Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 5 ▪ 2020

AROUND THE CORPS

NCOs graduated from the NCOA's ALC and SLC at TJAGLCS in Charlottesville, VA, in September. NCOs from around the Corps came together for a socially-distanced course, culminating in their graduation, presided over by RCSM Osvaldo Martinez and CSM Michael J. Bostic. (Credit: Jason Wilkerson/TJAGLCS)

Army Lawyer

Editorial Board

Issue 5 • 2020

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published six times a year by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia for the purpose of education and performance in legal responsibilities.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals. The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed at https://tjaglcspublic.army.mil/tal.

Articles may be cited as: [author's name], [article title in italics], Army Law., [issue number], at [first page of article], [pincite].

On the cover: Benjamin Spencer, Dean of William & Mary Law School, and captain in the U.S. Army Reserve. (Credit: Stephen Salpukas/William & Mary)

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Soldiers wear masks and stand socially-distanced during the WOBC graduation ceremony last August inside Decker Auditorium at TJAGLCS. (Credit: Jason Wilkerson/TJAGLCS)

Court Is Assembled

The Opportunities of Modernization

By Brigadier General Joseph B. Berger

Learning and innovation go hand in hand. The arrogance of success is to think that what you did yesterday will be sufficient for tomorrow.

—William Pollard

Upon entering an institute of higher education, pay attention—can you feel the difference between a place where minds expand freely toward solutions and inventions as yet unknown and a place where relative success has stagnated growth and dulled mental sharpness? Educational institutions and research centers must understand the constant need to modernize. This issue of the *Army Lawyer* is dedicated to the widespread efforts to modernize our Army—an Army looking to "leapfrog ahead" of our near-peer adversaries with "spirals of capability," phrases anyone paying attention to the Army's renaissance has certainly heard once, if not countless times.

Our Regimental Family constantly adapts to changes to the law. It is what makes the Legal Center and School (LCS) unique and the premier educational institution in the Department of Defense

(DoD). Legal professionals must be agile, adaptable, and flexible, all while remaining laser-focused on an unwavering commitment to ensuring we provide principled counsel. That is what we do every day and in every environment in which we advise clients. While we regularly adapt to changes in the law to best advise our clients, that is only one area in which our agility may be challenged. As the leaders whom we advise plan, and as we advise to inform those plans, we all remain acutely aware that the enemy gets a vote. Recently, the enemy—in the form of COVID-19—certainly has exercised that right in a way that has impacted all of our lives.

At the LCS, the enemy's vote profoundly challenged our institution to demonstrate its ability to rapidly evolve—to modernize—how we educate and train our Army. From in-resident instruction to distance learning, I am proud to report that every member of this incredible team has demonstrated the agility and innovation necessary to ensure a near-seamless transition. The list of those classes is long: two sections of the Advanced Leader Course, the Warrant Officer Advanced Course, the 210th Judge Advocate Officer Basic Course, and the 68th Graduate Course. Over 300 students—all of whom were in the building when DoD shifted its posture in response to the pandemic. Not only did we quickly and effectively pivot to overcome the constraints of the new operating environment, we also routinely conducted after action reviews, facilitating continuous improvement and adjustment as the pandemic has endured.

One of the main reasons the LCS was successful in its pivot from traditional to distance learning—while maintaining the highest standards of educational quality—was the Army's ever-present can-do mindset. We are used to rolling up our sleeves and accomplishing the mission, even in unpredictable and uncontrollable conditions.

Another, potentially more important factor contributing to the successful and rapid transition in the midst of chaos and hesitation is the innovative mindset of our valued staff and faculty. Some organizations' culture may unintentionally suppress leaders' and subordinates' creativity and initiative. Perhaps this is due to an organizational intolerance of failure, disapproval of disruption, or simple comfort with "the way things are." Modernization, however, not only allows for failure and disruption—it *requires* them.

In this case, the global pandemic threw the usual rulebook out the window. With it went mental limitations on how we must or may accomplish the mission, judgment about ideas suggested to solve new challenges, and potential embarrassment if an idea doesn't pan out. Any remaining cultural artifacts that stifle innovation disappeared. All ideas were on the table. This approach fueled the rapid roll-out of distance learning and the robust communications infrastructure supporting work-from-home capabilities. What resulted, particularly after a highly-successful, first-ever virtual Senior Officer Legal Orientation—conducted while the rest of professional military education across the Army had shut down—was the LCS earning the reputation as the Army-wide standard–bearer for distance learning transition.

This rapid fielding would not have blossomed so fully overnight had the seeds not already been planted. Organizations cannot be failure-intolerant one day and innovative after the enemy casts its vote the next day. An educational institution is naturally ripe for cultivating an experimental culture, and the LCS is no different. Graduate Course students were already encouraged to "think big thoughts," and professors and staff encouraged to try new teaching methods, technology, and ways to communicate. Whether it was a student's thesis on blockchain technology and military legal practice, the Battlefield Next podcast, or the use of Turning Point and other technology platforms in the classroom, the LCS and the Corps advocated mental agility and valued outside-the-box thinking long before the pandemic shrugged off any remaining mental barriers.

Modernization is not simply technology and lethality. It is also raising your hand to suggest a new solution to an old problem, managing diverse talent to maximize effectiveness, fulfillment, and retention, and developing deep expertise and broad versatility to meet our Army's future needs. Modernization is an investment in the future of our Corps, looking ahead to what we will need in the years to come and seeking to resolve future challenges now. Stewarding the profession into the future requires valuing modernization—and a culture that facilitates it.

We are used to rolling up our sleeves and accomplishing the mission, even in unpredictable and uncontrollable conditions

The challenge for each of us is to identify the aspects of our practices and our organizations that mandate that our stewardship obligations drive modernization. It is both a mindset, as well as a practice. And it requires everyone in the formation to have a voice. **TAL**

Be ready, stay nimble, and keep moving forward!

News & Notes

Photo 1
The newest noncomissioned officer in the JAG Corps, SGT Steven Bernard, is pinned (safely) by his friend, Emilio. SGT Bernard was promoted on 21 August at the U.S. Army Reserve Legal Command headquarters in Gaithersburg, Maryland.

Photo 2
Members of team 350th CACOM OCJA briefly remove their masks, while maintaining social distance, to wish LTC Mark Milhiser a safe departure from Pensacola, Florida, and arrival at the Pentagon. Outgoing CJA, LTC Milhiser poses with the much coveted, and well-earned, 350th CACOM paddle. He is accompanied in the photo by SSG Jacqueline Reyes (left) and MAJ Chris Kinslow (right).

Photo 3
The 2d Armored Brigade Combat Team "Black Jack" celebrated its 103d birthday on 29 August 2020. This birthday bash was more special due to the fact that two of its Soldiers had just won the 1st Calvary Division Paralegal Soldier and NCO Boards. Both SPC Barragan and SGT Moton received a coin from the Brigade CSM and were able to cut the cake. Pictured from left to right: SGT Mojet (Paralegal NCO), SPC Barragan (Paralegal SPC), SGT Moton (Paralegal NCO), 1LT Smith (Admin Law/NSL), SFC Graves (Senior Paralegal NCO); front: MAJ Herriford (Brigade Judge Advocate).

Photo 4
On 28 August 2020, the USAACE & Fort Rucker OSJA enjoyed a morning of off-post PT at Johnny Henderson Family Park in Enterprise, Alabama. Soldiers had the choice to either run or ruck the outer loop of the park. Pictured post workout from left to right: SSG Kevin Wise, SGT Nicholas Babel, PFC Nykeria Hill, CW2 Melanie Sellars, SPC Patrick Wilson, MAJ Michael Lovelace, SPC Louis "Please Remove Me From This Distro" Dupree, LTC Colin Cusack, SPC Ian Tiedje, CPT Joseph Ragukonis, CPT Andrew Cain, CPT Richard Brantley, and 1LT Weili Weng

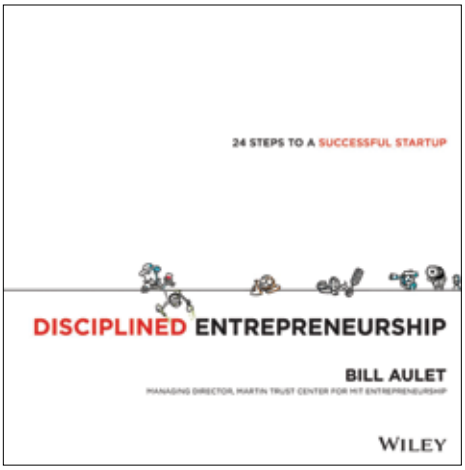
Photo 5
MSG Shakaylor S. McDaniel, Chief Paralegal NCO, and LTC Sean M. Connolly, SJA, 412th Theater Engineer Command, are consulting the new FM 1-04, *Legal Support to Operations*, and the 2020 Op Law Handbook while conducting MDMP during Operation Castle Rock at Camp Shelby, Mississippi.

Photo 6
MAJ Justin R. Wegner, Brigade Judge Advocate, 2BCT, 1st Infantry Division, USFK Korea, and CPT Michael W. Leach, Deputy Brigade Judge Advocate, 658th Regional Support Group, 9th Mission Support Command, emerge from 15 days of isolation in quarantine barracks, an experience they shared with two other barracks-mates on Camp Humphreys, South Korea. MAJ Wegner will serve in Korea on a rotation with the 1st Infantry Division while CPT Leach will perform operational support and military justice duties on Camp Humphreys for the 658th Regional Support Group.

Photo 7
1LT Heather McFarlain represented USAREC HQ OSJA in the historic USAREC Re-Patching Ceremony after 48 years of wearing the original patch design, which was approved on 6 December 1972. Pictured from left to right: Major General Kevin Vereen, 1LT Heather McFarlain, CSM John Foley.

Photo 8
COL Judy Boyd, Commander of the 13th Legal Operations Detachment-Expert, focuses on the trail ahead as she goes on to successfully (and safely) compete in the 2020 Maxxis Eastern States Cup Intense Downhill Race at Powder Ridge, Connecticut.

Photo 9
Congratulations to CPT Jules Szanton! Jules was recently sworn in as a Special Assistant U.S. Attorney by the Western District of Kentucky U.S. Attorney Russell Coleman. With this special trust and responsibility, CPT Szanton will now exercise Article III jurisdiction over Soldiers, Civilians, and visitors on Fort Knox, assisting USACC and Fort Knox in furthering respect for and adherence to the rule of law.



Book Review

Disciplined Entrepreneurship

Reviewed by Major John T. Castlen

As the primary attorney to Army Applications Lab (AAL), Army Futures Command's tech-focused outreach organization, I began a curated professional development program to understand how a company might build a business model around the Army as its target market. After reading my first book, I was not very optimistic.

Like many of you, I don't have a background in business. In school, I turned to an English degree because the idea of reading novels in coffee shops for "homework" appealed to my artistic side. But, when I was assigned as the legal advisor to AAL,[1] I found myself in the midst of the Austin startup scene: a new environment with its own etiquette, lingo, body of law, and key leaders. It was not unlike what some of us have experienced as rule of law attorneys in Iraq or Afghanistan—only with gourmet food trucks, live music, tacos, and some pretty nice swimming holes.[2] That, and no one has tried to kill me yet—that I'm aware of.

The AAL was formed in late 2018 with the express purpose of expanding the Army's access to non-traditional companies: startups, entrepreneurs, and other technology-focused companies.[3] It went through several iterations trying to implement lessons-learned from other Department of Defense (DoD) acceleration-focused organizations, including Defense Innovation Unit (DIU) and AFWERX.[4] When I arrived in July 2019, AAL had settled in on identifying its core value proposition to the Army and its non-traditional audience: to accelerate the discovery, evaluation, and transition of technology in support of the Army's modernization priorities.[5]

I see AAL's mission as a push and a pull. The AAL tries to push Army problems to the solver community in plain language to allow true innovation, and to use contracting and funding structures that make sense from a commercial industry perspective. The goal is to pull in technical solutions to the Army and transition the capability into the hands of a Soldier. While not limited to startups, ultimately, AAL's mission is to allow America's most innovative, agile, and creative companies to participate in the Army's modernization efforts—regardless of their size or history of working with the Government.[6]

When I finally learned what AAL's mission was and that I was going to be working with them on a day-to-day basis, I thought back to my wasted days drinking espresso and reading poetry in Chicagoland coffee shops. "It's time to learn something useful," I mused; so, I checked out a book on startups.

Disciplined Entrepreneurship

The book I chose was *Disciplined Entrepreneurship* by Bill Aulet.[7] The book was recommended by one of AAL's core leads, Porter Orr, a former Navy pilot who received an MBA from Massachusetts Institute of Technology.[8] Coming from previous innovation-focused jobs,[9] he was an incredible source of knowledge on the culture, incentives, decision-making process, and lingo of startups. As added street cred, he lived in an Airstream[10] with his wife, three kids, and two dogs.

During our many conversations wearing flannel shirts and drinking coffee, Porter impressed upon me the idea that, for the Army to truly allow America's small businesses to participate in its modernization efforts, it had to be able to demonstrate the potential for long-term value to the company's investors. If we expect them to turn to the Army as their target market, even bootstrapped companies with next-level technology have to be able to build a sensible business model that will lead to recurring revenue.

I began reading *Disciplined Entrepreneurship* to understand how a startup might build a business model around the Army. The book lays out a twenty-four-step guide for entrepreneurs who are seeking to commercialize their idea, invention, or intellectual property,[11] and walks through the market research, product development, and basic financial projections required to ensure that the business has the proper product-market fit and will be profitable after launch.[12] The concepts and calculations in the book provide a common language to discuss a venture[13] and would help answer the primary questions a venture capitalist would ask before deciding to invest.[14]

for the Army to truly allow America's small businesses to participate in its modernization efforts, it had to be able to demonstrate the potential for long-term value to the company's investors

However, beginning with step one—market segmentation[15]—I struggled to reverse engineer how a company might build its target market around the Army as a customer. Specifically, I questioned whether a company has access to enough information to conduct the necessary calculations to forecast its expected profits and to understand the end user. Also, I questioned whether the Army's contracting and capability development process were so complex that a company could not adequately map a path to recurring revenue.

This article attempts to compare the business development concepts highlighted in *Disciplined Entrepreneurship* with Army processes to show some of the challenges that a startup might encounter trying to develop technology for or pivot its business to the Army. While attracting entrepreneurs to the Army's modernization efforts is only one part of AAL's efforts, the intent of this article is to convey some of my thought process watching Army culture collide with the Austin technology ecosystem.

1. Does the Startup Have Sufficient Access to the End User to Develop a Relevant Solution?

The first steps in *Disciplined Entrepreneurship* are focused around interacting with and understanding the needs, desires, and values of the end user.[16] From market segmentation, to building an end-user profile,[17] to quantifying their value proposition,[18] an entrepreneur must first understand the needs of the customer.[19] But even more than their needs, before they achieve product-market fit and start generating traction, a company should know the priorities of their customer. Do they value usability over cost, for example, or is it some other performance metric such as size, durability, or power consumption?[20]

For companies to develop products that make sense and add value to Soldiers—the end user under Mr. Aulet's framework—they have to know what Soldiers actually do and how the Army operates. However, there may be misconceptions about what a Soldier's typical tasks are or how a headquarters element receives information and makes decisions. If a company doesn't know how the Army shoots, moves, and communicates—as well as resupplies, maintains, gathers intelligence, treats its wounded, and feeds its Soldiers—they either don't know if they have a solution to an Army problem or they can't develop a new solution. For the Army to attract innovation, it must provide an abundance of access to observe Army operations and interact with Soldiers.

For companies to develop products that make sense and add value to Soldiers—the end user under Mr. Aulet's framework—they have to know what Soldiers actually do and how the Army operates

2. Can a Startup Calculate the Total Addressable Market for Their Solution in the Army Market?

Step four in Mr. Aulet's process is the requirement to calculate the Total Addressable Market (TAM) for an entrepreneur's beachhead market.[21] The TAM is a calculation that describes the amount of annual revenue a business would make if they achieved one hundred percent market share for a particular market.[22] To calculate a TAM, a company needs to know the number of potential end users in their target market and estimate how much revenue each end user is potentially worth:[23]

> TAM = (Revenue per customer per year) x (Number of potential customers in target market)[24]

The calculation is a baseline estimate that is used to demonstrate to investors, partners, and other team members the potential value in a particular market.[25] While the TAM is only an estimate—and a running estimate at that—it's the gateway data point for major business decisions.[26] If the estimated value of the TAM is low, a company would likely decide against developing a product line or pivoting to that market.[27] More than flashing dollar signs on a pitch-deck, savvy business partners require a company to show their work and explain how they arrived at their TAM.[28]

For the Army to attract discerning business partners, it needs to provide enough data for companies to conduct their own market analysis and business calculations. Underestimating the TAM could cause a company with disruptive technology to pass on an opportunity to work with the Army because they couldn't see enough value.[29] Overestimating could be disastrous for a company who expends time and resources on a market that can't support their investment.[30] If there aren't enough end users in the Army for a niche technology, accurately calculating the TAM may be a lifeline for a small business who decides early to change course and focus on a different market.

3. Can a Startup Understand the Army's Decision-Making Unit?

Assuming that a company has enough information to sketch out a detailed end-user profile and can identify the potential for value in the market, the next challenge for a startup is to understand the internal business processes of the Army as a customer.

The Army has what Mr. Aulet would describe as a "complex" decision-making unit—meaning there is a difference between the person who will use the product and the person who will buy it.[31] In the Army, there are major organizational differences between the two: the end users are Soldiers and Civilians under the Chief of Staff of the Army,[32] and the purchasing agents are the Program Executive Offices under the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA(ALT)).[33] There are a lot of other organizations and personalities within and outside the Army that would be considered, within Mr. Aulet's framework, influencers, veto-holders, and champions—not the least of which is Congress.

If companies better understand who the true purchasing agents are for the Army, instead of scheduling office calls with general officers of operational units (i.e., end users), they could better focus their efforts on connecting with the right decision makers. Understanding which Army organization will be the buying agent and what it values in purchasing decisions, often expressed in evaluation criteria, is arguably more important for a company than knowing what the end user wants.

