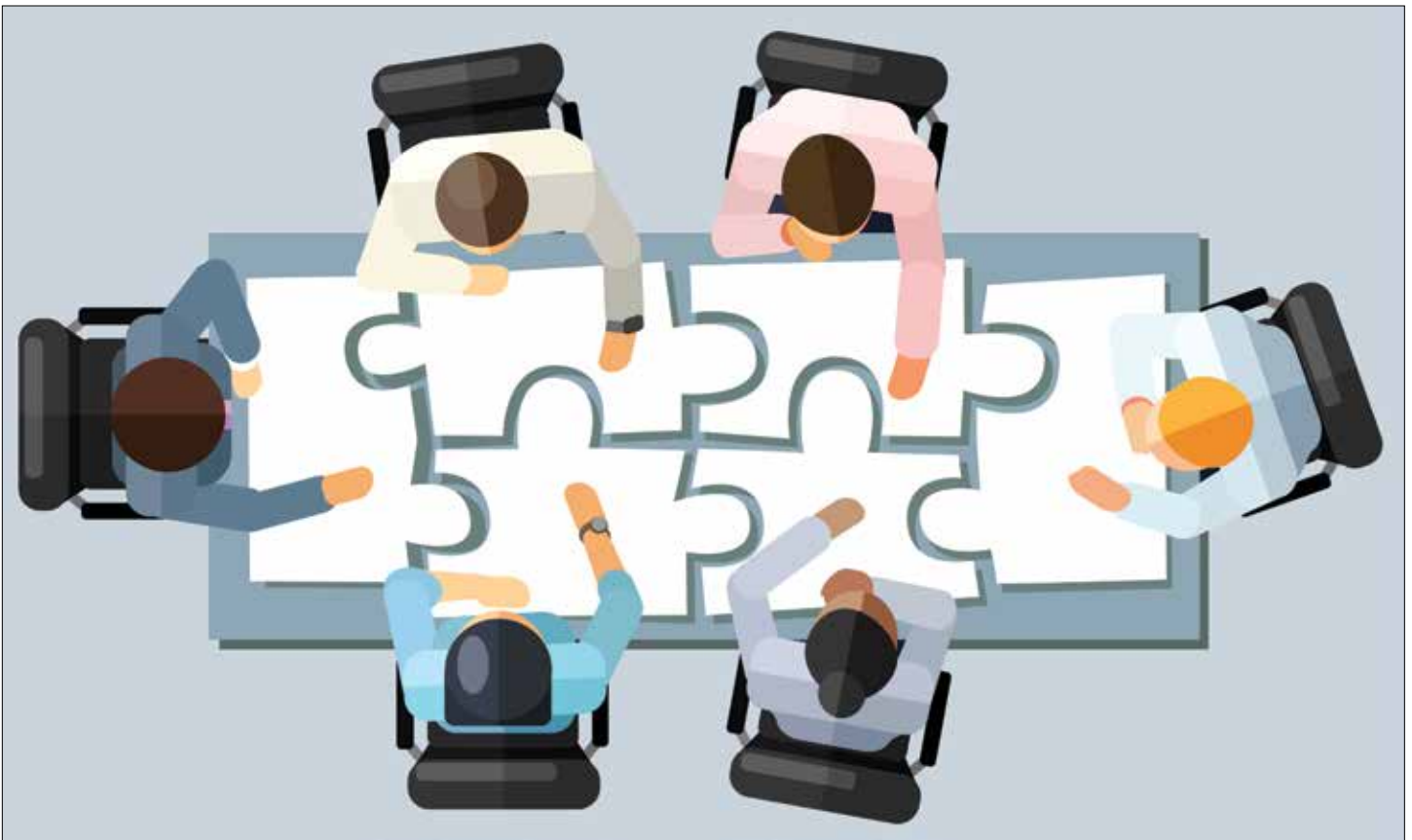
#### ***Execute Tasks Thoroughly and Quickly***

This principle applies most during the real-time version of Captain Sonar. During real-time Captain Sonar games, the team that moves quickly and correctly (that is, they make good moves faster) will be more successful. They will be able to power up their systems, repair their breakdowns, and close with the enemy faster. A well-performing crew, one that understands their mission and the captain’s plan (intent), will execute its tasks quickly.

#### ***Adapt to Demanding Challenges***

While it may be just a game and not truly “demanding” in the same way that many Army tasks are demanding, two teams of peers and friends in a head-to-head competition get their competitive juices flowing.





(Credit: istockphoto.com/Feodora Chiose)

A little friendly competition, perhaps sweetened by some small prizes (Snickers bars or something else fun), creates its own challenge.

As for adapting, the unique (and likely unfamiliar) structure and mechanics of Captain Sonar forces the players to adapt to the unfamiliar challenges of the game.

#### ***Learn from Experiences and Develop Pride in Accomplishments***

Because the players are likely unfamiliar with Captain Sonar, or even the basic concepts and mechanics of this game, much of the players' learning will come from their experiences. The training plan is designed so that the players do not have access to the full rulebook; instead, they learn by doing, not by reading—experiential learning.<sup>12</sup>

#### ***Adaptive and Agile Leaders***

The premise of Army mission command doctrine is the requirement that we develop "agile and adaptive leaders."<sup>13</sup> Army leaders must learn to operate in ambiguous environments without clear guidance from above.

Most JA training is focused on garrison legal operations, such as military justice. A JA must be ready, however, to deploy quickly and to advise commanders on a multitude of legal issues against near-peer adversaries. Modern hybrid warfare may involve cyber operations and space operations on a continuum of conflict between peace and war.<sup>14</sup> "Units and individuals cannot train on every task under every possible condition . . . They improve their ability to adapt through exposure to—and the intuition gained from—multiple, complex, and unexpected situations in challenging, unfamiliar, and uncomfortable conditions."<sup>15</sup>

Encouraging a group of Army lawyers and paralegals who are unfamiliar with Captain Sonar (unless and until they read this article!), to play this game can help mentally prepare them to function in ambiguity in an increasingly complex world. The answers to the problem facing them while playing Captain Sonar (how to work together as a team to locate and destroy the opposing submarine) are not found in the *Manual for Courts-Martial*, case law, or an

Army regulation. Just as young JAs had to be mentally agile and adaptive when first developing rule of law lines of effort in Iraq, the answers to tomorrow's ambiguous legal challenges may be absent in existing legal guidance. Adaptive and agile leaders must prepare to craft and discover their own answers.

#### ***How We Did It***

Here is how we used Captain Sonar in our office: we split the training audience into two teams of four, deliberately mixing players from different sections to enable and encourage people to work with those whom they do not normally see every day. Of course, splitting into teams based on sections or other groups that do normally work together can help forge internal teamwork.

We also deliberately placed players of all ranks on each team, then assigned the junior member of each team as the captain. A few days before the planned event, we informed each of the captains who was on their crew and gave them a player aid<sup>16</sup> that

explained the basic rules and gameplay. We did not give them the rulebook, although both captains, on their own initiative, looked up how-to-play videos on YouTube. Then, it was up to each captain to assign roles to their crew, based on their limited knowledge of the game, and explain to each of their crewmembers their duties and responsibilities.

On game day, the two teams sat opposite each other at the office conference table with dividers preventing them from viewing the other team's map and status indicators. The game started slowly as the captains struggled to explain their crews' duties and the crewmembers struggled to understand their actions. As they learned to maneuver the submarine, power up their weapons systems, and plot the opposing submarine's movements, gameplay and understanding slowly increased. Then each team began to understand the role of all of the other crew and began working together for specific ends, synchronizing their efforts. Once this happened, they gained an understanding of the tactics in the game, and gameplay and understanding increased quickly. The crews, each now operating together as a team, became very involved and excited about their competition. They enthusiastically tried to locate the opposing submarine and power up their weapons, while navigating their own submarine. Big moments—the location of the other submarine, the firing of a weapon, a successful hit—were greeted with raised voices and players on the edges of their chairs. Cheers from the winning team and groans from the losing team sounded when the opposing submarine sunk.

Our office has played the game multiple times, using Captain Sonar as a team building activity when new personnel join the office. Players look forward to Captain Sonar afternoons and have asked when we are playing again.

## Conclusion

Team building and leadership are key to Army service. However, the normal battle rhythm of a garrison Army OSJA rarely presents opportunities to deliberate develop these attributes. While the Army does offer episodic opportunities for team building, such as Leaders Reaction Courses, these often require advance scheduling and

planning and are difficult for an office to participate in while also being responsive to the daily mission of the command. Thus, leaders must look to unconventional means to build teams and develop leaders.

The game Captain Sonar offers an unconventional way to build teamwork and camaraderie in your office. The players learn how to work toward a common objective, which—adding in a bit of healthy competition—increases team building while also offering challenging problems, thus helping build their mental agility. Your office will end up closer as a team, with stronger, more agile and adaptive leaders. And, just as importantly, your office does this while having fun. **TAL**

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## Notes

1. I do not discuss the gameplay details in this article because part of the fun, and challenge, of this game is the “experiential learning” of figuring it out. See *infra* note 12. One of the training goals of Captain Sonar is for the players to learn to operate in ambiguity, without a full understanding of the gameplay when they start. However, for those interested in a better overview of the actual gameplay without reading the rulebook, I recommend viewing the following tutorial video: <https://www.youtube.com/watch?v=dcf-3SpHX7Po>. For an extended gameplay example, view: <https://www.youtube.com/watch?v=rMF59xINEA>.

2. This is the most complicated part of the game, one that must be played to be fully understood. Suffice it to say that you may need to move one direction to avoid an island or the edge of the map, move another direction to try to repair a key system, while also accounting for the location of the enemy submarine. That is, the captain must make tough, informed choices about the submarine's priorities.

3. U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS ch. 9 (May 2014).

4. Robert M. Cittino, *Lessons from the Hexagon*, ZONES OF CONTROL: PERSPECTIVES ON WARGAMING 440 (2016).

5. *Id.* at 452-53.

6. Some of the most valuable wargames for military education include the “Kriegspiel,” a double-blind refereed game sometimes used to recreate Napoleonic-era campaigns. In Kriegspiel, players play an individual leader in the campaign—the overall Army leaders, a corps commander, a division commander, etc.—and issue written orders to their subordinates, and situation reports to their superiors, through the referee. The referee then holds the orders and only delivers them after the requisite time delay for horse-born couriers has elapsed. The intelligence picture is incomplete and delayed, just as it was in early 19th-century warfare.

Another excellent pedagogic form of wargaming is the matrix game. Matrix games are refereed/facilitated games in which the players roleplay as different factions (countries, non-government organizations, etc.), in which the “players propose actions, weigh arguments and counter-arguments,” and attempt to replicate geopolitical actions. Colonel Jerry Hall & Lieutenant Colonel Joseph Chretien, *Matrix Games at the U.S. Army War College*, <https://paxsims.wordpress.com/2016/02/09/matrix-games-at-the-us-army-war-college/>. Readers can also visit <https://paxsims.wordpress.com/tag/matrix-games/> for a list of a variety of matrix games, including “On Thin Ice: A Matrix Game on the Future of the Arctic,” “Trouble in Paradise: A Micronesia Matrix Game,” and “Belt and Road: A Matrix Game of China's Global Trade and Infrastructure Project.”

7. Benjamin Jensen, *Welcome to Fight Club: Wargaming the Future*, WAR ON THE ROCKS (Jan. 4, 2019), <https://warontherocks.com/2019/01/welcome-to-fight-club-wargaming-the-future/>.

8. TOM CLANCY, THE HUNT FOR RED OCTOBER (1984).

9. While Captain Sonar helps players bond, if you would rather bring out the worst in everyone and tear apart your team, play *Diplomacy* instead (unofficial tagline: “Destroying Friendships Since 1959”), <https://boardgamegeek.com/boardgame/483/diplomacy>.

10. U.S. DEP'T OF ARMY, ARMY TECHNIQUES PUBLICATION 6-22.6, ARMY TEAM BUILDING iv (Oct. 2015).

11. *Id.*

12. Kendra Cherry, *The Experiential Learning Theory of David Kolb*, VERYWELLMIND (July 27, 2019), <https://www.verywellmind.com/experiential-learning-2795154>.

13. U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, LEADER DEVELOPMENT para. 1-15 (June 2015).

14. TRAINING AND DOCTRINE COMMAND, PAM 525-3-1, THE U.S. ARMY IN MULTI-DOMAIN OPERATIONS 2028 vi (6 Dec. 2018).

15. U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 7.0, TRAINING UNITS AND DEVELOPING LEADERS 2-25 (Aug. 2012).

16. Available on Boardgamegeek.com.



(Credit: Sgt. 1st Class Tina R. Eichenour, 38th Sustainment Brigade)

## Financial Liability in the Command Supply Discipline Program

By Major Thomas P. Burnham

If there were ever an Army program keeping company commanders awake at night, the Command Supply Discipline Program (CSDP) is a contender. The primary goal of the CSDP is efficient management of property<sup>1</sup>—the vehicles, weapons, equipment, parts, and other items commands use and for which they are responsible.<sup>2</sup> The CSDP is a rather rigorous program with enforcement at several echelons of command, numerous interested parties, and, importantly for us—legal applications that depend heavily on subjective analysis. As such, judge advocates (JAs), in a variety of billets, should be aware of the regulatory guidance and local command expectations with respect to the CSDP. Legal assistance attorneys will encounter outgoing company commanders after change-of-command inventories identify property losses within their ranks.<sup>3</sup> Meanwhile, brigade judge advocates (BJAs) and command legal advisors will advise

their commanders and staff on the same legal actions throughout the investigation and disposition. This article will detail the CSDP, discussing its regulatory background and policies, then explain context for JA involvement and an analytical framework as applied to financial liability.

### Regulation and Policy of the CSDP

When advising clients on CSDP matters, start with Army Regulation (AR) 735-5, Property Accountability Policies,<sup>4</sup> and AR 710-2, Supply Policy Below the National Level.<sup>5</sup> These regulations create the initial framework for analyzing CSDP issues. Understanding the associated policy concerns of property accountability will assist JAs in knowing with which fellow staff sections to network and analyze issues. These policy concerns include the following: establishing supply discipline, standardizing supply discipline requirements, unifying a list of such requirements, and increasing

efficiency in monitoring subordinate commands.<sup>6</sup>

If supply discipline is a priority for the command, practitioners can expect to find local policy memoranda on the matter. Some installations have a supplement to AR 735-5, but brigade and battalion policy letters usually provide the bulk of supplementary guidance for commanders and staff. The breadth and depth of such policies vary, but they generally give company commanders guidance on how to execute change-of-command inventories and clarify the role of supporting staff in the process. There may be provisions governing mandatory in- and out-briefs with superior commanders and key staff. Properly negotiating these wickets is both a baptism by fire for incoming commanders and the path to freedom for their outgoing counterparts. Before diving into the more specific legal concerns, JAs should be aware of the practical context behind CSDP matters.

### Context of CSDP Issues

First, what type of CSDP questions typically require a JA's input? The most common are financial liability investigations of property loss (FLIPLs)<sup>7</sup>—specifically, those that occur after company-level change-of-command inventories.<sup>8</sup> Commanders, generally at the brigade level and higher, frequently direct legal reviews of command policy memorandums prior to signature and publication.<sup>9</sup> This is especially true for policies implicating Soldiers' rights and pocketbooks, such as supply discipline.<sup>10</sup>

Second, who are the interested parties with respect to the CSDP? Army Regulation 735-5 succinctly states that the "CSDP is a commander's program."<sup>11</sup> The regulation lists superior commanders' duties, including implementing local CSDP policies and designating staff personnel to assist in monitoring and inspecting the CSDP.<sup>12</sup> Commander involvement in CSDP-related FLIPLs will be similar to other FLIPLs at the appointing and approving authority levels,<sup>13</sup> with the added possibility of a company commander as the respondent.<sup>14</sup> Staff interactions abound as well. Regulatory guidance to the Army G4 regarding CSDP responsibilities<sup>15</sup> flows down the technical chain, so that installation and unit logistics shops (G4/S4) have a stake in a competent



local CSDP.<sup>16</sup> Brigade-level S4s will also have a property book officer (PBO)—a warrant officer subject matter expert (SME) who runs property accountability, supervises lateral transfers between units, and adjusts property discrepancies for the command, among other responsibilities.<sup>17</sup> Operations sections (G3/S3), working with logistician counterparts, will operationalize supply discipline through fragmentary order provisions mandating staff assistance, inspections, and lateral transfers.<sup>18</sup> Networking with these sections, especially the PBO, will assist JAs in both crafting investigative plans for financial liability officers (FLO) and reviewing FLIPLs for legal sufficiency.

### Intersection of the CSDP and Financial Liability

The remainder of this article will focus on legal analysis related to the CSDP, through the lens of a BJA conducting a hypothetical FLIPL legal in-brief. A FLO has come to the BJA's office after receiving appointment orders to investigate the loss of numerous items recently unaccounted for during a change-of-command inventory. The FLO tells the BJA that the battalion executive officer (XO) and S4 both expressed concern about apparent company-level deficiencies in property management. How should the FLO proceed?

The BJA should consider highlighting the different types of responsibility when discussing the elements of financial liability. As applied, there is the potential liability of the outgoing commander (command responsibility) or even the company XO (supervisory responsibility stemming from usual duties of overseeing the arms, supply, chemical, biological, radiological, and nuclear, and communications rooms).<sup>19</sup> Next, a review of specific company-level CSDP duties is useful, with the caveat that the FLO should seek technical input from the battalion/brigade S4 shops, including the PBO.<sup>20</sup> As part of this review, the BJA should remind the FLO of table 2-2 in AR 710-2, when relevant for a given investigation:

- Execution of primary hand receipt holder change (when company commanders “high five” in front of the

PBO, officially handing off command responsibility);

- Annual inventories (if locally approved, this will account for approximately 10% of company property monthly, such that all property is accounted for each year);
- Monthly sensitive item inventories (e.g., weapons, night vision goggles, certain Global Positioning System devices, etc.);
- Supervision of and by company-level supply leaders (company XO, supply sergeant, armorer, etc.);
- Appointment and use of subordinates, such as platoon leaders, as primary hand receipt holders;
- Use and documentation of discretionary inventories (e.g., post-field exercise layouts of property that went to the field);
- Accountability after receipt, turn-in, and issue of property (including use of DA Forms 2062 and 3161);
- Accountability during change of custodial responsibility (supply sergeant and armorer); and
- Whether and when property discrepancies were reconciled with the PBO.<sup>21</sup>

Fortunately, most FLOs have been assigned to companies with assigned property and are likely familiar with much of the above. Army Regulation 710-2, Appendix B, lists many other technical and supervisory requirements for commands and G4/S4 shops. Although these may be relevant for a given FLIPL, the above bullets should provide adequate guidance for the typical CSDP-related investigation.

Analyzing the elements of financial liability is a significant challenge when scrutinizing a commander's CSDP execution. No matter how detailed the FLIPL findings are, the FLO will almost certainly encounter difficulty in assessing culpability and proximate cause. As the above bullets demonstrate, sound property accountability depends on several personnel even at the company level. And, unfortunately, the regulation provides no clear answer on how to reconcile the nuances of systemic CSDP successes and failures, when so many actors are involved. Without resolving this issue here, FLOs should always return to the AR 735-5 definitions of “culpability” and “proximate cause,” as well as consult with superior commanders and supporting staff

to better understand property accountability “culture” in the organization.<sup>22</sup>

Legal advisors will rarely encounter the matter of potential financial liability at echelons of command higher than a company. But nothing in AR 735-5 limits command or supervisory responsibility to the company level.<sup>23</sup> In fact, regulation mandates supply discipline duties for all commanders.<sup>24</sup> Assessment of culpability and causation at higher levels may require a more in-depth investigation and detailed analysis, as well as substantial staff coordination. If such scrutiny appears to be necessary, JAs should be the honest broker in the room in recommending a more senior FLO. Even if the approving authority does not impose financial liability on superior commanders and senior staff officers, the investigation can serve as the basis for other administrative action and even systemic improvements in supply discipline at the higher echelon.<sup>25</sup>

### Conclusion

Understanding the CSDP will facilitate our legal advice to commanders, staff, FLOs, and legal assistance clients. Judge advocates do not require in-depth knowledge with respect to equipment operational capabilities, line item coding in property systems, and the like. But, a baseline understanding of why the CSDP is a command priority, the roles of fellow staff SMEs, and company-level inventory processes (who, what, when, how, and why) are all force-multipliers. For additional reading on the CSDP, including war stories and best practices, JAs should reference the *Center for Army Lessons Learned Handbook No. 10-19*, as well as online articles and videos referenced below.<sup>26</sup> **TAL**

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### Notes

1. See U.S. DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES para. 11-2a (9 Nov. 2016) [hereinafter AR 735-5].

2. See *id.*, Glossary, sec. II (definitions of “equipment” and “organizational property”).

3. See U.S. DEP'T OF ARMY, REG. 710-2, SUPPLY POLICY BELOW THE NATIONAL Level tbl. 2-2a (28 Mar. 2008)

(listing inventory requirements for a change of primary hand receipt holder) [hereinafter AR 710-2].

4. AR 735-5, *supra* note 1.

5. AR 710-2, *supra* note 3.

6. AR 735-5, *supra* note 1, para. 11-2a.

7. *Id.*, ch. 13; *see also* AR 710-2, *supra* note 3, App. B, Sec. III.

8. *See* AR 710-2, *supra* note 3, tbl. 2-2a. In the author's experience, local policies provide guidance on executing change-of-command inventories. There is generally a pre-inventory and actual inventory in which the incoming and outgoing commanders account for each piece of company property, which subordinate platoons have laid out for them. On a related note, any Financial Liability Investigation of Property Loss (FLIPL) could implicate the Command Supply Discipline Program. Most FLIPLs, however, are due to an acute incident of loss at the operator or supervisor level. *See* AR 735-5, *supra* note 1, para. 13-29a (definitions of supervisory and personal responsibility). These incidents are generally unlikely to involve the more systemic concerns of a commander's responsibility to enforce the CSDP. *See id.*, para. 13-29a(2).

9. Such as open-door policies, equal opportunity policies, etc.

10. *See* AR 735-5, *supra* note 1, para. 13-43.

11. *Id.*, para. 11-1b.

12. *Id.*

13. *Id.*, para. 13-17.

14. *See id.*, Glossary, sec. II.

15. AR 710-2, *supra* note 3, para. 1-10a.

16. *See id.*, para. 1-10f.

17. *See* AR 735-5, *supra* note 1, Glossary, sec. II (defining "accountable officer").

18. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATIONS AND OPERATIONS para. 2-50 (11 May 2014) (incorporating C 1).

19. *See* AR 735-5, *supra* note 1, paras. 2-8a(1)-(2), 13-29a(2)-(3).

20. If the higher command suspected company leadership negligence with respect to the CSDP, then a financial liability officer with prior command experience may already be appointed. *See id.*, para. 13-27 & tbl. 13-1.

21. *See* AR 710-2, *supra* note 3, tbl. 2-2.

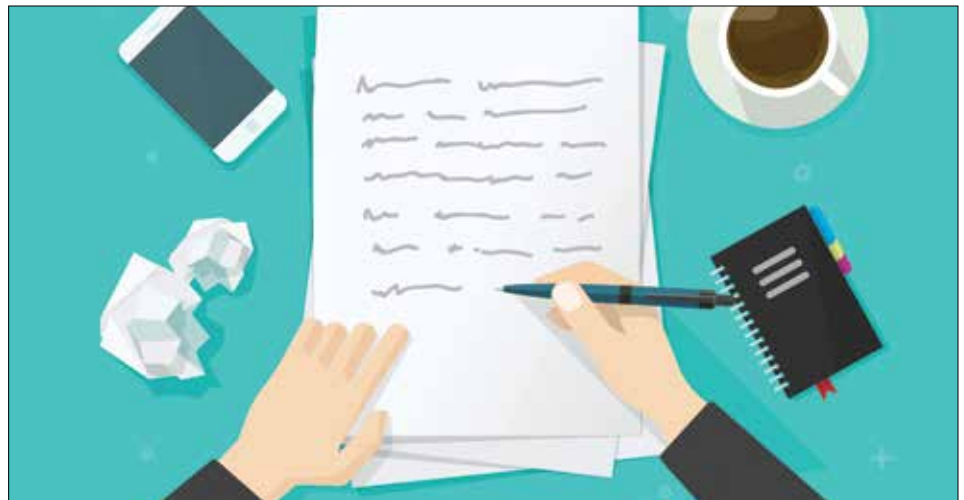
22. *See* AR 735-5, *supra* note 1, paras. 13-29b-c.

23. *See* AR 735-5, *supra* note 1, paras. 2-8a, 13-29a.

24. *Id.*, para. 1-4d(2).

25. *See id.*, para. 13-32c.

26. CTR FOR ARMY LESSONS LEARNED, SMALL UNIT LEADER'S GUIDE TO: THE COMMAND SUPPLY DISCIPLINE PROGRAM HANDBOOK No. 10-19 (Jan. 2010), [https://quartermaster.army.mil/oqmg/Call\\_Handbook\\_10-19.pdf](https://quartermaster.army.mil/oqmg/Call_Handbook_10-19.pdf); *see, e.g.*, Chief Warrant Officer (W-3) Anthony L. Rawlings, *Establishing Command Supply Discipline After Deployment*, ARMY LOGISTICIAN, Jan.-Feb. 2006, at 42, [https://alu.army.mil/alog/issues/JanFeb06/discip\\_deploy.html](https://alu.army.mil/alog/issues/JanFeb06/discip_deploy.html); Charles Holmes, *Army Command Supply Discipline Program AR 710-2*, CSDP MONITOR, <https://www.youtube.com/watch?v=-GdMuIBmXRM>.



(Credit: istockphoto.com/vladwel)

## What is the Contemporaneous Record in a Bid Protest?

By Major Jason W. Allen

**Few acquisitions are perfect.** When a bid protest is filed that challenges the agency's conclusions or decisions, there is typically a need to explain the agency's conclusions or decisions to defend against the protest. While additional documentation to explain the agency's conclusions or decisions may be appropriate, that documentation should be consistent with the contemporaneous record and should not alter or revise the contemporaneous record. This article details that distinction for judge advocates practicing in this field of law.

A contemporaneous record consists of documents prepared prior to or at the time of the agency's conclusion or decision. In order to be contemporaneous, the written record cannot be created after an agency's acquisition decision, and one cannot simply paper the file to record what was orally decided, even in good faith. Moreover, failure to create a contemporaneous written record can lead to quasi-judicial or judicial scrutiny that can stop an agency in its tracks, creating unnecessary delay and additional costs to the agency. Finally, failing to adequately document an acquisition in a timely manner

can erode the public's trust in our procurement system and frustrate the agency's effort to secure better values.

In *Global Technical Systems (Global)*, the protester alleged the market research documents consisted of "post hoc" analysis and should be given little to no weight.<sup>1</sup> In *Global*, the agency decided not to set aside the procurement for a small business and issued the solicitation.<sup>2</sup> A protest at the Government Accountability Office (GAO) followed. The solicitation was not suspended, and it closed during the pending protest.<sup>3</sup> The agency took corrective action, which included conducting additional market research, and the protest was dismissed.<sup>4</sup> After conducting the additional market research, the agency announced that no changes would be made to the solicitation, which had already closed.<sup>5</sup> Another protest followed with the protester asserting, in part, that little to no weight should be given to the "post hoc" additional market research because it was conducted after initial issuance of the solicitation.<sup>6</sup> The GAO held that the additional market research was not "post hoc" analysis because it was prepared prior

to the agency's conclusion not to make any changes to the solicitation.<sup>7</sup> Thus, a written record documenting the additional market research by the agency prior to the agency's decision not to amend the solicitation was contemporaneous and adequate.

While the contemporaneous record consists of pre-decision documents, additional documentation providing more rationale for contemporaneous conclusions can be considered by the GAO during the pendency of a protest. In *Rust Consulting, Inc.*, the GAO explained that

[i]n reviewing an agency's evaluation, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments and explanations. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions so long as those explanations are credible and consistent with the contemporaneous record.<sup>8</sup>

The GAO held that the contemporaneous record documented the agency's price realism conclusions, and that the agency's post-protest statement simply further explained its conclusions.<sup>9</sup> Therefore, post-protest explanations that provide a rationale for contemporaneous conclusions or fill in previously unrecorded details will be considered, while re-evaluations and post-protest judgments will be given little to no weight.

For example, analysis in a declaration or an agency's post-protest statement that does not reflect contemporaneous evaluation judgments will be given little to no weight by the GAO.<sup>10</sup> In *Solers Inc.*, the GAO held that the analysis in the selection authority's declaration was made in response to the protest and did not reflect the contemporaneous record.<sup>11</sup> The GAO held that the latter of the selection authority's two-part assessment in the post-protest

statement, that a strength needed to both exceed the requirement *and provide a quantifiable benefit*, was not a contemporaneous judgment reflected in the record, and, therefore, gave little weight to the selection authority's post-protest statement.<sup>12</sup> In *Solers Inc.*, the post-protest statement reflected an evaluation and judgment not reflected in the contemporaneous record, as opposed to an explanation of the judgment contained within the contemporaneous record.

However, *EDC Consulting, LLC (EDC)* stands for the principle that an agency must not alter or revise the contemporaneous documents as they existed at the time of the agency conclusion or decision.<sup>13</sup> In *EDC*, the agency provided documents to the GAO in the agency report that were prepared or changed after award, including: the insertion of a multi-page table, the creation of several memoranda, and revisions to the technical evaluation report and best value tradeoff analysis.<sup>14</sup> The GAO expressed concerns regarding the agency's submission of altered documents and scheduled a hearing to address the agency's preparation and submission of altered documents.<sup>15</sup> The agency decided to take corrective action, and the GAO published the agency's rationale, highlighting the impact on the integrity of the procurement:

[The agency] has previously acknowledged that documents had been created after award, specifically additional price realism memoranda and a memorandum detailing the methodology it used to evaluate price realism, and changed documents after award, specifically the Technical Evaluation Report (TER) and [Best Value Tradeoff Analysis]. Given the additions and the changes to documents after award, which [the agency] had previously submitted to [the] Government Accountability Office (GAO) as representative of the record at the time of award . . . [The agency] has determined that the evaluation process and documents do not meet [the agency's] standards for award.<sup>16</sup>

Thus, *EDC* makes it clear that the contemporaneous record consists only of the documents as they existed at the time

of the agency conclusion or decision, and any further explanation of the contemporaneous record must not alter or revise those documents. An agency's post-protest explanation is not part of the contemporaneous record, even though the GAO will consider post-protest explanation and rationale that is credible and consistent with the contemporaneous record and not a re-evaluation or judgment not documented in the record.

In summary, it is best for an agency to document its rationale and conclusions before or at the time an acquisition decision is made. Where an agency fails to document an acquisition decision contemporaneously, it is not advisable to change documents after the fact. Moreover, altering, creating, or revising documents, even if the changes accurately record the contemporaneous conclusions and decisions after a protest is filed, is improper. Once a protest is filed and the agency finds the record is not adequately and contemporaneously documented, it is advisable to take corrective action in the form of revisiting the acquisition decision and contemporaneously documenting the new decision at the time the new decision is made. **TAL**

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## Notes

1. *Global Technical Systems*, B-411230.2, 2015 CPD ¶ 335 at 17 (Comp. Gen. Sept. 9, 2015).
2. *Id.* at 4.
3. *Id.* at 6.
4. *Id.* at 5-6.
5. *Id.* at 7.
6. *Id.* at 17.
7. *Id.*
8. *Rust Consulting, Inc.*, B-406410, 2012 CPD ¶ 173 at 4, n.2 (Comp. Gen. May 18, 2012), (internal citations omitted).
9. *Id.*
10. *See Solers Inc.*, B-409079, B-409079.2, 2014 CPD ¶ 74 (Comp. Gen. Jan. 27, 2014).
11. *Id.* at 11-12.
12. *Id.*
13. *EDC Consulting, LLC*, B-414175.10, *et al.*, 2017 CPD 185 (Comp. Gen. June 9, 2017).
14. *Id.* at 4.
15. *Id.*
16. *Id.* at 5.





(Credit: istockphoto.com/primeimages)

## Funding Determinations for Army IT Acquisitions

*By Contract Fiscal Actions Division, Office of the Judge Advocate General<sup>1</sup>*

**Now more than ever, units seek to acquire the latest technological advances** to communicate with ease across geographically dispersed footprint and to more efficiently accomplish their mission. Funding an information technology (IT)<sup>2</sup> acquisition, however, is a complex area of fiscal law. Army fiscal law attorneys must carefully analyze the underlying facts related to an IT acquisition under a scattered array of legal authorities. This article consolidates the various legal guidelines and provides a framework for the fiscal analysis crucial to an ever-changing military IT environment.

### Appropriated Funds

The most common appropriations for IT acquisitions are operation and maintenance, Army (OMA);<sup>3</sup> other procurement, Army (OPA); and research, development, testing, and evaluation (RDT&E).<sup>4</sup> Generally, OMA funds expense items;<sup>5</sup> OPA funds investment items;<sup>6</sup> and RDT&E funds research and development (R&D) activities required to create new products and capabilities.<sup>7</sup>

The correct appropriation for funding IT acquisitions is determined by analyzing the intended purpose, underlying tasks, and cost of the requirement. These factors must

be considered in applying the expense/investment threshold (E/I-T) and systems analysis, as appropriate.<sup>8</sup>

### The Expense/Investment Threshold Exception

All costs are classified as either expenses or investments.<sup>9</sup> Expenses are the costs of resources consumed to operate and maintain an organization,<sup>10</sup> whereas investments are the costs that result in the acquisition of an end item that benefits future periods and are long-term in nature.<sup>11</sup>

The general fiscal law rule is that OMA can only be used to pay for expenses, and OPA can only be used to pay for investment items.<sup>12</sup> However, the E/I-T exception is the colloquial term for the statutory authority that allows the Army to use OMA to purchase investments with a unit or system cost of \$250,000 or less.<sup>13</sup> This statutory authority is an exception to the general fiscal law rule that all investment items must be purchased with OPA, instead enabling the use of OMA for these investment items.<sup>14</sup> The E/I-T exception does not apply to any costs funded with RDT&E. Instead, both expenses and investment costs involving R&D activities are funded using RDT&E funds, regardless of any unit or system cost.<sup>15</sup>

All activities that are not centrally managed<sup>16</sup> must apply the E/I-T exception to determine the correct appropriation for all IT investments that do not involve R&D.<sup>17</sup> This means OMA must be used to purchase all such investments that cost \$250,000 or less, and OPA is used for investment items that cost over \$250,000.<sup>18</sup>

Certain activities that are centrally managed must purchase non-R&D IT investments using OPA, regardless of the cost.<sup>19</sup> If a centrally managed investment item is not purchased via a Defense Working Capital Fund (DWCF),<sup>20</sup> it must be purchased with the most specific procurement appropriation, regardless of cost.<sup>21</sup> If a centrally managed item is purchased via a DWCF, and the item is not part of a full funding effort,<sup>22</sup> then the item must be purchased with OMA if the unit or system cost is \$250,000 or less. If a centrally managed item is purchased via a DWCF, and the item is part of a full funding effort, then the item must be purchased with the most specific procurement appropriation, regardless of

cost.<sup>23</sup> One way of determining whether an investment item is centrally managed is by asking a unit's logistics representative.

### **Systems Analysis for Information Technology Acquisitions**

The systems analysis needs to be applied when an activity is attempting to purchase multiple IT investment items and the cost of the items may need to be aggregated.<sup>24</sup> A system is "a number of components that . . . function[] within the context of a whole to satisfy a documented requirement."<sup>25</sup> The function and relationship of each individual investment item to one another must be fully defined to determine if the sum of the component parts will function together or separately.<sup>26</sup> If the components are installed so that the end item is intended to create something that causes all items to function together and rely on each other, then they form one system, and all of the costs must be aggregated.<sup>27</sup> If the individual investment items are end items in their own right and operate independently, then they are each considered separate systems, and the costs are not aggregated.<sup>28</sup>

Systems analysis for IT hardware acquisitions consists of determining whether the primary purpose of the hardware is to function as a component of a larger system (i.e., interconnected and primarily designed to operate as one) or designed primarily to operate independently. For example, individual employees' personal computers (PC) and stand-alone printers are considered "ancillary IT equipment" that form individual systems unto themselves when their primary purpose is to operate independently from other IT equipment.<sup>29</sup> When PCs are primarily used for systems administration, however, they are not considered as ancillary IT equipment and are likely considered as part of a larger system.<sup>30</sup> Ultimately, a systems analysis for IT hardware depends on the intended function as stated in the requirements document and not on whether the equipment has the capability to operate independently.<sup>31</sup>

Generally, the systems analysis for software acquisitions becomes relevant under two sets of circumstances: first, the acquisition of commercial-off-the-shelf (COTS)<sup>32</sup> software for use "as is," and second, the development of new software capabilities,

whether or not COTS software is incorporated into the development effort.<sup>33</sup>

The purchase of COTS software products that are used "as is" are generally considered investment items.<sup>34</sup> Therefore, if the COTS software costs less than \$250,000 use OMA, and if it costs more than \$250,000, use OPA.<sup>35</sup> However, if the use of a COTS software product is financed on an annual fee basis, then it is considered an expense and should be financed with either OMA or RDT&E funds, as appropriate, regardless of total cost.<sup>36</sup>

The creation or development of completely new software programs and capabilities must be funded with the RDT&E appropriation because it involves developmental efforts regardless of whether the costs involve expense and/or investment items.<sup>37</sup> "The procurement of engineering, design, integration, test, and evaluation services to enhance a [COTS] IT item to meet the government IT system's objective performance is funded with RDT&E. In other words, if modifying COTS for Army-unique functionality, use RDT&E."<sup>38</sup> Finally, for software modifications of currently-operational IT software, "RDT&E funds should be used to develop major upgrades increasing the performance envelope of existing systems."<sup>39</sup>

Hybrid systems are IT requirements that include both hardware and software components, and they are analyzed in the same way as hardware and software systems. In the case of hybrid systems, the requiring activity must determine whether the primary purpose of the components is to function independently or as part of a larger system. Therefore, the requiring activity must examine the factors described above, including whether the components (both hardware and software) will operate independently to satisfy the documented requirement and whether the components are necessary to satisfy the documented requirement.<sup>40</sup> For example, assume the Headquarters, Department of the Army, G-2 wants to build a vehicle capable of gathering various forms of intelligence. The requirement includes both hardware collection devices and software necessary to manage the activities within the vehicle. Although some of these components may be able to operate independently from each other, they function as part of a larger

system and would be considered one system to satisfy the documented requirement for funding determination purposes.

Potential costs could entail the purchase of all new items to create a brand new system (e.g., purchase all new components for a new video teleconference (VTC) system) or the purchase of new components to make additions, modifications, and/or upgrades to an existing item (e.g., making improvements to an existing VTC system).<sup>41</sup> Other costs to take into consideration include equipment, integration, engineering support, and software that form the system.<sup>42</sup> Additionally, the costs for installation of IT systems (software, hardware, or hybrid) may need to be included as part of the aggregated system cost.<sup>43</sup> Installation costs for investment systems may be considered a stand-alone expense—and thus not aggregated with the investment system cost—if a contractor, other than the prime contractor, that developed or produced the system installs the system.<sup>44</sup>

An activity may not split or fragment the acquisition of an IT system so it can remain under the E/I-T of \$250,000 in an effort to use OMA.<sup>45</sup> Failing to properly aggregate the costs of an IT system could result in violating the Purpose Statute<sup>46</sup> and/or the Anti-Deficiency Act.<sup>47</sup> The determination of whether an IT investment is a system is fact-specific, depending heavily upon the documented requirement. As a result, ensure the documented requirement is correct and sufficiently detailed in order to properly conduct a systems analysis to aggregate all costs before applying the E/I-T to determine if the \$250,000 threshold exception applies.<sup>48</sup>

### **Examples of Common Information Technology Acquisitions and Appropriations**

Below are common IT acquisitions and the appropriations that are generally used to fund each purchase. These examples are no substitute for conducting a full E/I-T and systems analysis to the particular facts and circumstances governing a specific IT acquisition.

Operations and Maintenance, Army appropriation funds are generally appropriate for the following IT acquisitions: services for the installation of IT (if the contractor

installing the system is not the prime contractor or direct subcontractor that sold the hardware and/or software);<sup>49</sup> costs of component parts replaced or repaired during routine maintenance and repair of an IT end item;<sup>50</sup> updates to software previously procured, that do not result in significant capability improvements or require extensive programming to incorporate;<sup>51</sup> studies and analyses;<sup>52</sup> ancillary IT equipment;<sup>53</sup> and software use licenses that do not support RDT&E efforts and whose licensing periods do not exceed one year in length.<sup>54</sup>

Other Procurement, Army appropriation funds are generally appropriate for the following IT acquisitions: centrally managed IT equipment (regardless of the cost of the IT unit/system);<sup>55</sup> the initial procurement of COTS items (including software);<sup>56</sup> replacing existing IT systems in their entirety;<sup>57</sup> modifying, upgrading, and replacing components or component parts during a system modification or upgrade;<sup>58</sup> and software use licenses that do not support RDT&E efforts and whose licensing periods exceed one year in length.<sup>59</sup>

Research Development, Test, and Evaluation<sup>60</sup> appropriation funds are generally appropriate for the following IT acquisitions: R&D of IT equipment and software, initial and follow-on operational testing of IT systems, designing and producing prototype IT equipment and software, and initial manufacturing processes of IT equipment;<sup>61</sup> modifications of COTS that create a new capability, including for Army-unique functionality;<sup>62</sup> development of software not in existence via software development services;<sup>63</sup> acquisition, operation, and sustainment of IT systems and equipment used exclusively to support RDT&E-funded activities;<sup>64</sup> and software use licenses that support RDT&E efforts, regardless of the period of the licenses.<sup>65</sup> When there is doubt as to the proper appropriation to fund the costs of an acquisition between the RDT&E appropriation and other appropriations, the issue should be resolved in favor of the RDT&E appropriation.<sup>66</sup>

It must be noted that developmental IT efforts involving Microsoft SharePoint<sup>67</sup> are not exempt from funding determination rules. Microsoft SharePoint is simply a COTS IT software system<sup>68</sup> and any

purchase, use, modification, and/or development of Microsoft SharePoint requires a fiscal analysis to determine the proper appropriation.

## Conclusion

The three most commonly used Army appropriations for IT acquisitions are OMA, OPA, and RDT&E. Generally, OMA funds are used for IT expense item acquisitions, OPA funds are for IT investment items and system acquisitions, and RDT&E funds are for all expense and investment items of IT development efforts. The E/I-T exception allows activities to use OMA to purchase non-R&D and non-centrally funded investment items that cost \$250,000 or less. A systems analysis is required to determine if the cost of component parts needs to be aggregated in determining if the E/I-T of \$250,000 has been exceeded concerning non-R&D investment items. **TAL**

## Notes

1. This article was prepared by the Contract and Fiscal Actions Division (KFAD), Office of the Judge Advocate General (OTJAG), U.S. Army, as a collaborative effort with contributions from Captain (CPT) Lyn P. Juarez, CPT James T. Casey, CPT James C. Coghlan, and CPT Dustin D. Harrison; edits by Mr. Randy E. Poole, CPT Benjamin D. Williams, Mr. Peter D. P. Vint, and Lieutenant Colonel Mark J. Oppel; and approval by Mr. Brian E. Bentley.

2. Information technology (IT) is

[a]ny equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the Army or [Department of Defense (DoD)]. This includes equipment that is used directly or is used by a contractor under a contract with the Army or DoD which requires either the use of such equipment or the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product. [It] also includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.

Defense Finance and Accounting Service—Indianapolis (DFAS-IN) Manual 37-100-19, The Army Management Structure, App. A, para. D.9.b (22 Aug. 2018), <https://www.asafm.army.mil/dfas.aspx?doc=37-100> [hereinafter DFAS Manual].

3. This article provides Army-specific guidance and will use the acronyms that are commonly known in the Army such as “OMA” instead of the more general “O&M” acronym.

4. DFAS Manual, *supra* note 2, para. D.2.c.

5. U.S. DEP’T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 01, paras. 010201.B.1., C.3., D.1 (Oct. 2008), <http://comptroller.defense.gov/FMR/fmrvolumes.aspx> [hereinafter “DoD FMR”].

6. *Id.* paras. 010201.B.2., C.3.

7. *Id.* para. 010212.B.3.; DFAS Manual, *supra* note 2, para. D.3.c.

8. Working Capital Fund activities and research, development, testing, and evaluation (RDT&E)-funded organizations follow specialized funding procedures for IT acquisitions, whereas organizations funded with operating funds must budget for IT efforts based upon the underlying purpose of the IT effort. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.

9. *Id.* para. 010201.B.

10. *Id.* para. 010201.B.1.

11. *Id.* para. 010201.B.2.; *Matter of: Army—Availability of Army Procurement Appropriation for Logistical Support Contractors*, B-303170 at 4-5 Comp. Gen. (Apr. 22, 2005), <https://www.gao.gov/decisions/appro/303170.htm>.

12. DoD FMR, *supra* note 5, vol. 2A, ch. 01, paras. 010201.B.1., B.2, C.2, C.3., D.1.

13. Congress has annually authorized the use of operation and maintenance, Army (OMA) appropriation funds to purchase investment items with a unit or system cost of up to \$250,000 through appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 8031, 132 Stat. 348, 470 (Mar. 23, 2018) (operations and maintenance, Army funds “may be used to purchase investment items having an investment item unit cost of not more than \$250,000.”). Congress permits OMA funds to be used to purchase investment items having a unit cost of \$500,000 or less if the Secretary of Defense determines this increased threshold is necessary to support contingency operations overseas. *See id.* § 9010.

14. DoD FMR, *supra* note 5, vol. 2A, ch. 01, paras. 010201.B.2., C.3, D.1.f.

15. DFAS Manual, *supra* note 2, paras. D.3.c-d.

16. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010224. “Centralized Item Management and Asset Control” is defined as

[t]he management in the central supply system or a DoD-wide or Service-wide acquisition and control system in which the manager has the authority for management and procurement of items of equipment. This includes such functions as requirement determination, distribution management, procurement direction, configuration control and disposal direction. Asset control includes the authority to monitor equipment availability and take such actions as necessary to restock to approved stockage levels.

17. *See id.* para. 010201.F. (using a chart to summarize DoD elections).

18. *See* DoD FMR, *supra* note 5, vol. 2A, ch. 01, paras. 010201.F, D.1.f.

19. *See id.* para. 010201.F.; DFAS Manual, *supra* note 2, paras. D.4.c.

20. DoD FMR, *supra* note 5, vol. 11B, ch. 01, paras. 010101, 010102 (“The Defense Working Capital Funds (DWCF) are established under the authority of 10 U.S.C. [§] 2208 . . . [and] consist of individual activity groups that are managed by [DoD] Components for providing goods and services, on a reimbursable basis,



to other activities within DoD and to non-DoD activities when authorized.”). Army Working Capital Funds (AWCF) follow the same rules as DWCF. DFAS Manual, *supra* note 2, fig. 3.

21. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.F.

22. “Full funding effort” looks at whether the item purchased is “intended for use in weapon system outfitting, government furnished material on new procurement contracts or for installation as part of a weapon system modification, major reactivation, or major service life extension.” DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.F; *see also id.* para. 010202 (full funding is a “budgeting rule that requires the total estimated cost of a military useable end item be funded in the fiscal year in which the item is procured”).

23. *Id.*

24. *Id.* para. D.3.c.

25. DFAS Manual, *supra* note 2, para. F.9; *see also id.* para. F.1 (defining system as “any combination of components/items which work together to perform a function or to satisfy an approved requirement . . .”).

26. *See id.* paras. D.6.a, F.1; DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.D.1.f.

27. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.D.1.f.

28. DFAS Manual, *supra* note 2, para. D.6.a.

29. *Id.*

30. *Id.*

31. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.D.1.f.

32. Commercial-off-the-shelf (COTS) is defined as

(1) . . . any item of supply (including construction material) that is—

(i) A commercial item . . . ;

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

FAR 2.101 (2005). *See also* DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010209 (defining a COTS as an item “purchased directly from a commercial source that can be utilized without alteration or modification . . .”).

33. *See* DFAS Manual, *supra* note 2, paras. D.4.e., D.8.e.

34. *Id.* para. D.8.c.

35. *Id.*

36. *Id.* An example of financing COTS software on an annual fee basis is using software COTS products commonly called software as a service (SaaS). A

SaaS provides a complete software solution that you purchase on a pay-as-you-go basis from a cloud service provider. You rent the use of an app for your organization, and your users connect to it over the Internet, usually with a web browser. All of the underlying infrastructure, middleware, app software, and app data are located in the service provider’s data center. The service provider manages the hardware and

software, and with the appropriate service agreement, will ensure the availability and the security of the app and your data as well. Software as a service allows your organization to get quickly up and running with an app at minimal upfront cost.

*What is a SaaS?*, MICROSOFT AZURE, <https://azure.microsoft.com/en-us/overview/what-is-saas/> (last visited Sept. 4, 2019).

37. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.3.; DFAS Manual, *supra* note 2, para. D.3.c. (clarifying that the E/I-T exception does not apply to RDT&E items).

38. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.3.b.; DFAS Manual, *supra* note 2, para. D.4.e.

39. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.3.

40. *See generally id.* para. 010201.D.1.f. (every component that functions together to create the system must be aggregated); DFAS Manual, *supra* note 2, para. D.8.c. (software is an investment item subject to the E/I-T exception). Since software is an investment item, it needs to be taken into consideration when conducting a systems analysis to see if it is one of the necessary components that functions with other components to create the system.

41. DFAS Manual, *supra* note 2, para. D.5.b.

42. *Id.* paras. D.4.b., F.9; DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.D.

43. DFAS Manual, *supra* note 2, para. D.4.f.

44. *Id.* para. D.4.f.2.

45. *Id.* para. D.3.e.

46. The Purpose Statute provides that “appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301(a) (2018).

47. The Anti-Deficiency Act (ADA) is a series of statutes that prohibit obligations and expenditures in excess of an appropriation or before an appropriation is available. *See* 31 U.S.C. §§ 1341, 1342, 1517 (2018). Any violation of the Purpose Statute may also result in an ADA violation. DoD FMR, *supra* note 5, vol. 14, ch. 2, para. 020102.B.1.

48. *See* DFAS Manual, *supra* note 2, paras. D.6.a, F.1; DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010201.D.1.f.

49. DFAS Manual, *supra* note 2, para. D.4.f.2.

50. *Id.* para. D.7.

51. *Id.* para. D.8.d. These types of software releases are considered maintenance efforts. “Minor improvements in software functionality accomplished during routine maintenance may also be [OMA] funded. For example, the creation/purchase of a small plug-and-play application or script that fine tunes or optimizes the existing application service provider capability are financed with [OMA].” *Id.*

52. *Id.* para. D.3.d. However, “[a]ny [R&D] costs that result in a prototype should be funded with RDT&E” regardless of amount. *Id.*

53. DFAS Manual, *supra* note 2, para. D.6.a (provided the E/I-T exception and system analysis finds the total cost is less than or equal to \$250,000).

54. *See* DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.4.b.

55. DFAS Manual, *supra* note 2, para. D.4.c. para. F.2.

56. *See id.* para. D.4.f. However, the initial procurement of COTS requires application of the E/I-T and Systems Analysis. *Id.* para. D.4.f.(1). The Computer Hardware, Enterprise Software and Solutions (CHES) is the Army’s designated primary source for the procurement of COTS IT hardware, software and, services. U.S. DEP’T OF ARMY, REG. 25-1, ARMY INFORMATION TECHNOLOGY para. 2-16h (5 June 2013). To purchase any IT hardware or software outside of CHES contracts, an Army organization has to obtain a waiver from CHES. AFARS 5139.101-90(a)(2) (29 Aug. 2016).

57. DFAS Manual, *supra* note 2, para. D.5.b. (after applying the E/I-T analysis).

58. *Id.* (after applying the E/I-T analysis).

59. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.4.b.

60. Research, development, testing, and evaluation (RDT&E) falls under seven broad budget activities: Basic Research, Applied Research, Advanced Technology Development (ATD), Advanced Component Development and Prototypes (ACD&P), System Development and Demonstration (SDD), RDT&E Management Support, and Operational System Development. DoD FMR, *supra* note 5, vol. 2B, ch. 05, para. 050105. The RDT&E budget activity that applies to a particular IT project will depend upon the acquisition milestone that project falls under and influences the annual budget preparation cycle. *Id.*; U.S. DEP’T OF DEF., INSTR. 5000.02, OPERATION OF THE DEFENSE ACQUISITION SYSTEM, para. 5.b.(3) (26 Nov. 2013). The Army has issued Army Regulation 73-1 to implement the budgetary guidance contained in DoDI 5000.02. U.S. DEP’T OF ARMY, REG. 73-1, TEST AND EVALUATION POLICY para. 1-1 (8 June 2018). The Army differentiates between two types of tests: Developmental Tests and Operational Tests. *Id.* para. 4-1. Developmental tests verify the technical specifications for the designed performance, identify the system’s capabilities and limitations, and determines contract compliance. *Id.* para. 4-2. Operational tests check to ensure the system will operate as designed and intended under realistic operating conditions prior to the system being fielded. *Id.* para. 5-1.

61. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010213.B.1.a, 010213.C.5.a.

62. *See* DFAS Manual, *supra* note 2, para. D.4.e. “Modification” is “the alteration, conversion, or modernization of an end item of investment equipment which changes or improves the original purpose or operational capacity in relation to effectiveness, efficiency, reliability, or safety of that item.” *Id.* para. F.3.

63. *Id.* para. D.8.e.

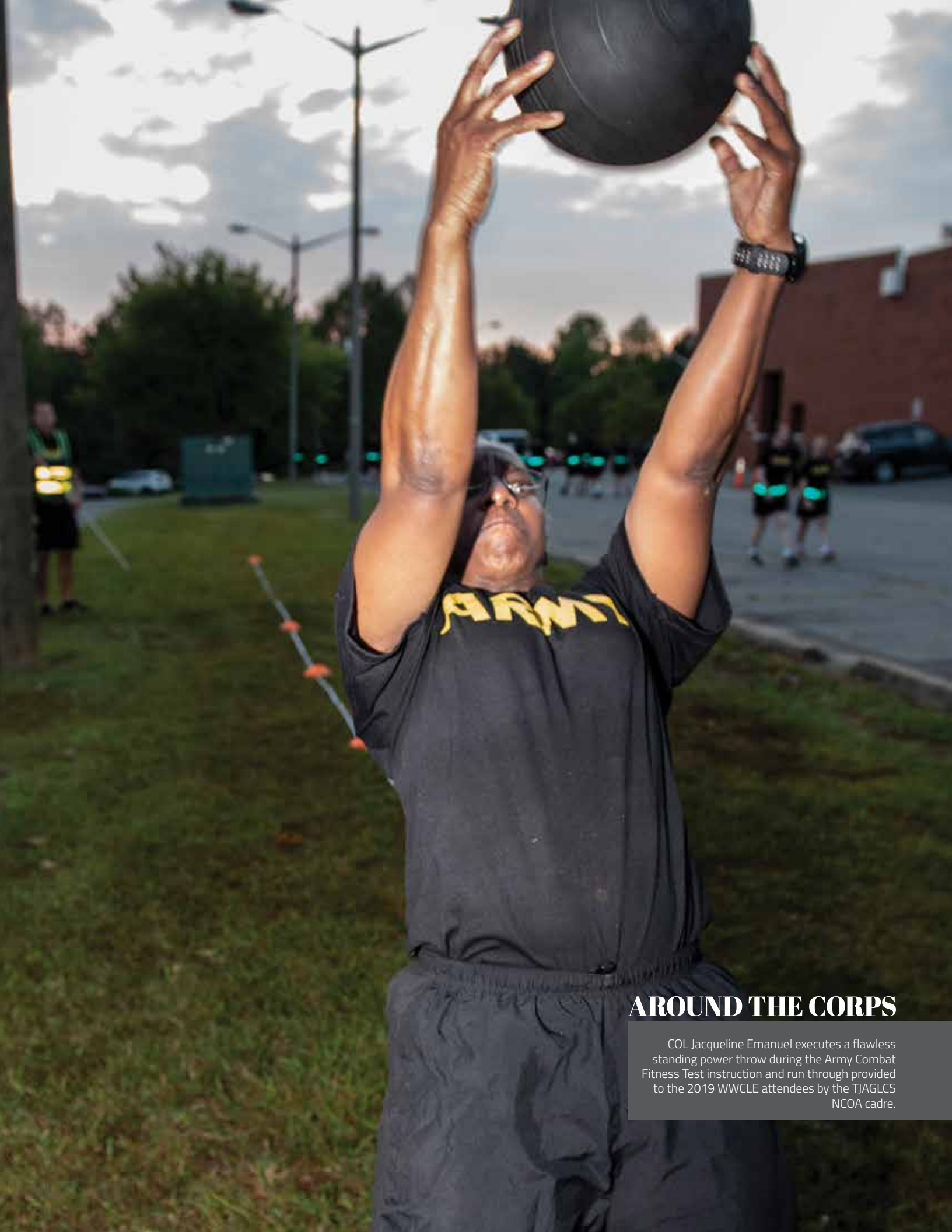
64. *Id.* para. D.4.d.