It's also important for startups to understand the role of other influencers in the Army's process of deciding what and when to purchase: Who is involved in the requirements generation process or the approval process to field a new capability? Who controls the funding that will be used? What contracting office will be used for the solicitation? Determining the decision-making unit of the customer to understand these key players and their priorities is a critical step before moving to that all-important step of charting a path to acquire a paying customer.

4. Can a Startup Map a Pathway to Recurring Revenue?

Mr. Aulet begins his book with the statement, "The single necessary and sufficient condition for a business is a paying customer. The day someone pays you money for your product or service, you have a business, and not a day before."[34] While the first steps of his book are focused on ensuring a startup has a thorough understanding of the customer, Mr. Aulet then fleshes out how a company will sell its product, build its business model, and make basic projections on profitability.[35]

In applying these steps, it seems that there are major challenges for a company to map out how it can get from product development to making its first sale to the Army. Specifically, the Force Development process requires significant internal-government coordination and multiple approvals before the Army can purchase and field new capabilities to Soldiers.[36]

As a brief aside, it should be noted that, under Mr. Aulet's framework, research and development (R&D) awards and expenses aren't considered part of a company's long-term financial projections.[37] Unless a company's business model is conducting R&D for the Army, the revenue streams included in the Lifetime Value of an acquired customer should come from a sale, such as a production award, purchase agreement, or some other licensing or maintenance arrangement.[38] This distinction is important because there are a lot of flashy R&D opportunities in the DoD right now—such as prize, pitch, or challenge competitions, as well as Small Business Innovation Research awards and prototyping projects using Other Transaction Agreements (OTA). However, the difference between an R&D award on a promising technology and that company generating recurring revenue is not so subtly referred to as the Valley of Death.[39] While an R&D funding opportunity may provide a longer runway through non-dilutive capital, transitioning technology into the Army requires more than production language in an OTA.

Purchasing and issuing new technology to an Army unit may require going through the Force Development Process—a process that the company has no control over and requires inter-agency coordination and, potentially, Congressional involvement.[40] A disruptive technology would need to be approved through the capability development process and its effect would have to be assessed with respect to the way the Army operates, as well as the way it is structured and manned.[41] Once those hurdles are cleared, a company may still have to compete for and win the production award;[42] and, depending on the company's intellectual property strategy, it might find more competition than expected if it conveyed Government purpose rights during the R&D effort.

There may be other avenues for a company to get their product into the hands of a Soldier, however. For instance, a validated operational needs statement is a way to short-circuit the capability development process and field nonstandard capabilities to units for ongoing or imminent missions,[43] and it may allow for quick, sole-source awards.[44] Joining with a prime-contractor to license or integrate technology may be a lucrative partnership for a startup that doesn't have the cash-flow to weather the technology maturation process or production capabilities.[45] There may be agency-wide or interagency multiple-award contracts they could be awarded, either directly or as a subcontractor, that would provide a company with an avenue into the Army or greater-DoD market.[46] The special operations community, which has its own procurement authority,[47] may also be a good sandbox for companies to receive user feedback and iterate on its solution before scaling into the big Army.

The bottom line is that finding a path to sell technology to the Army is not as easy as getting buy-in from an influential two-star general or winning a competitive R&D award

The bottom line is that finding a path to sell technology to the Army is not as easy as getting buy-in from an influential two-star general or winning a competitive R&D award. Because of the complexities of the Army decision-making unit, the Army might be preventing a company from being able to map out that process in a way that allows them to identify and mitigate risk.

Conclusion

My purpose in reading *Disciplined Entrepreneurship* was an attempt to understand the thought process of working with the Army from the perspective of a startup. In reading the book, I saw that there were challenges that extended beyond Government contracting and Army requirements documents. How the Army makes decisions on what to field and how its funds are partitioned and controlled impose significant obstacles for a company trying to understand and break into the Army market.

With the creation of the Cross-Functional Teams and AAL, Army Futures Command is addressing many of these difficulties—such as consolidating the

requirements development process and increasing the frequency and quality of interactions between industry and Army end users, also called Soldier touch-points. But the Army is a big organization inside of another big organization. Also, Army Futures Command only has control over the Army's funding designated for lower-level technology maturation,[48] and has to rely on an external Army organization for its contracting support.[49]

I'm certainly not the first person to recognize that there are challenges doing business with the Army; but—to me—the book underscored that, just as the Army uses a deliberate planning process,[50] businesses make decisions based on detailed analysis to maximize long-term value capture. If the Army wants high-quality solvers to focus their business and product development on the Army, it must ensure that companies have the ability to make informed decisions. Just as Porter told me from the beginning, for Army modernization to attract innovative solvers, companies must be able to demonstrate to their investors and business partners that there is the potential for long-term value and growth in the Army market. **TAL**

MAJ Castlen is a business and general law attorney at U.S. Army Futures Command in Austin, Texas.

Notes

1. While I may be tasked to support the Army Applications Lab, it's more accurate to say that I am the legal point man to a team of highly intelligent and supportive contract, fiscal, and ethics attorneys.

2. This assertion is based on the author's recent professional experiences as an attorney at U.S. Army Futures Command, from 16 June 2019 to present [hereinafter Professional Experiences].

3. Jen Judson, *Army Futures Command Is Leading a Cultural Shift, Much to the Delight of Industry*, Def. News (16 Oct. 2019), https://www.defensenews.com/digital-show-dailies/ausa/2019/10/16/army-futures-command-is-leading-a-cultural-shift-much-to-the-delight-of-industry.

4. Professional Experiences, *supra* note 2.

5. *Army Applications Lab*, Army Futures Command, https://armyfuturescommand.com/aal (last visited Aug. 17, 2020).

6. Army Applications Lab, *Overview*, LinkedIn, https://www.linkedin.com/company/army-applications-laboratory/about (last visited Aug. 17, 2020).

7. Bill Aulet, Disciplined Entrepreneurship: 24 Steps to a Successful Startup (2013).

8. Porter Orr, LinkedIn, https://www.linkedin.com/in/porterorr01 (last visited Aug. 17, 2020).

9. *Id.*

10. An Airstream is a brand of travel trailers.

11. Aulet, *supra* note 7, at 8–9.

12. *Id.* at 20.

13. *Id.* at xiv.

14. *See, e.g.*, Laurence K. Hayward, *Twenty Questions You Will Be Asked By Venture Capitalists (If You Get That Far) – Abbreviated Version*, VentureLab, Inc. (2009), http://www.theventurelab.com/assets/resources_twenty-questions.pdf.

15. Aulet, *supra* note 7, at 25-40. Market segmentation is the process of identifying the group of potential customers that, "share many characteristics and who would all have similar reasons to buy a particular product." *Id.* at 26.

16. *Id.* at 13.

17. *Id.* at 51-56.

18. *Id.* at 105-11.

19. *Id.* at 13, 51.

20. *See id.* at 72-75.

21. *Id.* at 57.

22. *Id.* at 59.

23. *Id.*

24. *Id.* at 59.

25. *Id.* at 60.

26. *Id.* at 59-61.

27. *Id.*

28. *Id. at* 60–61.

29. *See id.* at 60.

30. *See id.*

31. *See id.* at 27, 51, 139–47.

32. *See generally* 10 U.S.C. § 705 (2018).

33. *See* 10 U.S.C. § 7016(b)(5)(A) (2018); *see also Program Executive Offices,* Assistant Secretary of the Army (Acquisition, Logistics & Technology), https://www.asaalt.army.mil/About-Us/Program-Executive-Offices (last visited Aug. 7, 2020).

34. Aulet, *supra* note 7, at 25.

35. *Id.* at 13.

36. U.S. Dep't of Army, Reg. 71-32, Force Development and Documentation Consolidated Processes (20 Mar. 2019) [hereinafter AR 71-32].

37. Aulet, *supra* note 7, at 186.

38. *See generally id.* at 181–93. The Lifetime Value (LTV) calculation is the Net Present Value of profits over the first five-years of a startup's existence and includes the expected revenue per product/service balanced against the company's gross margins, production costs, costs of capital, etc. *Id.* at 186.

39. *See, e.g.*, *Cross the Valley of Death with Confidence*, MITRE, https://aida.mitre.org/blog/2019/03/24/cross-the-valley-of-death-with-confidence (last visited Aug. 7, 2020).

40. *See generally* AR 71-32, *supra* note 36.

41. *Id.*

42. 10 U.S.C. § 2304 (2018).

43. *See* U.S. Dep't of Army, Reg. 71-9, Warfighting Capability Determination ch. 6 (15 Aug. 2019).

44. *See generally* 10 U.S.C. § 1034(c)(2) (2018) (allowing for other than competitive procedures when there is "an unusual and compelling urgency").

45. *See, e.g.*, Theresa Hitchens, *Northrop Teaming With Startups To Build Autonomy Chops,* Breaking Defense (July 27, 2020, 12:24 PM), https://breakingdefense.com/2020/07/northrop-teaming-with-startups-to-push-air-forces-skyborg.

46. *See, e.g.*, NASA SEWP V, https://www.sewp.nasa.gov (last visited Aug. 7, 2020); *Computer Hardware, Enterprise Software and Solutions (CHESS)*, Program Executive Office Enterprise Information Systems, https://www.eis.army.mil/program/chess (last visited Aug. 7, 2020); *GSA Schedules*, U.S. General Services Administration, https://www.gsa.gov/buying-selling/purchasing-programs/gsa-schedules (last visited Aug. 7, 2020).

47. *Contracting*, Special Operations Forces Acquisition Technology & Logistics, https://www.socom.mil/SOF-ATL/Pages/contracting.aspx (last visited Aug. 7, 2020).

48. U.S. Dep't of Army, Dir. 2019-35, Funding Flow for Future Force Modernization Enterprise para. 4 (20 Nov. 2019). The Secretary of the Army split the Army's Research Development Testing and Evaluation (RDT&E) budget between ASA(ALT) and AFC, with AFC being responsible for Budget Activities 6.1 through 6.3, which is Basic Research, Applied Research, and Advanced Technology Development; and ASA(ALT) responsible for Budget Activities 6.4 through 6.7, which is Advanced Component Development and Prototypes through Operational System Development. *Id.*

49. U.S. Gov't Accountability Office, GAO-19-511, Army Modernization 19 (July 2019).

50. *See, e.g.*, U.S. Dep't of Army, Doctrine Pub. 5-0, Army Leadership ch. 3 (31 July 2019).

(Credit: istockphoto.com/bernie_photo)

Azimuth Check

Reporting Misconduct

By Colonel William R. Martin

The Judge Advocate General (TJAG) expects the daily actions of every member of the Judge Advocate Legal Services (JALS) to reflect an unwavering commitment to the highest standards of ethical conduct, founded on the premise that service to our nation is not only an honor, but a responsibility. This commitment requires steadfast integrity and absolute compliance with established professional conduct standards. The Judge Advocate General has established certain reporting requirements for misconduct so that he can evaluate, manage, and inquire into the delivery of legal services by the Judge Advocate General's (JAG) Corps. These requirements, discussed below, are separate and apart from those found in Army Regulation (AR) 27-26, Rule 8.3, and the corresponding rules in the various states and territories.[1]

When and How to Report Misconduct

Scenario 1

You are Captain (CPT) John Smith currently serving as a trial counsel. When you were home on leave last week, 500 miles from your duty station, you were arrested and charged with driving while intoxicated (DWI). You intend to fight the charge. You did not tell the arresting officer that you are in the Army, so you believe the likelihood is low that the Army will learn about your arrest unless you are convicted. At physical training this morning you told your buddy, another judge advocate (JA) named CPT Jane Jones, about your arrest and charge. You also said you were not going to tell your JA supervisor about it unless you were convicted. You are aware that AR 600-20, *Army Command Policy*, paragraph 4-23, requires you to report to your commander, in writing, any *conviction* for violating a criminal law.[2] Captain Jones tells you that she is not sure your position is right. She remembers hearing that JAs have to report to their legal technical chain supervisors if they have been charged with a criminal offense (other than misdemeanor traffic offenses), not just if they have been convicted. You have never heard that, so you challenge her to show you the authority for that requirement. Rather than tell you to do your own research since your career is at stake, not hers, she starts with the AR that covers just about everything related to the administration, requirements, and responsibilities of the JALS: AR 27-1, *Judge Advocate Legal Services*.[3]

Resolution to Scenario 1

Captain Jones's research lands on paragraph 11-10, which states:

> Any lawyer in JALS who has been *charged* with a criminal offense (other than misdemeanor traffic offenses) in any state, territory, commonwealth, or possession of the United States or in any federal court of the United States or the District of Columbia shall immediately inform, through appropriate technical channels, the Chief, Professional Responsibility Branch (PRB), of the charge. The lawyer shall thereafter promptly inform the Chief, PRB, of the disposition of the matter.[4]

Captain Jones is an excellent lawyer and researcher who takes her responsibility to be competent and diligent seriously, so she stays informed not just about laws and regulations but also TJAG's policies. She remembers seeing more about this issue, so she turns to JAGCNet, a fountain of information. She quickly finds the same reporting requirement in TJAG Policy Memorandum 17-01, *Professional Responsibility*.[5] As your friend and not as your

lawyer, CPT Jones shows you your reporting requirements.

You are now embarrassed about both your failure to know your reporting requirements and your attitude about it. You and CPT Jones have a professional, candid talk about why these reporting requirements reflect the Army Values and protect you, your clients, and the integrity of the JALS. Armed with this information, you report your arrest to your supervisors. Informed about your situation, your supervisory lawyers can now assess any personal conflict that may exist and, if necessary, make reassignment decisions to protect your clients, discuss substance abuse treatment options with you, and afford you the opportunity to demonstrate your character as you deal with your DWI charge.

Scenario 2

You are Colonel (COL) Williams, an installation staff judge advocate. At the office summer picnic this afternoon, you overheard a conversation between three E-4 paralegals. They seemed to be arguing about whether their section noncommissioned officer (NCO) in charge paralegal, Sergeant First Class (SFC) Gray, is bullying Private First Class (PFC) Brown, a new paralegal who arrived three days ago. Sergeant First Class Gray is yelling and screaming at PFC Brown in front of others, including in public office spaces, and ordering him to perform dozens of pushups for no apparent reason. But it was hard to hear everything they said, so you are not sure what you heard. What do you do? Should you ask the three paralegals? It is possible that your command paralegal NCO, Sergeant Major (SGM) Johnson, is aware of the matter and hasn't brought it to your attention just yet? You decide to ask SGM Johnson. It turns out what you think you overheard is news to him. You know it is your responsibility to look into this matter, and you decide that it would be best to try to confirm your suspicions, so you tell SGM Johnson to speak with the three paralegals. He comes back with not-so-good news: some people think SFC Gray is yelling and screaming at PFC Brown, while others view it as a loudly raised voice. Sergeant First Class Gray's interactions with PFC Brown concern both his duty performance as a paralegal and his duty performance as a Soldier. Most agree that PFC Brown is locked in the push-up position several times a day. Everyone in the section and others in other sections are aware of it, but SGM Johnson is not ready to label it as toxic leadership or bullying until he can get more facts.

Resolution to Scenario 2

You and SGM Johnson discuss it. Because toxic leadership and bullying behavior is not unique to a law office, and some of SFC Gray's interactions with PFC Brown concern his performance as a Soldier, should you ask the commander to conduct an AR 15-6 investigation into SFC Gray's behavior? Perhaps, but SFC Gray is a supervisor in the JALS, as defined in AR 27-1, paragraph 12-2b; and, according to AR 27-1, Chapter 12 (Mismanagement Inquiries), TJAG has jurisdiction to inquire into mismanagement in a law office.[6] Regardless, now that you have some facts, you know that you have an immediate requirement to inform the Regimental Command Sergeant Major (RCSM) because pursuant to TJAG Policy Memorandum 17-01, all allegations of misconduct or impropriety against any member of the JALS—whether criminal, professional responsibility, mismanagement, or any other type—will be reported through appropriate technical channels to the Chief, PRB, for JAs and Civilian lawyers; to the Chief Warrant Officer of the Corps for legal administrators; and to the RCSM for paralegal Soldiers.[7] You inform the RCSM, and you both discuss the investigation options. You bring the PRB into the discussion, and there is a unanimous decision that it would be best to start with a command investigation into the allegations of toxic leadership and bullying. But, SFC Gray's technical supervision of PFC Brown's performance as a paralegal will be carved out for your review under AR 27-1, Chapter 12.[8] Once the command investigation is complete, you will receive a copy, determine whether a separate Chapter 12 inquiry is still warranted and, if so, fold those findings into that inquiry.

Conclusion

As the reader can see, each scenario must be handled on a case-by-case basis. The takeaway is that each member of the JALS has reporting requirements when allegations of misconduct or impropriety are involved, whether as a self-report or a supervisor's report. **TAL**

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Notes

1. U.S Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers (28 June 2018).

2. U.S Dep't of Army, Reg. 600-20, Army Command Policy (24 July 2020).

3. U.S Dep't of Army, Reg. 27-1, Judge Advocate Legal Services (24 Jan. 2017) [hereinafter AR 27-1].

4. *Id.* para. 11-10.

5. Policy Memorandum 17-01, The Judge Advocate Gen., U.S. Army, subject: Professional Responsibility (1 Dec. 2017) [hereinafter TJAG Policy 17-01].

6. AR 27-1, *supra* note 3, para. 12-2b.

7. TJAG Policy 17-01, *supra* note 5.

8. AR 27-1, *supra* note 3.

General George S. Patton (Courtesy U.S. Army Signal Corps)

Lore of the Corps

War Crimes in Sicily

Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943

By Fred L. Borch III

Q: Do you know anything about some prisoners shot on July 14, near the Biscari Airfield?
A: (Captain Compton): Yes, sir.
...
Q: What order did you give concerning the shooting of these prisoners?
A (Captain Compton): I told my [lieutenant (Lt.)] to take care of it.
...
Q: What did you tell him?
A (Captain Compton): I told the Lt. to tell the [sergeant (Sgt)] to execute the prisoners.[1]

On 14 July 1943, about 1300, near the Biscari airport in Sicily, Captain (CPT) John T. Compton, a company commander serving in the 180th Infantry Regiment, 45th Infantry Division, ordered his men to execute thirty-six prisoners of war (POWs). Only three hours earlier, Sergeant (SGT) Horace T. West, also serving in the 180th, committed a similar war crime when he murdered thirty-seven Italian and German POWs by shooting them with a Thompson submachine gun. This is the story of those two events, the courts-martial of West and Compton for murder, and the very different outcomes of those trials.

Operation Husky, the Allied invasion of Sicily, kicked off on 10 July 1943, when British and Canadian forces landed on the southeastern corner of the island. The following day, Soldiers belonging to Lieutenant General (LTG) George S. Patton's Seventh Army and LTG Omar N. Bradley's II Corps waded ashore, some miles to the west, at Licata and Gela, respectively. Driving northward, the Americans, British, and Canadians ran into ten Italian and two German panzer divisions but, after fierce fighting, had seized the southern quarter of Sicily on 15 July.[2]

While this was good news for the invaders, the murder of German and Italian POWs the previous day cast a dark cloud over the sunny skies of Sicily. No one doubted that the killings had occurred or that they had happened during "a sharp struggle for control of the airfield north of Biscari."[3] Rather, the question was why it had occurred, who was responsible, and what should be done.

The facts were that, on 14 July 1943, troopers serving in the 180th Infantry Regiment overcame enemy resistance and, by about 1000, had gathered together a group forty-eight prisoners. Forty-five were Italian and three were German. Major Roger Denman, the Executive Officer in the 1st Battalion, 180th Infantry, ordered a noncommissioned officer (NCO), thirty-three year old SGT Horace T. West, to take the POWs "to the rear, off the road, where they would not be conspicuous, and hold them for questioning."[4]

After SGT West, several other U.S. Soldiers assisting him, and the forty-eight POWs had marched a mile, West halted the group. He then directed that "eight or nine" POWs be separated from the larger group and that these men be taken to the regimental intelligence officer (S-2) for interrogation.

As the official investigation conducted by Lieutenant Colonel (LTC) William O. Perry, the division inspector general (IG), revealed, West then took the remaining POWs "off the road, lined them up, and borrowed a Thompson Sub-Machine Gun" from the company first sergeant (1SG). When that NCO asked West what he intended to do, "SGT West replied that he was going to kill the 'sons of bitches.'" After telling the Soldiers guarding the POWs to "turn around if you don't want to see it," SGT West then singlehandedly murdered the disarmed men by shooting them. The bodies of the dead were discovered about thirty minutes later by the division chaplain, LTC William E. King. King later told the division IG that every dead POW had been "without shoes or shirts." This was expected, because it was common practice to remove a captured soldier's shoes and shirt to discourage escape. But King also told the IG that each POW "had been shot through the heart," which was unexpected but indicated that they had been killed at close range. Investigators subsequently learned that, after emptying his submachine gun into the POWs, West had "stopped to reload, then walked among the men in their pooling blood and fired a single round into the hearts of those still moving."[5]

Three hours later, twenty-five year old CPT John T. Compton, then in command of Company A, 180th Infantry, was with his unit in the vicinity of the same Biscari airfield. After the Americans encountered "sniping…from fox holes and dugouts occupied by the enemy,"[6] a Soldier managed to capture thirty-six enemy soldiers. When CPT Compton learned of the surrender, he "immediately had a detail selected" from his company to execute the POWs. According to LTC Perry, who investigated both shootings, Compton gave the following answers to Perry's questions:

Q. How did you select the men to do the firing?
A. I wished to get it done fast and very thoroughly, so I told them to get automatic weapons, the BAR [Browning Automatic Rifle] and Tommy Gun.

Q. How did you get the men? Did you ask for volunteers?
A. No, sir. I told the [SGT] to get the men.

Q. Do you remember exactly what you told him?
A. I don't remember exactly.

Q. What formation did you get them in before they were shot?
A. Single file on the edge of a ridge.

Q. Were they facing the weapons or the other side?
A. They were in single file, in a column, rifle fire from the right.

Q. Were the prisoners facing the weapons or the other side?
A. They were facing right angle of fire.

Q. What formation did you have the firing squad (sic)?
A. Lined 6 foot away, about 2 yards apart, on a line.

Q. Did you give any kind of a firing order?
A. I gave a firing order.

Q. What was your firing order?
A. Men, I am going to give ready fire and you will commence firing on the order of fire.[7]

Since Compton had lined his firing squad up so that the POWs presented a target in enfilade, there was little doubt that he intended to kill the POWs.

The following day, after knowledge of Compton's execution of the enemy travelled up the chain of command, LTG Bradley personally questioned the junior officer about his actions. As CPT Compton told Bradley, he "had been raised fair and square as anybody else and I don't believe in shooting down a man who has put up a fair fight." But, said Compton, these enemy soldiers "had used pretty low sniping tactics against my men and I didn't consider them as prisoners." Perhaps most importantly, CPT Compton added the following to his official statement:

> During the Camberwell operation in North Africa, [LTG] George S. Patton, in a speech to assembled officers, stated that in the case where the enemy was shooting to kill our troops and then that we came close enough on him to get him, decided to quit fighting, he must die. Those men had been shooting at us to kill and had not marched up to us to surrender. They had been surprised and routed, putting them, in my belief, in the category of the General's statement.[8]

What was to be done about these two massacres at Biscari? According to Carlo D'Este's *Bitter Victory: The Battle for Sicily 1943*, General Bradley "was horrified" when he learned what West and Compton had done, and "promptly reported them to Patton," his superior commander. Patton not only "cavalierly dismissed the matter as 'probably an exaggeration,'" but told Bradley "to tell the officer responsible for the shootings to certify that the dead men were snipers or had attempted to escape or something, as it would make a stink in the press, so nothing can be done about it."[9]

But Bradley was a man of principle, and refused to follow Patton's suggestion.[10] On the contrary, Bradley directed that West and Compton be tried for murder. As a result, Major General (MG) Troy H. Middleton, the 45th Infantry Division commander, convened a general court-martial to try SGT West for "willfully, deliberately, feloniously, unlawfully" killing "thirty-seven prisoners of war, none of whose names are known, each of them a human being, by shooting them and each of them with a Thompson Sub-Machine gun."[11] As for CPT Compton, he also faced a general court-martial convened by Middleton. The charge was the same, except that Compton was alleged to have killed "with premeditation…thirty-six prisoners of war…by ordering them and each of

them shot with Browning Automatic Rifles and Thompson Sub-Machine Guns."[12]

Sergeant West was the first to be tried. His court-martial began on 2 September 1943 and concluded the next day. West pleaded not guilty, and his counsel (none of whom were lawyers) portrayed him as "fatigued and under extreme emotional distress" at the time of the killings. This "temporary insanity defense," in fact, had been suggested by the division IG, who found that "in light of the combat experience of the sergeant and the unsettled mental condition that he was probably suffering from, a very good question arises as to his sanity at the time of the commission of the acts."[13] West also testified that he had seen the enemy murder two American Soldiers who had been taken prisoners, an experience which filled him with rage and made him want "to kill and watch them [the enemy] die, see their blood run."[14] The problem with this defense was that the killings had not occurred in the heat of battle, or near in time to the alleged murder of the two Americans, but rather long after the fighting had ceased and SGT West was escorting the POWs to the rear for interrogation.

Sergeant West also advanced a second rationale for what he had done at Biscari: he had been following the orders of General Patton who, insisted West, had announced prior to the invasion of Sicily that prisoners should be taken only under limited circumstances. Colonel Forest E. Cookson, the 180th Infantry's regimental commander, testified for the defense and confirmed that Patton had proclaimed he wanted the 45th Infantry Division to be a "division of killers," and that if the enemy continued to resist after U.S. troops had come within two hundred yards of their defensive positions, then the surrender of these enemy soldiers need not be accepted.[15] While Cookson testified further that he had repeated Patton's words "verbatem" (sic) to the Soldiers of his regiment, West's problem with claiming a defense based on following Patton's order was that the POWs he had killed had already surrendered and were in custody. Consequently, while West raised Patton's order in his trial, he did not really offer it as a defense.

The panel members clearly gave more weight to the testimony of 1SG Haskell Y. Brown, who testified that West had "borrowed" his Thompson "plus one clip of thirty rounds" and then had killed the Italians and Germans in cold blood.[16] The panel did not believe West was temporarily insane, and found him guilty of premeditated murder under Article 92 of the Articles of War.

In an unusual twist, however, the panel of seven officers sentenced West to "life imprisonment" only. They did not adjudge forfeitures or a dishonorable discharge. Perhaps this was because SGT West's good military character. West had served almost continuously with Company A, 180th Infantry Regiment since his induction in September 1940, was "exceptionally dependable," and had "fought bravely and courageously since the invasion of Sicily."[17] But a life sentence nevertheless sent the message that such a war crime would not be condoned, and the convening authority directed that West be confined in the "Eastern Branch, United States Disciplinary Barracks, Beekman, New York."[18]

The general court-martial of CPT Compton was a very different affair. While it was true that a number of Soldiers had carried out the executions, only Compton was being tried for murder. This was almost certainly because Field Manual (FM) 27-10, *Rules of Land Warfare*, which had been published in October 1940—more than a year before the United States entered World War II—provided that a Soldier charged with committing a war crime had a valid defense if he was acting pursuant to a superior's orders. In discussing the "Penalties for Violations of the Laws of War," paragraph 347 stated, in part:

> Offenses by armed forces. The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; ...*ill-treatment of prisoners of war. Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders.* The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.[19]

This language meant that the Soldiers who had been ordered by Compton to shoot the POWs had a complete defense to murder. But Compton's defense was that he, too, had been acting pursuant to orders—orders from General Patton. Compton claimed that he remembered, almost word for word, a speech given by Patton in North Africa to the officers of the 45th Infantry Division. According to Compton, Patton had said:

> When we land against the enemy, don't forget to hit him and hit him hard. We will bring the fight home to him. We will show him no mercy. He has killed thousands of your comrades, and he must die. If you company officers in leading your men against the enemy find him shooting at you and, when you get within two hundred yards of him and he wishes to surrender, oh no! That bastard will die! You will kill him. Stick him between the third and fourth ribs. You will tell your men that. They must have the killer instinct. Tell them to stick him. He can do no good then. Stick them in the liver. We will get the name of killers and killers are immortal. When word reaches him that he is being faced by a killer battalion, a killer outfit, he will fight less. Particularly, we must build up that name as killers and you will get that down to your troops in time for the invasion.[20]

A Soldier in Compton's company testified that he was "told that General Patton said that if they don't surrender until you get up close to them, then look for their third and fourth ribs and stick it in there. Fuck them, no prisoners!"[21] An officer testified that Patton had said that the "more prisoners we took, the more we'd have to feed, and not to fool with prisoners."[22]

Compton did not waver in insisting that he had been following orders. The POWs he had ordered shot had resisted at close quarters and had forfeited their

right to surrender. Additionally, Compton claimed that the executed men had been snipers (and that some were dressed in civilian clothes) and that this was yet another reason that they deserved to be shot—because sniping is dishonorable and treacherous. As Compton put it: "I ordered them shot because I thought it came directly under the General's instructions. Right or wrong a three star general's advice, who has had combat experience, is good enough for me and I took him at his word."[23]

On 23 October 1943, after the prosecution declined to make a closing argument in Compton's trial, the court closed to deliberate. When the members returned, the president of the panel announced that the court had found CPT Compton not guilty of the charge of murder and its specification.

When LTC William R. Cook, the 45th Infantry's Staff Judge Advocate, reviewed the *West* and *Compton* records of trial in November 1943, he immediately recognized that he had two problems. The first was that, when charged with very similar war crimes, an NCO had been convicted while an officer had been acquitted and, since that NCO had been sentenced to life imprisonment, this might be perceived as unfair.

But perhaps more troubling was that Compton had been acquitted because he claimed that his execution of POWs had been sanctioned by General Patton's orders. Cook did not want to criticize the court members directly, and he acknowledged that Patton's speech to the 45th's officers provided both a moral and a legal basis for the panel's conclusion that Compton had acted pursuant to superior orders. Lieutenant Colonel Cook also conceded that the 1928 *Manual for Courts-Martial* provided that the "general rule is that the acts of a subordinate officer or soldier, done in good faith...in compliance with... superior orders, are justifiable, unless such acts are...such that a man of ordinary sense and understanding would know to be illegal."[24] But, focusing on this last phrase, Cook wrote that he believed that an order to execute POWs was illegal. As he wrote in the "Staff Judge Advocate's Review" of Compton's trial:

> My own opinion on the matter is... the execution of unarmed individuals without the sanction of some tribunal is so foreign to the American sense of justice, that an order of that nature would be illegal on its face, and being illegal on its face could not be complied with under a claim of good faith. However, that opinion is my personal interpretation of the law, and being without adequate means of research, I am not prepared to state that it is an opinion founded on good authority.[25]

Lieutenant Colonel Cook did not address the language contained in paragraph 347 of FM 27-10, discussed above, which provided yet another legal basis for the panel to have acquitted CPT Compton.

and continued to serve as a Soldier until the end of the war, when he was honorably discharged

As James J. Weingartner shows in his study of the *West* and *Compton* trials, the "Biscari cases made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility of enemy reprisals should details of the incidents become common knowledge."[26] To keep what had happened from public view, both records of trial were classified "Secret" and the media was kept in the dark about the two episodes.

Captain Compton, who had been reassigned to another unit after his acquittal, was killed in combat on 8 November 1943. Like it or not, his death solved the problem of keeping his case confidential.

Not so with West. He was alive and, instead of being returned to the United States, where his presence in a federal penitentiary would likely bring unwanted publicity to him and his crime, West was shipped to a confinement facility in North Africa. Keeping West under Army control no doubt made it less likely that the Germans and Italians would learn of the Biscari killings.

In any event, after reviewing West's record of trial, Eisenhower decided to "give the man a chance" after he had served enough of his life sentence to demonstrate that he could be returned to duty.[27] After West's brother wrote to both the Army and to his local member of Congress asking about the case—raising the possibility again that the public would learn about what had happened at Biscari—the Army moved to resolve the worrisome matter.

In February 1944, the War Department's Bureau of Public Relations recommended that West be given some clemency, but "that no publicity be given to this case because to do so would give aid and comfort to the enemy and would arouse a segment of our own citizens who are so distant from combat that they do not understand the savagery that is war."[28] Six months later, on 23 November 1944, LTG Joseph McNarney, the deputy commander of Allied Forces Headquarters, then located in Caserta, Italy, signed an order remitting the unexecuted portion of West's sentence. Private West was restored to active duty and continued to serve as a Soldier until the end of the war, when he was honorably discharged.

But secrecy remained paramount in the *West* and *Compton* cases. A 1950 memorandum for MG Ernest M. "Mike" Brannon, The Judge Advocate General of the Army, advised that all copies of the records of trial were under lock and key in the Pentagon; the records apparently were not declassified until the late 1950s.[29]

Three final points about the courts-martial of SGT West and CPT Compton. First, the War Department Inspector General's Office launched an investigation into the Biscari killings, and General Patton was questioned about the speech that Compton and others had insisted was an order to kill POWs. Patton told the investigator that his comments had been misinterpreted and that nothing he had said "by the wildest stretch of the imagination" could have been considered to have been an order to murder POWs. The

investigation ultimately cleared Patton of any wrong-doing.

Second, on 15 November 1944, slightly more than five months after Allied landings in Normandy, and more than a year after the *West* and *Compton* trials, the War Department published Change 1 to FM 27-10. That change added this new paragraph:

> Liability of offending individual—Individuals and organization who violate the accepted laws and customs of war may be punished therefor. However, the fact that *the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment.* The person giving such orders may also be punished.[30]

Would the result in the Compton trial have been different if Change 1 had been in effect in October 1943?[31]

Finally, in *Hitler's Last General*, two British historians argued that if the legal principles used to convict SS-troops for the massacre of American POWs at Malmedy had been applied to the Biscari killings, then Patton[32] would have been sentenced to life imprisonment and Bradley to ten years. As for Colonel Cookson, who had commanded the 180th Infantry Regiment, he would have been sentenced to death.[33] Whether one agrees with this assessment or not, it is arguable that, in light of the principle of command responsibility for war crimes, some culpability may well have attached to senior American commanders in Sicily.

Remembering that military criminal law and the law of armed conflict today are much different than they were in World War II, what are the lessons to be learned from the events at Biscari? One might conclude that an officer serving in 1943 could expect different treatment at a court-martial from an enlisted Soldier being prosecuted for a similar offense. Another lesson might be that culpability for war crimes very much depends on who wins the war (so-called "victor's justice"). But perhaps the most important lesson is that commanders must be careful when giving a speech designed to instill aggressiveness and a "warrior" spirit in their subordinates. Word choice does matter, and Soldiers do listen to what commanders say to them. **TAL**

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This article is a reprint of Mr. Borch's article featured in the March 2013 issue of the Army Lawyer.

Notes

1. Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation, subj: Shooting of Prisoners of War under direction of Captain John T. Compton 5 (5 Aug. 1943) [hereinafter Compton Report of Investigation].

2. Albert N. Garland & Howard McGraw, U.S. Army in World War II, The Mediterranean Theater of Operations, Sicily and the Surrender of Italy 141–42 (1965).

3. James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, Historian, Nov. 1989, at 24, 25.

4. Office of the Inspector Gen., Headquarters, 45th Infantry Div., Report of Investigation of Shooting of Prisoners of War by Sgt. Horace T. West 1 (5 Aug. 1943) [hereinafter West Report of Investigation].

5. Rick Atkinson, The Day of Battle 118 (2007).

6. Compton Report of Investigation, *supra* note 1, at 1.

7. *Id.* at 3 (statement by Captain John T. Compton (July 1943)).