65. DoD FMR, *supra* note 5, vol. 2A, ch. 01, para. 010212.B.3.c.

66. *Id.* para. 010213.B.

67. Microsoft SharePoint is an IT software system that allows users to share files, data, and resources with others in order to facilitate collaboration on projects. *SharePoint*, MICROSOFT, <https://products.office.com/en-us/sharepoint/collaboration> (last visited Sept. 4, 2019).

68. FAR 2.101 (2005).



## **AROUND THE CORPS**

COL Jacqueline Emanuel executes a flawless standing power throw during the Army Combat Fitness Test instruction and run through provided to the 2019 WWCLE attendees by the TJAGLCS NCOA cadre.





Bryan Ortiz Armin and Bryan Ortiz Ramos  
(Courtesy: Fred Borch)



## No. 1

# Family Ties

## Tracing Family Members Who Have Served in the JAGC

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*By Fred L. Borch III*

There have always been family connections in our Corps. When it comes to generational connections, history reveals that grandfathers and grandsons, fathers and sons, fathers and daughters, uncles and nephews, and cousins have worn the crossed-pen-and-sword insignia that distinguishes judge advocates, legal administrators, and paralegal specialists from other Army Soldiers.

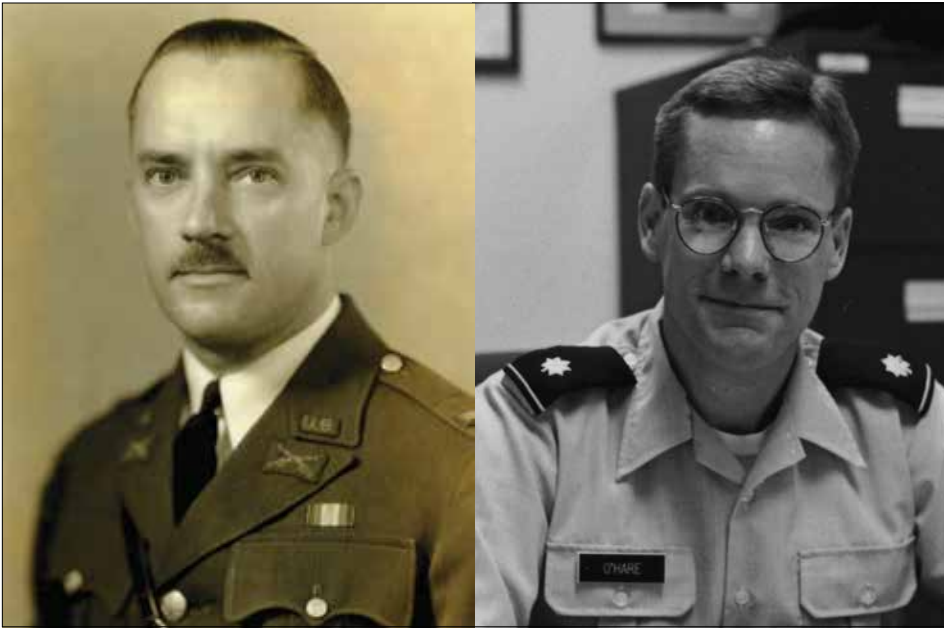
One of the most amazing familial relationships involves William Tudor. Elected by the Continental Congress to be the first Judge Advocate General, Colonel (COL) Tudor served as General George Washington's lawyer from 1775 to 1777. Two hundred years later, in 1975, Tudor's great-great-great grandson, Captain (CPT) Thomas "Tom" Tudor, joined our Corps and served as judge advocate with the 3d Armored Division in Germany. Tudor left active duty in 1978 but subsequently joined the U.S. Air Force Judge Advocate General's Corps in 1980. He retired in 2002.<sup>1</sup>

A Lore of the Corps article published in October 2014 identified some of these family relationships.<sup>2</sup> Here are eight more examples of "Generations in the Regiment," plus two bonus family relationships with connections to our Regiment: an Air Force-Army judge advocate father and son, and Air Force-Marine Corps judge advocate identical twin sisters who both completed the Graduate Course.

### **Grandfather-grandson: Major General Ernest M. "Mike" Brannon and COL Patrick D. "Pat" O'Hare**

Brannon entered the U.S. Military Academy in 1917 and was commissioned the following year as the result of an accelerated wartime graduation. After the end of World War I, however, the Army decided that Brannon and all of his classmates should return to West Point for another year, so then-Second Lieutenant Brannon returned as a student officer until June 1919.

In 1925, Brannon was detailed to Columbia Law School, where he began his law studies; he finally completed the requirements for an LL.B. in 1930. After an official transfer to the Judge Advocate General's Department, then-Major Brannon served in a variety of assignments, including Chief of Contracts and Chief of Tax Divisions, Office of The Judge Advocate General (OTJAG), from 1938 to 1942, and Judge Advocate (the equivalent of a modern-day Staff Judge Advocate (SJA)), First U.S. Army from 1943 to 1945. In this last important position, then-COL Brannon served in England, France, and Germany. When Brannon returned to the United States at the end of World War II, he again took up legal work in contracting as the "Procurement Judge Advocate." Major General Brannon reached the pinnacle of his career with his selection to be The Judge Advocate General (TJAG) in 1950. Brannon's four-year tour as the top Army lawyer was challenging, given that



Major General Ernest M. "Mike" Brannon, left, and COL Patrick D. "Pat" O'Hare, now the assistant director of the legal center at TJAGLCS.



Major General George S. Prugh, left, and Lieutenant Colonel (LTC) Virginia P. Prugh. (Courtesy: Fred Borch)

a Cold War with the Soviet Union was underway in Europe. Additionally, it was during TJAG Brannon's tenure that the Corps implemented the new Uniform Code of Military Justice (UCMJ) during combat in Korea and the Corps re-established The Judge Advocate General's School, U.S. Army (TJAGSA) in Charlottesville. Major General Brannon retired in January 1954.<sup>3</sup>

Almost thirty years later, his grandson Patrick D. "Pat" O'Hare (Major General

Brannon was the father of O'Hare's mother) joined our Corps after graduating from law school at Washington and Lee. Prior to commissioning as a judge advocate, O'Hare spent four years as a U.S. Peace Corps Volunteer in St. Lucia and Togo. Between 1983 and 2005, COL O'Hare served in a variety of assignments, including: Appellate Government Counsel, Government Appellate Division; Litigation Attorney, Procurement Fraud Division

(detailed to the Department of Justice); and Instructor, Criminal Law Division, TJAGSA. While in this last assignment, Pat O'Hare completed the coursework for an LL.M. in Government Procurement from George Washington University. The Corps had, however, already identified COL O'Hare as one of its most accomplished members, since he had been selected below the primary zone for promotion to major (MAJ)—a very rare event in the 1980s.

After leaving TJAGSA, then-MAJ O'Hare served overseas as the Deputy Staff Judge Advocate (DSJA), 2d Infantry Division, Camp Red Cloud, Korea, before completing Command and General Staff College (CGSC) in residence and then assuming duties as the Regional Defense Counsel, Region V, U.S. Army Trial Defense Service, at Fort Lewis, Washington. O'Hare was the SJA, National Training Center and Fort Irwin, California, before his final active duty assignment as Director, Legal Center, The Judge Advocate General's Legal Center and School (TJAGLCS). After retiring in 2005, COL (Ret.) O'Hare remained at TJAGLCS as the Deputy Director of the Legal Center.

**Father-daughter: Major General George S. Prugh and Lieutenant Colonel (LTC) Virginia P. Prugh**

Born in Norfolk, Virginia, in 1920, George Shipley "George" Prugh served as a Coast Artillery Officer in New Guinea and the Philippines in World War II. In May 1945, then-CPT Prugh left active duty to enter the Hastings College of Law, University of California, in San Francisco. In 1948, he entered our Corps and reported for duty at OTJAG, where he worked in the Military Justice, Claims, and Litigation Divisions. Prugh subsequently served in a variety of increasingly important assignments and locations, including SJA, Rhine Military Post (later Western Area Command), Kaiserslautern, Germany, and DSJA, Eighth U.S. Army, Korea.

In 1964, then-COL Prugh made history as the first judge advocate War College graduate to deploy to Vietnam when he became the SJA, Military Assistance Command, Vietnam. Two years later, Prugh was the top lawyer at U.S. European Command, located first in France and then

in Stuttgart, Germany. He was promoted to major general and assumed duties as TJAG in 1971. Major General Prugh is best remembered for his active role in the area of international law and the Law of Armed Conflict. He was a member of the U.S. Delegation to the Geneva meetings of the International Committee of the Red Cross and the Swiss-hosted diplomatic conference that examined how best to modernize the Geneva Conventions of 1949. These meetings, which took place in 1971 and 1972, ultimately resulted in the 1977 Protocols Additional to the 1949 Conventions.<sup>4</sup>

Major General Prugh's daughter, Virginia Patton "Patt" Prugh, entered the Corps in 1982 after graduating from the Hastings College of Law—like her father. Her first tour of duty was with the 21st Support Command, Pirmasens and Kaiserlautern, Germany, where she served as a trial counsel and chief of international law. After returning to the United States, Patt Prugh was assigned to OTJAG's Litigation Division, with duty at the Frauds Section, Civil Division, Department of Justice. After completing the Graduate Course, then-MAJ Prugh returned to Europe, where she spent two years as the judge advocate assigned to the U.S. Embassy, Paris, France, and another two years as the Deputy Commander, U.S. Army Claims Service, Europe.

From 1994 to 1996, Prugh served as a Senior Defense Counsel at Fort Lewis before returning to Europe as the Deputy Legal Advisor, Allied Forces Southern Europe, Naples, Italy. She had intermittent assignments as the legal advisor to the Kosovo Verification Coordination Center during the buildup to the Kosovo air campaign, and, thereafter, as the legal advisor to the North Atlantic Treaty Organization-led Kosovo Force (better known by the acronym KFOR). She subsequently served as the Deputy Joint Force Judge Advocate, U.S. Joint Forces Command, Norfolk, Virginia, before being detailed in 2003 to the Office of the Legal Advisor, Law Enforcement and Intelligence, Department of State.

After retiring from active duty as a lieutenant colonel in 2006, Patt Prugh remained at the Department of State as an attorney-advisor. Over the last thirteen years, she has served as the head of the U.S.



CPT Michael "Brett" Buckley, left, and CPT Michele B. Buckley. (Courtesy: Fred Borch)

Delegation for a number of U.N. conferences, including the U.N. Convention against Transnational Organized Crime (UNTOC) and its working groups on International Cooperation and Migrant Smuggling. For the last two years, she has been the Chairman of the UNTOC Working Group on Trafficking in Persons.<sup>5</sup>

#### **Father-daughter: CPT Michael "Brett" Buckley and CPT Michele B. Buckley**

Brett Buckley entered the 94th Judge Advocate Basic Course in October 1980 after obtaining his Juris Doctor degree at Lewis and Clark Law School.<sup>6</sup> He then served a year in Korea with 2d Infantry Division as a trial counsel before being reassigned to the Presidio of San Francisco, where he was the Senior Defense Counsel. Then, he briefly served as an Army Reserve Individual Mobilization Augmentee at Fort Shafter, Hawaii, before leaving the Corps entirely.

Today, he is a District Court Judge for Thurston County, Washington, and is the recipient of the 2019 Washington State Bar Association's Outstanding Judge Award. This prestigious award honors those "who champion justice, act with integrity and professionalism, and serve the public and their communities through the rule of law."<sup>7</sup>

His daughter, Michele Buckley, was directly commissioned after graduating from law school at the University of Washington in Seattle. Assigned to the 82d Airborne

Division, she successfully completed the Jumpmaster course before deploying briefly to Afghanistan in 2014. She subsequently left Fort Bragg for Joint Base Lewis-McChord (JBLM), where she served first as a brigade trial counsel in the 7th Infantry Division. In 2016, Michele Buckley joined 1st Special Forces Group as a battalion judge advocate and deployed with her unit to Kuwait for six months later that year. Today, CPT Buckley is a defense counsel at JBLM.<sup>8</sup>

#### **Father-sons: Chief Warrant Officer Three (CW3) Cedric Woodruff, COL William A. Woodruff, LTC Joseph A. Woodruff**

Born in Mississippi in 1919, Cedric Woodruff moved to Alabama as a child. His father died when he was five years old, and his mother was a widow with eight children, so as soon as he was old enough—in 1936—Woodruff enlisted in the Alabama National Guard to bring in some extra income for his family.

When World War II broke out, Cedric Woodruff was working for the Louisville and Nashville Railroad as a brakeman, and consequently was deferred from the draft. But after D-Day 1944, the need for replacements was so acute that the government cancelled his deferment, and he was inducted into the Army.

Woodruff never served overseas in World War II (he was at Camp Blanding, Florida, when Germany surrendered in May





Above, Chief Warrant Officer Three (CW3) Cedric Woodruff, second from right. Below, one of his sons, COL William A. Woodruff. (Courtesy: Fred Borch)



1945), but he liked military life and stayed in the Army Reserve in the late 1940s and early 1950s. In 1955, Woodruff put in a request for voluntary active duty, forfeiting two stripes (he had been a master sergeant

in the Army Reserve) to return to full-time soldiering as a staff sergeant (SSG).

While serving in France in the late 1950s, SSG Woodruff had his first experience with military law when he was made the “Courts and Boards Officer” at the Army Base Section headquarters in Poitiers. He liked legal work (special and summary courts-martial and administrative elimination boards) and, after returning to the United States, learned that the Judge Advocate General’s (JAG) Corps announced that it was looking for Soldiers who had legal experience to apply to be warrant officers. Staff Sergeant Woodruff applied and, after a successful interview before a board of officers, was appointed as a warrant officer one.

His first assignment was as the legal administrator in the Office of the Staff Judge Advocate (OSJA), VII Corps, Stuttgart, Germany. Mr. Woodruff reported for duty in August 1962 and, as he put it in a 2007 interview, “about seventy-five percent of my job was military justice.”<sup>9</sup> But he also drafted replies to congressional inquiries

and wrote letters of reprimand for officers who had committed relatively minor transgressions. According to Woodruff, his favorite sentence in these letters was: “Your misconduct causes me to doubt your future worth in the Army.”<sup>10</sup>

In 1966, now-Chief Warrant Officer Two Woodruff deployed to Vietnam with the 1st Infantry Division, which was then located at Lai Khe. After completing this tour of duty, Woodruff was assigned to Fort Benning, Georgia. Timing is everything, and then-CW3 Woodruff was intimately involved in the management of the Calley court-martial from late 1970 through early 1971. As the administrative warrant officer, Woodruff worked closely with CPT Aubrey Daniel, the lead trial counsel, in scheduling the arrival and departure of witnesses, as well as arranging for all temporary duty travel for Daniel and his co-counsel, CPT John Partin. Woodruff also worked with the lead defense counsel, MAJ Al Raby, to obtain additional legal support for him and Calley.<sup>11</sup> Chief

Warrant Officer Three Woodruff considered the Calley case to be the highlight of his career in the Corps, and he retired a year after the trial ended in August 1972.

Cedric Woodruff's oldest son, COL William A. "Woody" Woodruff was commissioned as an infantry officer through Reserve Officer Training Corps (ROTC) at the University of Alabama. While serving in the 3d Infantry Division in Germany in the early 1970s, he transferred to the artillery branch before entering law school as a Funded Legal Education Program (FLEP) officer at the University of South Carolina's law school in 1975. Three years later, then-CPT Woodruff graduated first in his class and reported to the Judge Advocate Officer Basic Course (JAOBC) at TJAGSA; he was the top graduate in that course as well.

From 1979 until he retired from active duty in 1992, Woody Woodruff served in a variety of assignments, including the OSJA, Fort Gordon, Georgia, Litigation Division, OTJAG, and Torts Branch, Civil Division, U.S. Department of Justice (DOJ). He was the first judge advocate to be detailed to DOJ's Civil Division. Then-MAJ Woodruff subsequently joined the Administrative Law Division, TJAGSA, where he specialized in teaching classes on federal litigation. His last assignments were in Washington, D.C., as the Deputy Chief and Chief, Litigation Division, OTJAG.

After retiring from active duty in 1992, Woodruff joined the faculty of Campbell University's School of Law. He was twice selected as Professor of the Year and also has been honored for his research and scholarship. Colonel Woodruff retired from Campbell's law school in 2017; he now has professor emeritus status.<sup>12</sup>

Woodruff's younger brother, Joseph A. Woodruff (who also used the nickname "Woody") also entered our Corps via the FLEP after completing law school at the University of Alabama in 1981. After completing JAOBC, then-CPT Woodruff served as a claims officer and trial counsel at Fort Benning, Georgia, until 1983, when he became the Senior Defense Counsel, U.S. Trial Defense Service, with duty at Fort Rucker, Alabama. After being promoted to major in 1986, Woodruff was assigned to the U.S. Army Aviation Center, Fort Rucker. At that location, he served as



COL Steven F. Lancaster, right, with COL Nicholas Lancaster. (Courtesy: Fred Borch)

the Chief, Administrative Law, and DSJA before leaving active duty and transitioning to the Army Reserve. Woodruff was in the Individual Ready Reserve when he retired as a lieutenant colonel. Today, he is a Circuit Judge in the 21st Judicial District in Tennessee. This is a four-county judicial district, and Woodruff is one of five judges in a court of general jurisdiction, with responsibility for criminal and civil cases.<sup>13</sup>

#### **Father-son: COL Steven F. Lancaster and COL Nicholas Lancaster**

Steven F. "Steve" Lancaster graduated from Notre Dame in 1967 and completed law school at Indiana University three years later. After completing JAOBC, then-CPT Lancaster served two years at Fort Sam Houston, Texas, before being assigned to the 25th Infantry Division in 1972. For the next three years, he served as a prosecutor and defense counsel and as a military judge at special courts-martial; the latter was an unusual assignment as Lancaster had not yet attended the Advanced Course (now the Graduate Course) at TJAGSA.

After completing the Advanced Course in 1975, then-MAJ Lancaster spent the next five years at TJAGSA as an instructor in the Administrative and Civil Law Division before attending CGSC in residence. Lancaster then served in increasingly important leadership assignments, including:

DSJA, 3d Infantry Division, Wuerzburg, Germany; SJA, 32d Army Air Defense Command, Darmstadt, Germany; DSJA, U.S. Army Europe, Heidelberg, Germany; SJA, V Corps, Frankfurt, Germany; and SJA, Fort Knox, Kentucky. Colonel Lancaster retired from active duty in 1995 and then began a second career as the Administrator, Indiana Court of Appeals.

His son, COL Nicholas F. "Nick" Lancaster, was commissioned into the infantry after completing ROTC at Xavier University, Cincinnati, Ohio. After four years at Fort Carson, Nick entered law school at Indiana University via the FLEP and graduated in 1999. Then-CPT Lancaster's first judge advocate assignment was at Fort Riley, Kansas, followed by a tour of duty with the 101st Airborne Division. He deployed to both Afghanistan and Iraq with the "Screaming Eagles." After completing the Graduate Course at TJAGSA, then-MAJ Lancaster served as the DSJA for the 19th Expeditionary Support Command, Taegu, Korea, before returning to Charlottesville to teach in the Criminal Law Division. From 2009 to 2012, then-LTC Lancaster served as the Command Judge Advocate (CJA), U.S. Army Office of Military Support before returning to Charlottesville again to assume duties as the Director, Center for Law and Military Operations, TJAGLCS. He then served





COL Thomas R. Lujan, right, and MAJ Dustin J. Lujan. (Courtesy: Fred Borch)

as the SJA, U.S. Army Special Operations Command, Fort Bragg, North Carolina, attended the Army War College, and returned to Afghanistan as the SJA, U.S. Forces-Afghanistan. Nick Lancaster assumed his current duties as Director, Legal Center, TJAGLCS, in June 2017.

**Father-son: COL Thomas R. Lujan and MAJ Dustin J. Lujan**

Thomas Randall “Tom” Lujan was commissioned Air Defense Artillery (ADA) after graduating from the U.S. Military Academy in 1971. After serving in several ADA assignments, then-CPT Lujan attended law school at the University of Minnesota as a FLEP officer and transferred to the JAG Corps in 1979. He then served in a variety of assignment including the OSJA, 25th Infantry Division, and DSJA, 1st Special Operations Command (the predecessor to U.S. Army Special Operations Command). In 1985, then-MAJ Lujan became the first judge advocate assigned to the 1st Special Forces Operational Detachment-Delta.

After completing in residence CGSC, Lujan served as the DSJA, Combined Arms Center, Fort Leavenworth, Kansas, before returning to Fort Bragg to assume duties as the SJA, U.S. Army Special Operations Command. After leaving that assignment in 1993, then-COL Lujan served as the

Executive Officer at the U.S. Army Legal Services Agency before his final assignment as the SJA, U.S. Special Operations Command, MacDill Air Force Base, Tampa, Florida. When he retired from active duty in 1998, COL Lujan was proud of having a total of forty parachute “jumps” in ten years on “airborne status.” When combined with one jump in Ranger school and five during basic airborne training, Tom Lujan had a total of forty-six descents by parachute during this Army career.

His son, Dustin J. Lujan, was commissioned through ROTC at the University of Southern California in 2005 and, after five years as an infantry officer, then-CPT Lujan attended law school via the FLEP at William and Mary. After transferring to the Corps in 2013, Dustin was assigned as the Battalion Judge Advocate for the 48th Chemical Brigade and 85th Civil Affairs Brigade at Fort Hood; he deployed to Liberia as part of the Ebola response from April to June 2015. Lujan then served a year as the trial counsel for the 13th Sustainment Command (Expeditionary) at Fort Hood before completing the 65th Graduate Course in 2017. Lujan then served two years as the Chief of Military Justice, Military District of Washington. He is now serving as the Brigade Judge Advocate (BJA), 2d Stryker Brigade Combat Team, JBLM.

**Father-son: COL Stephen E. Castlen and MAJ John T. Castlen**

When then-First Lieutenant John T. Castlen graduated from the 181st JAIBC in May 2010, it likely was the first time in military legal history that a father and son had been active duty judge advocates at the same time. His father, COL Stephen E. Castlen, was then serving as a trial judge at Fort Benning, Georgia.

Stephen “Steve” Castlen was born in Kentucky and enlisted in the Army in 1975. He qualified as a legal clerk military occupational specialty (MOS) 71D and served three years at V Corps, Frankfurt, Germany. After leaving active duty as Specialist Five Castlen, he obtained an undergraduate degree from Indiana State University in 1981 and his law degree at the Salmon P. Chase College of Law in 1985. Castlen then rejoined the Army, joining our Corps and serving in Germany as a trial and defense counsel and as the Officer-in-Charge, Coleman Legal Services Center, Sandhoffen, Germany.

Then-CPT Castlen’s next assignments were in Washington, D.C., and included working as a plans officer in the Personnel, Plans, and Training Office at OTJAG and serving as a trial attorney in the Defense Procurement Fraud Unit at the DOJ. Then-MAJ Castlen subsequently taught administrative and civil law at TJAGSA before assuming duties as the DSJA, Fort Lee, Virginia. He then served as the SJA at Fort Leonard Wood, and SJA, U.S. Army Reserve Command, before finishing his Army career as a trial judge at Fort Benning. Colonel Castlen retired in 2013. Today, Steve Castlen is the Court Clerk and Administrator, Georgia Court of Appeals.

His son, John T. Castlen, was commissioned through ROTC at Wheaton College, Illinois, and, after completing law school at Northern Illinois University on an educational delay, joined our Corps in 2010. Castlen served first as an administrative law and domestic operational law attorney at the 1st Infantry Division, Fort Riley, Kansas, before deploying to Afghanistan in 2012. After returning to Kansas, then-CPT Castlen served as a trial counsel for a year before being assigned to Germany in 2014, where he first worked in international and operational law before transitioning to the





COL Stephen E. Castlen, left, and MAJ John T. Castlen. (Courtesy Fred Borch)

practice of administrative law at U.S. Army, Europe, in Wiesbaden. From 2017 to 2018, he was a defense counsel in Wiesbaden before returning to the United States to complete the 67th Graduate Course. Major Castlen is presently serving as a business and general law attorney with Army Futures Command, Austin, Texas.<sup>14</sup>

**Father-son: Sergeant First Class (SFC) Bryan Ortiz-Arman and Private First Class (PFC) Bryan J. Ortiz-Ramos**

Bryan Ortiz-Arman was born and raised in Ponce, Puerto Rico. He had considered enlisting in the Army prior to the fateful events of September 11, 2001, but after that day, he was “upset and decided, for the first time perhaps, that it was my turn to do something for my country.”<sup>15</sup>

After completing Advanced Individual Training (AIT) at Fort Jackson, then-PFC Ortiz-Ramos served as a paralegal specialist in Camp Casey, Korea. From 2003 to 2006, he was assigned to Fort Bliss, Texas, where he served as a paralegal at the 31st Combat Support Hospital and 6th Air Defense Artillery Brigade. While at Fort Bliss, then-Sergeant Ortiz-Ramos decided to become a court reporter and completed the 14th Court Reporter Course in April 2004. He was then assigned to the 32d Air

and Missile Defense Command, and later to the U.S. Army Air Defense Artillery Center and Fort Bliss.

In 2006, then-SSG Ortiz-Ramos was assigned as a court reporter at 1st Cavalry Division, Fort Hood, Texas, and deployed to Iraq from 2006 to 2007. While at Camp Liberty, Baghdad, he served as a non-commissioned officer for the tax center, operational law, and claims—in addition to his court reporter duties. After returning briefly to Fort Hood, SFC Ortiz-Ramos joined the 2d Infantry Division, with duty at U.S. Eighth Army, Yongsan. From 2012 to 2015, he was the senior court reporter at the 10th Mountain Division, Fort Drum, New York. Sergeant First Class Ortiz-Ramos then served as the Senior Court Reporter Instructor at TJAGLCS, where he managed the basic, advanced, and senior court reporting courses and explored new technologies and approaches to court reporting. Ortiz-Ramos is now serving as the senior court reporter at 3d Infantry Division, Fort Stewart, Georgia.

His son, PFC Ortiz-Arman, was also born in Puerto Rico but went to high school in New York and Virginia. After graduating in 2018, he enlisted in the Army on the last day of October 2017 and completed AIT for MOS 27D Paralegal Specialist in May 2018. Private First Class Ortiz-Arman is presently

assigned to the 3d Chemical Brigade, U.S. Army Chemical School, Fort Leonard Wood, Missouri. **TAL**

*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

**Notes**

1. Fred L. Borch, *“It’s a Family Affair:” A History of Fathers, Daughters and Sons, Brothers and Grandfathers and Grandsons in the Corps*, LORE OF THE CORPS 3-8 (2019).
2. *Id.*
3. JUDGE ADVOCATE GENERAL’S CORPS, *THE ARMY LAWYER* 200-02 (1975).
4. *Id.* at 256-57. For more on the 1977 Additional Protocols, see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 129-49 (2nd ed. 2016).
5. E-mail from Virginia P. Prugh to Fred L. Borch (Aug. 22, 2019, 3:30 PM) (on file with author).
6. The Judge Advocate General’s School, U.S. Army, JAG Form 48, Personnel Data Sheet, Buckley, Michael Brett (Oct. 1980) (on file with author).
7. News Release, Thurston County, Washington, Presiding Judge of District Court Recipient of 2019 Outstanding Judge Award (June 20, 2019), <https://www.thurstoncountywa.gov/tchome/pages/newsreleasedetail.aspx?List-ID=1971>.
8. Officer Record Brief, Buckley, Michele B. (11 July 2019) (on file with author).
9. Telephone Interview with Chief Warrant Officer Three (Retired) Cedric Woodruff (Feb. 20, 2007).
10. *Id.*
11. See *United States v. Calley*, 22 C.M.R. 19 (A.C.M.R. 1973), *aff’d*, 48 CMR 19 (C.M.A. 1973); *Calley v. Calloway*, 382 F. Supp. 650 (1974); *Calley v. Hoffman*, 519 F. Supp. 814 (1974), *cert. denied*, 425 U.S. 911 (1975); RICHARD HAMMER, *THE COURT-MARTIAL OF LT. CALLEY* (1971); WILLIAM PEERS, *THE MY LAI INQUIRY* (1979). See also, Fred L. Borch, *What Really Happened at My Lai on March 16, 1968*, *ARMY LAW.*, Mar. 2018, 1-5.
12. William “Woody” A. Woodruff, CAMPBELL U., <https://directory.campbell.edu/people/william-woody-a-woodruff/> (last visited Sept. 8, 2019).
13. E-mail from Joseph Woodruff to Fred L. Borch (Aug. 23, 2019, 10:30 AM) (on file with author).
14. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, 67TH GRADUATE CLASS DIRECTORY 11 (2018).
15. E-mail from SFC Bryan Ortiz-Ramos to Fred L. Borch (Aug. 23, 2019, 4:03 PM) (on file with author).
16. E-mail from Lt Col Kathryn Navin to Fred L. Borch (Aug. 27, 2019, 10:45 PM) (on file with author).
17. *Id.*
18. *Id.*
19. E-mail from Lt Col Nicole Navin to Fred L. Borch (Aug. 28, 2019, 7:19 AM) (on file with author).
20. Biography, Lieutenant Colonel Nicole M. Navin, United States Air Force (on file with author).
21. E-mail from CPT Christian R. Burne to Fred L. Borch (Aug. 29, 2019, 2:10 AM) (on file with author).



Lieutenant Colonels Kathryn M. (left) and Nicole M. Navin. (Courtesy Fred Borch)

## Sister Services

*Having examined eight Army generational relationships, this article looks at two other family connections that deserve to be highlighted: the Air Force Judge Advocate General with an Army judge advocate son and two identical twin sisters—one in the Marine Corps and one in the Air Force—who are connected with the Regiment because both sisters earned their LL.M. degrees in the Graduate Course.*

### **Sisters: Lieutenant Colonels Kathryn M. and Nicole M. Navin**

The Navin sisters were born and raised in Kenosha, Wisconsin. While they are identical twins, Nicole is older than her sister by two minutes. Kathryn “Kate” Navin earned her law degree from the University of Pittsburgh in 1999; she had previously been commissioned as a Marine Corps second lieutenant in 1998. Kate Navin chose to be a Marine because she thought being a Marine

“would be the biggest challenge . . . both physically and mentally.”<sup>16</sup> She writes that she “thought briefly about the Air Force, but the physical requirements, training, and challenge of being a Marine was what drew me to the Marine Corps.”<sup>17</sup>

After completing The Basic School at Quantico, Virginia, and the Naval Justice School in Newport, Rhode Island, Kate Navin was designated a Marine judge advocate in 2000. She then served in a variety

of assignments, including a thirteen-month deployment in 2007 with Multinational Forces West to Al Anbar Province, Iraq. Then-Major Navin’s connection with our Corps occurred in 2009, when she was a student in the 58th Graduate Course. After graduating in 2010 with a specialty in contract and fiscal law, she served as Procurement Counsel, Western Area Counsel Office, Marine Corps Base Camp Pendleton, California. Later that year, she



deployed with U.S. Central Command's (CENTCOM) Contracting Command in support of I Marine Expeditionary Force (Forward), Camp Leatherneck, Iraq.

Lieutenant Colonel Navin finished out her career in the Marine Corps as the SJA, Marine Corps Recruit Depot Paris Island/Eastern Recruiting Region, and as the Deputy Branch Head for Civil and Administrative Law, Judge Advocate Division, Headquarters, Marine Corps in the Pentagon. She retired in 2019.<sup>18</sup>

Her sister, Air Force Lieutenant Colonel Nicole R. Navin, took a very different path as a judge advocate. After graduating from the University of Wisconsin-Whitewater in 1996, Nicole Navin enlisted in the Air Force and served as a Chinese Linguist at Hickam Air Force Base, Hawaii, from 1997 to 2001. After leaving active duty, she entered law school at Florida State University; she graduated in 2004. Nicole then joined the Air Force JAG Corps because she "enjoyed it based on my previous experience" as an Air Force service member.<sup>19</sup> She subsequently served in a variety of assignments, including: Assistant SJA, 1st Fighter Wing, Langley AFB; Area Defense Counsel, Langley, AFB; and DSJA, 52d Fighter Wing, Spangdahlem Air Base, Germany. Then-Major Navin made her connection with our Corps when she spent a year in the 62d Graduate Class from 2013 to 2014. After obtaining her LL.M., with a specialty in contract and fiscal law (like her sister), Nicole Navin worked briefly as the Chief, Fraud Remedies Branch, Air Force Legal Operations Agency, Andrews Air Base, Maryland, before deploying to Camp As Sayliyah, Qatar, as the Assistant CJA, CENTCOM Joint Theater Support Contracting Command. Today, Lieutenant Colonel Navin is the BJA, Uniformed Services University of the Health Sciences, Naval Support Activity, Bethesda, Maryland.<sup>20</sup>

### **Father-son: Lieutenant General Christopher F. Burne and CPT Christian R. Burne**

Christopher F. Burne had a long and distinguished career as an Air Force lawyer, culminating in his service as the Air Force Judge Advocate General from 2014 to



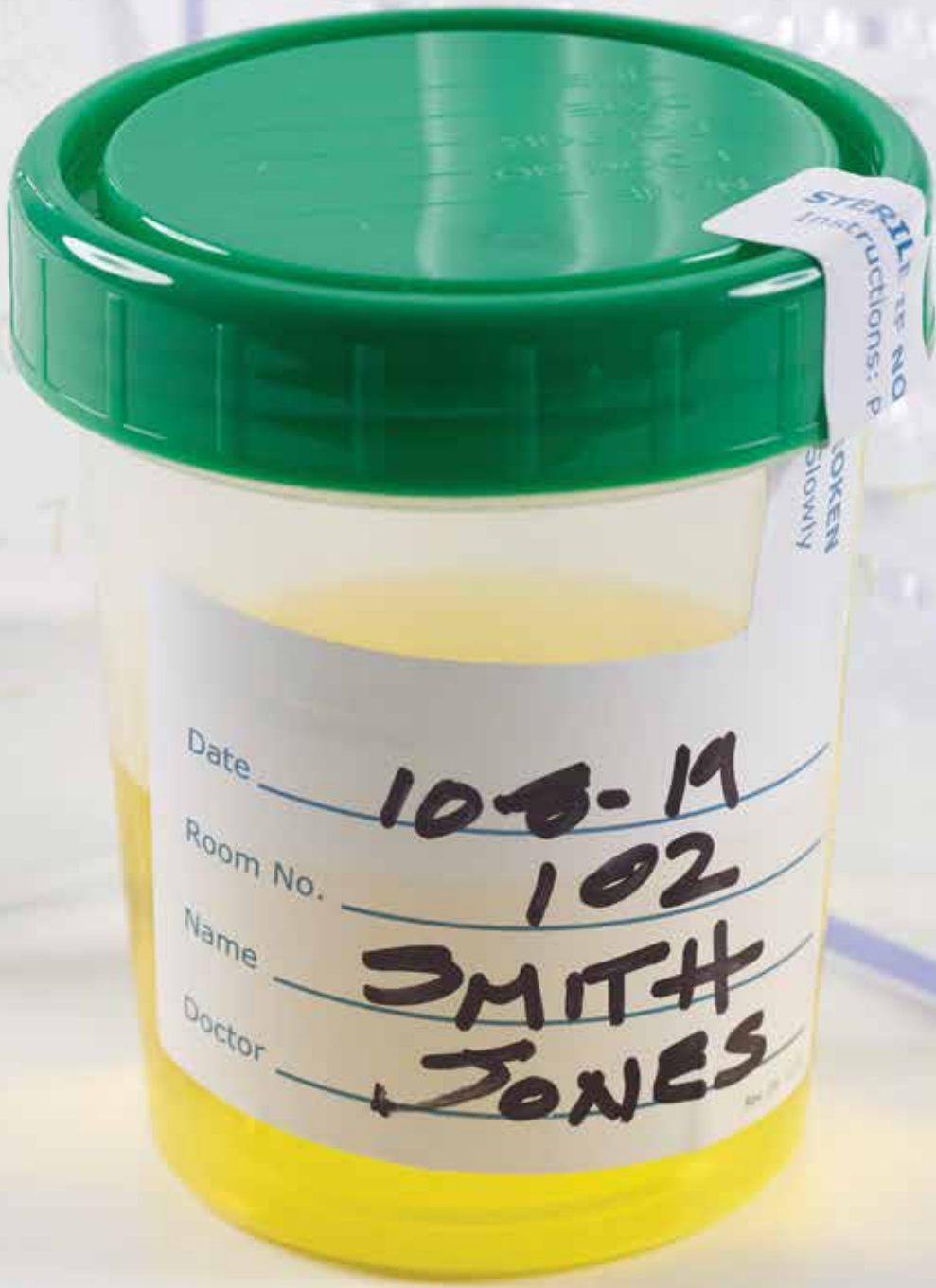
Lieutenant General Christopher F. Burne and CPT Christian R. Burne. (Courtesy Fred Borch)

2018. Burne was directly commissioned in the Air Force after graduating from law school in 1983, and he served in a number of increasingly important assignments, including: DSJA, Western Space and Missile Center, Vandenberg Air Force Base (AFB); SJA, 32d Fighter Group, Soesterberg Air Base, Netherlands; SJA, 20th Fighter Wing, Shaw AFB, South Carolina; SJA, 8th Air Force, Barksdale AFB, Louisiana; and SJA Air Combat Command, Joint Base Langley-Eustis, Virginia. Lieutenant General Burne retired in 2018.

His son, CPT Christian R. Burne, commissioned through the Army ROTC at the University of Scranton in 2014. He then obtained an educational delay to attend law school at Dickenson in Carlisle,

Pennsylvania. After graduating in 2017, Christian Burne commissioned as a judge advocate first lieutenant and entered our Corps. He finished the 205th JAOBC in May 2018 and was assigned to XVIII Airborne Corps, Fort Bragg, North Carolina. Burne is now deployed to Camp Arifjan, Kuwait, where he serves as an operational law attorney with Combined Joint Task Force-Operation Inherent Resolve.<sup>21</sup> **TAL**





## No. 2

# Urine Trouble

## Prosecuting Wrongful Uses of Controlled Substances with Urinalysis

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*By Major Eduardo A. Palomo*

Prosecuting violations of Article 112a, Uniform Code of Military Justice (UCMJ),<sup>1</sup> requires familiarity with urinalysis procedures, forensic toxicology, hearsay rules, and military case law interpreting *Crawford v. Washington*.<sup>2</sup> This article will orient trial counsel to the general components of Article 112a, UCMJ, trials, beginning with identifying the controlled substance in the specification, collecting urine from the accused, transferring the urine specimen to a testing laboratory, and concluding with expert testimony from a forensic toxicologist. With the aim of enhancing trial counsel prosecution of drug cases, this article focuses on wrongful use shown through urinalyses conducted by Army drug testing programs and testing conducted by the Defense Forensic Science Center or a Department of Defense (DoD) Forensic Toxicology Drug Testing Laboratory.

### **The Elements of Article 112a, UCMJ**

The elements of wrongful use of a controlled substance are straightforward. The government must prove that (1) the accused used a controlled substance; (2) the accused actually knew they used the substance; (3) the accused actually knew that the substance was a controlled substance; and (4) the use was wrongful.<sup>3</sup> While not an enumerated element, the government must prove that the substance is either specifically listed in Article 112a, UCMJ, or “listed on a schedule of controlled substances[.]”<sup>4</sup>

The Military Judge’s Benchbook provides that “[u]se’ means to inject, ingest, inhale, or otherwise introduce into the human body, any controlled substance. ‘Use’ includes such acts as smoking, sniffing, eating, drinking, or injecting.”<sup>5</sup> The presence of a controlled substance in one’s urine is sufficient to establish administration, ingestion, or physical assimilation.<sup>6</sup> Presence of a metabolite of the controlled substance is likewise sufficient to establish use.<sup>7</sup>

The government must next show that the accused knowingly used the substance in question, that they knew it was a controlled substance, and that the use was wrongful. These three elements may be inferred from surrounding circumstances where direct proof is not available. The government must actually elicit testimony or introduce other evidence showing that the “suggested conclusion of wrongfulness should be inferred based on the predicate facts proven.”<sup>8</sup> Types of evidence that may support inferences of knowledge and wrongfulness include high concentrations of a drug, testimony concerning the drug’s effect on the user, facts disproving passive inhalation, statements by the accused, or other acts offered under Military Rule of Evidence (MRE) 404(b). Such evidence is of critical importance in all Article 112a, UCMJ, cases, and particularly in cases where the scientific evidence does not plainly support inferences of wrongful and knowing use.<sup>9</sup>



(Credit: istockphoto.com/ElMiguelacho)

Inferences of knowing use and wrongfulness are permissive, not mandatory.<sup>10</sup> Practitioners must take care to identify facts that support such inferences and develop clearly articulable theories for how those facts show knowledge and wrongfulness. Trial counsel should likewise be prepared to deliver opening statements and closing arguments discussing the predicate facts and the consequent inferences couched in terms of the government's burden of proof. Put differently, trial counsel must argue that the circumstantial evidence showing knowledge and wrongfulness is itself proof beyond a reasonable doubt satisfying the corresponding elements.

Evidence giving rise to inferences of knowledge and wrongfulness may vary widely from case to case. Trial counsel should work with a forensic toxicologist, medical review officer, or criminal investigator to develop theories of knowledge and wrongfulness.

### Roadmap of Proof

A successful Article 112a, UCMJ, prosecution generally involves explaining the following basic components to the factfinder: (1) identifying the drug or controlled substance; (2) initiation of the urinalysis; (3) conducting the urinalysis; (4) transfer of urine to the installation drug testing coordinator; (5) transfer of urine to the drug testing laboratory; (6) establishing chain of custody through assignment of a unique identifying number to the urine specimen; and (7) expert testimony describing forensic testing and identifying the drug or controlled substance in the urine specimen. Each of these basic components will be discussed in its own detailed section below.

To begin, trial counsel must properly identify the substance on the charge sheet. Certain substances listed in Article 112a, UCMJ,<sup>11</sup> may be identified simply by listing them in the Article 112a, UCMJ,

specification and offering evidence that the accused's urine contained that substance. Substances not specifically listed in Article 112a, UCMJ, but listed on a schedule of controlled substances prescribed by the President or schedules I through V of the Controlled Substances Act<sup>12</sup> must be identified through reference to the appropriate schedule. Judicial notice is generally the most reliable mode of proof for such schedules.

Once trial counsel properly identifies the substance in question, they should present their case-in-chief chronologically beginning with initiation of the urinalysis. A company commander or first sergeant is usually able to describe whether the urinalysis was part of a 100% unit inspection, random inspection, probable cause test, or unit policy. Trial counsel should then call the unit prevention leader (UPL) and the urinalysis observer to describe the collection, documentation, storage, and transportation of the accused's urine specimen. The UPL should testify about the use of the specimen custody documents generated during the urinalysis and how they transported the urine to the installation drug testing coordinator. The drug testing coordinator will then testify about the storage of the urine specimen and its shipment to the testing location. At this point, the finder of fact should be able to clearly link the accused's identifying information with the urine specimen in question.

Once received by the testing location, laboratory personnel will assign a unique laboratory accession number to the specimen to be used on all storage and testing documentation generated by the laboratory. Trial counsel should be unambiguous in connecting the accused's urine specimen to the laboratory accession number found on testing and storage documentation. Counsel may offer proof of that connection through the testimony of the forensic analyst who conducted the testing of the urine specimen or a certifying scientist familiar with the testing.

Trial counsel should then ask the forensic analyst or certifying scientist to describe the presumptive and confirmatory tests performed on the urine specimen and explain documentation generated during those tests. Once the forensic analyst or certifying scientist explains the tests, they



will be able to provide an expert opinion about the nature of the substance in the accused urine.

### Identifying the Controlled Substance

Article 112a, UCMJ, contains three separate clauses identifying different categories of prohibited substances. The first clause is a list of specifically named substances. The second clause proscribes wrongful use of substances “listed on a schedule of controlled substances prescribed by the President for the purposes of this article.”<sup>13</sup> The third clause includes substances not already specified in the other two categories and “listed in schedules I through V of section 202 of the Controlled Substances Act.”<sup>14</sup> Do not use the third clause for substances listed in the first two clauses.

The first clause is self-explanatory and includes the most commonly used drugs.<sup>15</sup> Article 112a, UCMJ, specifically identifies “[o]pium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and marijuana and any compound or derivative of any such substance”<sup>16</sup> as prohibited substances. Trial counsel may use the name of a substance as listed in the first clause in the Article 112a, UCMJ, specification without further reference to a schedule of controlled substances.<sup>17</sup>

An expert opinion that the accused’s urine contained any of the substances listed above from a forensic toxicologist with at least some knowledge of the testing of the accused’s urine specimen is generally sufficient to identify the prohibited substance.<sup>18</sup> Such proof extends to metabolites of any of these substances. Note that test results may describe only the chemical compound present in the urine and may not identify the substance by its common name. For example, laboratory test reports may show 11-nor-delta-9-tetrahydrocannabinol-carboxylic acid, a metabolite of tetrahydrocannabinol (THC) in the urine specimen. Where the specification alleges that the accused wrongfully used marijuana, be sure to elicit testimony from a forensic toxicologist that THC is a compound found in marijuana.

The second clause incorporates a schedule of controlled substances prescribed

by the President and published in the Manual for Courts-Martial.<sup>19</sup> It references the same substances listed in the text of Article 112a, UCMJ, and adds the drugs phenobarbital and secobarbital. As a practical matter, practitioners should not charge offenses under the second clause unless the substance in question is phenobarbital and secobarbital. If the substance in question is phenobarbital or secobarbital, counsel should name phenobarbital and secobarbital and include the words “a controlled substance” in the specification.<sup>20</sup>

Military appellate courts have not directly addressed whether a military judge must take judicial notice of the schedule published in the *Manual for Courts-Martial (MCM)*.<sup>21</sup> As a matter of caution, counsel charging wrongful use of phenobarbital and secobarbital should consider requesting that the military judge take judicial notice of the schedule published in the *MCM*. After judicial notice of this schedule, trial counsel must offer an expert opinion that the accused’s urine contained phenobarbital and secobarbital in the same manner as described for the first clause.

The third clause incorporates schedules I through V of the Controlled Substances Act. Specifications under clause three must identify the substance by *exactly* the same name as shown in the schedule of controlled substances.<sup>22</sup> Do not use common or street names in the specification. Trial counsel must request judicial notice of the Controlled Substances Act, 21 U.S.C. § 812 and the appropriate schedule found in 21 C.F.R. §§ 1308.11 et. seq. under MRE 202<sup>23</sup> The motion should include both the Act and the appropriate schedule as attachments.<sup>24</sup> While not required under MRE 202(a), the military judge may give an instruction that the substance in question “is a controlled substance under the laws of the United States.”<sup>25</sup>

Counsel must take special care to elicit testimony that the substance found in the accused’s urine is the same substance (or a metabolite thereof) named in the schedule of controlled substances. For example, if witnesses refer to the substance in question as “ecstasy,” the forensic toxicologist must state that “ecstasy” is a common name for the 3,4-Methylenedioxymethamphetamine found in the accused’s urine specimen.<sup>26</sup>

### Initiation of the Urinalysis

After properly identifying the substance, counsel should proceed with a chronological presentation of the facts ultimately leading to forensic testing of the accused’s urine sample. The fact-finder will be interested to know why the accused provided a urine sample in the first place. By beginning with the initiation of the urinalysis, trial counsel is able to answer this question while accounting for any special circumstances surrounding a unit sweep inspection or a probable cause test. This starting point may also facilitate introduction of incriminating statements by the accused or evidence offered under MRE 404(b) to show knowledge or wrongful use. Finally, describing the initiation of the urinalysis may assist in laying foundations to admit documents with the accused’s identification number into evidence.

The company commander, first sergeant, or UPL is often in the best position to discuss the initiation of a urinalysis.<sup>27</sup> Commanders typically conduct urinalyses for two purposes: inspection and probable cause. Inspections are part of a regulatory requirement to conduct drug testing for purposes of “security, military fitness, and good order and discipline of the unit.”<sup>28</sup> Commanders may conduct random inspections, inspections executed pursuant to a command policy,<sup>29</sup> or unit sweeps.

Testimony about initiating inspections is relatively simple and involves describing unit policies implementing the Military Personnel Drug Testing Program. The testimony of a company commander or first sergeant is often not necessary for inspections, as the UPL is generally more familiar with the regulatory requirements for the inspection in question. In order to describe the initiation of a urinalysis, the UPL should discuss the type of inspection involved, the purpose of the inspection, the test codes used to identify the type of inspection, and documentation required for the inspection.<sup>30</sup>

Probable cause tests offer richer factual backgrounds than inspections.<sup>31</sup> Company commanders and first sergeants are often very familiar with the probable cause test in question and tend to offer persuasive testimony about the underlying facts. Counsel should offer those facts under MRE 404(b)

to show knowledge and wrongfulness. As an example, trial counsel may offer the testimony of a first sergeant who observed the accused with bloodshot eyes and rolling papers to show that the accused knew he used marijuana and that the use was without legal justification.

### **The Urinalysis**

Explaining the collection of the accused's urine is of critical importance to proving wrongful use. In order to successfully explain the urinalysis, counsel will have to show that the urine specimen in question originated from the accused and that the UPL properly documented, stored, and transmitted the urine. Practitioners must accordingly be familiar with the Unit Prevention Leader Handbook and related regulations.<sup>32</sup>

Trial counsel should call the UPL to testify about their training, knowledge of governing regulations, the collection of the accused's urine, completion of specimen custody documents (commonly referred to as the Department of Defense (DD) Form 2624, Specimen Custody Document-Drug Testing),<sup>33</sup> storage of the urine, and transportation of the urine to the installation drug testing coordinator.

#### ***Preparing and Conducting the Urinalysis***

Unit Prevention Leaders must be designated on appointment orders by the unit commander and must complete UPL certification training.<sup>34</sup> At minimum, the UPL should be thoroughly familiar with Army Regulation (AR) 600-85, Appendix E, *Standing Operating Procedures for Urinalysis Collection, Processing, and Shipping*.<sup>35</sup> After discussing their qualifications and training, the UPL should explain preparation of the DD Form 2624 for the urinalysis in question, unit-testing roster (also called a testing register or ledger), supplies needed for testing,<sup>36</sup> briefing of observers, and inspection of urine collection areas.

The UPL should then describe verification of the accused's information on the DD Form 2624, unit-testing roster (used to document all personnel who provided urine specimens for the urinalysis in question), and bottle labels against his or her military identification card. The identification number on the urine specimen bottle should match

the identification number found on the DD Form 2624. The UPL should clarify any apparent discrepancies found on this documentation. The UPL will then require the accused to initial the urine specimen bottle to verify their information on the bottle label.

Next, the UPL will give the accused the urine specimen bottle from its box and place the accused's identification card in the box. The accused will proceed to the specimen collection area to provide a urine specimen. An observer must "[m]aintain direct eye contact with the specimen bottle from the time the UPL hands it to the Soldier until the time the UPL places it in the collection box."<sup>37</sup> The observer must observe urine leave the accused's body and go into the urine specimen bottle.<sup>38</sup>

The accused must next return the urine specimen bottle to the UPL, who will ensure the bottle cap fits tightly and place tamper evident tape across the cap and bottle. This process concludes with the UPL returning the accused identification card, placing the urine specimen bottle in a leak-proof bag, and placing the bottle in its box. Both the observer and the accused will sign the unit testing roster verifying that the accused "provided the urine in the specimen bottle and that they observed the specimen being sealed with tamper evident tape and placed into the collection box."<sup>39</sup>

#### ***Post-Urinalysis Procedures***

After collection of the urine specimens, the UPL again verifies that the information on the DD Form 2624 matches the information on the urine specimen bottle labels. After verifying this information, the UPL places the DD Form 2624 in the urine specimen box and transports the urine specimen box to the installation drug testing collection point as soon as possible.

#### ***Practice Point: Deviation from Standard Procedure***

Accounting for any human error in the collection, documentation, or storage of the urine is vital in determining whether to pursue criminal charges at all<sup>40</sup> and may affect witness lists, voir dire, direct and cross-examination of government witnesses, and instructions.<sup>41</sup> Because compliance with applicable procedures varies widely, counsel must conduct detailed

interviews with the UPL, the observer, and any other individuals who substantially participated in the collection of the accused's urine. Counsel should review AR 600-85, paras. E-4 through E-7 with the UPL and make note of any deviation from those procedures.

A common deviation is delayed transportation of the urine specimens to the installation drug testing collection point. While governing regulations allow delay,<sup>42</sup> practitioners should account for the length and conditions of storage. Lengthy delays or failure to follow regulatory requirements for temporary storage of urine specimens at the unit level may result in exclusion of subsequent test results or the fact-finder doubting the integrity/reliability of the testing.<sup>43</sup>

#### ***Practice Point: Recalling Detailed Facts***

Another frequent concern involves difficulty in recalling the urinalysis in question. Urinalyses tend to be rote, uneventful affairs that collect urine for scores of service members over the course of a few hours. The UPL or the observer may conduct dozens of urinalyses over the course of a calendar year. Unit Prevention Leaders and observers typically learn of positive urinalysis results many months after the original urinalysis. They may accordingly have difficulty in recalling details about a specific urinalysis.<sup>44</sup> Unit Prevention Leaders and observers may nevertheless testify about matters of routine practice. Counsel should also ask the UPL or observer whether they ever deviate from the procedures they normally follow. If they do not generally deviate from those procedures, counsel may offer their testimony as evidence of habit or routine practice under MRE 406.<sup>45</sup> For trial before members, consider requesting a special instruction for such evidence.<sup>46</sup>

#### ***Practice Point: Authenticating the DD Form 2624***

The UPL may assist in authenticating documentation associated with the accused's urine specimen irrespective of their recollection of the urinalysis in question. When preparing for trial, identify the documentation associated with the urinalysis that the UPL generates or maintains. Review that documentation for signatures, handwriting,

or other unique identifying features that the UPL recognizes. The UPL may then testify about their personal knowledge of the records. Such testimony is sufficient to satisfy authentication requirements.<sup>47</sup>

Trial counsel may also use the UPL to begin laying the foundation for hearsay exceptions for documentation associated with the urinalysis. Practitioners may wish to offer the DD Form 2624 into evidence during the forensic toxicologist's testimony, but the UPL may nevertheless testify that such records are kept in the normal course of business and that generating such records is a regular practice of that unit.<sup>48</sup> The testimony of the UPL coupled with the testimony of the forensic toxicologist will provide a robust foundation to show that the DD Form 2624 is admissible as a business record.<sup>49</sup>

### **The Drug Testing Coordinator**

The drug testing coordinator manages and oversees the drug-testing program for an entire installation. While their duties are manifold, their testimony at trial should not extend past describing the purpose of the drug-testing program and establishing a link in the chain of custody for the accused's urine specimen.

First, the drug-testing coordinator must be familiar with the purpose of military drug-testing programs and should be able to testify that the program "emphasizes readiness and personal responsibility."<sup>50</sup> Such testimony is necessary to avoid testimonial hearsay objections to the DD Form 2624 and other documents generated as part of the urinalysis.<sup>51</sup>

Second, the drug testing coordinator should testify about their receipt of the urine specimen from the UPL, storage of the specimen, and shipment of the specimen to the drug-testing laboratory. Although the prosecution is not required to present every link in a chain of custody,<sup>52</sup> the drug-testing coordinator is helpful in explaining the reliability of their storage and shipment methods as a way to eliminate any concern of contamination or misidentification of the accused's urine specimen. Upon receiving a box of urine specimens from the UPL, the drug-testing coordinator will again ensure that the information on the bottle labels matches the information

on the DD Form 2624 and the unit-testing roster.<sup>53</sup> The drug-testing coordinator will then sign the DD Form 2624 and store the urine specimen in a specialized specimen storage room while they arrange for shipment of the specimen to the drug-testing laboratory. Trial counsel should ask the drug-testing coordinator to describe the layout, security equipment, and temperature of the specimen storage room.<sup>54</sup> Finally, the drug-testing coordinator will arrange for shipment of the specimen to the appropriate drug-testing laboratory using the U.S. Postal Service or a commercial carrier, such as FedEx.<sup>55</sup>

### **Practice Point: Using the Drug Testing Coordinator While Preparing Your Case**

The drug testing coordinator normally maintains DD Forms 2624, unit ledgers, and unit accountability documentation, and other locally generated documentation associated with a urinalysis. Note that the drug-testing coordinator forwards the DD Form 2624 to the testing laboratory, but not the unit ledger or other locally generated documentation. The unit ledger is therefore not a part of the lab documentation packet and may not be included in a law enforcement file. Trial counsel should interview the drug-testing coordinator early in their preparation for trial to identify and gather relevant documentation. Doing so will aid in trial planning and facilitate discovery.

### **Chain of Custody Documentation**

Admitting the DD Form 2624 into evidence is essential to link the urine provided by the accused to the tests performed by drug-testing laboratory. The UPL, drug-testing coordinator, and forensic toxicologist may reference the DD Form 2624 while testifying to account for collection of the urine, storage of the urine, receipt of the urine by the drug-testing laboratory, and assignment of a laboratory accession number by laboratory personnel.