8. *Id.*

9. Carlo D'Este, Bitter Victory: The Battle for Sicily 318 (1988).

10. While Patton initially was not interested in a trial for West and Compton, D'Este notes that he later changed his mind. *Id.* at 319. Atkinson writes that this change of heart occurred after the 45th Division's IG found "no provocation on the part of the prisoners.... They had been slaughtered." Patton then said: "Try the bastards." Atkinson, *supra* note 5, at 119.

11. United States v. West, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 4 [hereinafter *West* Record of Trial].

12. Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 84, (13 Nov. 1943), *in* United States v. Compton, No. 250835 (45th Inf. Div., 23 Oct. 1943).

13. Compton Report of Investigation, *supra* note 1, at 2.

14. *West* Record of Trial, *supra* note 11, at 101.

15. *Id.* at 58–59; Weingartner, *supra* note 3, at 28.

16. *West* Record of Trial, *supra* note 11, at 8.

17. West Report of Investigation, *supra* note 4, at 2.

18. Headquarters, 45th Infantry Div., Gen. Court-Martial Order No. 86 (4 Nov. 1943).

19. U.S. Dep't of Army, Field Manual 27-10, Rules of Land Warfare para. 347 (1 Oct. 1940) (emphasis added).

20. United States v. Compton, No. 250835 (45th Inf. Div., 23 Oct. 1943), at 58–59.

21. *Id.* at 55.

22. *Id.* at 48.

23. *Id.* at 63.

24. Manual for Courts-Martial, United States para. 148a (1928).

25. Staff Judge Advocate's Review, *in West* Record of Trial, *supra* note 11, at 3.

26. Weingartner, *supra* note 3, at 38.

27. Atkinson, *supra* note 5, at 20.

28. *Id.* at 39.

29. Memorandum from Lieutenant Colonel W. H. Johnson, Judge Advocate Gen.'s Corps Exec., for Gen. Brannon, subj: Records of Trial [Compton & West] (26 May 1950).

30. U.S. Dep't of Army, Field Manual 27-10, Rules of Land Warfare para. 345.1 (1 Oct. 1940) (C1, 15 Nov. 1944) (emphasis added).

31. For more on the Army's decision to remove superior orders as an absolute defense to a war crime, see Gary D. Solis, The Law of Armed Conflict 354–55 (2009). Today, paragraph 509a of Field Manual 27-10 provides that "the fact that the law of war has been violated pursuant to an order of a superior authority... does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." U.S. Dep't of Army, Field Manual 27-10, Rules of Land Warfare para. 509a (July 1956).

32. As for George S. Patton, widely regarded as one of the best combat commanders of all time, General Eisenhower said it best: "His emotional range was very great and he lived at either one end or the other of it." Solis, *supra* note 31, at 386. Assuming that Eisenhower was correct, what does this say about Patton's responsibility for West's and Compton's actions in Sicily?

33. Ian Sayer & Douglas Botting, Hitler's Last General (1989). For more on the Malmedy murders, see Charles Whiting, Massacre at Malmedy (1971). *See also* Danny S. Parker, Fatal Crossroads (2012); James J. Weingartner, A Peculiar Crusade (2000). For a short legal analysis of the Malmedy trial, see Fred L. Borch, *The 'Malmedy Massacre' Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, Army Law., Jan. 2011, at 3.

AROUND THE CORPS

BG Joseph B. Berger, Commanding General of TJAGLCS, welcomes the 212th JAOBC in September as they begin their instruction in Charlottesville, VA. Half of the OBC attends in person while the other half attends via Zoom to facilitate social distancing while learning from TJAGLCS's excellent faculty. (Credit: Jason Wilkerson/TJAGLCS)

SGT Horace West (Courtesy Thomas Kelly)

Special Contribution

War Criminal Paroled

Horace T. West and the Final Chapter of the Biscari Massacre

By Thomas Harper Kelly

In February 1945, United Press International (UPI) war correspondent Robert Vermillion visited the positions of the 100th Infantry Division in Alsace—near Bitché, France. His intent was to interview a sniper—from Wagoner, Oklahoma, in L Company, 399th Infantry Regiment—who was credited with killing more than 130 German troops. That Soldier, Sergeant Horace Theodore West, was a thirty-five-year-old Oklahoma native with thinning gray hair and skin "tanned the color of smoked ham." During the interview, West told Vermillion (the UPI reporter) that his beloved Springfield rifle, equipped with a telescopic sight, was named after his wife Mabel.[1] In his story, West described the prayer he shared with Mabel and his two children before he shipped out: he asked God to "take care of all the boys on the battlefields."[2] On the subject of killing, West meekly posited, "[a] man shouldn't be too proud of killing another man."[3] But, he added, "the Germans started it."[4]

What Vermillion did not know, and could not have known, was that the seemingly pious West had only recently returned to combat after being imprisoned for over a year. His crime? He murdered thirty-seven Italian and German prisoners of war (POWs) in an incident now known as The Biscari Massacre.

New scholarship[5] shows that a convicted war criminal sentenced to life, paroled, and returned to combat, continued to kill; and, in the process, he became a minor celebrity in his new unit.[6] This new chapter of the Biscari Massacre reveals innominate dimensions of the case and unknown applications of military justice during World War II.

The Biscari Massacre

Sergeant West was a cook in A Company, 180th Infantry Regiment, 45th Infantry Division when it landed near Gela, Sicily, as part of Operation Husky.[7] On 14 July 1943, several days after the initial landings, West's company was engaged near the airport at Biscari. The battalion's executive officer, Major Roger Denman, ordered West and several other American Soldiers to escort forty-eight German and Italian POWs to the rear for questioning. After marching the POWs a mile, West halted the group and selected eight or nine to report to the regimental intelligence officer. He then borrowed a Thompson sub-machine gun from his company's first sergeant, and told him he was going to kill the "sons of bitches."[8] He instructed his comrades to "turn around if you don't want to see it."[9] West murdered the disarmed POWs at close range, then reloaded and began firing single shots into the hearts of the POWs still moving.[10]

The bodies of the executed POWs were quickly discovered and brought to the attention of II Corps Commander, Lieutenant General Omar Bradley.[11] The same day, West's company commander, Captain John T. Compton, had also been involved in the killing of thirty-six POWs near Biscari. Both incidents deeply troubled Bradley, who reported them to Seventh Army Commander Lieutenant General George S. Patton.[12] Patton initially

dismissed the accounts and told Bradley that the incidents would "make a stink in the press."[13] Patton told Bradley to advise the officer responsible for the shooting to say either that the dead men were snipers, or they were shot during an escape attempt; regardless, nothing could be done about it. However, Bradley ignored Patton and pressed for charges to be brought against both Compton and West. Patton belatedly agreed.[14]

West was tried first.[15] He was found guilty of the murder of thirty-seven POWs and sentenced to life.[16] Captain Compton, whose trial took place after West, was acquitted of the charges against him.[17] Compton was then reassigned and, on 8 November 1943—roughly four months after the incidents around Biscari, was killed in action.[18]

James J. Weingartner, the historian who first examined the incidents, argued that the Biscari Massacre "made the U.S. Army and the War Department acutely uncomfortable. Both feared the impact on U.S. public opinion and the possibility of reprisals should the details of the incidents become common knowledge."[19] With Compton dead, the chance that his involvement would be revealed was removed. West, however, sat in an Army prison in North Africa. His brother sought information from the War Department on details of his brother's confinement. Eventually the matter was brought to the attention of General Dwight D. Eisenhower, and he recommended that West be given another chance.[20]

In February 1944, the War Department recommended that West be granted clemency, but that no publicity be given to his case because "to do so would give aid and comfort to the enemy, and would arouse a segment of our own citizens who are so distant from combat that they would not understand the savagery that is war."[21] On 23 November 1944, after serving fourteen months of his life sentence, West was paroled and restored to active duty at the rank of Private.[22] West's court-martial records were kept under lock and key at the Pentagon until the 1950s.[23]

Previous scholarship traced West's service to his parole and subsequent honorable discharge, but it skipped an entire chapter of his story. Following his release, West was far from inconspicuous. After his parole, the Army did not assign West to a rear echelon unit.[24] Instead, he progressed through the Army Ground Forces replacement system, joined an infantry division fighting in France, and unexpectedly found himself appearing in his unit's newspaper, the Army's newspaper—titled *The Stars and Stripes*—and newspapers across America.[25]

When West arrived at the front and learned The Kid had been picked off by a sniper, he lamented it "went plumb against my liver"

Squaring Things for "The Kid"

On 24 January 1945, Private West—along with twenty-nine other replacement Soldiers—was assigned to the depleted L Company, 399th Infantry Regiment, 100th Infantry Division.[26] Official records, postwar memoirs, and histories of the company give no indication that anyone there knew about his involvement with the Biscari Massacre, or his imprisonment; this is hardly surprising given the secrecy surrounding both events. Nonetheless, West quickly made a name for himself in his new unit as a sniper.

According to West, his sniping exploits were motivated by a desire to avenge the death of "The Kid"—a young Soldier he had met in a replacement depot on the way to the front and who was assigned to L Company the day before West arrived.[27] As the story goes, West took The Kid under his wing, shared what he learned from his earlier combat experiences, and "warned him not to move aroun' too much" on the frontlines, "particularly when you figure there might be a sniper around"[28] Unfortunately, The Kid became the victim of a German sniper almost immediately.[29] When West arrived at the front and learned The Kid had been picked off by a sniper, he lamented it "went plumb against my liver."[30] West said that "the guys in the outfit were burned up…I went to the [commanding officer] and told him I could get that sniper if he'd give me a chance. [He] said 'Fine, go git him!'"[31] West said he went "lookin' for the bugger," and his vengeance was swift:

> First thing I did was to find the hole where the kid was. I asked a lot of questions, naturally, like: "where he was sitting when he got it?"… There was no wind that day, so after figurin' the trajectory of the bullet, I picked a spot where the lousy sniper had to be when he fired at the kid. There was a fork in the tree about five feet above the ground which made a swell spot for his gun. I thought I saw movement there and put my telescopic sight on it. Sure enough, there was his head and part of his shoulder. I drew a bead with old "Mabel" and let go. The Kraut's head snapped up and I saw him tumble over backward.[32]

In the following days, West claimed to have killed two more German soldiers as they attempted to sneak up a trail opposite his company's positions.[33]

On 15 February 1945, West's company moved to new positions near an observation post overlooking Reyersviller, France—dubbed "The Panama Canal."[34] Assigned to screen the work of Soldiers expanding the Canal, West allegedly spotted six Germans and directed 60mm mortar fire that killed them all.[35] He then claimed to have eliminated an additional five Germans with his sniper rifle.[36] On another day, West was credited with the dispatch of fourteen German soldiers and a possible wounding or killing of six more while sniping and acting as a forward observer for his company's mortars.[37]

West's reputation grew apace with his body count. He received a promotion directly from private to sergeant within three weeks of joining L Company, and was featured on the front page of the 100th Infantry Division newspaper, the

Century Sentinel.[38] In an article titled "Sniper Picks Off 17 Krauts to Square Things for 'Kid," his battalion commander—Lieutenant Colonel Bernard V. Lentz—praised West as "a better shot than any Nazi sniper we've ever encountered.…I'd say he personally has pushed their line back at least 150 yards."[39] It was shortly after that article's publication that Vermillion, the UPI reporter, interviewed West. The resulting story, "They Started it, Says Oklahoma Sniper with 130 Nazis to Credit," began appearing in newspapers across the country.[40] A report of West's exploits also appeared in the London edition of *The Stars and Stripes*.[41]

"150 Germans and a Legend"

A fascinating element of West's story is how many of the sources refer to his earlier service with the 45th Infantry Division and his combat experiences in Sicily, but fail to adequately explain why West left the 45th Infantry Division and why he was assigned to the 100th Infantry Division almost eighteen months later.

The first mention of West's earlier service appears in the *Century Sentinel*, which merely states that West had "been through the mill" with A Company, 180th Infantry Regiment, 45th Infantry Division.[42] The 399th Infantry's regimental history offers what is, at best, an oversimplification: "West had fought in Sicily with the 45th. He wanted to fight in Germany, so African authorities gave him a Springfield sniper rifle and shipped him off to the [European Theater of Operations]."[43]

The UPI story describes how West had "been shooting Germans, running, sitting, and standing since his old division, the 45th, landed in Sicily [on] July 10, 1943," but missed combat in Italy because "he was assigned to the 100th division as a rifle company headquarters handyman."[44] But, the 100th Infantry Division had not even arrived in the European Theater of Operations until 20 October 1944; and, West's assignment to the division did not occur until late January 1945.[45]

The UPI story is also the origin of West's unsubstantiated claims that he killed over one hundred German soldiers.[46] West was quoted as saying "I reckon I must have killed around 120 [Germans] in Sicily.… But that was close fighting. The killing in Sicily didn't take skill as much as fire power and, most of the time, I was using a tommy gun."[47] This was a particularly shocking statement from a Soldier previously convicted by general court-martial of murdering thirty-seven unarmed POWs with a submachine gun.[48]

West's claims are disturbing and dubious. His boast of killing 120 Germans in Sicily is particularly suspicious given his assignment as a cook in the company headquarters, and not as a member of a rifle squad.[49] The 399th Infantry Regiment history contains a photograph of West with the caption, "Legend says West killed 150 Germans. The legend is fact," repeating West's likely embellishment and giving it additional authority.[50] Furthermore, according to Roy Sees—who served with West in L Company, 399th Infantry—there were no witnesses to many of his "kills":

> He was kind of a loner, as far as the company concerned.…He would get up in the morning early and start out with that rifle he had and we would probably see him then later again in the evening. He would stay overnight and then get up in the morning and go sniper [sic] some more.…He'd come out in the morning and he'd get ready to go with his rifle on his shoulder …and say, "Well, I'm going to go out and kill some more Krauts" and that's the last you'd see of him during the day.[51]

With regard to the claim that West was responsible for the deaths of 150 German soldiers, Sees was not convinced. "It don't sound right to me, but he was a braggart," Sees said.[52] "He was always bragging about killing Germans, whether he killed any or not was kind of a joke around the company because there was no way of proving whether he shot anybody, because there was nobody there but him.…He was by himself, alone."[53]

"All the Good Men I Served With"[54]

On 1 April 1945, West was evacuated to a rear hospital due to an illness—possibly hepatitis—which prevented his return to his company before the end of the war in Europe.[55] Despite the 448 days he spent in confinement, he had enough "points" under the Army's discharge system to be returned to the United States in October 1945, and was honorably discharged in January of the following year.[56] There is no indication that he received any official reprimand, or otherwise ran afoul of the military justice system, after his parole in November 1944.[57]

West's story after his parole is not one of redemption

While it is unclear whether West—a pre-war member of the 45th Infantry Division—maintained any connection to that unit, he was a paying member of the 100th Infantry Division veterans' association as late as 1985; he wrote in its newsletter that he would not be able to make the division's annual reunion, but that he "would like to be there and meet all the good men [he] served with."[58] Horace Theodore West died in Mayer, Arizona on 24 September 1994.[59]

The Legacy of the Biscari Massacre

This new research[60] adds a new dimension to the narrative of the Biscari Massacre and how its legacy must be interpreted. It may be argued that one of its perpetrators, Captain Compton, received his due when he was killed in action shortly after his trial. Despite its verdict, West's case is not simple. He survived the war, escaped serious punishment, and wrought havoc upon the enemy after his early release. It appears that West's desire to kill never waned, but was reformed and made acceptable in the mores of conventional warfare. And, in the process, West was elevated from murderer to cause célèbre.

West's story after his parole is not one of redemption. It is a continuation of the same narrative of violence that began in Biscari. It may only serve as an example of the imperfect application of military justice in the American Army during World War II; however, it also illustrates, in the words

of War Department officials, the "savagery that is war."[61] **TAL**

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Notes

1. United Press Int'l, *Wagoner Fighter Has 130 Notches On Garand Rifle*, Record-Democrat (Mar. 1, 1945), https://www.newspapers.com/clip/39339365/the-record-democrat/.

2. *Id.*

3. *Id.*

4. *Id.*

5. In this case, the new scholarship is based on the author's personal research.

6. *Sniper Picks off 17 Krauts to Square Things for Kid*, Century Sentinel, Feb. 24, 1945, at 1 [hereinafter Century Sentinel]. Robert Vermillion, *Missus Never Misses, Mabel Takes Care of the Sergeant*, Stars & Stripes (London), Mar. 1, 1945.

7. Fred L. Borch, *War Crimes in Sicily: Sergeant West, Captain Compton and the Murder of Prisoners of War in 1943*, Army Law., Mar. 2013, at 1.

8. *Id.*

9. *Id.*

10. *Id.* at 2.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 3–5.

19. James J. Weingartner, *Massacre at Biscari: Patton and an American War Crime*, Historian, Nov. 1989, at 38.

20. *Id.*

21. Borch, *supra* note 7, at 5.

22. *Id.*

23. *Id.*

24. A rear echelon unit would have allowed West to avoid publicity. He also would have been safe from capture and the opportunity to divulge the events of the Biscari Massacre. Rick Atkinson, The Day of Battle: The War in Sicily and Italy, 1943–1944 at 120 (2007); Weingartner, *supra* note 19, at 39; Borch, *supra* note 7, at 5.

25. Atkinson, *supra* note 24.

26. L Company, 399th Infantry Regiment, Morning Report (Jan. 24, 1945) (on file with author).

27. West was the one who nicknamed the young Soldier "The Kid." Century Sentinel, *supra* note 6.

28. *Id.*

29. *Id.*

30. Vermillion, *supra* note 6, at 2.

31. *Id.*

32. Century Sentinel, *supra* note 6, at 1, 4. It is important to note that West's version of events differs from the memories of other L Company Soldiers. For example, John Khoury in his book, *Love Company*, approximates the death of the replacement as late February–not January. John M. Khoury, Love Company (2003). Another L Company veteran, George Tyson, who wrote the definitive history of the Company, *Company L Goes to War*, recalls the death of a replacement that shares some similarities with West's description of "The Kid." George Tyson, Company L Goes to War 103–04 (2004). However, Tyson believes the replacement's death was because of West's sniping, and not the reason for it. *Id.* According to Tyson, West was already with L Company and actively engaged in sniping when the replacement arrived in late January 1945, and in Tyson's opinion, the replacement's death was likely attributable to it. *Id.* Also, it is possible that West referred to the replacement only as "The Kid" because neither he, nor anyone else in the company, knew the Soldier's name. According to Tyson, when the replacement's body was searched he was found not to be wearing any dog tags and ultimately was identified through a process of elimination by regimental staff. *Id.* To the Soldiers in L Company who never had the chance to meet or even see him, he "was like a ghost. An enigma. A rumor." *Id.*

33. Century Sentinel, *supra* note 6 at 4.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Khoury, *supra* note 32, app. D; Century Sentinel, *supra* note 6, at 1.

39. Century Sentinel, *supra* note 6, at 4.

40. Robert Vermillion, *They Started it, Says Oklahoma Sniper With 130 Nazis to Credit*, Lincoln J. Star, Feb. 27, 1945, at 1.

41. *Id.*; Vermillion, *supra* note 6, at 2.

42. Century Sentinel, *supra* note 6.

43. Franklin Gurley, 399th in Action: With the 100th Infantry Division 100 (1945).

44. Vermillion, s*upra* note 40.

45. *Id.*

46. United Press Int'l, *supra* note 1.

47. Vermillion, s*upra* note 40.

48. *Id.*

49. While West was assigned to the company headquarters as a cook, for most of the previous year he had been detached from the company on special duty—including as the acting Provost Sergeant in charge of the division stockade at Fort Devens. Second Lieutenant David T. Duncan—an officer in A Company—testified that, on the day of the massacre, "Sergeant West was in Company 'A', but had been more or less in an individual capacity you might say. He was on special duty for a number of months in the [United States] before coming across, and consequently had been replaced in his squad with another Sergeant...for that reason, West was attached to Company Headquarters and was not controlling a squad." United States v. West, No. 250833 (45th Inf. Div., 2–3 Sept. 1943), at 90; Off. of the Staff Judge Advoc., Headquarters, 45th Infantry Div., Proceedings of Board of Med. Officers 5 (26 Aug. 1943).

50. Gurley, *supra* note 43.

51. *Id.*

52. *Id.*

53. Interview with Roy Sees (May 8, 2015).

54. 100th Division Association Newsletter, Holiday Issue 1985, at 9.

55. Viral hepatitis was a problem in the European Theater of Operations during the winter of 1945. The 325th Medical Battalion's March unit journal (the 325th was the 100th Infantry Division's organic medical unit) states that it was a major problem in the division, and the report of the following month notes that while the number of hepatitis cases had decreased considerably, it still warranted mention. 4 Preventive Medicine in World War II: Communicable Diseases Transmitted Chiefly Through Respiratory and Alimentary Tracts 35 (John Boyd Coates & Ebbe Curtis Hoff, eds., 1958); U.S. Dep't of Army, Monthly Sanitary Report for the 325th Medical Battalion 4 (24 Jan. 1945) (NARA RG 407, Entry 427); U.S. Dep't of Army, Monthly Sanitary Report for the 325th Medical Battalion 4 (1 Apr. 1945) (NARA RG 407, Entry 427); Khoury, *supra* note 32, app. D.

56. Certificate of Discharge, Sergeant Horace T. West (U.S. Army, Jan. 1946).

57. *Id.*

58. 100th Division Association Newsletter, *supra* note 54.

59. Horace T. West in the U.S., Social Security Death Index, 1935-2014, Ancestry.com,https://search.ancestry.com/cgi-bin/sse.dll?indiv=try&db=ssdi&h=66536236 (search results available after signing in).

60. The "new research" listed here was conducted by the author.

61. Borch, *supra* note 7, at 5.

The 82d Airborne Division changes command at Fort Bragg, NC. (U.S. Army photo by SGT Juan F. Jimenez)

Practice Notes

Notable Revisions of Army Regulation 600-20

By Major Michael J. Wood & Major Joshua S. Mikkelsen

To improve is to change; to be perfect is to change often.[1]

After almost three years of staffing, on 24 July 2020, the U.S. Army updated the previous version of Army Regulation (AR) 600-20,[2] dated 6 November 2014. While incorporating fourteen Department of Defense (DoD) Instructions and Directives and sixteen Army Directives, the new AR 600-20 addresses cyber and social media misconduct, clarifies harassment issues, discusses political activities, and merges multiple policies connected to commanders' responsibilities (e.g., family care plans, medical readiness, lactation support, religious accommodation, transgender Soldiers, sexual orientation, etc.). According to the four-page Summary of Changes, there are sixty-six substantive changes to the 224-page regulation. This article distills the most notable amendments that commanders at various grades and judge advocates might find insightful.

Brief Physical Exercise Can Be Corrective Training

The Army understands extra or corrective training is one of the most effective non-punitive measures. To this end, "brief physical exercises are an acceptable form of corrective training for minor acts of indiscipline (for example, requiring the Soldier to

do push-ups for arriving late to formation), so long as it does not violate the Army's policies prohibiting hazing, bullying, and unlawful punishment."[3] As the regulation notes, this corrective training "may be taken after normal duty hours."[4]

Notice of Military Protective Orders

Commanders now have an obligation to notify the Director of Emergency Services/Provost Marshal Office (DES/PMO) of military protective orders (MPO) involving their Soldiers.[5] This notice alerts DES/PMO to notify other military and civilian law enforcement officials of the MPO. Commanders must record each MPO using DD Form 2873.

Online Activity Associated with Extremist Organizations and Criminal Gangs

The Army now has a clearer policy regarding "extremist organizations, criminal gangs, and associated cyber activity and social media."[6] As a matter of accountability, "Army personnel are responsible for content they publish on all personal and public internet domains to include social media sites, blogs, and other websites."[7] Prohibited engagements not only include actual physical participation, but also include cyber participation such as promoting, recruiting, training, and fundraising through social media. Additionally, the regulation prohibits simple "browsing or visiting internet Web sites or engaging in cyber activities when on duty…that promote or advocate violence directed against the [United States or the] DoD, or that promote international terrorism or terrorist themes."[8] This section empowers commanders to prohibit Soldiers from ostensibly engaging in cyber-related activities with or on behalf of extremist organizations and criminal gangs. However, at least textually, commanders have much broader power.

Commanders have the authority to prohibit military personnel from engaging in or participating in any cyber or social media activities that the commander determines will adversely affect good order and discipline or morale within the command. This includes, but is not limited to: the authority to order the removal of images, symbols, flags, language, or other displays from social media and internet domains; or to order Soldiers not to participate in cyber and social media activities that are contrary to good order and discipline or morale of the unit or pose a threat to health, safety, and operational security of military personnel or a military installation.[9]

Online Misconduct

Listed under the umbrella of harassment, online misconduct is now on the list of punishable offenses under the Army Harassment Prevention and Response Program. Specifically, hazing, bullying, and online misconduct may be punished because they "undermine trust, violate our ethic, and negatively impact command climate and readiness."[10] Online misconduct has its own separate sub-paragraph and is defined as "the use of electronic communication to inflict harm."[11] The regulation's examples of "electronic communication" and "harm" are quite broad. "Examples of online misconduct include, but are not limited to: hazing, bullying, harassment, discriminatory harassment, stalking, retaliation, or any other types of misconduct that undermines dignity and respect."[12]

Lautenberg Amendment

Although Soldiers have an affirmative, continuing obligation to inform commanders of a conviction of a misdemeanor crime of domestic violence, "company and battery-level commanders will [now] ensure that Soldiers in-processing their unit are notified" of the requirements in the Domestic Violence Amendment to the Gun Control Act of 1968, also known as the Lautenberg Amendment.[13] The regulation sets out four distinct provisions of the Lautenberg Amendment that Soldiers must be notified of when in-processing. Additionally, "a copy [of this section of the regulation] will be displayed outside the unit arms rooms and all facilities in which government firearms or ammunition are stored, issued, disposed, or transported."[14]

Law of War

The regulation has a new section entitled "command responsibility under the law of war."[15] Under this section,

> Commanders are legally responsible for war crimes they personally commit, order committed, or know or should have known about and take no action to prevent, stop, or punish. In order to prevent law of war violations, commanders are required to take all feasible measures within their power to prevent or repress breaches of the law of war from being committed by subordinates or other persons subject to their control.[16]

Accommodation of Religious Practices

This regulation incorporated Army Directive 2016-34, *Processing Religious Accommodation Requests Requiring a Waiver to Army Uniform or Grooming Policy*, and Army Directive 2018-19, *Approval, Disapproval, and Elevation of Requests for Religious Accommodation*.[17] Now commanders and their staff can easily reference this regulation rather than multiple, old, superseding directives.

Political Activities

The regulation clarifies the Army policy on political activities in accordance with DoD Directive 1344.10.[18] "Soldiers are expected to carry out their obligations as citizens. However, while on active duty, Soldiers are prohibited in certain cases from engaging in certain political activities."[19] The plain text of the regulation and its appendix[20] provide helpful guidelines and examples of both permissible and prohibited political activities.

MEO and SHARP Program

The Military Equal Opportunity (MEO) policy and program saw revisions as well.[21] For instance, sexual harassment no longer falls under the MEO program. In addition, the complaint processing system for MEO and Harassment (hazing, bullying, or discriminatory harassment) now seeks to be clearer and faster. As an example, there are now three types of complaints: anonymous, informal, and formal. The regulation further provides that "when practical, an informal complaint should be resolved within [sixty] calendar days";[22] whereas the old regulation exempted informal complaints from a timed suspense. Finally, the

Sexual Harassment/Assault Response and Prevention (SHARP) program now incorporates DoD policy on the Sexual Assault Response Program—including DoD Sexual Assault Advocate Certification Program requirements, Sexual Assault Incident Response Oversight Report requirements, and Commander's Critical Information Requirements.[23]

Retaliation

The new AR 600-20 incorporates Army Directive 2014-20, *Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense.* The regulation continues to make violations consisting of reprisal and maltreatment punitive;[24] however, retaliation consisting of ostracism is not punitive. Army Directive 2014-20 defined ostracism as the exclusion from social acceptance, privilege, or friendship of a victim or other member of the Armed Forces because they reported—or individuals believed they reported—a criminal offense with the intent to discourage reporting or the administration of justice.[25] Although ostracism is no longer punitive under AR 600-20, commanders are still charged with preventing ostracism,[26] and they must still report ostracism to the SARB as a form of retaliation.

Notification/Updates to Victims of Sexual Assault

The requirement for battalion commanders to update a victim within fourteen days of reporting and to ensure updates every month and within forty-five days of disposition has changed. The language now specifies that the Senior Commander (SC) will ensure that the victim's immediate commander provides monthly updates within seventy-two hours of the SARB. This is a non-delegable duty.[27] Additionally, the SC—or someone under the SC's command—will inform the victim of all case dispositions, including those disposed of by non-judicial punishment, within two business days of the final disposition decision.

Sexual Contact Offense Withholding Authority

Under the previous AR 600-20, paragraph 8-5(m)(5),[28] all sexual contact offenses were withheld to the battalion command level. This requirement no longer exists under the new AR 600-20. However, the reader should note that the withholding of penetrative sexual assaults to the O-6 /Special Court-Martial Convening Authority level is still in effect.

Conclusion

Informed by Churchill's quote, because of the plethora of changes, one may automatically deem this regulation improved. However, most of the sixty-six substantive changes are not creations of new policy; they are merely incorporations of various standing policies into a more convenient one-stop shop for commanders to reference. Although there is not much new policy with the update of AR 600-20, it is imperative that commanders and judge advocates understand the subtle and nuanced changes that did occur and, more importantly, know where to reference these requirements in the field. **TAL**

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Notes

1. Winston Churchill said this in 1924. Karl-Georg Schon, *Wit & Wisdom*, Int'l Churchill Soc'y (Sept. 27, 2020), https://winstonchurchill.org/ publications/ finest-hour/finest-hour-100/wit-wisdom-10/.

2. U.S. Dep't of Army, Reg. 600-20, Army Command Policy (24 July 2020) [hereinafter AR 600-20].

3. *Id.* para. 4-6b(1).

4. *Id.*

5. *Id.* para. 4-7e.

6. *Id.* para. 4-12h.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* para. 4-19.

11. *Id.* para. 4-19a(5).

12. *Id.*

13. *Id.* para. 4-22c(2).

14. *Id.*

15. *Id.* para. 4-24.

16. *Id.*

17. *Id.* para. 5-6.

18. *Id.* para. 5-15.

19. *Id.*

20. *Id.* app. B.

21. *Id.* ch. 6.

22. *Id.* para. 6-6b(2)(a).

23. *Id.* ch. 7.

24. *Id.* para. 5-13c(1).

25. U.S. Dep't of Army, Dir. 2014-20, Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense (19 June 2014).

26. AR 600-20, *supra* note 2, para. 7-11n(b)(11).

27. *Id.* para. 7-5t(11).

28. U.S. Dep't of Army, Reg. 600-20, Army Command Policy (6 Nov. 2014).

Staff Sgt. Virginia Inouye and Master Sgt. Brandon Sarceda, 204th Airlift Squadron loadmasters, deliver Hawaii Air National Guard Airmen and Soldiers April 17, 2020, to Kahului Airport, Maui, Hawaii. Guardsmen were airlifted from Oahu on a C-17 Globemaster III to minimize the risk of exposure of disease at airports. Hundreds of guardsmen have been activated to assist the State of Hawaii's response to COVID-19. (U.S. Air Force photo by Senior Airman John Linzmeier)

COVID-19

Response in the Indo-Pacific Theater

By Lieutenant Colonel Laura A. Grace & Major Sean P. Mahoney

Judge advocates (JAs) are frequently asked to compile a comprehensive list of all of a commander's authorities—this is not an easy task. Judge advocates know that authorities are derived from a vast library of resources—from the Constitution, to laws and statutes, all the way down to regulations, directives, policies, and orders. For an Army Service Component Command, authorities can flow from either the Combatant Commander (CCDR) *or* the Secretary of the Army (SecArmy). Some affectionately refer to the Combatant Command (CCMD) and Headquarters, Department of the Army (HQDA) as mom and dad. In the same way that parents can have different approaches to enforcing rules for their child, the CCMD and HQDA can have differing approaches to implementing Department of Defense (DoD) policies. As a legal advisor for a subordinate command, whose guidance should the command follow?

This question became more than academic over the past several months as attorneys at United States Army Pacific (USARPAC) responded to guidance relating to COVID-19 force health protection and requests for Defense Support to Civil Authorities (DSCA). The COVID-19 pandemic response operations highlighted the difficulty in determining the applicability of guidance from two higher headquarters on an issue that impacts CCMD and Service responsibilities. Both United States Indo-Pacific Command (USINDOPACOM) and HQDA published orders and guidance implementing DoD policies—some of which conflicted or were unclear as to application outside the continental United States (OCONUS), to include Hawaii, Alaska, and the U.S. territories. Even when the orders

from higher were unambiguous, to ensure proper authorities were applied, JAs needed to be knowledgeable about a broad array of authorities for the multiple, simultaneous missions related to COVID-19.

Many of the legal issues addressed during COVID-19 were not new or particularly difficult. The challenge has been identifying the correct authority for the distinct mission when the various missions stem from the same threat—a global pandemic. Judge advocates embedded in the planning process recognized the potential conflicts and ensured that authority and funding lines were not crossed. This article discusses CCMD and HQDA lines of authority while using the COVID-19 response as a case study in the way the authorities can easily be blurred. This article also focuses on authorities applied to DSCA response while also addressing force health protection and stop movement guidance. The section Lines of Authority discusses some of the conflicts between the lines of authority and ambiguity contained in the policies from HQDA. Next, the section Multiple Simultaneous Missions highlights some of the confusion that resulted from executing several simultaneous missions all stemming from the same threat. The Conclusion reiterates the importance of using precise language in policies and understanding the authorities applicable to a complex operation with various simultaneous missions.

Lines of Authority

Legislation known as the Goldwater-Nichols Department of Defense Reorganization Act of 1986 was a significant organizational change for the DoD; it was intended, among other things, to streamline the chain of command for CCDRs.[1] The legislation gave operational authority to CCMDs for assigned forces, while individual Services remained responsible for the administrative support of those forces.[2] This created two distinct lines of authority. The first flows from the President, through the Secretary of Defense (SecDef), to the CCDRs; the second flows from the President, through SecDef, to the Service Secretaries. Commanders of units assigned to a CCMD derive authorities from both lines—mom and dad.

United States Army Pacific Command is the operational-level Army Service component command assigned to USINDOPACOM.[3] As such, USARPAC is under the authority, direction, and control of the CDR, USINDOPACOM on all matters assigned to USINDOPACOM.[4] The CCDR exercises Combatant Command (COCOM) authority over assigned forces—authority involving organizing and employing; assigning tasks; designating objectives; and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish assigned missions.[5] When delegated, Combatant command authorities—including operational control authorities—are exercised through Service component commanders.[6] While the CCMD is responsible for operational missions, for example DSCA, the Services are responsible for the administration and support of Service forces, including forces assigned to a CCMD.[7] Service Secretaries execute these authorities through administrative control (ADCON)—authority over organizations with respect to administration and support, including training, maintaining, equipping, and deploying the forces.[8] Because these are the SecArmy's statutory responsibilities, ADCON does not transfer outside of the Army.[9] United States Army Pacific Command exercises ADCON authority and responsibility on behalf of SecArmy for USARPAC forces that have been further assigned to USINDOPACOM.[10] Accordingly, USARPAC derives its authorities from USINDOPACOM for operational missions and from SecArmy for administrative support of Army forces. Mom and dad each set the rules for issues under their respective domains.