As discussed briefly above, admitting the DD Form 2624 into evidence requires appropriate witnesses to authenticate the document and lay the foundation for the business records hearsay exception. While the DD Form 2624 may be authenticated by the UPL, consider that the UPL does not generally have personal knowledge

of information recorded on the DD Form 2624 after they deliver the urine specimen to the installation drug-testing coordinator. The forensic toxicologist or certifying scientist is often better positioned to authenticate the DD Form 2624 by testifying about assignment of a laboratory accession number and signatures in the "chain of custody tracking" section of the document.

Next, trial counsel should elicit testimony from the UPL and the forensic toxicologist to lay the foundation for the business records hearsay exception. The business records hearsay exception requires evidence from a records custodian or "another qualified witness" that (1) the information was recorded close in time to the event it documents, (2) that "the record was kept in the course of a regularly conducted activity" of the organization, and (3) "making the record was a regular practice" of the organization.<sup>56</sup>

While there is no singular "records custodian" for the DD Form 2624, this is an indispensable document for both the UPL and the forensic toxicologist. Both witnesses must testify about the information recorded on the DD Form 2624, the regulatory requirements to generate and maintain the document, and their level of experience with the document. The UPL and the forensic toxicologist should easily qualify as a "qualified witness."<sup>57</sup>

Trial counsel must next show that the information was recorded close in time to the events it documents. Both the UPL and the forensic toxicologist should be able to testify that annotating changes of custody and assignment of a laboratory accession number (LAN) occur contemporaneously with those events.<sup>58</sup> The remaining elements of the business records hearsay exception require evidence that the military regularly conducts urinalyses and that personnel conducting urinalyses generate and maintain a DD Form 2624 for every urinalysis.

However, trial counsel will not avoid a hearsay objection by simply satisfying the requirements of MRE 803(6). Trial counsel must also present evidence that the DD Form 2624 is not a testimonial document. *Crawford v. Washington* and its progeny prohibit introduction of out-of-court statements "made under circumstances which



would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.<sup>59</sup> Put differently, an otherwise admissible item of hearsay is nevertheless inadmissible where the primary purpose of the statements was to “create evidence.”<sup>60</sup>

Trial counsel must accordingly elicit testimony from the UPL and the forensic toxicologist characterizing the DD Form 2624 as an internal control document. Testimony about the general purpose of the drug-testing program should demonstrate that the program is designed for “security, military fitness, and good order and discipline[.]”<sup>61</sup> This purpose applies most directly to “inspection” tests where the command does not necessarily anticipate criminal prosecution.

Testimony about the various purposes of the drug-testing program may be less persuasive in cases involving a probable cause tests, which, by their nature, suggest criminal prosecution. For probable cause tests, counsel should argue that the DD Form 2624 is, above all, a chain of custody document lacking in the “formality or solemnity” of a document prepared for evidentiary purposes.<sup>62</sup> A claim that UPLs and forensic toxicologists must ultimately testify about their involvement in a drug test is a red herring that does not change the primary purpose of the DD Form 2624.<sup>63</sup> With proper preparation before trial, the UPL and forensic toxicologist should have little difficulty laying the foundation for the business records hearsay exception and addressing testimonial hearsay concerns.

### **The Expert in Forensic Chemistry**

The linchpin for the government’s case-in-chief is the expert testimony of a forensic toxicologist. The forensic toxicologist will account for receipt of the accused’s urine specimen by the drug-testing laboratory, describe initial screening and testing of the urine, explain machine-generated reports, and ultimately offer an expert opinion about the substance found in the accused’s urine. The forensic toxicologist must testify that the substance in question is not naturally produced in the body, that the substance is nothing other than the substance identified in the specification, that the substance is of sufficient concentration

to demonstrate knowing and wrongful use, and that the testing was reliable both in methodology and execution.<sup>64</sup>

### **Qualifying the Expert Witness**

Trial counsel must first qualify the witness as an expert in forensic toxicology. Counsel should begin by asking the witness to describe the field of forensic toxicology in general terms. The response should include a description of the witness’s familiarity with the study of how chemicals interact with the body—pharmacology—and the study of how the body interacts with chemicals—pharmacokinetics. The witness may then testify about their qualifications in forensic toxicology with sufficient detail to persuade the fact finder to rely on the witness’s testimony concerning the testing of the accused’ urine specimen. Next, the witness should discuss their undergraduate education and graduate work related to forensic toxicology. Then, the witness should testify to professional experience and any peer-reviewed<sup>65</sup> publications relevant to forensic toxicology. Counsel should emphasize any graduate work, publications, certifications, or professional experience involving the testing methods used to test the accused’s urine specimen. Finally, the witness should testify about any other education, training, credentials, or experience relevant to forensic toxicology and documented in their curriculum vitae.

Practitioners must be aware that the military judge may sustain a hearsay objection if trial counsel offers the curriculum vitae into evidence.<sup>66</sup> The military judge may certainly consider the curriculum vitae in deciding whether to recognize the witness as an expert,<sup>67</sup> but the military judge need not (and likely will not) admit the document into evidence over objection. Trial counsel may ask opposing counsel to stipulate to the admissibility of the curriculum vitae, but trial counsel should not rely on the possibility of a stipulation when preparing the testimony of the forensic toxicologist. Also, consider whether the fact finder will consider live testimony more persuasive than a lengthy curriculum vitae.

After the witness testifies about their education, publications, training, credentials, and work experience relevant to

forensic toxicology, trial counsel should ask the military judge to recognize the witness as an expert in the forensic toxicology.

### **Urine Specimen Intake and the Laboratory Accession Number**

Once the military judge recognizes the witness as an expert in forensic toxicology, trial counsel should elicit testimony about the urine specimen intake procedures for the lab that tested the accused’s urine.<sup>68</sup> To that end, DoD Instruction (DoDI) 1010.16 standardizes specimen intake procedures for DoD Forensic Toxicology Drug Testing Laboratories.<sup>69</sup> The forensic toxicologist’s testimony should describe delivery of urine specimen boxes via authorized courier to the receiving and processing section of the laboratory. The receiving and processing technician will inspect boxes for damage, broken seals, leakage, or other discrepancies that might affect chain of custody or suggest contamination of the urine specimens. The technician will then review the documentation accompanying the specimens to ensure that the information found on the DD Form 2624 matches the information found on the bottles.

After this initial inspection, the technician must document any “deviation in the proper submission of a specimen or accompanying documentation”—otherwise called a “discrepancy.”<sup>70</sup> The technician will not submit specimens with fatal discrepancies for further testing. The forensic toxicologist should explain any non-fatal discrepancies documented in the laboratory documentation packet. Counsel should ensure that the forensic toxicologist explains why the non-fatal discrepancy does not undermine the reliability of the forensic testing.

After accounting for any discrepancies documented during intake, the forensic toxicologist should discuss the assignment of a LAN. The LAN is an anonymous identifier unique to an individual urine specimen. The intake technician will place a sticker with the LAN on the portion of the DD Form 2624 that pertains to the corresponding urine specimen. The forensic toxicologist should testify that all other documentation generated by the laboratory uses only the LAN to identify and track the urine specimen.

Counsel should ask the forensic toxicologist foundational questions to satisfy the “business records” hearsay exception for the DD Form 2624.<sup>71</sup> The foundation includes testimony about when information is recorded on the DD Form 2624, whether the person who recorded the information has knowledge of that information, that that form is kept in the course of a regularly conducted activity by the laboratory, and that recording information on the form is a regular practice of the laboratory. Counsel should establish that the forensic toxicologist is a “qualified witness”<sup>72</sup> to sponsor the DD Form 2624 as a business record by discussing their familiarity with the form and how frequently they use or review it. Finally, trial counsel should offer the DD Form 2624 into evidence.<sup>73</sup>

#### **Temporary Storage**

After receipt and processing, the technician will move the urine specimen into temporary storage to await testing. “Temporary storage” is a generic term for all urine storage at the laboratory.<sup>74</sup> The forensic toxicologist should describe the conditions of storage and explain how the conditions of storage do not cause any forensically significant degradation of controlled substances in the urine specimen. The forensic toxicologist should also explain that metabolization of controlled substances in a urine specimen does not continue after urine leaves the body. Similarly, the forensic toxicologist should explain that the concentration of a controlled substance or metabolite would not spontaneously elevate during temporary storage. Ultimately, this testimony should exclude the possibility of tampering or confusion of samples. At this point in the forensic toxicologist’s testimony, the fact finder should understand that the urine specimen is identical to the urine that left the accused’s body.

#### **Presumptive Testing**

The forensic toxicologist should explain that laboratory technicians test small samples called “aliquots” extracted from a urine specimen bottle. Technicians remove aliquots from the urine specimen bottle by pouring urine from the bottle into a test tube. Technicians do not insert pipettes or other foreign objects into the bottle. This

technique minimizes any risk that a potential adulterant might enter the bottle.

After describing the removal of an aliquot from the bottle, the forensic toxicologist should explain use of immunoassay (IA) testing as a preliminary test to screen out negative urine specimens and identify “presumptively positive” specimens for further testing. Immunoassay testing only detects approximate levels of controlled substances and does not offer scientifically conclusive results. Department of Defense Forensic Toxicology Drug Testing Laboratories (FTDTL) uses IA testing to identify “presumptively positive” urine specimens for more intensive gas chromatography mass spectrometry (GC/MS) testing to confirm the presence of a substance in the urine. The FTDTL discards urine specimens that are not presumptively positive.

Testimony concerning presumptive testing should not require reference to laboratory documents and should not be especially detailed.<sup>75</sup> The forensic toxicologist’s discussion of IA testing is necessary only to account for all handling of the urine and to exclude any possibility of contamination at the laboratory.

#### **Confirmatory Testing**

Laboratory technicians submit presumptively positive urine specimens for a second “confirmatory” test. The FTDTL commonly uses GC/MS to test a urine specimen for the substance that triggered the presumptively positive IA result.<sup>76</sup> The forensic toxicologist should describe how the confirmatory testing equipment accurately detects substances on a molecular level and provides precise measurements about the concentration of a substance in a urine specimen. The forensic toxicologist must explain calibration of the equipment by measuring an internal standard<sup>77</sup> of the controlled substance for which the urine specimen was presumptively positive. Note that the FTDTL inserts the internal standard in the same batch of presumptive positive specimens in order to create a blind quality control system. The forensic toxicologist must next explain the use of inert “blanks” to clean equipment between testing of each specimen. In sum, this explanation must account for the accuracy, margin of

error, reliability, and scientific validity of the confirmatory testing methodology.

Once the forensic toxicologist establishes the reliability of the testing methodology and equipment, they may discuss testing of the accused’s urine specimen by referencing data generated by the testing equipment. Gas chromatography mass spectrometry equipment generates a “quantitation report” with graphs and other data representing measurements of the substances tested. The laboratory documentation packet likely contains multiple quantitation reports showing testing of inert blanks, the chemical exemplar, and the accused’s urine specimen. Trial counsel need not admit the quantitation reports for the blanks and internal standards into evidence.

However, trial counsel should admit the quantitation report for the accused’s urine specimen into evidence. While the fact finder is unlikely to glean useful information from the quantitation report alone, it will be useful for the forensic toxicologist to explain the concentration of the substance found in the urine. First, counsel must have the forensic toxicologist authenticate the quantitation report by explaining the nature of the report and how they recognize it.<sup>78</sup>

Trial counsel must next address potential hearsay on the document by asking the forensic toxicologist to identify the portions of the quantitation report that are wholly machine generated and distinguishing them from those portions which require human input.<sup>79</sup> The forensic toxicologist must explain the portions that require human input and lay an appropriate foundation for an applicable hearsay exception.<sup>80</sup> As an example, the forensic toxicologist should be able to explain that the LAN appears on the quantitation report for internal control purposes. In contrast, the concentration of the controlled substance as shown in nanograms per milliliter is generated by the GC/MS equipment.

Finally, counsel should account for any initials, stamps, or other markings on the document. Quality reviewers often certify the results of a confirmatory test by stamping or initialing the document. If defense counsel objects to such markings as impermissible hearsay, trial counsel should explain that



(Credit: istockphoto.com/Lothar Drechsel)

they are not offered for the truth of the matter asserted—the accuracy of the test results—and are accordingly not hearsay.<sup>81</sup>

After the forensic toxicologist authenticates the quantitation report and accounts for potential hearsay on the documents, trial counsel should offer the document into evidence. Once admitted into evidence, counsel should publish the quantitation report in a manner that allows the forensic toxicologist to point to specific portions of the document during the remainder of their testimony.<sup>82</sup>

#### **Expert Opinion**

At this point, the witness should have discussed intake of the accused urine specimen, assignment of a LAN to that specimen, temporary storage, IA testing, and GC/MS testing. Trial counsel should next elicit an expert opinion about the nature of the substance found in the urine

specimen bearing the LAN related to the accused's identifying information.<sup>83</sup>

The forensic toxicologist should begin by verifying that the LAN found on the quantitation report is the same as the LAN next to the accused's DoD identification number on the DD Form 2624. Using a projector or other in-court publication means, the witness should identify the LAN on each document. Trial counsel should next ask the witness whether they know of any breaks in the chain of custody between intake and testing of the specimen.

The forensic toxicologist should then briefly explain the data on the quantitation report. After this explanation, counsel must ask the witness to provide an expert opinion about the nature and concentration of the substance in the urine specimen. If the witness identifies a substance not specifically identified in the specification, they should explain that the substance is either a

metabolite or a derivative of the controlled substance listed in the specification.

The witness should conclude by testifying "(1) that the [substance or] metabolite is not naturally produced by the body [and is not] any substance other than the drug in question; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug, and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample."<sup>84</sup>

#### **Practice Point: Certifying Scientists<sup>85</sup>**

While the ideal witness to explain testing of the urine sample is the analyst who performed the confirmatory testing, trial



counsel may offer the expert opinion of another forensic toxicologist who did not personally test the urine sample but had some personal—albeit indirect—connection to the test at issue. Testing laboratories are often unable to provide the analyst who personally conducted the testing. Forensic Toxicology Drug Testing Laboratories administrators often assign a certifying scientist as a substitute for the analyst who actually performed the tests. A FTDTL certifying scientist performs a supervisory role by reviewing and certifying all analytical data and chain of custody documents for testing performed by the subordinate analysts. Practitioners should ensure that a certifying scientist's qualifications enable them to deliver an appropriate expert opinion, as the certifying scientist may not be a forensic toxicologist. A FTDTL certifying scientist may not be in the actual supervisory chain of the analyst who conducted testing, but they are nevertheless familiar with procedures applicable to all analysts at the FTDTL.

A certifying scientist may offer “a proper expert opinion based on machine-generated data and calibration charts, his knowledge, education, and experience and his review of the drug testing reports alone.”<sup>86</sup> Practitioners should consider crafting the direct examination of the certifying scientist with a focus on the quantitation report and other laboratory documentation as “[e]vidence describing a process or system and showing that it produces an accurate result.”<sup>87</sup> Similarly, the certifying scientist is an appropriate witness to authenticate the quantitation report and other laboratory documentation so long as they have some knowledge that those documents are what they purport to be.<sup>88</sup> Counsel considering offering the testimony of a certifying scientist must thoroughly read and understand *United States v. Katso*.<sup>89</sup>

#### **Practice Point: The Laboratory Documentation Packet**

The forensic toxicologist is the appropriate witness through which to admit the DD Form 2624 and the quantitation report. The forensic toxicologist may also be an appropriate witness to admit other portions of the laboratory documentation packet. A

laboratory documentation packet typically consists of a DD Form 2624, temporary storage documents, intra-laboratory chain of custody documents, screening worksheets, quality control reports, presumptive testing reports, data reviews, and quantitation reports for blanks, internal standards, and urine specimens.

Admitting other portions of the laboratory documentation packet into evidence is generally not necessary to establish the elements of wrongful use of a controlled substance. First, most of these documents are not readily comprehensible to laypersons and require explanation by a person with appropriate knowledge, expertise, or training. Second, authentication and establishing appropriate hearsay exceptions for statements in the various reports may add hours to the length of the forensic toxicologist's direct examination. Similarly, referencing voluminous documentation during the forensic toxicologist's testimony may cause the panel to lose interest or become confused.

Third, the entire laboratory documentation packet is more likely to draw objections—particularly to any markings purporting to certify results or verify accuracy.<sup>90</sup> Successful objections may require trial counsel to redact portions of the reports and offer those redacted copies into evidence. Redacting documents in the middle of trial may unnecessarily delay proceedings and frustrate the panel, the military judge, and support staff. Moreover, offering redacted documents into evidence is far from ideal and may leave the fact finder with unanswered questions about the redacted material.

Practitioners should weigh these concerns against any benefits of admitting most or the entire laboratory documentation packet. Counsel seeking to admit the entire packet should have specific, articulable reasons for doing so and should consider filing a motion to pre-admit such documentation before trial.

#### **Practice Point: Low Concentration Levels**

As discussed previously in *Expert Opinion*, a high concentration of a prohibited substance demonstrates “a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug can be evidence

of knowing and wrongful use.”<sup>91</sup> Likewise, low concentrations present a challenge to showing knowing and wrongful use. The concentration of a prohibited substance is low if it is near the “cutoff concentration” established in DoDI 1010.16, Table 2.<sup>92</sup> Before considering criminal charges for low concentrations of a controlled substance, practitioners must consult a forensic toxicologist to discuss direct or circumstantial evidence that might demonstrate knowing and wrongful use. Two essential facts that may demonstrate knowing and wrongful use are the peak concentration of the prohibited substance and the rate of elimination for that substance. Peak concentration is the highest concentration of a substance after ingestion and typically occurs shortly after ingestion.<sup>93</sup> Rate of elimination is the rate that a substance clears the body and is often expressed in terms of the substance's half-life. Once a person ingests a substance, the concentration of that substance in the body will rise until it arrives at a peak concentration. After arriving at that peak concentration, the concentration of that substance will decrease in accordance with the substance's rate of elimination.

A forensic toxicologist cannot testify about whether the concentration on the quantitation report represented the peak concentration of the substance in the accused's urine. However, a relatively low peak concentration of a controlled substance with a short half-life strongly suggests more recent ingestion of that substance. For an early morning urinalysis, a low concentration undercuts a claim of innocent ingestion where the accused would have been asleep during the purported window of ingestion. A subsequent response that the accused (innocently) ingested the substance the day before supports an inference that the peak concentration was actually higher than that shown on the quantitation report. In this example, such an inference may be sufficient to “reasonably discount the possibility of unknowing ingestion[.]”<sup>94</sup> Counsel seeking to discount the possibility of innocent ingestion in this manner should prepare relevant hypothetical questions to ask during direct examination of the forensic toxicologist.<sup>95</sup>

## Miscellaneous Considerations

### *Evidence of the Accused's DoD Identification Number*

As discussed above, the fact finder must be able to connect the tests performed by the forensic toxicologist to the urine specimen provided by the accused. The testimony of the UPL and the observer along with the accused's initials on the urine specimen bottle label is generally sufficient to make this connection. However, trial counsel may wish to introduce evidence clearly showing the accused's DoD identification number. The accused's enlisted record brief (ERB) or officer record brief (ORB) displays this information in a readily admissible format.<sup>96</sup> Counsel may also consider requesting that the commander or first sergeant photocopy both sides of the accused's common access card. This photocopy may then be admitted into evidence after the commander or first sergeant authenticates it. Finally, trial counsel may simply ask the commander or first sergeant to compare the DoD identification number on the DD Form 2624 to the accused's ERB/ORB before trial. During direct examination of the commander or first sergeant, trial counsel may show the witness the DD Form 2624 and ask whether the DoD identification number belongs to the accused.

### *The Urine Specimen*

A forensic toxicologist may ask whether trial counsel seeks to admit the actual urine specimen into evidence. Admitting the urine specimen into evidence shows that the accused personally handled the bottle while writing his or her initials on the label.<sup>97</sup> Admitting the urine specimen accordingly tends to exclude the possibility of tampering or confusion of samples. Evidence that excludes tampering or confusion of samples offers the fact finder a clearer view of the forensic toxicologist's opinion that the data generated by the GC/MS equipment shows a prohibited substance in the accused's urine.

The UPL is usually the appropriate witness to authenticate the urine specimen. As discussed previously in *Preparing and Conducting the Urinalysis*, the UPL should have already testified that they personally received the urine specimen from the

accused. Bear in mind that the UPL likely did not handle the urine specimen bottle after delivering it to the drug testing coordinator. The UPL must accordingly be able to identify the bottle as the one that the accused provided. To authenticate the urine specimen bottle, they should rely on distinctive markings found on the bottle such as the base area code, administrative data, and the accused's initials.<sup>98</sup> Counsel may treat the accused's initials as evidence that they adopted other statements on the label as a way to exclude the label from the rule against hearsay.<sup>99</sup> However, counsel should still use the UPL or the drug-testing coordinator to lay the foundation for the business records hearsay exception under MRE 803(6) for other statements found on the bottle label. Counsel may offer the urine specimen into evidence after the forensic toxicologist accounts for broken tamper evident tape or any other changes to the condition of the bottle.

Note that the military judge will require the court reporter to include a photograph of the specimen bottle as a substitute for the record of trial.<sup>100</sup> After inclusion of a photographic substitute for the record, the forensic toxicologist may retain custody of the specimen and return it to storage at the FTDTL after conclusion of trial.

Trial counsel who do not offer the urine specimen into evidence due to destruction of the specimen or for some other strategic reason may face an objection to the forensic toxicologist's opinion. Opposing counsel may claim that the urine specimen must be admitted into evidence because it is the basis of the forensic toxicologist's opinion. This claim misinterprets the rules governing expert testimony. As a preliminary matter, the basis of this opinion are the data shown on the quantitation report—not the urine itself.<sup>101</sup> More to the point, MRE 703 does not require the underlying basis of the forensic toxicologist's opinion to be admitted into evidence.<sup>102</sup> A brief reference to MRE 703 should be sufficient to overcome such an objection.

### *Evidence of Crimes, Wrongs, or Other Acts*

Circumstantial evidence is often useful to prove knowing and wrongful use. However, practitioners should be cautious

in offering evidence of crimes, wrongs, or other acts. Such evidence may be admissible under MRE 404(b) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>103</sup> Counsel offering such evidence must articulate how the proffered evidence actually proves one of these allowable purposes. For example, evidence that the accused consumed a \$50 "detoxification drink" that she received from her brother who was a drug dealer may show knowledge and "consciousness of guilt[.]"<sup>104</sup> Practitioners who cannot clearly articulate an allowable purpose under MRE 404(b) risk introducing impermissible propensity evidence.<sup>105</sup>

Evidence of prior drug use is particularly difficult to offer for an appropriate purpose. For example, evidence that a summary court-martial previously convicted the accused of using the same substance is likely inadmissible without a more substantial connection to the accused's design, intent, absence of mistake, or claim of innocent ingestion. Put differently, a "fact finder may not infer that, because the [accused] had used drugs on another occasion, he is guilty of the charged offense."<sup>106</sup> Evidence "offered to prove a fact by means of a design or pattern must be 'significantly similar' to the charged act."<sup>107</sup> Counsel considering offering evidence of other drug use under MRE 404(b) must be able to show *considerable* similarity between any underlying facts, including time, place, method of ingestion, presence of other persons, and reason—if any—for ingesting the prohibited substance.

Should the military judge exclude evidence of the accused's prior drug use offered under MRE 404(b), trial counsel may consider using such evidence to cross-examine a defense witness who testifies about a pertinent character trait of the accused. Impeachment of a defense witness with specific instances of the accused's conduct under MRE 405(a) is distinct from evidence offered by the Government under MRE 404(b).<sup>108</sup> As an example, a defense witness who testifies that the accused has a character trait for sobriety or law abiding behavior may open the door to inquiry about the accused's prior drug use.<sup>109</sup> Defense counsel are unlikely to intentionally elicit such testimony during direct-examination of

defense witnesses, but a talkative defense witness may nevertheless open the door to cross-examination about the accused's prior drug use. For panel cases, practitioners who anticipate impeachment using the accused's prior drug use should request an Article 39a, UCMJ, session outside the presence of the members.

### Exclusion of Evidence

Diligent trial counsel and well-prepared witnesses should have little difficulty in establishing the admissibility of the DD Form 2624, GC/MS quantitation report, and urine specimen. However, exclusion of one or more of these pieces of evidence should not preclude an otherwise appropriately offered expert opinion "(1) that the [substance or] metabolite is not naturally produced by the body [and is not] any substance other than the drug in question; (2) that the cutoff level and reported concentration are high enough to reasonably discount the possibility of unknowing ingestion and to indicate a reasonable likelihood that the user at some time would have experienced the physical and psychological effects of the drug, and (3) that the testing methodology reliably detected the presence and reliably quantified the concentration of the drug or metabolite in the sample."<sup>10</sup> Indeed, MRE 703 states that underlying facts "need not be admissible for the opinion to be admitted."<sup>11</sup> Nevertheless, if the military judge excludes the DD Form 2624, GC/MS quantitation report, or urine specimen, trial counsel should take special care to elicit detailed testimony about the information found on the excluded evidence in an effort to connect the forensic toxicologist's opinion to the urine provided by the accused.

### Conclusion

Prosecuting a violation of Article 112a, UCMJ, for wrongful use of a controlled substance can be a highly technical endeavor requiring substantial study and preparation. This article may guide pretrial preparation, but practitioners must actually develop a trial plan specific to the unique facts of their case. Counsel must accordingly work with the UPL, forensic toxicologist, and other witnesses to understand relevant administrative procedures and scientific methods. Practitioners must also

thoroughly understand applicable hearsay exceptions to clearly articulate theories of admissibility for the documentary evidence they seek to admit. Trial counsel with a well-developed trial plan will place the fact finder in the best position to consider all relevant evidence and to reach a verdict clearly warranted by that evidence. **TAL**

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### Notes

- 10 U.S.C. § 912a (2018).
- 541 U.S. 36 (2004).
- U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHMARK para. 3a-36-2 (electronic version 2.8.1) [hereinafter BENCHMARK].
- 10 U.S.C. § 912a(b)(2).
- BENCHMARK, *supra* note 3, para. 3a-36a-2.
- "[L]aboratory results of urinalysis coupled with expert testimony explaining them constituted sufficient evidence" to support a finding of wrongful use of marijuana. *United States v. Harper*, 22 M.J. 157, 159 (C.M.A. 1986).
- In this context, a metabolite is a chemical compound "produced only by the body's reaction or chemical breakdown" of a controlled substance. *Id.* at 161.
- Id.* at 159.
- "[W]here scientific evidence is relied upon to prove the use of marijuana, the Government may not presume that the judge or members are experts capable of interpreting such evidence." *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987).
- Harper*, 22 M.J. at 162.
- See *infra* *Identifying the Controlled Substance* for a list of substances named in Article 112a, UCMJ.
- 21 U.S.C. § 812 (2018).
- 10 U.S.C. § 912a(b)(2) (2018).
- See 21 U.S.C. § 812 (2018) and accompanying schedules under 21 C.F.R. §§ 1308.11 et. seq.
- MANUAL FOR COURTS-MARTIAL, UNITED STATES A23-12 (2016) (Article 112a analysis). The drafters commented that "most commanders and some legal offices do not have ready access" to the "controlled substances list as modified by the Attorney General in the Code of Federal Regulations[.]" *Id.* This anachronistic comment is unlikely to excuse improper identification of a prohibited substance.
- 10 U.S.C. § 912a(b)(1).
- A sample specification under the first clause for marijuana reads as follows: "In that PFC John Doe, did, at or near Fort Location, between on or about 1 January 2019 and 6 January 2019, wrongfully use marijuana."
- See *infra* *The Expert in Forensic Chemistry*, for a detailed discussion about eliciting such an expert opinion.

19. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 50.c.(1) (2019) [hereinafter 2019 MCM].

20. An example of a specification under the second clause for phenobarbital may read as follows: "In that PFC John Doe, did, at or near Fort Location, between on or about 1 January 2019 and 6 January 2019, wrongfully use phenobarbital, a controlled substance."

21. *United States v. Bradley*, 68 M.J. 556 (A. Ct. Crim. App. 2009).

22. An example of a specification under the third clause for 3,4-Methylenedioxyamphetamine (commonly known as ecstasy or MDMA) may read as follows: "In that PFC John Doe, did, at or near Fort Location, between on or about 1 January 2019 and 6 January 2019 wrongfully use 3,4-Methylenedioxyamphetamine, a Schedule I controlled substance."

23. *Bradley*, 68 M.J. at 557 ("the government must either introduce evidence that the purported substance is listed in 21 U.S.C. § 812 . . . or request the trial court take judicial notice of that fact"). While judicial notice is the most reliable way to introduce such evidence, the forensic toxicologist may testify that the substance in question is a controlled substance under an applicable schedule of the Controlled Substance Act.

24. Counsel should use an official copy of the Act as published through the U.S. Government Publishing Office on <https://www.govinfo.gov/>.