The threat caused by COVID-19 impacted all military activities and cannot be classified as solely operational or administrative. For example, the DoD stop movement policies impacted travel for DSCA missions and other operations as well as travel for training at Army schools. Consequently, USARPAC received direction from both lines of authority.

Combatant Command vs. Service Authorities

Almost seven months into the pandemic response, USARPAC staff and subordinate forces continue to struggle with understanding authorities and delegations. This is problematic when the CCMD and HQDA interpret or implement DoD policies differently. This section focuses on the authority to grant exceptions to the DoD stop movement policies to illustrate the issue.

In March 2020, DoD issued three separate stop movement policies, which were ultimately replaced by a 20 April 2020 memorandum applicable to all domestic and international travel.[11] In each of the policies, there was explicit language identifying exception authorities for the stop movement policies: the CCDR could approve exceptions for individuals assigned to the CCMD and the Service Secretary could approve exceptions for individuals under his jurisdiction.[12] In other words, follow the parent with custody.

Under a delegation from the USINDOPACOM Commander, the Commanding General of USARPAC initially withheld exception authority at his level.[13] The SecArmy's delegations, on the other hand, varied based on the type of travel—emergency leave, for example.[14] Despite USARPAC's withholding of the exception to policy (ETP) authority, USARPAC staff and subordinate units routinely followed the SecArmy delegations, instead of adhering to the less permissive USARPAC authorities. There are at least two reasons for the confusion. First, some of the staff who normally took direction from HQDA on ADCON issues (e.g., permanent change of station (PCS) moves) continued to do so without understanding that for the stop movement policies, SecDef delegated authority through the CCMD line of authority for units assigned to the CCMD. This confusion was eventually mitigated through better staff communication and collaboration. The second source of confusion was that, at least initially, HQDA delegations appeared to apply Army-wide, including forces assigned to a CCMD.

Between 14 and 22 March 2020, HQDA published seven documents regarding COVID-19 stop movement policies that appeared to evolve in their level of recognition of the different lines of authority. The first policy stated that SecArmy was the ETP authority to the stop movement policy, with no disclaimer for personnel

assigned to a CCMD.[15] The Secretary of the Army's subsequent delegation to the Under Secretary of the Army (USA) and the Vice Chief of Staff of the Army (VCSA) only delegated authorities granted "to him"[16] but applied the memorandum "to all Army military and civilian personnel and their families assigned to DoD installations, facilities, and surrounding areas in the United States and its territories."[17] The authority to approve emergency leave, as well as the return of Service members and Department of the Army Civilians from temporary duty or leave, was later delegated to the first General Officer/Senior Executive Service in the chain of command.[18] This delegation was emailed to commanders, regardless of whether they were assigned to a CCMD. The USARPAC staff drafting orders initially incorporated language from both lines of authority, causing considerable confusion. Judge advocates began sitting side by side with the personnel drafting the orders to ensure the correct delegations were incorporated into the USARPAC orders.

The HQDA publications eventually included explicit language regarding applicability of the delegations. However, there continues to be confusion regarding COCOM and ADCON authorities and why CCMD-assigned forces follow the CCMD lines of authority for some ADCON issues.[19] The best way to mitigate confusion in the future is through clearer language in policies and better communication.

The Office of The Judge Advocate General's National Security Law Read Book, which contained updates on the most recent authorities and information on potential forthcoming HQDA guidance, helped JAs identify potential conflicts early. The USARPAC Office of the Staff Judge Advocate created its own daily summary, which was shared with subordinate JAs. The USARPAC National Security Law Division also created a theater milBook site and held monthly virtual theater sync meetings to create a shared understanding of the policies.[20]

Continental United States (CONUS) vs. Domestic—What's in a Name?

In addition to confusion regarding lines of authority, initial HQDA policies appeared to conflate domestic with CONUS, causing additional uncertainty. Operational control authorities and other units assigned to USARPAC are located in Hawaii, Alaska, Washington State, Guam, Republic of Korea, and Japan. Joint doctrine defines CONUS as the "United States territory, including the adjacent territorial waters, located within North America between Canada and Mexico."[21] This excludes Alaska and Hawaii. A pay and allowances statute defines CONUS as the forty-eight contiguous states of the United States and the District of Columbia, excluding Alaska and Hawaii.[22] The Financial Management Regulations make a distinction between OCONUS and Non-Foreign OCONUS, defining Non-Foreign OCONUS as Alaska, Hawaii, and U.S. territories and possessions—which in the Indo-Pacific includes Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and American Samoa.[23] Therefore, units in Washington State are CONUS, while the remaining USARPAC units are OCONUS or Non-Foreign OCONUS.

The Secretary of Defense's first stop movement order for domestic DoD travel applied to all "DoD military and civilian personnel and their families assigned to DoD installations, facilities, and surrounding areas in the United States and its territories."[24] However, some of the Army's guidance implementing the DoD policy referred to CONUS instead of the United States and its territories, thereby excluding Alaska, Hawaii, and the U.S. territories. For example, an All Army Activities message addressing PCS guidance included CONUS to CONUS PCS moves *and* CONUS to Foreign OCONUS locations.[25] Non-Foreign OCONUS locations were not addressed. Similarly, an HQDA execute order addressed several travel scenarios between the Center for Disease Control, Travel Health Notice Level 2 or 3 countries, and CONUS; once again, this left a gap for Hawaii, Alaska, and U.S. territories.[26]

In the global pandemic environment, it is logical that different standards apply to international and domestic locations, as well as between CONUS and OCONUS. However, many of the HQDA policies and guidance omit the Non-Foreign OCONUS locations. These policies were likely intended to make a distinction between domestic and foreign; however, the failure to recognize that the Indo-Pacific area of responsibility (AOR) includes Non-Foreign OCONUS locations caused confusion and guesswork on HQDA's intent. Much of the confusion occurred in the beginning of pandemic operations when leaders were trying to get information to the field quickly. This confusion could be mitigated by using more precise and consistent language. In addition to interpreting orders from two higher headquarters, JAs needed to understand COVID-19 response missions—and applicable laws—to ensure the proper authorities and funding were being followed.

Judge advocates began sitting side by side with the personnel drafting the orders to ensure the correct delegations were incorporated into the USARPAC orders

Multiple Simultaneous Missions

Since January 2020, all military commands shifted efforts to responding to the COVID-19 threat. In addition to force health protection efforts, USINDOPACOM activated USARPAC as the Theater Joint Force Land Component Command (TJFLCC) and supported component command for DSCA for the COVID-19 response. It was also designated lead for foreign humanitarian assistance (FHA) in specified countries. With the exception of force health protection, personnel in this area of operations understand the applicable authorities and have significant experience with the various missions—especially DSCA. The United States Army Pacific Command has served as the supported command for several events—such as volcanic eruptions, hurricanes, and super typhoons—in the past two years. However, the DSCA events

have been isolated to one geographic area at a time. This is the first time forces are executing DSCA missions throughout the United States and its territories, planning for FHA, and implementing force health protection measures all at the same time. The challenge is not in understanding the authorities, it is in applying the correct authorities to the specific mission.

USINDOPACOM, the Other DSCA Authority

Not many people are aware that USINDOPACOM has a distinct DSCA mission and territory from U.S. Northern Command (USNORTHCOM).[27] In fact, initially the Federal Emergency Management Agency (FEMA)—the lead federal agency for DSCA—appeared to forget. Due to the nationwide effort to respond to the COVID-19 threat, some requests for assistance from states were scoped at a national level. When this happened, FEMA issued the request to USNORTHCOM for validation and approval—but failed to include USINDOPACOM. Since USNORTHCOM does not have the approval authority for the USINDOPACOM AOR, USINDOPACOM and USNORTHCOM had to develop an internal DoD process for reviewing FEMA requests that could impact both AORs before being approved.

The DSCA mission in the USINDOPACOM AOR is challenging because of vast distances and diverse locations. The AOR includes the State of Hawaii and the U.S. territories of Guam, American Samoa, and CNMI. United States Army Pacific Command is located 2,405 miles from the applicable FEMA regional headquarters, and is located between 2,566 and 3,864 miles from the DSCA locations it supports. The Commonwealth of the Northern Mariana Islands is comprised of fourteen separate islands which have varying levels of infrastructure and only one hospital. American Samoa and CNMI do not have National Guard units and cannot easily receive assistance from another State's National Guard. The vast distances make assistance from other states, territories, or commercial contractors infeasible. In many cases, the DoD is not just the most appropriate resourcing solution, it is the only solution. Consequently, DSCA missions in the Indo-Pacific tend to be more substantial than they might be in other parts of the United States. This section highlights a few of the issues JAs addressed when conducting DSCA, FHA, and force health protection missions simultaneously.

DSCA—Not Just the Stafford Act

The complex nature of the COVID-19 DSCA response revealed that most practitioners focus on the Stafford Act[28] as the single source for DSCA authority and that the Economy Act[29] is often overlooked. The authority for DoD to provide DSCA support to other federal agencies is derived from the Economy Act, whereas the Stafford Act gives authority to support state and local authorities. While both authorities provide a valid basis for DSCA support under DoD Directive 3025.18, DSCA practitioners are most familiar with the Stafford Act's authorities to aid local governments. It was easy to forget that when another federal entity requests assistance, the authority is found in the Economy Act.

During the initial stages of the pandemic, both local and federal authorities engaged in planning and response efforts. The Department of Health and Human Services (DHHS) issued the earliest requests for assistance to the DoD asking for assistance in quarantining individuals returning to the United States from China. Joint Base Pearl Harbor-Hickam (JBPHH) was designated as a quarantine site for these travelers while, at the same time, the state and local authorities began to plan for state-directed quarantine sites.

The TJFLCC planners initially recommended that the State of Hawaii make a Stafford Act request to use the same facility that DHHS was establishing at JBPHH for travelers returning from China. The State was informed that it would be required to pay a share of the cost for establishing and running the facility. Hawaii officials were understandably confused as to why DoD would suggest the State request use of a federally–established quarantine site and then require it to pay a portion for operation of the site. Judge advocates advised that the DHHS requests were Economy Act requests—which basically amount to transfer of funds through the Treasury, and that the State's requests were Stafford Act requests—which could come with cost sharing. If travelers were being quarantined by the order of the Federal Government, the State would not be responsible for any of the costs; but, if the State wanted to use the facility, it would be responsible for a share of the costs. While this was the first confusion, it was not the last when it came to these two authorities.

***DSCA vs. Force Health Protection—USS* Theodore Roosevelt**

The Stafford and Economy Acts were again confused when both civil authorities and DoD officials prepared to respond to the COVID-19 outbreak on a Navy aircraft carrier. The USS *Theodore Roosevelt* docked in Guam with a ship full of infected Sailors, requiring a DoD response for both DSCA and internal DoD support. At the same time, FEMA requested DoD assistance in standing up the reserve center in Guam to provide shower, bath, laundry, and other logistical support to forces providing DSCA assistance in Guam; the DoD marshalled resources to aid the Sailors of the USS *Theodore Roosevelt*. The overlapping efforts by some of the same personnel initially caused confusion.

Judge advocates advised that direct support to the USS *Theodore Roosevelt* Sailors was a DoD internal effort and should be requested through the Economy Act. Since it was not a request from civil authorities, the support could not be tasked as part of a FEMA mission assignment or be funded by FEMA disaster relief funds. However, support to Guam for issues stemming from the infected Sailors could be a valid mission assignment. For example, requests from a local government for medical support at the local hospital overwhelmed by treating infected Sailors could be funded by FEMA.

DSCA vs. Traditional Military Air Transportation Authorities—Strategic Air to American Samoa

When the Governor of American Samoa closed the territory's borders to incoming passengers, commercial airlines cancelled routes to American Samoa. This left residents stranded without regular commercial transportation to get supplies and personnel to the distant island. Civilian authorities in American Samoa requested FEMA's assistance in transporting medical personnel and

lab testing supplies.[30] The military aircraft conducting the mission were not full, so there were requests to fill the seats with non-DSCA related passengers, including DoD retirees in need of non-COVID-19-related medical treatment, a non-DoD affiliated bone marrow transplant donor, and—in one case—a family that had been stranded in Alaska and Hawaii several months after the borders in American Samoa were closed.

Reviewing requests for civilians to fly on military aircraft is not a novel legal issue. Department of Defense Instruction (DoDI) 4515.13 sets out eligibility requirements for transporting civilians on military aircraft.[31] However, the DoDI does not address applicability to DSCA missions where another federal agency is funding the flight. Additionally, SecDef restricted the ability of certain categories of passengers to fly Space Available during COVID-19, but he exempted certain categories of individuals, such as military retirees traveling for medical treatment.[32] This carve-out provided the authority to transport retirees travelling from American Samoa to Hawaii for medical treatment. The authority to transport the other passengers was more challenging.

There are two types of assistance FEMA provides to State and local authorities: Direct Federal Assistance (DFA) and Federal Operational Support. Federal Operational Support is when one federal agency assists another to execute its response and recovery missions.[33] Because the support is internal to the federal government, there is no cost-share with the State or local authorities. Direct Federal Assistance, on the other hand, is when a State or local authority makes a specific request for a certain type of assistance.[34] If FEMA supports the assistance, the State or local authority typically shares the costs.

Judge advocates advised that, while transporting a stranded family may not appear to be a traditional DSCA emergency mission, DFA provides FEMA with the authority to request the transportation of people who might not otherwise be authorized to travel on the military aircraft as part of the DSCA mission—so long as FEMA has non-DSCA authority to transport the individuals.[35] Judge advocates looked beyond military transportation policies to find the applicable authorities to transport the passengers. The Federal Emergency Management Agency began categorizing these non-traditional DSCA passengers as DFA on the mission assignment tasking orders to ensure the proper cost sharing was applied. Equally as important, the stranded family was returned home.

DSCA vs. FHA

United States Army Pacific Command was also designated the TJFLCC for FHA in the Compact of Free Association (COFA) States, which include Palau, Republic of the Marshall Islands (RMI), and the Federated States of Micronesia (FSM). Designating one command to coordinate DSCA and FHA provides for efficiencies in training and experience; but, it can also confuse authorities for operations that look similar if it wasn't for the sovereign of the territory where the assistance is being provided. The United States has a unique relationship with the COFA states, but they are still sovereign nations.

After World War II, the three COFA states mentioned above and CNMI were placed under the United Nation's Trusteeship System and declared the United States to be the Administering Authority.[36] Originally controlled by the U.S. Navy, in 1951 administration was transferred to the U.S. Department of the Interior. The CNMI became a U.S. territory while Palau, RMI, and FSM became independent nations known as the Freely Associated States.[37]

The lead federal agency for FHA to the COFA states is the U.S. Agency for International Development.[38] However, FEMA drafted a mission assignment to move supplies from the Strategic National Stockpile for the COVID-19 response to Guam, CNMI, and the COFA states. Judge advocates advised that FEMA lacked authority for the proposed mission assignment and, therefore, would not have the authority to reimburse DoD under the Stafford Act for the assistance. Ultimately, DHHS contracted directly with a carrier to move the supplies to the COFA states.

This section highlighted a few of the legal issues encountered while advising on DSCA operations. Judge advocates identified potential issues early and helped ensure proper authorities and funding were applied to the distinct missions. Much of their success can be attributed to recent DSCA experience and training. The servicing JAs had already built relationships and gained the trust of the relevant leaders. Consequently, they were included in planning with FEMA and the state and territories from the beginning of the current operations.[39]

Conclusion

Judge advocates are trained to spot legal issues and, while the challenges brought on by the COVID-19 pandemic might appear novel, the fundamentals of mainly administrative and fiscal law and command authority are not new. The challenge is two-fold: (1) how do we correctly implement policies from two higher headquarters, and (2) how do we identify the correct authority for the distinct missions when there are multiple efforts to address the same threat? The COVID-19 pandemic and associated DoD response tested internal understanding of authorities, as well as the ability to coordinate planning and execution of multiple missions under a web of authorities. Learning the fundamentals of traditional man, train, and equip authorities versus COCOM authorities is essential for JAs to help commanders navigate these missions. The COVID-19 response highlighted some challenges that had not been fully realized before; but, these lessons are already being codified in after action reports for the next major disaster response. The more that experiences are shared, and the more lessons are learned across the Corps, the better JAs will understand authorities in the future. **TAL**

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Notes

1. Goldwater-Nichols Department of Defense Reorganization Act, Pub. L. No. 99-433, 100 Stat. 993 (1986).

2. 10 U.S.C. § 7013. The Secretary of the Army is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Army, including: recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing,

administering, and maintaining the construction, outfitting, and repair of military equipment; the construction, maintenance, and repair of buildings, structures, and utilities; and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section.

3. U.S. Dep't of Army, Reg. 10-87, Army Commands, Army Service Component Commands, and Direct Reporting Units (11 Dec. 2017) [hereinafter AR 10-87].

4. 10 U.S.C. § 164(d)(1) (1986).

5. *Id.* at (c)(1); Joint Chiefs of Staff, Joint Pub. 1, Doctrine for the Armed Forces of the United States V-2 (25 Mar. 2013) (C1, 12 July 2017) [hereinafter, JP 1].

6. JP 1, *supra* note 5, at V-6.

7. *Id.* at V-12.

8. *Id.*

9. *Id.* 10 U.S.C. § 7013.

10. AR 10-87, *supra* note 3, para. 8-3a. United States Army Pacific also exercises shared administrative control (ADCON) over other United States Indo–Pacific Command assigned Army forces through military operation areas (MOAs), such as the MOA with United States Army Forces Command for shared ADCON of I Corps.

11. Memorandum from Sec'y of Def. to Chief Mgmt. Officer, Dep't of Def. et al., subject: Travel Restrictions for DoD Components in Response to Coronavirus Disease 2019 (11 Mar. 2020) [hereinafter 11 March 2020 Travel Restrictions Memo]; Memorandum from Deputy Sec'y of Def. to Chief Mgmt. Officer, Dept. of Def. et al., subject: Stop Movement for all Domestic Travel for DoD Components in Response to Coronavirus Disease 2019 (13 Mar. 2020); Memorandum from Joint Staff J3 to U.S. Command et al., subject: MOD 01 to REVISION 01 to DoD Response to Coronavirus-2019 EXORD (24 Mar. 2020); Memorandum from Sec'y of Def. to Chief Mgmt. Officer, Dep't of Def. et al., subject: Modification and Reissuance of DoD Response to Coronavirus Disease 2019—Travel Restrictions (20 Apr. 2020).

12. *See supra* note 11. The Department of Defense (DoD) policies also specified that, if the individual is assigned to the Joint Staff and the Chief Management Officer for the Office of the Secretary of Defense, the approval authority for exemptions to the stop movement policies belong to the Chairman of the Joint Chiefs of Staff.

13. Headquarters, U.S. Army Pacific Command, Fragmentary Order 1 to USARPAC Order 20-03-029, USARPAC COVID-19 Response and Reporting, para. 3.E.4.B.4.D (22 Apr. 2020).

14. Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (20 Mar. 2020).

15. Headquarters, Dep't of Army, Execute Order 144-20, Army Wide Preparedness and Response to Coronavirus (COVID-19) Outbreak, Fragmentary Order 8 (14 Mar. 2020).

16. *Citing* Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (15 Mar. 2020).

17. *Id.*

18. *Citing* Memorandum from Sec'y Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Delegation of Authority to Approve Domestic Travel (20 Mar. 2020).

19. This topic should receive greater attention during the officer basic and graduate courses to ensure JAs understand the lines of authority.

20. USARPAC AOR National Security Law Group, MilBook, https://www.milsuite.mil/book/groups/us-arpac-aor-national-security-law (last visited Sept. 22, 2020). The link provided leads to a group discussion by USARPAC AOR National Security Law. This is a private group and you must obtain permission to enter it. *Id.*

21. JP 1, *supra* note 5, at GL-6.

22. 37 U.S.C. § 101 (1962).

23. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 9, DEF-10 (Sept. 2019).

24. 11 March 2020 Travel Restrictions Memo, *supra* note 11.

25. All Army Activities Message, 026/2020, 172052X Mar. 20, U.S. Dep't of Army et al., subject: Personnel Policy Guidance in Support of Army Wide Preparedness and response to Coronavirus Disease (COVID) 19 Outbreak.

26. Headquarters, Dep't of Army, Execute Order 144-20, Army Wide Preparedness and Response to Coronavirus (COVID-19) Outbreak, Fragmentary Order 7 (14 Mar. 2020).

27. Joint Chiefs of Staff, CJCS Defense Support of Civil Authorities EXORD (30 July 2019).

28. Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 §§ 5121-5207, as amended.

29. Economy Act, 31 U.S.C. § 1535.

30. U.S. Dep't of Homeland Sec., Federal Emergency Management Agency Mission Assignment 3465EM-AS-DOD-01 (24 Mar. 2020).

31. U.S. Dep't of Def., Instr. 4515.13, Air Transportation Eligibility (22 Jan. 2016) (C4 31 Aug. 2018).

32. Memorandum from Under Sec'y of Defense to Sec'y Military Dep't. et al., subject: Space Available Travel Program Limitations Due to Coronavirus Disease 2019 (23 Mar. 2020).

33. 44 C.F.R. § 206.8 (2009).

34. U.S. Dep't of Homeland Sec., Federal Emergency Management Agency, Mission Assignment Policy FP 104-010-2 (6 Nov. 2015).

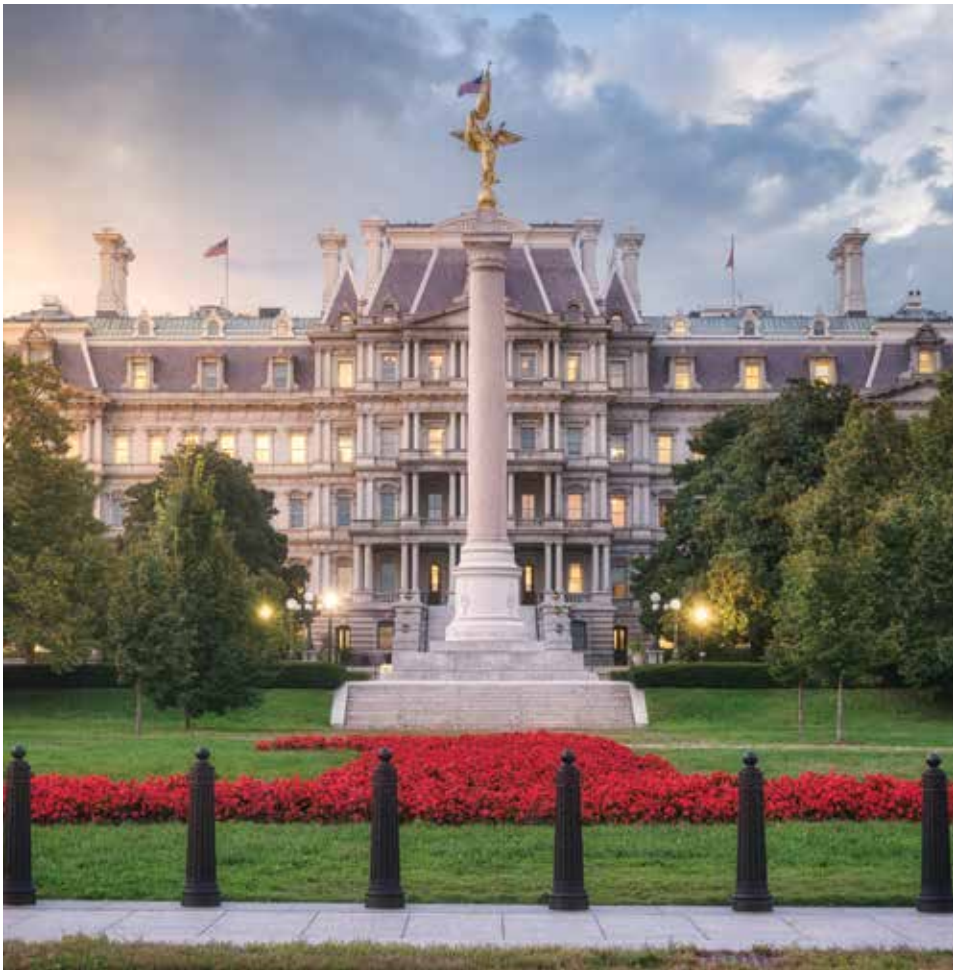
35. In this case, the Federal Emergency Management Agency (FEMA) used its own "Space-A" authorities, where individuals may be transported so long as there is space on the flight and the individuals reimburse FEMA for the costs of the flight. This initially caused confusion, as FEMA requested the individuals to be transported under "Space-A" authorities and asked that the DoD be responsible for determining the reimbursement amounts and collect the money from the individuals. Once it became clear that FEMA was working under "FEMA Space-A" and not "DoD Space-A," the mission could be executed.

36. S.C. Res. 21 (Apr. 2, 1947).

37. The Freely Associated States was an independent nation that signed a comprehensive agreement with the United States—called a COFA—that governs diplomatic, economic, and military relations with the United States.

38. In the absence of a Presidential Disaster Declaration, the U.S. Agency for International Development (USAID) supports the Republic of the Marshall Islands (RMI) and the Federates States of Micronesia (FSM) as they would any other country. If there is a Presidential Disaster Declaration, USAID is still the Lead Federal Agency, but FEMA is authorized to pay for the support (USAID does the work, FEMA pays the bill). This operational blueprint is contained in the Federal Programs and Services Agreements for the Compacts of Free Association. Palau does not have a Federal Programs and Services Agreement like FSM and RMI, so FEMA does not provide any Foreign Humanitarian Assistance support to Palau. The United States Agency for International Development could request that FEMA provide support to Palau, but USAID would fund the support.

39. The Center for Army Lessons Learned co-hosted a two-day DSCA training with USARPAC in November 2018, and hosted DSCA training in New Orleans in July 2019. These training efforts should be sustained and broadened to include pandemic scenarios and issues unique to the Indo-Pacific AOR.



(Credit: Fominayaphoto – stock.adobe.com)

Serving on the NSC Staff

By Lieutenant Colonel Yevgeny S. Vindman

The National Security Council (NSC) is a statutory body formed shortly after World War II (WWII) pursuant to the National Security Act of 1947, as amended (the Act).[1] The NSC staff supports the mission of the NSC, the National Security Advisor (NSA), and the President of the United States as an "advise and assist" component of the Executive Office of the President.[2] Situated in the grand Eisenhower Executive Office Building (EEOB) on the eighteen-acre White House complex, the NSC staff takes up the entire third floor of the building—once considered the heart of the national security and foreign relations establishment of the United States.[3] The NSC staff is composed of senior political appointees and elite career national security and foreign relations professionals. For nineteen months, I had the distinct privilege to observe and participate in the interagency coordination and policy-making process as a deputy legal advisor on the NSC staff. In scores of meetings in the EEOB and the West Wing, I observed leaders execute the NSC's coordination function with interagency counterparts on a broad range of topics of geo-strategic importance. The best leaders had several traits in common. Whether on the NSC Staff, or at the unit level, these traits are hallmarks of effective staff coordination.

The NSC Staff Structure

The purpose of the NSC staff is two-fold—(1) to provide confidential advice to the President on matters of foreign relations and national security and (2) to coordinate policy development and implementation across the executive branch.[4] The Act, as amended, does not grant the NSC staff any power to direct or task department and agencies to execute these functions.[5] The NSC staff achieves its objectives by acting primarily through other powers. These other powers or "soft powers" of the NSC emanate from its proximity to the President and the powers he vests in the NSC staff through implementing guidance. Pursuant to National Security Presidential Memorandum–4 (NSPM-4), the NSC staff is authorized to convene interagency coordination meetings, set the meeting agenda, and generate a summary of conclusions about what was agreed to at the meeting.[6] Convening an interagency coordination meeting with relevant senior executive branch decision–makers on a specific topic can be a difficult undertaking, which makes NSC soft powers substantial. There are three formal meetings convened pursuant to NSPM-4.[7]

A Policy Coordination Committee (PCC) is convened at the Assistant Secretary level by an NSC Staff Senior Director—typically political appointees; the Deputies Committee (DC) is convened by the Deputy National Security Advisor (DNSA) with deputy department and agency counterparts; and the Principals Committee (PC) meeting is convened by the NSA with counterpart cabinet-level department and agency heads. In the current administration, a formal NSC meeting—chaired by the President with the heads of departments and agencies—is an infrequent occurrence. The Chairman of the Joint Chiefs of Staff attends the PC and the Vice Chairman of the Joint Chiefs of Staff attends the DC. A recurring meeting, not specified in NSPM-4, is the sub-PCC. To advance the implementation of policy objectives, the sub-PCC and the PCC

contribute the majority of the grunt work and coordination. National Security Council staff directors convene the sub-PCC at the Deputy Assistant Secretary, or one-star, level. Meetings of the sub-PCC or PCC on a national security initiative often culminate in a DC or PC. During these meetings, senior participants are empowered to compel their agencies to implement coordinated and unified policies. Once agreement is secured at a PC or DC meeting, departments and agencies execute policy pursuant to their statutory authorities.

The NSC staff is small and agile. Pursuant to statute, the NSC staff is restricted to no more than 200 policy personnel.[8] This statute accounts for its size. These policy personnel cover almost every national security and foreign relations matter of national interest. In addition, the NSC staff is flat and—therefore—agile. To reach the DNSA or NSA, an NSC director reports to an intermediary, typically a senior director.[9] Directors interact regularly with the DNSA or NSA on matters falling within the scope of their responsibilities. Consequently, the size and agility of the NSC staff allows actions to move swiftly to the DNSA or NSA for decision by one or more cabinet officials or the President.[10] This permits the system to function in a crisis response setting, as it did during the attacks on the Saudi oil fields in September 2019. The system also functions well in routine processes, even for Herculean endeavors—such as the 2018 coordination and implementation of NSPM-13, also known as the United States Cyber Operations Policy.[11] National Security Presidential Memorandum-13 was monumental in that, for the first time, it allowed the delegation of certain authorities to the Department of Defense (DoD) to conduct time-sensitive military operations in cyberspace.[12]

Over its history, the mission and power of the NSC has waxed and waned. When the soft power wielded by the NSC staff wanes, policies implemented by departments and agencies risk becoming discordant. Without NSC staff coordination, each department and agency can become absorbed in its own fiefdom, causing friction through competing missions and resulting in an apparent lack of coherence in the executive branch's policies. The Syria troop withdrawal and Afghanistan troop strategy are two examples of such friction in the current administration.[13] The NSC of the Johnson administration, which resulted in poor decisions about the Vietnam War, is a classic historical example of a weak or discordant NSC.[14]

Effective Coordination

The single largest personnel contributor to the NSC staff during my tenure was the DoD. Detailees included distinguished senior uniform Service members and DoD Civilians. Department of Defense uniformed Service members—typically senior lieutenant colonels, colonels, and several general officer/flag officers—are assigned as directors. These uniformed military personnel, with decades of experience, are seasoned in military arts and sciences including: mission command, logistics, planning, and coordination. This experience makes DoD personnel well-equipped to operate on the NSC staff. Effective military and non-military leaders on the NSC staff exhibit the following traits.

This experience makes DoD personnel well-equipped to operate on the NSC staff

Competence

In this case, competence refers to consummate expertise in a field and a nuanced mastery of all aspects of a particular topic. Many of the staff have higher degrees—PhDs, masters, and professional degrees were abundant. Such deep knowledge allows the staff to consider all facets of a particular policy proposal or national security problem and to be the undisputed subject matter experts when dealing with counterparts, whether at the White House or in a department or agency.

Organization

The most successful operators are meticulous planners, writers, and organizers.[15] Short, but comprehensive writing is a critical component of an organized, planned process to move a policy concept through NSC coordination mileposts. Organization—including effective correspondence management, meeting preparation, and time management—is critical given that staff typically attend three- to five-hour long meetings a day and manage several hundred emails across multiple classified and unclassified networks. A script or road map for a meeting is an effective tool to keep participants on task.

Vision

Successful NSC staff have a vision of what they intend the policy to be and what the policy is to achieve. They have a passion for their work and a plan to move policy from formulation to implementation. Successful staff are able to articulate their vision to others in written and verbal communications in a rational, fact-based manner.

Energy

Energy, grit, and resolve are traits that couple a diligent work ethic with the fortitude to navigate policy through a fraught interagency coordination process. Stewarding multiple departments and agencies with varied, sometimes conflicting, interests towards a coordinated national policy requires significant energy.

Relationships

Comradery amongst NSC staff is a key factor in how well they work together at the director level. Relationships are based on mutual respect and trust. These relationships are critical since a policy initiative may have equities across multiple regional, issue-focused, and functional directorates, as well as departments and agencies. Stakeholders, both inside and outside the NSC, can provide input and concurrence for a policy to proceed through the interagency coordination process. Each stakeholder represents their own department and agency mission, perspective, and power center. Ultimately, these factors

must align in order to develop coherent national policy. Successful staff know who to go to and what coordination is necessary to implement policy in the future. Building relationships based on respect, diligence, competence, and a shared vision are hallmarks of a successful NSC staff.

Building relationships based on respect, diligence, competence, and a shared vision are hallmarks of a successful NSC staff

Conclusion

Successful NSC staff reach out to the relevant stakeholders—on the staff and at departments and agencies—prior to formal meetings, discuss proposed policies, and secure concurrence. Only then does a formal meeting take place. This is particularly impressive given the absence of statutory authority the NSC exerts throughout the coordination process. Due to their leadership and management skills, depth of expertise, experience in building relationships, and coordinating actions, DoD staff are well-suited to NSC staff work. These traits displayed by effective NSC staff are the same traits successful staff officers must demonstrate to succeed in every military unit. **TAL**

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Notes

1. 50 U.S.C. § 3021 (2018) *amended by* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116–92 (2019).

2. *See* Citizens for Responsibility & Ethics in Wash. v. Trump, 302 F. Supp. 3d 127 (D.D.C. 2018); Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993); Protect Democracy Project, Inc. v. United States DoD, 320 F. Supp. 3d 162 (D.D.C. 2018); DoD Grants and Agreements, 32 C.F.R. pt. 21 (2020). *See also* Memorandum from Webster L. Hubbell, Associate Attorney General, to Principal FOIA Administrative and Legal Contacts At All Federal Agencies (Nov. 3, 1993), https://www.justice.gov/oip/blog/foia-update-foia-memo-white-house-records (DOJ OIP memo on White House Records). Advise and assist components of the Executive Office of the President are considered the President's personal staff. They are not agencies and are not subject to the Freedom of Information Act. This status ensures that, generally, advice to the President can be provided without threat of disclosure to the public or Congress. It allows the administration to develop effective policy in private and provide the President time to digest the input from his closest advisors; after careful deliberation, the President can make a decision. The intent is to protect the deliberative process and have a free flow of ideas. Congressional oversight of the President's decisions and administrations actions subsequent to internal deliberations have historically been the norm.

3. Prior to WWII the Eisenhower Executive Office Building housed the Department of War, Department of State, and Department of the Navy. It was once the largest office building in Washington, D.C.

4. *Supra* note 1. National Security Council functions:

> (1) advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the Armed Forces and the other departments and agencies of the United States Government to cooperate more effectively in matters involving the national security; (2) assess and appraise the objectives, commitments, and risks of the United States in relation to the actual and potential military power of the United States, and make recommendations thereon to the President; (3) make recommendations to the President concerning policies on matters of common interest to the departments and agencies of the United States Government concerned with the national security; and (4) coordinate, without assuming operational authority, the United States Government response to malign foreign influence operations and campaigns.

Id.

5. *Id.*

6. National Security Presidential Memorandum from United States President to Vice President, et al., subject: Organization of the National Security Council, the Homeland Security Council, and Subcommittees (4 Apr. 2017), https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-4/. The staff is composed of regional, issue-focused, and functional directorates and headed by a single civilian Executive Secretary, pursuant to 50 U.S.C. § 3021, who is also the Chief of Staff. *Id.*

7. *See* Colonel Peter R. Hayden, *Executive Counsel: A Deputy Legal Advisor's Work at the NSC*, Army Law., 2020 Iss. No. 2, at 16.