25. See BENCHMARK, *supra* note 3, para. 3a-36a-2, n.7.

26. See *Bradley*, 68 M.J. at 557.

27. U.S. DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 4-2b (28 Nov. 2016) [hereinafter AR 600-85] (the Army Drug Testing Program "is a battalion commander's program normally executed at the company level").

28. *Id.* para. 4-5a.

29. As an example, a command policy requiring the testing of all Soldiers returning from lengthy periods of leave. See AR 600-85, *supra* note 27, para. 4-5a(2).

30. AR 600-85, *supra* note 27.

31. For example, a probable cause test may be appropriate where the accused "appeared abnormally agitated and related a bizarre story about some 'guys trying to kill him,' and that he had been 'digging for diamonds' in his neighbor's yard." *United States v. Harris*, 65 M.J. 594, 596 (N-M Ct. Crim. App. 2007).

32. ARMY CENTER FOR SUBSTANCE ABUSE PROGRAM, UNIT PREVENTION LEADER HANDBOOK VERSION 3 (Dec. 16, 2009).

33. U.S. Dep't of Def., Form 2624, Specimen Custody Document-Drug Testing (Nov. 2014) [hereinafter DD Form 2624].

34. See AR 600-85, *supra* note 27, para. 9-6a (complete list of qualifications).

35. AR 600-85, *supra* note 27, Appendix E.

36. Supplies for testing include "(1) The DOD prescribed urine specimen bottles with boxes. (2) Optional wide mouth collection cup. (3) Tamper evident tape. (4) Specimen bottle labels. (5) Unit ledger [also called a testing register or ledger]. (6) DD Forms 2624. (7) Disposable rubber gloves. (8) Disinfectant for disinfecting specimen collection area. (9) Absorbent pads, blue ink pens, black ink pens, and AAA-162 (unit personnel accountability report)." AR 600-85, *supra* note 27, para E-4 (emphasis removed).

37. *Id.* para. 4-9d (1).



38. *Id.* para. 4-9d (2).

39. *Id.* para. E-5w.

40. See BENCHBOOK, *supra* note 3, para. 3a-36a-2, n.8 (“Military judges, however, should exclude drug test results if there has been a substantial violation of regulations intended to assure reliability of the testing procedures.”). See also *United States v. Strozier*, 31 MJ 283 (C.M.A. 1990).

41. See *id.* (requiring the following instruction for “technical” deviations from governing regulations which establish procedures for collecting, transmitting, or testing urine samples”: “Evidence has been introduced that the government did not strictly comply with all aspects of (Army Regulation 600-85) (\_\_\_\_\_) governing how urine samples are to be (collected) (transmitted) (and) (tested). In order to convict the accused, the evidence must establish the urine sample originated from the accused and tested positive for the presence of (\_\_\_\_\_) without adulteration by any intervening agent or cause. Deviations from governing regulations, or any other discrepancy in the processing or handling of the accused’s urine sample, may be considered by you in determining if the evidence is sufficiently reliable to establish that the accused used a controlled substance beyond a reasonable doubt.”).

42. See AR 600-85, *supra* note 27, para. E-6f.

43. See *supra* note 36.

44. See *United States v. Gonzalez*, 37 M.J. 456 (C.M.A. 1993) (chain of custody is not “broken” despite a witness’s inability to recall details of urinalysis).

45. Habit evidence is behavior that is “regular, consistent, and specific” performed with “invariable regularity” and is “admissible to show that an individual’s conduct on a specific occasion was consistent with his conduct on past occasions.” 1 STEPHEN A. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* § 406.02 (7th ed. 2011).

46. The Military Judges’ Benchbook does not contain a sample instruction for habit evidence. A sample special instruction requested under Rule for Court-Martial (RCM) 920(c) should read as follows: “Evidence has been introduced that (UPL’s name) routinely (insert evidence of routine). Evidence of a person’s habit or an organization’s routine practice may be considered to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.”

47. 2019 MCM, *supra* note 19, Mil. R. Evid. 901(b) (1) (testimony from a witness with knowledge “that an item is what it is claimed to be” is evidence that satisfies the authentication requirement).

48. See *infra Chain of Custody Documentation* for further discussion of admitting chain of custody documentation.

49. See 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6).

50. AR 600-85, *supra* note 27, para. 1-7a.

51. See *infra Chain of Custody Documentation* for further discussion regarding testimonial hearsay.

52. See BENCHBOOK, *supra* note 3, para. 7-20 (“The ‘chain of custody’ of an exhibit is simply the path taken by the sample from the time it is given until it is tested in the laboratory. In making your decision in this case you must be satisfied beyond a reasonable doubt that the sample tested was the accused’s, and that it was not tampered with or contaminated in any significant respect before it was tested and analyzed in the

laboratory. You are also advised that the government is not required to maintain or show a perfect chain of custody. Minor administrative discrepancies do not necessarily destroy the chain of custody.”).

53. AR 600-85, *supra* note 27, para. 4-13b.

54. See *id.* para. E-10 (allowing for only one door to a specimen storage room, requiring windows to be “covered with steel or iron bars or steel mesh”).

55. *Id.* para. 4-13f.

56. 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6).

57. See, e.g., *United States v. Console*, 13 F.3d 641, 657 (3d Cir. 1993) (“the term ‘other qualified witness’ should be construed broadly, and that a qualified witness need not be an employee of the record-keeping entity so long as he understands the system”) (internal citations and quotations omitted); *United States v. Ramer*, 883 F.3d 659 (6th Cir. 2018) (a government investigator was a qualified witness for purposes of a hearsay exception for bank records).

58. See AR 600-85, *supra* note 27, para. E-7c (“Each change of custody must be annotated at the time of the occurrence.”).

59. *United States v. Blazier (Blazier I)*, 68 M.J. 439, 442 (C.A.A.F. 2010).

60. *United States v. Tearman*, 72 M.J. 54, 59-61 (C.A.A.F. 2013). See also *Bullcoming v. New Mexico*, 564 U.S. 647, 659 (2011) (“To rank as ‘testimonial,’ a statement must have a ‘primary purpose’ of ‘establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution.”) (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

61. AR 600-85, *supra* note 27, para. 4-5a.

62. See *Tearman*, 72 M.J. at 59-61. The prohibition against testimonial hearsay normally excludes “formal, affidavit-like” documents obviously created for accusatory purposes. *United States v. Sweeney*, 70 M.J. 296, 299 (C.A.A.F. 2011).

63. Under AR 600-85 paragraph 4-9a, UPLs and observers “must be prepared to testify about their actions in court[.]” AR 600-85, *supra* note 27, para. 4-9a. This statement does not relate specifically to the primary purpose of the DD Form 2624 or to the aims of the drug-testing program in general. Army Regulation 600-85, chapter 4, identifies manifold purposes for the drug-testing program, including maintaining Army values, health and welfare, safety, and readiness. *Id.* ch. 4.

64. See *United States v. Campbell*, 50 M.J. 155, 160 (C.A.A.F. 1997).

65. Counsel should learn whether the witness authored any articles or studies published in a journal that is not subject to peer review. While such publications may support qualification of the witness as an expert, peer review more clearly demonstrates the publication’s degree of acceptance within the scientific community. Non-peer reviewed publications pose greater risk of containing material that is not generally accepted within the scientific community. Opposing counsel are accordingly less likely to successfully use peer-reviewed publication to challenge the witness’s qualification as an expert or to undermine the expert witness’s credibility on cross-examination.

66. Out-of-court statements offered for the truth of the matter asserted are hearsay and, as such, are generally inadmissible. 2019 MCM, *supra* note 19, Mil. R. Evid. 801(c), 802. The curriculum vitae is a document (i.e., a statement) made out of court and offered to prove the

matters contained therein (i.e., the witness’s education and qualifications). The exceptions to the rule against hearsay under Military Rule of Evidence (MRE) 803 are not likely to apply.

67. Under MRE 104(a), the “military judge is not bound by evidence rules” in deciding “any preliminary question about whether a witness is available or qualified, a privilege exists, a continuance should be granted, or evidence is admissible.” 2019 MCM, *supra* note 19, Mil. R. Evid. 104(a). While the military judge may consider such inadmissible evidence in deciding a witness’s qualifications, MRE 104 is not an independent theory of admissibility. *Id.*

68. The forensic toxicologist is not likely to have observed receipt and processing of the accused’s urine specimen. The forensic toxicologist may nevertheless testify about the laboratory’s standard procedure. See *infra Practice Point: Certifying Scientists* for discussion regarding the testimony of an expert that did not personally test the accused’s urine specimen.

69. U.S. DEP’T OF DEF., INSTR. 1010.16, TECHNICAL PROCEDURES FOR THE MILITARY PERSONNEL DRUG ABUSE TESTING PROGRAM enclosure 4, para. 8 (27 Feb. 2017) [hereinafter DoDI 1010.16]. As discussed in the introductory paragraph, this article focuses on testing by DoD drug-testing centers. Tests conducted by non-DoD drug-testing laboratories may or may not involve similar intake and testing procedures. For such tests, practitioners should make a pointed effort to seek the forensic toxicologist’s assistance in becoming familiar with the intake and testing procedures in place at a non-DoD drug-testing laboratory. Trial counsel should also consider asking a DoD forensic toxicologist to review non-DoD test results and highlight any areas of concern.

70. DoDI 1010.16, *supra* note 69, Glossary. Discrepancy codes are established by the Director of DoD Drug Testing Policy and Programs. *Id.* para. 8.a. A list of discrepancy codes is not publically available, but counsel may request the list from a FTDTL forensic toxicologist.

71. 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6).

72. See *supra* note 53.

73. In order to avoid a relevance objection, consider redacting any personally identifiable information for other urine specimens documented on the DD Form 2624 or marking a separate redacted copy as a backup exhibit.

74. The FTDTL retains urine specimens for one year, but trial counsel may request retention of specimens past one year. Use of the actual urine specimen during the government’s case-in-chief is generally unnecessary, so trial counsel should request retention past one year only upon defense request or where particular necessity requires retention. Destruction of a urine specimen in accordance with established procedures is appropriate where the specimen has no “apparently exculpatory” value and the defense did not request preservation. See generally *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986) (finding no prejudice in the destruction of evidence with no “apparently exculpatory” value, but suggesting that “the better practice is to inform the accused when testing may consume the only available samples”).

75. Immunoassay (IA) testing involves principles that are beyond the understanding of laypersons and in-depth testimony may bore or confuse the fact finder. For discussion of the scientific principles involved in

IA testing, see Captain David E. Fitzkee, *Prosecuting a Urinalysis Case: A Primer*, ARMY LAW., Sept. 1988, at 13.

76. This article references gas chromatography mass spectrometry (GC/MS) testing only. The FTDTL may also perform liquid chromatography tandem mass spectrometry (LC/MS/MS) as a confirmatory test. Although LC/MS/MS testing and GC/MS testing use distinct scientific principles to detect substances, the forensic toxicologist should not testify in detail about those principles. While this section should apply to other types of confirmatory testing without substantial change, counsel should consult with the forensic toxicologist to account for significant facts specific to that type of testing.

77. The chemical standard is a verified sample of the controlled substance in question.

78. To authenticate evidence, the witness need only provide "sufficient evidence" that the "item is what it is claimed to be." 2019 MCM, *supra* note 19, Mil. R. Evid. 901(b)(1).

79. Military Rule of Evidence 803(6)(E) exempts "forensic laboratory reports" from the rule against hearsay. 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6)(E). Further, the LAN should not be considered a testimonial statement where created for purposes of "internal control, not to create evidence[.]" United States v. Tearman, 72 M.J. 54, 59 (C.A.A.F. 2013).

80. See 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6). See also *Tearman*, 72 M.J. at 59 (holding that chain of custody information is not testimonial where created for purposes of "internal control, not to create evidence").

81. Trial counsel may attempt to characterize these markings as business records. However, the military judge will likely consider such a characterization a "conduit" for the testimonial statements of another." United States v. Katso, 74 M.J. 273, 275 (C.A.A.F. 2015) (quoting United States v. Blazier (*Blazier II*), 69 M.J. 218, 225 (C.A.A.F. 2010)). Nevertheless, trial counsel should prepare a separate copy of the quantitation report with the markings redacted in the event the military judge sustains the defense objection. Counsel should have the court reporter mark this redacted quantitation report as a prosecution exhibit before trial begins.

82. Courtrooms differ widely in projection equipment. Trial counsel should verify the functionality of projection equipment once before trial and again immediately before the forensic toxicologist testifies. Counsel may also print copies of the quantitation report for distribution to panel members to reference during the forensic toxicologist's testimony.

83. See generally 2019 MCM, *supra* note 19, Mil. R. Evid. 702. The forensic toxicologist will use their scientific knowledge to explain use of reliable methods to test the accused's urine.

84. United States v. Campbell, 52 M.J. 386, 388 (C.A.A.F. 2000) (internal citations and quotations omitted).

85. Avoid using the term "surrogate expert." A surrogate expert is generally one who did not observe or review the tests in question and may not testify about what the forensic toxicologist who actually performed the tests "knew or observed about the events his certification concerned." Bullcoming v. New Mexico, 564 U.S. 647, 661 (2011).

86. *Katso*, 74 M.J. at 282 (quoting *Blazier II*, 69 M.J. at 226).

87. 2019 MCM, *supra* note 19, Mil. R. Evid. 901(b)(9).

88. 2019 MCM, *supra* note 19, Mil. R. Evid. 901(b)(1).

89. *Katso*, 74 M.J. 273.

90. Markings that certify or approve testing methods and results may be testimonial hearsay. See United States v. Sweeney, 70 M.J. 296, 299, 304 (C.A.A.F. 2011).

91. United States v. Campbell, 52 M.J. 386, 388 (C.A.A.F. 2000).

92. The FTDTL only reports positive results for specimens with a concentration of a prohibited substance equal to or above the cutoff concentration. A specimen with a concentration below the cutoff concentration is considered a negative result. As an example, a urine specimen with a concentration of 90 ng/mL will report as negative because the cutoff concentration for d-amphetamine is 100 ng/mL. DoDI 1010.16, *supra* note 69, tbl. 2.

93. The timing of peak concentration depends on method of ingestion and numerous physiological factors. Considering the variability of these factors, forensic toxicologists are generally unable to estimate time of ingestion or timing of peak concentration.

94. *Campbell*, 52 M.J. at 388.

95. "The combination of Rules 702, 703, and 705 enables counsel to use the hypothetical question to assist in the presentation of understandable testimony and to emphasize and highlight such testimony." STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 702.02 (2018); but see United States v. Markis, No. 20070580, 2009 CCA LEXIS 299, at \*6-8 (A.C.C.A. Aug. 18, 2009) (affirming military judge's refusal to allow the expert witness to answer hypothetical questions calling for an opinion that the accused's "confessions were merely the product of his suggestibility, as this would 'usurp the exclusive function of the jury to weigh the evidence and determine credibility'").

96. The enlisted record brief/officer record brief may be authenticated with a self-proving affidavit generally issued by the U.S. Army Human Resources Command. 2019 MCM, *supra* note 19, Mil. R. Evid. 902(4a). Such affidavits generally contain language sufficient to satisfy the business records hearsay exception under MRE 803(6). 2019 MCM, *supra* note 19, Mil. R. Evid. 803(6).

97. Recall that the accused must initial the urine specimen bottle before providing a urine specimen. See *Preparing and Conducting the Urinalysis, supra*.

98. Testimony about the "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" is sufficient to authenticate that item of evidence. 2019 MCM, *supra* note 19, Mil. R. Evid. 901(b)(4).

99. See 2019 MCM, *supra* note 19, Mil. R. Evid. 801(d)(2)(B) (excluding from the rule against hearsay statements "the [opposing] party manifested that it adopted or believed to be true". This exclusion is commonly known as "statements by a party opponent.").

100. U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL, Rule 17.5 (1 Jan. 2009).

101. "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." 2019 MCM, *supra* note 19, Mil. R. Evid. 703. A forensic toxicologist cannot conclusively identify a substance without referencing data generated through scientific testing.

102. The facts relied on by an expert witness need not even be *admissible* in order to admit an opinion based on those facts. *Id.*

103. The list of allowable purposes under MRE 404(b) is not exhaustive and may include evidence that does not fit neatly under one of those purposes. United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989).

104. United States v. Pope, 69 M.J. 328, 331 (C.A.A.F. 2011).

105. Military appellate courts routinely reverse findings of guilt where trial counsel offer evidence of other drug use without a clearly permissible purpose. See, e.g., United States v. Cousins, 35 M.J. 70, 75 (C.A.A.F. 1992) (trial counsel inappropriately argued, "People who use methamphetamine are just as likely to use cocaine").

106. United States v. Williams, 37 M.J. 972, 975 (A.C.M.R. 1993); cf. United States v. Ross, 44 M.J. 534 (A.F. Ct. Crim. App. 1996) (finding no error with introducing prior conviction of accused for an "identical offense" of using marijuana to impeach the accused under MRE 609(a)(1)).

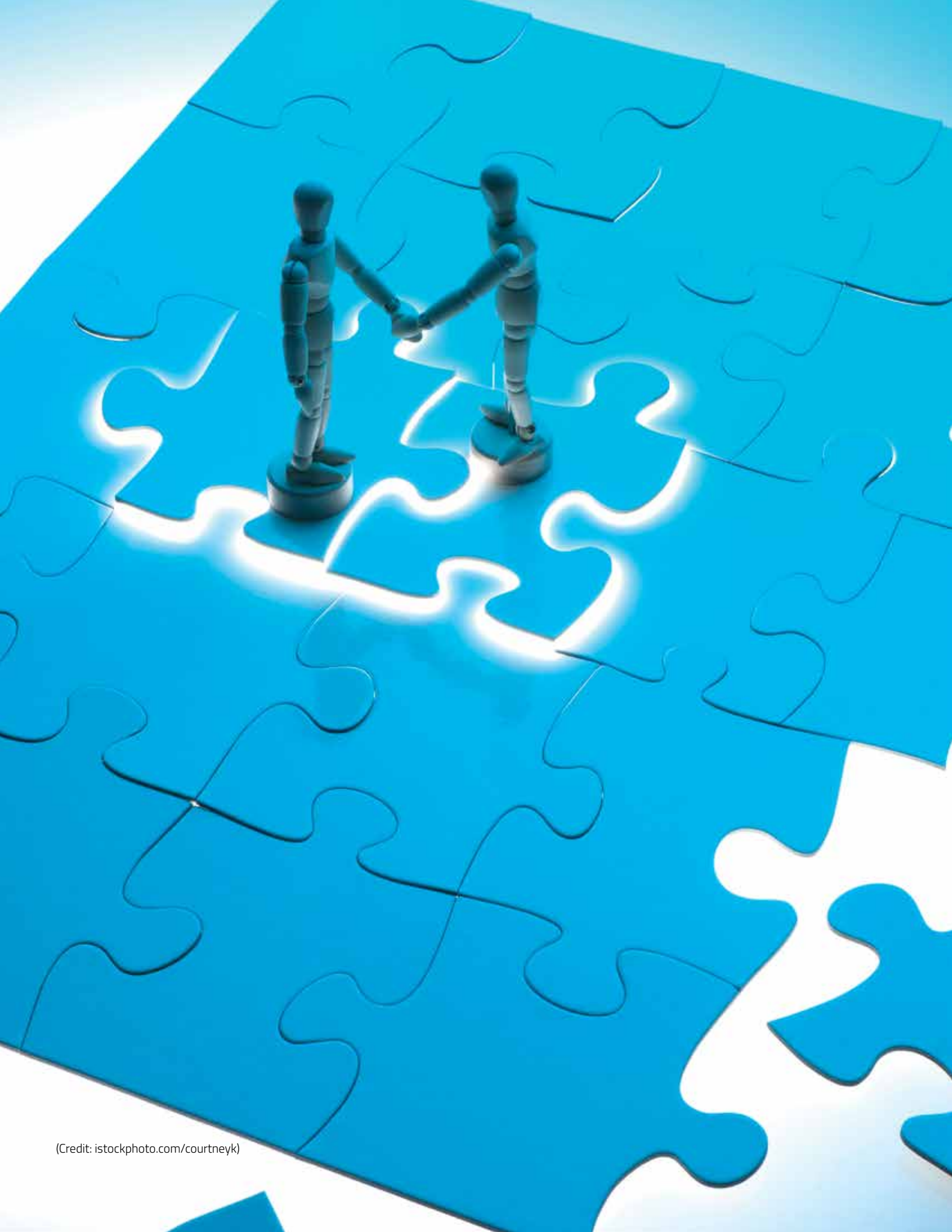
107. United States v. Williams, 39 M.J. 758, 760 (A. Ct. Crim. App. 1994).

108. Military Rule of Evidence 405(a) allows "inquiry into relevant specific instances of the person's conduct" during cross-examination of a character witness. 2019 MCM, *supra* note 19, Mil. R. Evid. 405(a).

109. "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson v. United States*, 335 U.S. 469, 479 (1948); see also *United States v. Johnson*, 46 M.J. 8 (1997).

110. United States v. Campbell, 52 M.J. 386, 388 (C.A.A.F. 2000).

111. 2019 MCM, *supra* note 19, Mil. R. Evid. 703.



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## No. 3

# The Section 809 Panel's Work

## Cuneo Lecture Highlights Efforts to Modernize Acquisition and Procurement Policies

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*On 8 November 2018, Lieutenant General (Retired) N. Ross Thompson came to The Judge Advocate General's Legal Center and School to give the Cuneo Lecture during the contract and fiscal law symposium. Below are his remarks.*

Thank you to The Judge Advocate General's Legal Center and School for inviting me to talk with you today and share some thoughts on the perennial topic of acquisition reform. I will take this opportunity to offer some advice as well, and what you do with that advice is entirely up to each one of you.

I want to recognize Lieutenant Colonel Alan Apple and Major Andy Bowne from the Contract and Fiscal Law Department for helping facilitate the logistics to make my visit here possible. Andy also helped the Section 809 Panel with some of its research by writing a paper on "other transaction authorities" that is going to be included in our volume 3 report.

Lieutenant Colonel Sam Kidd had a chance to talk with you yesterday, and I will do my best to not cover the same ground. It has been a pleasure to work with Sam as the general counsel for the 809 Panel. Sam is one of the extremely talented staff members supporting the 809 Panel, either full time or part time, on loan from one of the services or agencies, on loan from industry, or in some cases doing pro bono work to support the important work of the 809 Panel.

I will talk about three topics today: why is the work of the 809 Panel so important?; what are the criteria the 809 Panel uses to grade its work?; and what is the most important topic area, in my opinion, on which the Panel will make recommendations? I will

leave time at the end to answer questions on any of the 809 topics that may be of interest.

### **Why is the work of the Panel so important?**

Speed, innovation, defense industrial base expansion—all are critical to turn inside the decision cycle of our adversaries.

There is no denying that we are now in a period of great power competition. 1989-2014—twenty-five years of U.S. economic and military dominance, then Russia invades Crimea and Ukraine, China begins to assert territorial claims in the South China Sea, and cyberattacks begin to increase in frequency and consequence.

Given the turmoil in the international security environment, there are many big national security challenges. For example, competing with great powers while avoiding great-power war; deterring and responding to both old and new means of strategic attack—new cyberattacks daily; managing the continued destabilization, disintegration, and reintegration of the Greater Middle East at a lower, sustainable strategic cost; contending with nuclear-armed minor powers; restoring conventional overmatch—battle network/guided munitions with Russia, China, and other adversaries now having second offset capabilities that we dominated for twenty-five years; operating in newly or more hotly contested



Lieutenant General (Retired) N. Ross Thompson, speaks during the Cuneo lecture at TJAGLCS. (Credit: Jason Wilkerson/TJAGLCS)

operational domains—space, cyberspace, electromagnetic, near space (hypersonics, 100-320,000 feet); and preparing for and withstanding a looming technological tidal wave. As legal professionals, you must understand the basics of the technology to be effective advisors to the Department of Defense (DoD) leadership.

The world is in the midst of rapid, unprecedented technological change, to include: advanced computing (e.g., quantum, deep neural networks) leading to artificial intelligence (AI); AI and big data leading to machine learning; machine learning leading to increasingly capable autonomous systems and robots; AI/big data/machine learning and additive manufacturing leading to an AI-driven fourth industrial revolution; genomics and synthetic biology leading to advances both good and bad; and

nanotechnology, material sciences, and additive manufacturing leading to new means of production and sustainment.

This tidal wave will sweep away older ways of doing business and bring with it the prospect for new military-technical revolutions. Because most of these new technologies derive primarily from the commercial sector and are dual use, the competitive landscape will be much more level and dynamic than in the past. Given the breadth of these key national security challenges, the DoD must first and foremost improve its institutional resilience, flexibility, and adaptability. This is the why of the current period of acquisition reform. These challenges are both inter-related and complex, and they will present themselves in an equally complex security environment. The next twenty-five years will likely

be a time of unexpected events, unexpected technical developments, and fast followers. Operational and technological surprise is likely to be endemic, and operational advantage will likely be fleeting.

An important, if not the most important, aspect of this preparation is recruiting, training, and retaining the right talent. The competition for talent will be especially intense with the private sector, and even with our strategic competitors. This will be expensive. The DoD is suffering from a “triple whammy.” (1) DoD equipment is run-down after seventeen continuous years at war. (2) The Department is still recovering from the effects of sequestration and successive Balanced Budget Acts and dealing with nine straight years of continuing resolutions prior to this year, fiscal year (FY) 2019 (continuing resolutions are a topic you will see addressed in the 809 Panel Volume III report). (3) Operations and maintenance costs rise faster than the rate of inflation.

I was the Army programmer for two assignments as the deputy and the principal. Dollars count to make things happen. The programmatic response to these challenges are the need to: rebuild joint force readiness; recapitalize the nuclear triad (\$1.3-1.4 trillion); dominate cyberspace and the electromagnetic spectrum; prepare to fight and win in space, not just support from space; pursue advanced technologies, *especially AI and improved autonomy*; develop new operational concepts and organizational constructs—not just hardware and software, but the way we organize and deploy forces; and develop a lethal, agile, and resilient force posture and employment—smaller, dispersed, resilient, adaptive bases that are energy-independent.

Artificial intelligence and improved autonomy will likely see the greatest aggregate investment. Called out as a “key capability”: “the Department will invest broadly in military application of autonomy, artificial intelligence, and machine learning, including rapid application of commercial breakthroughs, to gain competitive military advantages.”<sup>1</sup> Our great power competitors recognize the importance of AI and improved autonomy and are striving for first mover advantage, especially China. The AI-autonomy race will define great power military competition much like the nuclear

race defined the Cold War. An op-ed in the *Washington Post* yesterday proposed the need for an AI czar.<sup>2</sup> Investments in advanced technologies will be in addition to modernization spending, which have been depressed since the Budget Control Act.

All of the programmatic investment should be focused on capability, not more capacity. We must focus on force quality before attempting increases in force quantity. Force structure is incredibly expensive, and there is an opportunity cost to having more force structure than you need.

### **What are the criteria the 809 Panel uses to grade its work?**

The Section 809 Panel has identified five essential attributes that should be inherent in tomorrow's outcome-based acquisition system.

#### ***Criteria #1: Competitive and Collaborative***

The number of companies competing for defense contracts is declining. Industry experts forecast that acquisitions and mergers in the defense market segment will continue and exacerbate the decline in competition. A report by the Center for Strategic and International Studies that was released in January 2018 indicated a substantial decline has occurred in the number of "first-tier prime vendors" between 2011 and 2015. The number of small businesses registered to do business with the federal government fell by more than 100,000 companies, and the number of DoD contract actions for small business decreased by approximately 70% from FY 2011 to FY 2014.

The traditional defense industrial base is dramatically changing shape. Consequently, the DoD must be able to operate in a dynamic marketplace in which it wields less influence. The Section 809 Panel's research has shown that companies for which the DoD is not a primary customer either struggle to understand the DoD's acquisition system or decide not to conform to its transaction rules. These companies are often unwilling to engage in time-consuming, tedious, competitive processes, and they do not plan their transactional calculus around meeting extraneous and irrelevant contractual requirements. In extreme cases,

delays in the award of contracts caused by prolonged process requirements have put some companies out of business—a problem especially acute among small businesses and technology innovators. The DoD's current approach to administering competition by predetermining a set of defined specifications and requirements is too slow and limits opportunities for new entrants into the defense marketplace.

The range of potential solutions available to the DoD to solve its warfighting challenges is artificially constrained by a rigid requirements process. The nation's adversaries are not spending years "studying analysis of alternatives," but are focusing on quickly fielding new capabilities and solutions to their own operational and strategic challenges. The Section 809 Panel will recommend ways to modify competitive procedures, irrespective of the acquisition dollar value, by recognizing that competition takes place in certain market segments. An *open market* adaptation to the current forms of acceptable DoD competitive processes could preclude any need for further competition. Ideally, a reconfigured competition model could integrate more use of value analysis (such as valuing the cost avoided due to the DoD not having to develop a capability itself), to assess price reasonableness at the transactional level.

Changing the DoD's competitive procedures to compete solutions to problems, rather than assess a company's ability to meet detailed technical specifications, is an avenue for systemic change. Using such an approach, the DoD could give warfighters greater input into the process by leveraging their first-hand experience to articulate problems and select the best solutions put forth by industry. Changing the character of competition in such a way could shift the DoD away from spending extensive time defining and validating requirements, to using more challenge-based competitions or taking advantage of available market solutions to quickly develop and field new capabilities.

The DoD's current approach to acquisition does not foster meaningful collaboration with the private sector or within the DoD itself. The DoD's acquisition workforce fears that communication with industry may result in punishment.

This concern undermines the DoD's ability to work with industry as a true partner. An inability or unwillingness to collaborate with industry results in the DoD lacking awareness of the full range of available potential solutions; creates barriers for nontraditional contractors to enter the defense marketplace; and results in the DoD acquiring suboptimal products, services, and solutions. The DoD must foster collaborative partnerships across the entire marketplace to accomplish its mission today and in the future.

#### ***Criteria #2: Adaptive and Responsive***

This shift has already begun in a major way, using a variety of waivers and tailored processes; for example, by tailoring DoD Instruction 5000.02,<sup>3</sup> middle tier acquisition authorities, and use of other transaction authorities. Program success that relies on intervention by the DoD's most senior leadership is not scalable to the majority of DoD acquisitions. Acquisition by exception is neither a scalable nor a cost-effective model, and when the process does not take full advantage of the marketplace, it is still neither fully adaptive nor responsive. To demonstrate adaptability and responsiveness, the DoD needs to create an organization that is malleable and at times decentralized. Leaders and the workforce as a whole must be empowered and trusted to make quick decisions; policies and procedures must constantly evolve; and truly cross-functional teams must be incentivized to solve problems collaboratively without coming to the Pentagon to make every big decision.

The Section 809 Panel recommends building similar models to those with demonstrated success in the DoD, such as SOFWERX and Hacking for Defense, to scale such approaches across DoD's acquisition system. This is a major focus for all the Service Acquisition Executives today.

#### ***Criteria #3: Transparent***

Transparency in DoD acquisition is essential to promoting competition and collaboration, as well as ensuring the trust of the American people. In the context of acquisition, transparency has entwined meanings—one being visibility of relevant information to buyers and sellers in the marketplace about requirements and



transactional outcomes, and the other being access to accurate data necessary for proper oversight. The DoD struggles to create an environment in which transparency in acquisition for either purpose is valued as a critical element of success. The U.S. military is one of the most trusted institutions in the United States today. It is imperative that tomorrow's defense acquisition system maximizes transparency to bolster and maintain that trust. The 809 Panel has some important recommendations on data analysis and data architecture.

#### **Criteria #4: Time Sensitive**

Time has to become a more valued attribute of the acquisition life cycle. Anecdotes and data abound about the excessive lead time experienced for delivering products and services to the warfighter; the slow processes drive business and healthy market competition away from the DoD. The prolonged length of an acquisition by the DoD indicates the existence of two problematic issues: a workforce culture beholden to process over mission and a system that lacks incentives to quantify lost opportunity and manpower costs. The current DoD acquisition workforce culture emphasizes and rewards process-driven behavior for which time becomes of secondary or tertiary value, yet there is little in the acquisition literature to prove that valuing time means sacrificing regulation or safeguards. Valuing time comprises balancing speed with the due diligence appropriate for a given acquisition.

#### **Criteria #5: Allows for Trade-Offs**

Allowing for trade-offs gives the DoD the flexibility required to obtain optimal results. It is not always feasible to implement any or all of the above attributes simultaneously. When urgency requires immediate delivery, for example, the DoD may be willing to forgo competition altogether. Allowing for trade-offs empowers informed decision-making during any given acquisition.

### **What is the most important topic area on which the Panel will make recommendations?**

The answer is, of course, the acquisition workforce! As I already mentioned, the way the DoD buys what it needs to equip its warfighters is from another era, one in

which the global strategic landscape was entirely different.

Congress charged the 809 Panel with reshaping the DoD acquisition system into one that is bold, simple, and effective. This requires more than rule changes. The Panel's existing reports to Congress identified the DoD acquisition workforce as a pivotal factor in the success of acquisition reform. "The ultimate effectiveness and efficiency of defense acquisition depends on, and is determined by, the people who are responsible for all phases of acquisition."<sup>4</sup> Accordingly, the Panel concluded it should address the workforce in its analysis and recommendations. United States national security relies on harnessing the efforts of "the innovative and the inventive, the brilliant and the bold"<sup>5</sup> in the service of the nation.

The Panel issued three overarching recommendations in its June 2018 Volume 2 report to Congress for improving the management of the DoD acquisition workforce: (1) amend the framework of hiring authorities to maximize hiring flexibility for critical skill gaps, (2) convert a temporary personnel system (Acquisition Demo) to a permanent, mandatory system for all of the acquisition workforce, and (3) ensure the Defense Acquisition Workforce Development Fund is properly funded and managed in order to guarantee its benefits for the acquisition workforce indefinitely.<sup>6</sup> These recommendations intend to ensure that the DoD will possess the tools and the resources necessary to continuously improve its acquisition workforce. But tools and resources alone aren't enough to guarantee acquisition workforce members' success.

The Panel's outreach to stakeholders in the DoD and the private sector confirmed that career development needed to be a focus of its recommendations. In their eyes, a reshaped future acquisition workforce would likely consist of an open career development model that could include experience in both the government and the private sector. They also agreed that if the DoD is to achieve its ambitions for the acquisition workforce, it will need to prepare and develop its workforce members differently. The question was *how*?

How should the DoD develop its acquisition workforce (AWF) from the time

an AWF member enters the workforce until he or she separates or retires? What occupational qualifications and competency measures should the DoD implement for each member to facilitate his or her career progression and development? How do AWF members know what skills they need, and what key work experiences they should pursue to meet their goals? Do AWF members possess enough specific domain knowledge (i.e., specialized discipline) and concrete experience to fulfill their responsibilities properly? Is the DoD identifying, cultivating, and elevating the AWF member with the most talent and the greatest potential? Do those members enjoy a perspective that is broad enough to interact with the private sector successfully? How can the DoD guarantee that AWF members' skills and development needs are evaluated based upon measurable competencies and not just on academic course participation and time in a position?

Volume 3 recommendations in January 2019 focus precisely on these types of workforce development issues. The Panel proposes changes to the DoD's career development framework for AWF members around three crucial aspects of career development: professional certifications, functional area career paths and competencies, and public-private exchange programs.

#### **Professional Certifications**

The current three-level certification system, established in response to the Defense Acquisition Workforce Improvement Act (DAWIA), has been a central feature in the professionalization of the DoD AWF over the past three decades. Today, most AWF members have four-year college degrees and meet minimum time requirements in an "acquisition-related position" for their career fields. However, DAWIA implementation falls short by not linking certification levels to occupational qualifications that AWF members can demonstrate on the job. The Panel recommends that the DoD modernize the certification process to emphasize professional skills that are transferable across the government and industry by relying more on professional certifications and by focusing on a defined set of occupational qualifications connected to positions.



(Credit: istockphoto.com/eternalcreative)

Specifically, the Panel recommends amending the DAWIA to require professional certifications based on nationally or internationally recognized standards as the baseline, where possible. This will allow both the DoD and industry to adopt a common body of knowledge, improve communication and collaboration between the two, increase the applicant pool, and further raise the professionalism of the AWF.

Some examples of professional certification programs using the American National Standards Institute (ANSI) procedures are:

1. The National Contract Management Association (NCMA) is currently carrying the NCMA Contract Management Standard through the ANSI-approved standards process. The ANSI Accredited Standards Developer designation enables NCMA to advance the contract management profession by accrediting standards and certification programs.
2. The Project Management Institute Project Management Professional Certification scheme is accredited by the ANSI against the International Organization for Standardization (ISO) 17024. The ISO 17024 standard includes vigorous requirements for examination development and maintenance and for the quality management systems for continuing quality assurance.
3. The National Society of Professional Engineers licensure and qualification program is third-party-accredited by the Accreditation Board for Engineering and Technology, Inc.

The Panel also recommends eliminating the statutory mandate for twenty-four hours of business credit for contracting and auditing AWF members. Since most AWF members now have four-year degrees, the Panel believes it is no longer necessary to mandate specific disciplines' education requirements in law, and the DoD should have latitude to hire candidates with other

degrees, like data analytics. In fact, specific credit requirements may hinder hiring managers' ability to choose the right person for a job.

#### ***Functional Area Career Paths and Competencies***

Department of Defense AWF members can spend their entire careers without the benefit of a comprehensive functional area career path to guide their career development. The Panel recommends the DoD create career paths in each functional area that would include technical competencies, key work experiences, leadership, and other "soft skills," in addition to education and training. Doing so will provide guidance for AWF members and their supervisors so they can become proactive stewards of their careers. Career paths would provide members and their supervisor's guidance to help determine what each member needs to be successful in their careers. Career paths not only illustrate career possibilities to members, they are also necessary to ensure



(Credit: istockphoto.com/EtiAmmos)

that qualified members are available to fill positions that require particular qualifications to accomplish a unit's mission. An illustrative long-range career path would include jobs of increasing complexity, responsibility, accountability, management, and leadership opportunities. They describe the occupational qualifications (i.e., education, training, and competencies) and key work experiences<sup>7</sup> required to advance. Career advancement does not mean "race to the top;" rather, it's growing skills to enhance mission success and fulfill the members' aspirations.

The Panel recommends changes in statute and guidance to require competency models with proficiency standards that include technical and non-technical skills for the AWF. Task competencies are methods for a member to demonstrate individual tasks or task elements specific to the member's current position to qualify the member in "an observable, measurable pattern of knowledge, abilities, skills, and

other characteristics that individuals need to perform work roles or occupational functions successfully."<sup>8</sup> Task competencies assist the member's development by using specific mission-related tasks and requiring supervisor feedback in order to identify any training gaps. Each AWF member should be observed by a more senior acquisition professional for each task competency using a proficiency standard at each stage in their career. Competencies may be gained through education, training, or experience. Proficiency standards are distinct formal descriptions of levels of expertise within a competency that describe the member's ability to execute a task successfully and are used as an occupational qualification measure. Consider the analogy of aircraft pilots. New cadet-pilots are gradually introduced to increasingly complex skills under the guidance of instructor pilots (IPs). The IP must observe the cadet successfully perform a skill or maneuver to specific standards before certifying that the cadet can move on

to learn new skills. Only when the cadet has demonstrated to the IP that they can handle the aircraft without supervision are they allowed to solo.

When veteran pilots move to a different aircraft, or return to flying after an extended period away, they go through the same process. Although they may not have to recertify on basic flight principles, they have to demonstrate to a flight examiner who is experienced and current in the particular aircraft that they are qualified to fly that type of aircraft safely. Similarly, members should demonstrate task competencies at the required proficiency standard for a particular job to a more senior AWF member who is qualified and experienced in those skills in order to be considered qualified to perform duties requiring those skills.

Competency models with proficiency standards will not only help AWF members manage their professional development better, they will permit employers to better match candidates to jobs. Proficiency



standards would show how a member actually demonstrates the job tasks, and to what level of proficiency, rather than just cataloging how many years a member has held an acquisition position. By knowing what proficiency is expected of them in the future, the member and their supervisors can plan how to fulfill their development needs when creating their individual development plans. At the military department/DoD agency or unit level,<sup>9</sup> hiring activities would have a method to effectively qualify a member using a set of competencies, so they can effectively determine the person's "fit" for the next job. Competencies should be vested in individuals and individuals should be matched to missions, instead of having static occupations define both.

### **Public-Private Exchange Programs**

The relationship between the acquisition workforce in the DoD and its counterpart in the private sector is a critical element in the success of the defense acquisition system. It is important that the DoD AWF members and private sector AWF members understand each other's processes, attitudes, and objectives. Public-private exchange programs (PPEPs) are a valuable tool for the DoD to utilize in order to foster such understanding. If implemented properly, PPEPs can form a cornerstone of the DoD's efforts to engage with the private sector. However, the DoD has struggled to successfully develop a broad-based, two-way PPEP that would involve all functional disciplines in the AWF.

The problem is not political. There is widespread support among DoD officials and Congress for PPEPs. However, the DoD has been unable to create a broad-based two-way exchange program despite its genuine desire to do so.

For example, the Office of the Secretary of Defense (OSD) manages a Title 5 exchange program called Training with Industry, the Army also has a Training with Industry program, and the Air Force has an Education with Industry program. While these programs have achieved some success in placing DoD AWF members in industry, none of these programs provide a two-way exchange, and because the OSD-led program is open to all DoD civilian workforce members, the number of opportunities for AWF members is very small.

A successful two-way PPEP between the public and private sectors would be valuable for the DoD and industry alike. However, structural disincentives undermine support for PPEPs among three critical stakeholders: (1) the DoD employing offices object to relinquishing members without the budgetary or personnel flexibility to backfill their positions during their period of assignment; (2) AWF members do not believe that completing a PPEP assignment will provide a tangible benefit to their careers; and (3) private sector companies fear that sending their workforce members to the DoD could create a risk for Organizational Conflict of Interest (OCI) complaints that may jeopardize chances for future contract awards.

The Panel recommendations for AWF PPEPs are designed to overcome these disincentives by: (1) providing employing offices with statutory budgetary and personnel flexibilities to support it; (2) offering incentives for DoD AWF members that participate (i.e., classify PPEPs as "key work experiences" along career paths); and (3) eliminating the risk of OCI complaints that are based solely on private sector workforce member assignment to the DoD by establishing in statute that an OCI cannot be created for a private sector company simply by a company workforce member's participation in the AWF PPEP, in and of itself.

All of the Section 809 Panel's workforce recommendations address current problems in acquisition workforce policy directly, and offer concrete solutions to overcome them. As rapid transformation of the defense acquisition sector continues, the DoD will require a professional, talented, experienced, and broad-minded workforce to succeed on the warfighter's behalf. The Panel possesses the utmost confidence that the DoD can develop a workforce, built upon the dedication and passion of its members, to regain and maintain the technical dominance upon which our national security relies.

### **Conclusion**

In summary, we talked about 3 topics: (1) Why acquisition reform? Because we are in great power competition; (2) What are the critical attributes to measure success?; (3) Workforce—people must be valued to lead the necessary change to today's Defense Acquisition System.

You have an extraordinary opportunity to help protect the lives of service members, contribute to better warfighting capabilities, and contribute in a major way to your agency's mission outcomes—whether you are in the DoD or another department of government. You have to go outside your comfort zone and take a risk in every sense of the word. To expand what you thought you were capable of doing when it comes to leadership, responsibility, agility, selfless service, and above all, courage, to challenge the status quo—policy, regulation, and statute. Who is better able to do that than those in the audience today? I wish you all the very best as you return to leadership positions or assume leadership positions in the future. You have the challenge of making things happen and making things work! **TAL**

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### **Notes**

1. DOUGLAS C. LOVELACE JR., 147 TERRORISM: COMMENTARY ON SECURITY DOCUMENTS 67 (2018).
2. David Ignatius, *China's Application of AI Should Be a Sputnik Moment for the U.S. But Will It Be?*, WASH. POST (Nov. 6, 2018), [https://www.washingtonpost.com/opinions/chinas-application-of-ai-should-be-a-sputnik-moment-for-the-us-but-will-it-be/2018/11/06/69132de4-e204-11e8-b759-3d88a5ce9e19\\_story.html](https://www.washingtonpost.com/opinions/chinas-application-of-ai-should-be-a-sputnik-moment-for-the-us-but-will-it-be/2018/11/06/69132de4-e204-11e8-b759-3d88a5ce9e19_story.html).
3. U.S. DEP'T OF DEF., INSTR. 5000.02, OPERATION OF THE DEFENSE ACQUISITION SYSTEM (31 Aug. 2018).
4. ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL INTERIM REPORT, MAY 2017, at 26 (May 2017), [https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel\\_Interim-Report\\_May2017\\_FINAL-for-web.pdf](https://section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf).
5. LOVELACE JR., *supra* note 1, at 30.
6. 2 REPORT OF THE ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL, Section 2 (June 2018), [https://section809panel.org/wp-content/uploads/2019/01/Sec809Panel\\_Vol2-Report\\_JUN2018\\_012319.pdf](https://section809panel.org/wp-content/uploads/2019/01/Sec809Panel_Vol2-Report_JUN2018_012319.pdf).
7. For purposes of this recommendation, the Panel defines "key work experiences" as interactions inside and outside of government that foster professional development and career broadening (e.g., rotational assignments, temporary assignments, managerial and leadership experience, defense joint/service/agency collaboration, or simulation/exercise engagement).
8. U.S. DEP'T OF DEF., INSTR. 1400.25, Volume 250, DOD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: CIVILIAN STRATEGIC HUMAN CAPITAL PLANNING (SHCP) 21 (7 June 2016).



(Credit: istockphoto.com/stevecoleimages)

## No. 4

# Shh!

## Analyzing Surreptitious Recordings by Soldiers

*By Major Victoria L. Camire*

“Privacy is one of the biggest problems in this new electronic age.”<sup>1</sup> In these technologically advanced times, Soldiers are discovering more innovative ways to obtain evidence in their favor for legal actions, such as administrative investigations and courts-martial.<sup>2</sup> One of the methods Soldiers are using is to surreptitiously videotape or audio record other Soldiers without that other person’s consent.<sup>3</sup>

This article shows judge advocates<sup>4</sup> how to analyze the legality of these recordings, using three different installations as examples—Joint Base Lewis-McChord, Washington; Fort Hood, Texas; and Fort Bragg, North Carolina. Judge advocates should consider state law; federal law; the potential negative effects of a client engaging in surreptitious recordings in the federal workplace or of other Soldiers; and the professional responsibility obligations you, as an attorney, should consider before dispensing legal advice.

### State Law

#### *One-Party Versus Two-Party Consent*

First, you should consider state consent statutes. State law will often have more in-depth guidance regarding the recording of private conversations. The location in which the recording took place and the location of the parties to the conversation will determine what the law allows.<sup>5</sup> If the parties are in different states, the state law for each should be considered. In reviewing applicable

state law, you should initially determine how many parties must consent to a recording and then if there are any applicable privacy rights or torts.

Currently, each state requires either only one party of a conversation to consent to its recording, or all parties to consent for it to be a lawful recording.<sup>6</sup> Thirty-eight states and the District of Columbia are colloquially referred to as “one-party consent” states.<sup>7</sup> Texas and North Carolina are among these one-party consent states.<sup>8</sup> One-party consent states require only one party to consent to the recording of the conversation before it is recorded and that one party can be the individual recording the conversation.<sup>9</sup> Therefore, only one party to the conversation must consent if (1) your client is physically located in a one-party consent state, (2) all participants to the conversation are physically located in a one-party consent state, and (3) the conversation is being recorded in a one-party consent state.

The second type of consent state is colloquially called a “two-party consent” state.<sup>10</sup> Currently, California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington are two-party consent states.<sup>11</sup> These states require all parties to the conversation to consent to the recording of the conversation.<sup>12</sup> The state of Washington limits the consent requirement to only recordings of a private conversation.<sup>13</sup> If any of the participants are in a two-party consent state or the recording is taking place in a two-party



consent state, then all parties to the conversation must consent before the conversation may be legally recorded, with one exception discussed later in this article.<sup>14</sup>

The consent required differs based on the state where the recorder, participants, and recording device are located. For example, under the federal standard and in many states, including Washington and North Carolina, the recorder can obtain consent from a party to the conversation by merely disclosing that the conversation is being recorded.<sup>15</sup> It is best practice to capture the consent either in the recording or in writing in case the legality of the recording is later challenged.<sup>16</sup>

When your client is not a party to the conversation and has not received consent to record from any party to the conversation, your client may only record the conversation if the circumstances provide the participants with no reasonable expectation of privacy.<sup>17</sup> As an example, there is generally no reasonable expectation of privacy when located in public places, and therefore, your client may usually secretly record others in public places.<sup>18</sup> However, private owners of areas that are open to the public may impose additional restrictions through posted signs or other similar methods of notification.<sup>19</sup>

### ***Other State Criminal and Civil Privacy Protections***

Then, you should consider any other applicable state criminal statutes and civil claims of action before advising your client on the surreptitious recording of conversations. Due to privacy concerns, even some one-party consent states have additional statutes requiring all parties to consent to secret recordings in certain circumstances.<sup>20</sup> These statutes generally apply to situations in which individuals have an enhanced expectation of privacy, such as during sexual encounters.<sup>21</sup>

State privacy laws can be criminal. For instance, in Washington, it is a Class C felony to record someone

without that person's knowledge and consent while the person [ ] is in a place where he or she would have a reasonable expectation of privacy; or [record t]he intimate areas of another person without that person's

knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.<sup>22</sup>

Texas<sup>23</sup> and North Carolina<sup>24</sup> have similar criminal statutes.

Most states also recognize both civil invasion of privacy causes of action and criminal statutes. In common law, there are four types of civil invasion of privacy claims: "(1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye."<sup>25</sup> Not all states recognize these four common law tort claims. Washington, Texas, and North Carolina, specifically, allow some of the four privacy rights by either statute or case law, but not all.<sup>26</sup> In addition, Texas similarly specifically authorizes an individual whose conversation was intercepted to sue the interceptor.<sup>27</sup> There is a range of possible remedies exposing your client to a lot of monetary risk should your client engage in activity that violates another's privacy, and therefore, warrants significant consideration before advising your client.<sup>28</sup>

### **Federal Law**

After determining the applicable state law, you should consider whether there are applicable federal restrictions on secretly recording others. Despite common misconception, the limitations imposed by the Constitution and Bill of Rights are only applicable to government agents and not private parties.<sup>29</sup> The U.S. Supreme Court does not recognize a constitutionally protected right to privacy in surreptitious recordings by private parties.<sup>30</sup> Therefore, private parties are not bound by federal constitutional limitations when secretly recording others. However, Soldiers are bound by federal statutes, the Uniform Code of Military Justice (UCMJ), and local policies or regulations.

### **Federal Statutes**

You should also consider federal law, which may contain additional restrictions on our

actions. The Federal Wiretapping Act of 1968 only requires one party to a conversation to consent to its recording.<sup>31</sup> But even if one party to the conversation consents to the recording, it is illegal to secretly record the conversation "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the [U.S.] or of any State."<sup>32</sup> The individual being recorded may also file a civil action against the recorder.<sup>33</sup>

Whether the Federal Wiretapping Act applies in a case occurring on an installation depends on the jurisdiction for that installation.<sup>34</sup> Four types of jurisdiction can exist on military installations: exclusive,<sup>35</sup> concurrent,<sup>36</sup> partial,<sup>37</sup> or proprietorial interest.<sup>38</sup>

The Federal Wiretapping Act is the controlling law in areas of exclusive federal jurisdiction,<sup>39</sup> and generally, only one party must consent even if the area with exclusive federal jurisdiction is located in a two-party consent state.<sup>40</sup> In contrast, the state consent requirements will govern if any of the parties are located on, or the recording occurred on, an area that does not have exclusive federal jurisdiction.<sup>41</sup> While both federal and state law apply in areas that are not exclusive federal jurisdiction, the more restrictive law will apply despite the other law being more expansive in what actions are allowed.<sup>42</sup>

Of the three installations used as examples in this practice notice, Joint Base Lewis-McChord (JBLM), Washington, is the only installation located in a two-party consent state.<sup>43</sup> Joint Base Lewis-McChord has portions of land that are exclusive federal jurisdiction and other portions that are concurrent jurisdiction.<sup>44</sup> Therefore, whether a client can legally secretly record a conversation while on JBLM will depend on what particular portion of the installation the recording and conversation are occurring.

It is important to consider not only audio and video recordings but also photographs as still pictures may be taken from such video recordings, and if the video recording occurs on a military installation the recording may inadvertently or unintentionally capture images of restricted areas or equipment.<sup>45</sup> Federal law prohibits making a graphical representation of installations

and equipment that the President has designated protected.<sup>46</sup> If an individual must make such graphical representation, the individual must receive approval before publication or release.<sup>47</sup> Aside from these statutes, you should also check with the local Public Affairs Office, which regularly engages in recording others as part of its official duties, to see if they are aware of any additional restrictions that may apply on the installation.

### **Installation and Unit Policies**

Consider whether local installation and unit policies prohibit secret recordings. Commanders at all levels can legally institute policies that prohibit secret recordings in the workplace and on post if there is a valid military purpose.<sup>48</sup>

### **Violations of the UCMJ**

When determining how to advise your client, the last area of federal law you should consider is the UCMJ. The following punitive UCMJ articles, or attempts to commit these offenses,<sup>49</sup> are the most common as it relates to secret recordings: Articles 92, 120c, and 134. Other punitive articles may be applicable, depending on the facts and circumstances of the specific situation in which your client is seeking legal advice.<sup>50</sup>

A wide range of actions may violate Article 92, UCMJ, for failure to obey a lawful order or regulation, or for dereliction of duty.<sup>51</sup> For example, if the client records conversations in a secure facility or unintentionally records classified information, your client may have committed a security violation.<sup>52</sup> Furthermore, policies may exist prohibiting items, such as electronic devices, from certain locations or activities that do not constitute secure facilities.<sup>53</sup> Failure to abide by these policies could also constitute an Article 92, UCMJ, violation. Finally, if the installation on which the recording took place or where your client is located has policies or regulations in place prohibiting such recordings or prohibiting any part of the specific circumstances surrounding the recording, your client may have violated this UCMJ provision.<sup>54</sup>

In addition to Article 92, UCMJ, and other articles addressing orders violations, another major UCMJ punitive article that

may come into play is Article 120c. Article 120c, UCMJ, punishes indecent viewing and recording of “the private area of another person, without that other person’s consent and under circumstances in which that other person has a reasonable expectation of privacy.”<sup>55</sup> For instance, if your client is secretly recording in a locker room or during a sexual encounter, your client may have violated Article 120c, UCMJ.<sup>56</sup>

The final major UCMJ article that is most common in this area is Article 134.<sup>57</sup> Article 134, UCMJ, applies to “circumstances [in which] the accused’s conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.”<sup>58</sup> Clause 3 of Article 134, UCMJ, allows the government to make any federal statute or any “assimilated State, Territory, Possession, or District law” under the Federal Assimilative Crimes Act a criminal offense for a service member.<sup>59</sup> Therefore, even if a criminal offense is not explicitly included in the UCMJ, the military can utilize Article 134, UCMJ, to court-martial service members for that offense.

You should also consider the offenses of conspiracy under Article 81,<sup>60</sup> UCMJ, and accessory after the fact under Article 78,<sup>61</sup> UCMJ, for both your client and yourself. As counsel, you need to ensure your actions do not make you a co-conspirator or accessory after the fact through state or federal law, as well as through the professional responsibility limitations discussed below. For example, you cannot advise your client to secretly record others without their consent in a two-party consent state because then you could be a co-conspirator.

The applicability of any UCMJ punitive articles must be determined on a case-by-case basis, given the facts and circumstances related to your specific client and the specific acts discussed. Of course, any final decision on whether your client will be subject to punishment under the UCMJ is reserved to your client’s commander.<sup>62</sup>

### **Practical Impact of Recording Others**

Notwithstanding federal and state law allowing your client to secretly record others, you should encourage your client to consider what realistic value will be gained from

the recording, even though your client may initially believe the value of the recording to be extremely high. If you determine that your client *can* surreptitiously record others, the key here is whether your client *should*.

Recording others without their consent can damage relationships. In the military context, surreptitious recordings can have a negative effect within the unit and on completion of the mission.<sup>63</sup> Soldiers may be concerned that other Soldiers are secretly recording them, which prevents candid and open discussions in the workplace. Soldiers may question other Soldiers’ loyalty and trustworthiness. Soldiers may also act as if others are engaging in underhandedness when they are not. These are important factors to consider, even for the client facing the most severe punishment—your client’s actions may lose good witnesses to testify on your client’s behalf or alienate the chain of command against your client.

Finally, the recording itself may be used against your client depending on the contents of the recording or the circumstances surrounding the recording.<sup>64</sup> For example, if by recording, your client violated a punitive article of the UCMJ, action may be taken against your client for that misconduct. Alternatively, if your client did not violate any UCMJ article, but the statements contained within the secret recording support the adverse action against your client, the government may seek to introduce the recording into evidence to support its case. Ultimately, your client should weigh the possible negative impact against the possible positive value gained from secretly recording others.

### **Attorney Professional Responsibility Considerations**

You should consider your respective state bar rules and service professional responsibility rules that affect the legal advice you provide your client. Each state has its own set of ethics rules and the Army has Rules of Professional Conduct outlined in Army Regulation 27-26, Rules of Professional Conduct for Lawyers.<sup>65</sup> As a judge advocate, you are bound by the ethics rules for both the state where you are licensed to practice law and the Service professional responsibility rules.<sup>66</sup>



(Credit: istockphoto.com/Standart)

The rules for the Army, as well as the State Bars of Washington, Texas, and North Carolina, include a provision prohibiting the commission of illegal or dishonest/deceitful acts, or assisting a client in such misconduct.<sup>67</sup> This specifically includes “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>68</sup> Moreover, it is unethical to have a client do something you are prohibited from doing—for instance, “communicate with a person the lawyer knows is represented by counsel.”<sup>69</sup>

Based on these restrictions, attorneys in Washington, or other two-party consent states, must ensure all parties to a conversation give consent prior to recording in accordance with Washington Revised Code Annotated Section 9.73.030.<sup>70</sup> In North Carolina, Rule 8.4, Misconduct, of the State Bar Rules of Professional Conduct prohibits engaging in dishonest behavior or “conduct that is prejudicial to the administration of justice.”<sup>71</sup> The North Carolina State Bar has opined that it is improper for an attorney to listen to or watch an illegally obtained recording.<sup>72</sup> Therefore, for those attorneys licensed in North Carolina, if your client brings in a recording that fails to comply with the laws previously discussed, you are ethically prohibited from listening to or viewing the recording.<sup>73</sup>

The Army and North Carolina also have rules regarding the type of counseling you may provide outside of purely legal advice. In the Army, attorneys “may discuss the legal and moral consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.”<sup>74</sup> The North Carolina Rules of Professional Conduct authorize attorneys to “refer not only to law, but also to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation” when providing advice.<sup>75</sup>

You must ensure you are continuously checking for updated professional responsibility opinions or amended rules for both the state in which you are licensed to practice law and the federal government before rendering advice in this area of the law.

### Conclusion

The law is complex when it comes to whether a Soldier can secretly videotape or audio record his or her subordinates, peers, supervisors, or any other individual. This article provides an outline of what to consider when providing legal advice to clients on this issue. You should always review applicable state law. Specifically, you should consider consent laws, other privacy laws, and recognized civil causes of action

for each state where a participant to the conversation is located, where your client is located, and where the recording occurs. You should also always review federal law, including installation or unit policies and the UCMJ.

Ultimately, your client must conduct their own risk-benefit analysis as to what action to take; but you, as a judge advocate, should counsel your client on whether their actions are legal and whether it is advisable to take such action given any potential negative effect of your client having secretly recorded others. You must consider applicable state and service professional responsibility rules before providing legal advice on this matter. Taking all of these factors into consideration, you can appropriately advise your client on how to proceed before the client secretly records others or after the client has already engaged in such acts. **TAL**

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### Notes

1. Mike Sager, *Andy Grove: What I've Learned*, *ESQUIRE* (Jan. 29, 2007), <http://www.esquire.com/entertainment/interviews/a1449/learned-andy-grove-0500/>. Andy Grove was Intel’s Chairman at the time. *Id.*
2. “Privacy faces unprecedented threats from pairing video technology and information technology.” Max Guirguis, *Electronic Visual Surveillance and the Reasonable Expectation of Privacy*, 9 J. TECH. L. & POL’Y 143, 152 (2004). Emerging technology makes it easier than ever to secretly record others. “Katrina Patrick, a Houston lawyer who represents aggrieved employees, says that more than 50 percent of the people who come to her office bring digital evidence.” David Koepfel, *More People are Using Smartphones to Secretly Record Office Conversations*, *BUSINESS INSIDER* (July 28, 2011, 5:43 PM), <http://www.businessinsider.com/smartphones-spying-devices-2011-7>. Engaging in secret recordings has proved useful for some individuals. See *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 190 (S.D.N.Y. 1997) (Texaco settled a class action lawsuit for racial discrimination for \$115 million after the release of secret recordings showing “racial bias by senior officials of Texaco.”).

The evidence caught live on videotape is among the most reliable and is known to result in the highest conviction rate because, unlike people, the camera and the tape cannot lie. Videotaping makes the credibility of the witness or claims by the suspect or the officer a less critical issue by presenting the court with indisputable and objective evidence, free from personal predilection and subjective assessment.



Max Guirguis, *Electronic Visual Surveillance and the Reasonable Expectation of Privacy*, 9 J. TECH. L. & POL'Y 143, 144-145 (2004).

3. This assertion is based on the author's previous professional experiences as Defense Counsel for Joint Base Lewis-McChord, Washington, from 16 July 2012 to 10 July 2014 [hereinafter Professional Experiences]. For a helpful starting point on this topic, see *Reporter's Recording Guide: A State-by-State Guide to Taping Phone Calls and In-Person Conversations*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Summer 2012), <https://www.rcfp.org/rcfp/orders/docs/RECORDING.pdf> [hereinafter *Reporter's Recording Guide*] (outlining statutes, criminal penalties, civil suits, and issues with disclosing recordings for each state from the perspective of journalists).

4. Judge advocates serving as legal assistance attorneys, defense counsel, or special victim counsel are most likely to deal with this issue. See *McDade v. State*, 154 So.3d 292 (Fla. 2014) (The Supreme Court of Florida found that a victim's secret recording of her stepfather offender violated Florida's law requiring all parties consent to the recording of a conversation, and therefore, the recording should have been suppressed at the stepfather's criminal trial.).

5. See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006) (applying California law in a case where the participants of a secretly recorded conversation were in California and Georgia). See also *I.K. v. M.K.*, 753 N.Y.S.2d 828 (Sup. Ct. 2003) (applying New York law over Pennsylvania law in a civil action suit involving secretly recorded conversations because New York was the forum state even though the conversations were recorded in Pennsylvania).

6. See, e.g., TEX. PENAL CODE ANN. § 16.02(c)(4) (2011); WASH. REV. CODE ANN. § 9.73.030(1) (1986).

7. Professional Experiences, *supra* note 4. See *Reporter's Recording Guide*, *supra* note 4.

8. TEX. PENAL CODE ANN. § 16.02(c)(4) (2011); N.C. GEN. STAT. § 15A-287(a) (1995). See *Becker v. Computer Sciences Corp.*, 541 F. Supp. 694 (D. Tex. 1982) (holding that it is "legal to tape one's own telephone conversation with another person without telling the other person"); *Ward v. State*, 787 S.W.2d 116 (Tex. App. 1990) (holding "that when the Appellant talked with the victim's mother, he took the risk that she would repeat or record their conversation").

9. See, e.g., TEX. PENAL CODE ANN. § 16.02(c)(4) (2011); N.C. GEN. STAT. § 15A-287(a) (1995).

10. Professional Experiences, *supra* note 4. See *Reporter's Recording Guide*, *supra* note 4.

11. See *Reporter's Recording Guide*, *supra* note 4.

12. See, e.g., WASH. REV. CODE ANN. § 9.73.030 (1986). See *Reporter's Recording Guide*, *supra* note 4.

13. WASH. REV. CODE ANN. § 9.73.030(1) (1986).

14. The exception is that if all participants are in a location and the recording itself takes place where there is exclusive federal jurisdiction, only one party must consent. See *infra* notes and accompanying text.

15. See WASH. REV. CODE ANN. § 9.73.030(3) (1986). See, e.g., *State v. Price*, 611 S.E.2d 891, 897 (N.C. App. 2005) ("Here, the trial court found that both parties to the conversation heard the recorded warning that the call was subject to monitoring and recording and that they consented, at least impliedly, by continuing with the conversation in the face of that warning."); *State v. Modica*, 149 P.3d 446, 454 (Wash. App. 2006), *aff'd*,

186 P.3d 1062 (Wash. 2008) ("A party to a conversation is deemed to have consented to having his or her communication recorded when the person knows that the recording is taking place.").

16. Professional Experiences, *supra* note 4.

17. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 18.20, § 1(1)(2) (West 2015); N.C. GEN. STAT. § 15A-286(17) (1997).

18. See *Katz v. United States*, 389 U.S. 347 (1967); see also *Recording Police Officers and Public Officials*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/recording-police-officers-and-public-officials> (last visited June 28, 2019) (providing an overview of U.S. Court of Appeals cases regarding recording police and other public officials).

19. Mickey H. Osterreicher, *Recording in Public Places and Your First Amendment Rights*, VIDEO MAKER (Oct. 10, 2012), <https://www.videomaker.com/article/15619-recording-in-public-places-and-your-first-amendment-rights>.

20. See, e.g., TEX. PENAL CODE ANN. § 21.15 (2015).

21. *Id.*

22. WASH. REV. CODE ANN. § 9A.44.115(2) (2017).

23. See TEX. PENAL CODE ANN. § 21.15 (2015).

24. See N.C. GEN. STAT. § 14-202(d) (2012); N.C. GEN. STAT. § 14-202(e) (2012).

25. *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 322 (1984). See RESTATEMENT (SECOND) OF TORTS § 652A-E (AM. LAW INST. 1977); Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). Under the Restatement (Second) of Torts, intrusion upon seclusion only applies when the intrusion is intentional and when "the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977). Public disclosure only applies when the fact disclosed "(a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977). See *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (discussing public disclosure of private facts). False light publicity only applies when "(a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." RESTATEMENT (SECOND) OF TORTS § 652E (AM. LAW INST. 1977).

26. See WASH. REV. CODE § 42.56.050 (1987); *Reid v. Pierce County*, 136 Wash.2d 195 (1998); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 578 (Tex. 1994); *Miller v. Brooks*, 123 N.C.App. 20, 25 (1996); *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988).

27. TEX. CIV. PRAC. & REM. CODE § 123.002 (West 1985). See *Banik v. Tamez*, No. 7:16-CV-00462, 2017 WL 2505653, at \*10 (S.D. Tex. June 9, 2017).

28. See WASH. REV. CODE § 9.73.060 (2011); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1085 (5th Cir. 1984); *Topheavy Studios, Inc. v. Doe*, No. 03-05-00022-CV, 2005 WL 1940159 (Tex. App. Aug. 11, 2005); TEX. CIV. PRAC. & REM. CODE § 123.004 (West 2001); N.C. GEN. STAT. § 15A-296(a) (1995).

29. See *Katz v. United States*, 389 U.S. 347 (1967). "Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom

he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

"A speaker bears the risk the person in whom he confides will betray his confidence." *Id.* As stated in the dissenting opinion in *Lopez v. United States*, "[t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak." *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting). See also *Lewis v. United States*, 385 U.S. 206 (1966).

30. "The right of privacy guaranteed by the Fourteenth Amendment includes only those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty and this privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 65 (1973). In *United States v. Moore*, the Court of Military Appeals held that an "accused had no constitutional privacy right prohibiting participant in conversations with him from allowing others to hear and record conversations regardless of accused's lack of knowledge or consent." *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994). The Court ruled that the secret videotaping and audio recording of a Colonel by his mistress did not violate the First Amendment because "no zone of privacy prevents a participant in a conversation from revealing what was said." *Id.*

31. 18 U.S.C. § 2511 (2008). "The legislative history of [the Electronic Communications Privacy Act of 1986] reveals that Congress intended that the states be allowed to enact more restrictive laws designed to protect the right of privacy." *People v. Conklin*, 12 Cal.3d 259, 271 (1974).

32. 18 U.S.C. § 2511(2)(d) (2008). See *United States v. Cassiere*, 4 F.3d 1006, 1021 (1st Cir. 1993) for an example application of this provision.

33. 18 U.S.C. § 2520 (2002).

34. To determine an installation's jurisdiction, coordinate with the installation's Office of the Staff Judge Advocate General. U.S. DEP'T OF ARMY, REG. 405-20, FEDERAL LEGISLATIVE JURISDICTION para. 9(c) (21 Feb. 1974) [hereinafter AR 405-20].

35. "Only Congress has the authority to legislate for areas held under exclusive legislative jurisdiction." *Id.* para. 4(a).

36. "Both State and Federal laws are applicable in a concurrent legislative jurisdiction area." *Id.* para. 4(b).

37. For areas with partial jurisdiction, the legislative scheme is as follows:

As to the authority to legislate, execute and enforce municipal laws granted without reservation by the State to the Federal Government, administration of the Federal area is the same as if it were under exclusive Federal legislative jurisdiction. Such powers may be exercised only by the Federal Government. As to the authority to legislate, execute and enforce municipal laws reserved by the State, administration of the area is the same as though the United States had no legislative jurisdiction whatever. As to those powers granted to the Federal Government with a reservation by the State to exercise the same powers concurrently, administration of the area is as though it were under concurrent legislative jurisdiction.

*Id.* para. 4(c).

38. If the federal government has a proprietorial interest, “[t]he United States exercises no legislative jurisdiction. The Federal Government has only the same rights in the land as does any other landowner.” *Id.* para. 4(d).

39. U.S. CONST., art. VI, cl. 2 (Supremacy Clause).

40. See *supra* note 33 and accompanying text; Chicago, R.I. & P. Ry. Co. v. McGlinn, 114 U.S. 542 (1885); Pacific Coast Dairy v. Department of Agriculture of Cal., 318 U.S. 285 (1943).

41. AR 405-20, *supra* note 36, para. 4(b), (c), (d).

42. See *id.*

43. See *supra* note 12 and accompanying text.

44. E-mail from Major Gregory Costello, Chief, Federal Litigation, Joint Base Lewis-McChord, to author (Dec. 12, 2017, 09:19 EST) (on file with author).

45. 18 U.S. Code § 793 may apply if the video contains information related to national defense. 18 U.S. Code § 793 (1996). See U.S. DEP’T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM para. 10–12 (29 Sep. 2000) [hereinafter AR 380-5].

46. 18 U.S. Code § 795 (1994). See AR 380-5, *supra* note 46, para. 10–14.

47. 18 U.S. Code § 797 (1994). See AR 380-5, *supra* note 46, para. 10–16.

48. Before instituting such policies, commanders should seek legal advice from their unit legal advisor. For an overview from a supervisor’s perspective, see Captain Drew A. Swank, *How to Stop Surreptitious Recording of Conversations in the Federal Workplace*, ARMY LAW., Feb. 2000. See, e.g., Policy Letter 7, Headquarters, 1st Battalion, 44th Air Defense Artillery Regiment, 69th Air Defense Artillery Brigade, subject: Command Policy Letter 7, Prohibiting the Nonconsensual Use of Recording Devices in the Work Environment (10 Oct. 2017); Policy Memorandum 12, Headquarters, U.S. Army Support Activity Fort Dix, subject: US Army Support Activity (USASA), Fort Dix Command Policy Memorandum #12—Prohibiting the Nonconsensual Use of Recording Devices in the Work Environment (3 Aug. 2017).

49. UCMJ art. 80(a) (2018).

50. Other possible punitive articles under the UCMJ that may be applicable to secret recordings include UCMJ art. 89 (2018), UCMJ art. 91 (2018), UCMJ art. 93 (2018), and UCMJ art. 107 (2018).

51. It is a violation of Article 92, UCMJ, if your client: “(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties.” UCMJ art. 92 (2019).

52. Under Army Regulation 530-1, Operations Security, paragraph 2–22(f), every Soldier has a duty to “[p]revent unauthorized disclosure of sensitive and/or critical information.” U.S. DEP’T OF ARMY, REG. 530-1, OPERATIONS SECURITY para. 2–22(f) (26 Sept. 2014). Security violations or any other criminal misconduct may affect your client’s ability to retain his or her security clearance. U.S. DEP’T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM para. 8-3, 1-7 (24 Jan. 2014).

53. See e.g., 82D AIRBORNE DIVISION, AIRBORNE STANDING OPERATING PROCEDURES (ASOP) para. 1-7(a)(5) (1 Aug. 2014) (“Electronic items such as cellular

phones, cameras, MP-3 players, and PDAs are NOT AUTHORIZED to be used for anything other than official military business or emergency use from final manifest through the conclusion of the ground tactical plan” during all airborne jumps.).

54. Willful disobedience of a superior commissioned officer’s order may also be a violation of Article 90, UCMJ. UCMJ art. 90 (2018). To be a violation under Article 90, UCMJ, “[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service.” *Id.* As long as there is a “valid military purpose,” the command may restrict the Soldier’s ability to secretly record others, even if state law and other applicable Federal law authorize such recordings. *Id.* The same analysis for Article 90, UCMJ, applies to Article 91, UCMJ, which would apply if the person who made the order is a warrant officer, noncommissioned officer, or petty officer. UCMJ art. 91 (2018).

55. UCMJ art. 120c (2018). This statute differs from the Marines United “revenge porn” scandal in that revenge porn deals with photographs that were taken with consent, but distributed without consent. See Jared Keller, *The Rise And Fall (And Rise) Of Marines United*, TASK & PURPOSE (Mar. 16, 2017, 11:20 AM), <https://taskandpurpose.com/rise-fall-rise-marines-united/>; UCMJ art. 117a (2018).

56. See UCMJ art. 120c (2018).

57. UCMJ art. 134 (2018). If your client is a commissioned officer, the government could also charge your client with a violation of Article 133, UCMJ, for “conduct unbecoming an officer and gentleman.” UCMJ art. 133 (2018). For this article to be applicable, the conduct would likely be similar to that punishable under other articles, such as Article 120c, UCMJ. UCMJ art. 120c (2018).

58. UCMJ art. 134 (2018). This is referred to as the terminal element. See *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). In addition to the general article in Article 134, UCMJ, there are other criminal offenses within Article 134, UCMJ, that may be applicable to surreptitious recordings by your client. These include obstructing justice and wrongful interference with an adverse administrative proceeding. UCMJ art. 134 (2016); see UCMJ art. 131b and 131g (2018) for offenses on or after 1 January 2019.

59. UCMJ art. 134, cl. 3 (2018).

60. UCMJ art. 81 (2018).

61. UCMJ art. 78 (2018).

62. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306 (2019).

63. Other countries, such as Israel, have similar issues with soldiers recording their leaders. See Zehavit Zaslansky, *Fearing Dismissal: Military Professionals are Recording Conversations with Their Commanders*, JERUSALEM ONLINE (Apr. 22, 2014, 8:26 PM), <https://www.jerusalemonline.com/fearing-dismissal-military-professionals-are-recording-conversations-with-their-commander-4917/> (“The behavior we have learned of—soldiers recording their commanders without the latter’s[] knowledge in order to then make use of their statements in legal proceedings—is wrong and indicates a measure of dishonesty.”).

64. See *Housley v. Spirit Aerosystems, Inc.*, 628 Fed. Appx. 571, 575 (2015) (“The recordings in this case turned out to be a double-edged sword. [The employee] wanted the jury to know about them[], but the employer[] turned the tables on her by promoting their use for a different, albeit limited, purpose. . . . In the end [the employee] was obliged to take the bitter with the sweet.”).

65. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26].

66. *Id.* para. 7.

67. See *id.* r. 1.2(d), 4.1, 4.4, 8.4; WASH. R. PROF. COND. r. 1.2(d), 4.1, 4.4(a), 8.4 (2015); TEX. DISCIPLINARY R. PROF. CONDUCT r. 1.02(c), 4.01, 4.04(a), 8.04(a)(3) (1995); 27 N.C.A.C. Chapter 2, Rules 1.02(d) (2003), 4.1 (2003), 4.4(a) (2015), 8.4 (2017). See also ABA RULES OF PROFESSIONAL CONDUCT; ABA CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(3)-(4) (AM. BAR ASS’N 1983); MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016).

68. AR 27-26, *supra* note 66, r. 8.4(b); WASH. R. PROF. COND. r. 8.4(b) (2015); TEX. DISCIPLINARY R. PROF. CONDUCT r. 8.4(b) (1995); 27 N.C.A.C. Chapter 2, Rule 8.4(b) (2017).

69. See AR 27-26, *supra* note 66, r. 1.2(d), 4.2; WASH. R. PROF. COND. r. 1.2(d), 4.2 (2015); TEX. DISCIPLINARY R. PROF. CONDUCT r. 1.02(c), 4.02 (1995); 27 N.C.A.C. Chapter 2, Rules 1.02(d), 4.2 (2003).

70. WASH. REV. CODE ANN. § 9.73.030 (1986).

71. 27 N.C.A.C. Chapter 2, Rule 8.4(b) (2017).

72. North Carolina State Bar, Op. RPC 192 (1995), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/rpc-192/>.

73. *Id.*

74. AR 27-26, *supra* note 66, r. 1.2(d).

75. 27 N.C.A.C. Chapter 2, Rule 2.1 (2003).



## **AROUND THE CORPS**

SPC Jenkins helping a service member at a legal assistance office.





(Credit: istockphoto.com/sorbetto)

# Closing Argument

## Embrace Your Team's Conflict

By Kristin J. Behfar

*It turns out successful teams have plenty of conflict. Their victories come in managing it the right way.*

**Despite spending most of their careers in top-down management structures,** senior military officers eventually find themselves serving in environments where they are leading, or being led by, their peers. As most any colonel can attest, peer teams often have, for lack of a better term, complex group dynamics.

Like their counterparts in the business world, these senior officers often find themselves hamstrung by contentious meetings, unable to leverage their teams' strengths, and incapable of driving those teams toward creative, forward-thinking solutions.

My research into strategic leadership—conducted over the course of two decades with the help of my own team members, and confirmed during my tenure at the U.S. Army War College—might offer some solutions.

Successful teams have three things in common: they meet their performance goals; their members feel satisfied that they are learning/benefiting from being a part of the team; and the process the team uses to collaborate sets it up for future success.<sup>1</sup> But my work has found that in as little as five weeks of working together, only about

twenty-five percent of teams meet these criteria.<sup>2</sup> The rest of the teams typically experience less-than-ideal processes and a decline in performance and/or satisfaction.

What goes wrong? Most team members report that conflict among members gets in the way. The effect of that conflict, however, is not always straightforward. Under the right conditions, for example, conflict can stimulate divergent thinking and lead to improved problem solving. On the other hand, it also tends to increase defensiveness, distract members from effective problem solving, and generate interpersonal animosity.

So how can a team harness the benefits and limit the liabilities of conflict? It's all in how that conflict is *managed*.

There are clear and reliable patterns associated with both effective and ineffective conflict management. These patterns center on a critical tradeoff between getting work done and making individual members happy. The most effective teams create strategies to do both, but the majority of teams sacrifice one or the other.

Teams that are proactive in identifying conflicts and addressing them before they escalate have more satisfied members. Teams that operate in reactive mode, wherein conflicts take them by surprise or keep the team in constant firefighting mode, have less satisfied members.

These tradeoffs around performance and satisfaction are summarized below in the accompanying chart. In general, higher-performing teams, like those found in quadrants 1 and 3 (top and bottom left, respectively), create conflict-resolution strategies that make it clear how individuals need to contribute to the team and how that contribution aligns with the individual's interests. Lower-performing teams, like those found in quadrants 2 and 4 (top and bottom right), focus more on appeasing individuals and addressing idiosyncrasies.

Let's look at the teams in each quadrant. Quadrant 4 teams tend to have an unorganized or ad hoc approach to managing their conflict. They not only fail to balance individual versus team interests, they actually fail to address either one. Their strategies focus more on immediate complaints rather than underlying interests. A history of unfocused and unsuc-

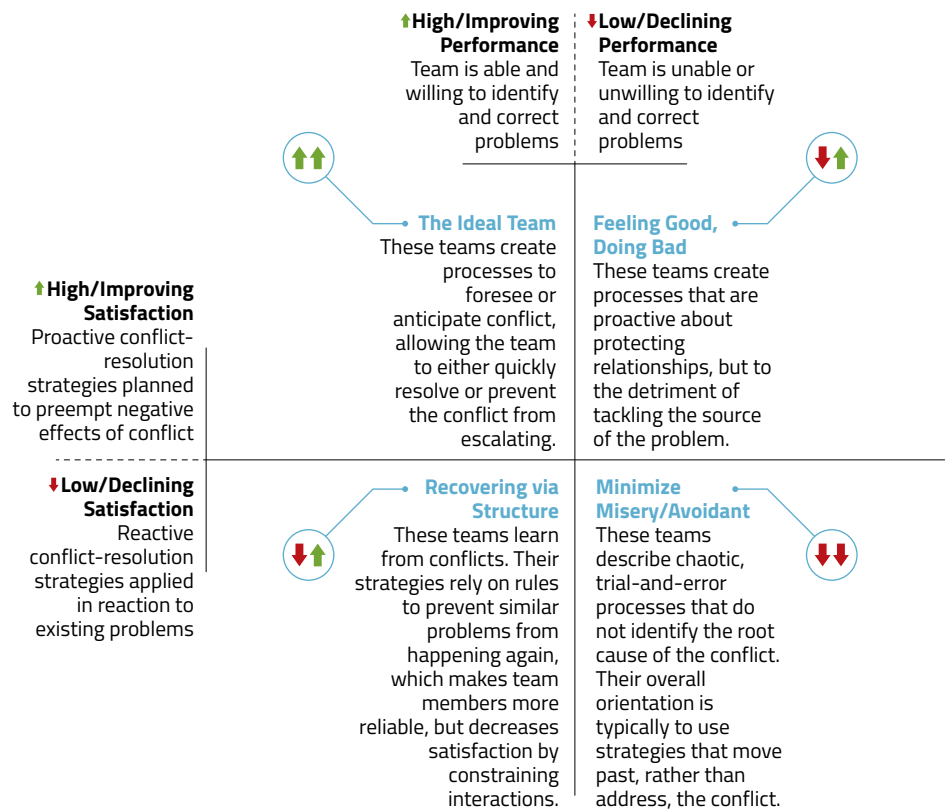
Successful conflict attempts combined with an imbalance of individual versus team interests generally limits the willingness and ability of members to engage in good-faith conflict resolution. When members of Quadrant 4 teams do try to engage with one another, they often opt for Band-Aid strategies that do not address how the team is structured. These teams usually experience high turnover and require significant outside intervention to recover.

Quadrant 2 teams, meanwhile, orient themselves to resolve conflict using the principle of *equality*—giving equal weight to every individual’s interest. This focus on equality among individuals creates a team norm that values consensus and harmony at the cost of decision quality. For example, these teams consider themselves proactive because their discussions identify what it will take to keep each person positive and engaged in the team. This is indeed a good practice, but only when aligned with what the team is trying to achieve.

Teams in Quadrant 3, by contrast, orient themselves to resolve conflict with *enforced equity*. These teams quickly learn from and address their conflicts. These teams’ strategies typically revolve around how to restore and enforce equity. For example, they often create rules, explicit agreements, and clear expectations about how to force members into playing an appropriate part. But these are less than ideal because they are put into place *after* there is a problem. This decreases member satisfaction because the balance of individual versus team interests tips toward the team side.

Quadrant 1 teams are the most “ideal,” because they resolve conflict using the principle of *equity*—each member is asked to contribute his or her fair share only in ways that serve the team. This means that not everyone equally gets what he or she wants, but members usually understand why team decisions are fair and equitable. The strategies unique to these teams include the following:

- Having explicit discussions about what members want to do versus what the team needs each person to do;
- Proactively forecasting preventable problems;



- Taking time to discuss preventable problems; and
- Focusing on the content of the complaint during a conflict rather than how it is delivered.

While Quadrant 1 teams are examples of “ideal” collaboration, that does not mean they do not experience difficult conflict. In fact, great teams typically have *all the same types and severity* of conflict that other teams have. Quadrant 1 teams are simply better able to contain negative effects by using equitable resolutions as an underlying principle when managing conflict. Such resolutions help maintain or restore a sense of fairness, ensure optimal resource allocation, and promote productivity and positive relationships among team members. Not using these techniques can result in behavior that detracts from team performance and/or satisfaction, as seen in the other quadrants.

Sustaining a high-performing, highly satisfied team takes a great deal of maintenance and awareness. Over the lifespan of a team, it is highly likely that it will cycle through several or all the quadrants. Understanding the effect that different orienta-

tions toward conflict-management strategies have on a team’s viability is important because it helps a team recognize where there are imbalances that create negative processes and interactions—and where to focus resources to prevent or reverse the negative effects. **TAL**

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### Notes

1. J. Richard Hackman & Charles G. Morris, *Group Tasks, Group Interaction Process, and Group Performance Effectiveness: A Review and Proposed Integration*, 8 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 45-99 (1975).

2. This article is a summary of the research presented in: Kristin Behfar, Randall Peterson, Elizabeth Mannix, & William Trochim, *The Critical Role of Conflict Resolution in Teams: A Close Look at the Links between Conflict Type, Conflict Management Strategies, and Team Outcomes*, 93 *J. APPLIED PSYCHOL.* 170-88 (2008).



THE JUDGE ADVOCATE GENERAL'S  
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## AROUND THE CORPS

Two Air Force students of the graduate course at the U.S. Army's Judge Advocate General's Legal Center and School walk in front of the building on their way to class. (Credit: Chris Tyree)





## AROUND THE CORPS

The Fort Gordon OSJA playing football for morning PT.



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