8. *Supra* note 1. The professional staff for which this subsection provides shall not exceed 200 persons, including persons employed by, assigned to, detailed to, under contract to serve on, or otherwise serving or affiliated with the staff. The limitation in this paragraph does not apply to personnel serving substantially in support or administrative positions. *Id.*

9. Ceremonials Div. of the Off. of the Chief of Protocol, The Order of Precedence of the United States of America (Nov. 3, 2017), https://www.state.gov/wp-content/uploads/2018/12/Order-of-Precedence.pdf.

10. The volume of actions was remarkably high. For instance, a deputy legal advisor would process 300-400 emails per day; and, during the course of a twelve to fourteen hour work day, they would attend meetings that lasted three to four hours.

11. *See generally* Ellen Nakashima, *White House Authorizes 'Offensive Cyber Operations' to Deter Foreign Adversaries*, Wash. Post (Sept. 20, 2018, 7:18 PM), https://www.washingtonpost.com/world/national-security/trump-authorizes-offensive-cyber-operations-to-deter-foreign-adversaries-bolton-says/2018/09/20/b5880578-bd0b-11e8-b7d2-0773aa1e33da_story.html.

12. Honorable Paul C. Ney Jr., DoD General Counsel Remarks at U.S. Cyber Command Legal Conference (Mar. 2, 2020) (clarified that the President has authority to direct military operations in cyberspace to counter adversary cyber operations against our national interests and that such operations, whether they amount to the conduct of hostilities or not, and even when conducted in secret, are to be considered traditional military activities and not covert action, for purposes of the covert action statute).

13. *Trump's Foreign Policy Moments, 2017–2020*, Council on Foreign Relations, https://www.cfr.org/timeline/trumps-foreign-policy-moments (last visited July 22, 2020).

14. I.M. Destler & Ivo H. Daalder, *A New NSC for a New Administration*, Brookings (Nov. 15, 2000), https://www.brookings.edu/research/a-new-nsc-for-a-new-administration/.

15. Prior to joining the staff, and to ensure they were effective written communicators, most candidates were required to submit writing samples.

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HIV and Converging Policies

By Major Nicholas D. Morjal

Like a busy intersection, it is difficult to navigate the varied military policies that govern medical accessions, standards of medical fitness for continued service, separation of non-deployable Service members, and medically-based assignment limitations. Soldiers diagnosed with the human immunodeficiency virus (HIV) lay at the busy intersection of these converging areas of law and life. Commanders tasked to maneuver these areas rely on legal and medical professionals to provide grounded advice so they may issue the right orders and avoid collisions.

Imagine that you are a brigade judge advocate in a United States Army Forces Command (FORSCOM) unit scheduled to deploy in six months. Medical providers just notified one of your commanders that a Soldier in their unit—who is scheduled to attend the Advanced Leader Course (ALC) next month—tested positive for HIV. The medical provider instructed the commander to escort the Soldier to the military treatment facility for in-person notification. What happens next? What are the commander's counseling requirements? May the Soldier still attend ALC? May he deploy? Is he automatically subject to a medical evaluation board (MEB)? Must he or can he be administratively separated from service? If he can be separated, should he be? If so, how? Is he subject to the Department of Defense's (DoD) and Army's recent non-deployable Service member policies?

Rules governing HIV-infected Soldiers are subject to much litigation and debate. Judge advocates (JAs) dealing with these cases should—and practically must—work closely with the Office of The Judge Advocate General (OTJAG), as well as the U.S. Army Litigation Division (LITDIV), and the Headquarters, Department of the Army (HQDA), G1, Military Personnel Management (DMPM). What follows is a short discussion of the basic rules that will allow JAs to engage in meaningful discussions as they seek guidance through these technical channels. This article also provides the framework and resources to tackle some of the basic questions posed by commanders and staff.

Accessions, Probationary Officers, and Initial Entry Enlistees.

Generally, the DoD medical accessions policy allows applicants for military service who do not meet physical and medical standards to request a waiver.[1] Waiver authorities, usually within the military departments, make determinations based on "all available information" regarding the condition, as well as "the specific needs" of the service.[2] Having a history of immunodeficiency—and in particular the presence of HIV—is among the list of disqualifying conditions.[3] The DoD medical accessions policy does not explicitly prohibit medical waivers for HIV.

The DoD has, however, published stricter guidance in a separate HIV policy.[4] Without exception, the DoD HIV policy denies military eligibility to HIV-infected applicants.[5] It directs testing for all applicants and current Service members[6] and defines the standards for evaluating fitness for continued service.[7] Similarly, the Army has published two separate regulations governing medical accessions and HIV. Both regulations explicitly prohibit accessions and waivers for HIV-infected applicants.[8]

Pursuant to the Army's HIV regulation, it will dis-enroll HIV-infected applicants pending appointment in

any officer procurement program, including the Reserve Officers' Training Corps, direct commissioning, and Officer Candidate School.[9] Likewise, the United States Military Academy will separate and discharge HIV-infected cadets under its own regulations.[10] Finally, the Army will separate HIV-infected probationary officers and enlisted personnel identified within 180 days of their appointment or initial entry onto active duty, for failure to meet medical fitness standards.[11]

Active Duty Personnel Policies and Procedures

Moving past accessions and initial entry, there are specific rules and limitations for HIV-infected Soldiers who contracted the virus while in service. According to the Army's HIV regulation, "[e]very effort will be made to ensure that…HIV infected personnel are treated no differently than other Soldiers."[12] While that remains true as it relates to their medical treatment, fitness for duty standards, and physical disability processing, the impact of assignment limitations and additional restrictions for HIV-infected Soldiers makes equality more difficult in everyday life.

Medical Fitness Standards, Command Responsibility, and Additional Rules

Unlike applicants identified during the accessions process, currently serving HIV-infected Soldiers are subject to the same medical fitness standards as other Soldiers. Unless there is also "progressive clinical illness or immunological deficiency,"[13] the Army cannot separate HIV-infected Soldiers based solely on their infection. In fact, although medical providers annotate Soldiers' HIV status in the Medical Protection System (MEDPROS), their individual physical, upper, lower, hearing, eyes, psychiatric (PULHES) values remain the same.[14] Providers are required to refer HIV-infected Soldiers for appropriate treatment and evaluate their fitness for continued service in the same way they would for anyone else with a "chronic or progressive illnesses."[15]

The Army allows HIV-infected Soldiers determined to be fit for duty to continue serving and provides them with appropriate medical care.[16] However, medical providers must refer HIV-infected Soldiers who show signs of immunological deficiency or a progressive illness to an MEB, regardless of the clinical stage of the disease.[17] Those with "rapidly progressive" clinical illness or immunological deficiency do not meet medical retention standards, and medical providers must refer them for physical disability processing.[18] The Army will then separate or retire those determined to be unfit for duty using the existing procedures under that process.[19]

That said, HIV-infected Soldiers are treated differently in other ways, beginning from their initial diagnoses. Following a positive HIV result, the local HIV "program coordinator" adds medical deployment restrictions to their medical profile.[20] The program coordinator then notifies the HIV-infected Soldier's immediate commander.[21] Under strict instruction not to inform the Soldier of the test results, the commander is required to accompany the Soldier to the military treatment facility, then issue the Soldier a written counseling.[22]

In it, commanders are required to place verbatim regulatory language imposing various orders and restrictions. Commanders must order HIV-infected Soldiers to advise all prospective sexual partners of their infection prior to engaging in any sexual activity; use condoms when they engage in oral, vaginal, penile, or anal sex with a partner; notify medical, dental, and emergency health care workers of their HIV infection; and comply with all HIV medical management directed by their infectious disease physician.[23] Further, commanders must order them not to donate blood, blood products, sperm, semen, eggs, breast milk, or tissues, and to report previous donations to the HIV program coordinator.[24] Finally, the commander must notify them that they are "non-deployable" and may not go on temporary duty (TDY) outside of the continental United States (OCONUS)—subject to updated guidance discussed below.[25]

In turn, HIV-infected Soldiers are required to acknowledge the commander's orders and restrictions using similar language in the "plan of action" section of the counseling. [26] They must agree to "cooperate fully" with their HIV program coordinator and "confidentially reveal the identity of all persons with whom [they] have had sex or shared needles for the period starting [three] months prior to [their] last negative HIV test," so that contacts may receive counseling and testing to break the chain of transmission.[27] In addition to revealing their identities, HIV-infected Soldiers must agree to inform their contacts, including their spouse, of their HIV infection and recommend that those individuals seek medical consultation.[28] Finally, HIV-infected Soldiers must agree that potential sexual partners will not be under the influence of alcohol, drugs, or prescription medication that could alter their judgment during any HIV disclosure discussion.[29]

While tied to the mission, it is easy to see how these restrictions make it hard for commanders to treat HIV-infected Soldiers "no differently than other Soldiers."[30] To be sure, the HIV program coordinator verifies that spouses are informed[31] and, as discussed below, HIV-infected Soldiers may be subject to discipline for failing to comply with any of the commander's written orders.[32] While this accounts for some of the personal restrictions, HIV-infected Soldiers also face professional restrictions.

Assignment Limitations

The Army's HIV regulation restricts HIV-infected Soldiers from deployments or assignments overseas.[33] In fact, it prohibits them from performing official duties overseas for any duration of time, and those confirmed to be HIV-infected while stationed overseas will have their foreign service tour "curtailed," to be "expeditiously reassigned" to the United States.[34] Within the United States, the Army will not assign HIV-infected Soldiers to any "table of organization and equipment" or "modified table of organization and equipment" (MTOE) units, which are designed and structured for combat deployments.[35] Installation commanders may reassign HIV-infected Soldiers already serving in those units to a "table of distribution and allowances" (TDA) unit, designed and structured for a garrison mission, upon completion of their "normal tour" (three years from their report date).[36] However, reassignment is limited to an authorized position for the Soldier's grade, primary or

secondary military occupational specialty (MOS), and other regulatory management and assignment criteria.[37] If no local assignment is available, commanders will refer HIV-infected Soldiers to Human Resources Command (HRC) for new assignment instructions.[38]

In addition, the Army precludes HIV-infected Soldiers from participating in military-sponsored educational programs that result in an additional service obligation.[39] This includes advanced civilian schooling, professional residency, fellowships, training with industry, and "equivalent educational programs," regardless of whether civilian or military organizations conduct the training.[40] For Soldiers already assigned to such programs at the time of their HIV diagnoses, the Army will dis-enroll them at the end of their current academic term.[41] Those Soldiers may, however, retain any financial support they received through the end of the term.[42] Likewise, the Army will not recoup any money, and it will waive any additional service obligation incurred due to enrollment in the program.[43] Notably, this does not include professional military education (PME) schools that are required for career progression in a Soldier's MOS, branch, or functional area—such as Noncommissioned Officer Education System (NCOES) schools, Captains Career Course, or intermediate level education.[44]

Last, the Army will not assign HIV-infected Soldiers to any recruiting command, cadet command, or military entrance processing command. This is especially true if their medical condition requires frequent medical follow-up and the projected duty station is geographically isolated from an Army medical treatment facility capable of providing it.[45] Apart from these specific restrictions, commanders may not change an HIV-infected Soldier's assignment based solely on their infection.[46] Nor may commanders group all HIV-infected Soldiers within a command into the same subordinate unit, duty area, or living areas unless no other units, positions, or accommodations are available.[47] The majority of the above are restrictions that the Army has placed upon HIV-infected Soldiers and do not come from United States Code or DoD policy. Therefore, a Soldier may request an exception to policy, such as serving in an MTOE unit.[48]

Administrative Separation of Enlisted Soldiers and Officers

Section 705(c) of the 1987 National Defense Authorization Act has been interpreted to prohibit discharging a service member solely for having HIV.[49] Enlisted HIV-infected Soldiers who otherwise meet medical retention standards may still be subject to both voluntary and involuntary administrative separation for reasons other than their diagnosis of HIV. For example, HIV-infected Soldiers may voluntarily submit requests for discharge under regulatory provisions governing unfulfilled enlistment commitments,[50] or alternatively, voluntarily under the Secretary of the Army's plenary authority.[51] In such cases, the Army's HIV regulation requires a JA to counsel the Soldiers and, at a minimum, provide them with information regarding their post-discharge eligibility for medical care.[52] Commanders may also use the regulatory provisions governing the failure to meet procurement medical fitness standards for Soldiers identified as HIV-infected within 180 days of initial entry onto active duty.[53] Further, commanders may involuntarily separate HIV-infected Soldiers for misconduct if they violate any of the orders contained in their preventative medicine counseling or, like any other Soldier, for other misconduct.[54] The commander also has the option to use the secretarial plenary authority if a Soldier is not complying with their counseling, but the conduct does not constitute misconduct.[55]

Similarly, HIV-infected officers may voluntarily submit an unqualified resignation or request for release from active duty (REFRAD).[56] This includes resignations for probationary officers who test positive for HIV but were infected prior to accepting an appointment.[57] As with enlisted Soldiers, a JA must counsel these officers.[58] With that said, commanders may also involuntarily separate probationary officers identified as HIV-infected within 180 days of their appointment for substandard duty performance.[59] Finally, commanders may involuntarily separate HIV-infected officers for misconduct if they violate any of the orders contained in their preventative medicine counseling.[60]

Non-Deployable Service Members Policy

Recent military retention policies add to the complexity of issues surrounding HIV-infected Soldiers.[61] The DoD policy requires military departments to make retention determinations for Service members who are non-deployable for more than twelve consecutive months—or sooner under certain circumstances.[62] Under the Army policy, permanent, non-deployable Service members are unqualified to hold any MOS, absent an exception to policy.[63] Notably, this includes Service members with medical conditions that permanently prevent their deployment.[64]

Based on a reading of the Army's current HIV regulation, this *appears* to include HIV-infected Soldiers. Specifically, HRC places a formal "non-deployable flag" in their record,[65] the HIV program coordinator adds a deployment restriction code to their file in MEDPROS and changes the "non-deployment module" to "YES,"[66] and the commander notifies them that they are "non-deployable" in a written HIV counseling.[67] If true, this would render them unqualified to hold any MOS, in direct conflict with the Army's HIV regulation.

Recognizing the inherent conflict between these two policies, the Army has published a memorandum with additional guidance, which modifies the categorization of those infected with HIV.[68] The memo directs that HIV-infected Soldiers be characterized as "deployable with limitations"—as opposed to non-deployable—unless there are other underlying legal, administrative, or medical reasons that justify the latter.[69] This exempts HIV-infected Soldiers from the Army retention policy and its elimination requirements. However, several questions still remain: Will the Army update its HIV regulation to match its recent retention guidance? What about OCONUS duty assignments and TDY? How will Combatant Command policies[70] and agreements with host nations influence these decisions?[71] How do commanders, HRC, and medical providers address the deployment issue in a Soldier's written counseling, flag, and MEDPROS in the interim?

Conclusion

Soldiers with HIV lay at the busy crossroads of converging military policies and regulations. Active lawsuits and practical considerations demand a careful, deliberate approach to each of the many complex issues involved. Current regulations task unit commanders with some requirements, and HRC with others. In all cases, JAs should work through their technical channels at OTJAG and LITDIV for guidance. Understanding the basic rules and policies will enable JAs to engage in meaningful conversations, protect the process, and serve as trusted advisors to commanders who must maneuver through this complex area of the law. **TAL**

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Notes

1. U.S. Dep't of Def., Instr. 6130.03, Medical Standards for Appointment, Enlistment, or Induction into the Military Service para. 1.2.d. (6 May 2018) [hereinafter DoDI 6130.03].

2. *Id.* para. 4.2.c.(1).

3. *Id.* para. 5.23.a-b.

4. U.S. Dep't of Def., Instr. 6485.01, Human Immunodeficiency Virus (HIV) in Military Service Members para. 1.2.d. (7 June 2013) [hereinafter DoDI 6485.01].

5. *Id.* para. 3.a.

6. *Id.* encl. 3, para. 1.b, 1.c.(1)-(2).

7. *Id.* encl. 3, para. 2.c., 2.e.

8. U.S. Dep't of Army, Reg. 40-501, Standards of Medical Fitness para. 2-2.b. (27 June 2019) [hereinafter AR 40-501]; U.S. Dep't of Army, Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus paras. 1-16.a., 5-3.c. (22 Apr. 2014) [hereinafter AR 600-110].

9. AR 600-110, *supra* note 8, para. 5-3.h.(2)-(3).

10. *Id.* para. 5-3.h.(1).

11. *Id.* paras. 6-13.d., 6-14.b.

12. *Id.* para. 6-1.c.

13. *Id.* para. 1-16.e.

14. *Id.* para. 4-11.d.

15. DoDI 6485.01, *supra* note 4, encl. 3, para. 2.c.

16. *Id.* encl. 3, para. 2.c.

17. AR 600-110, *supra* note 8, para. 6-15.b.

18. *Id.* para. 1-16.k. (citing AR 40-501, *supra* note 8).

19. DoDI 6485.01, *supra* note 4, encl. 3, para. 2.e.

20. AR 600-110, *supra* note 8, para. 4-11.d.

21. *Id.* para. 4-4.a.

22. *Id.* para. 4-4.b.-e.

23. *Id.* para. 4-9.a.(1)(a), (c), (d).

24. *Id.* para. 4-9.a.(1)(b).

25. *Id.* para. 4-9.a.(1)(e).

26. *Id.* para. 4-9.a.(2).

27. *Id.* para. 4-9.a.(2)(a).

28. *Id.*

29. *Id.* para. 4-9.a.(2)(d).

30. *See id.* para. 6-1.c.

31. *Id.* para. 4-5.b.(4).

32. *Id.* paras. 6-13.e., 6-14.c.

33. *Id.* para. 6-3.a.

34. *Id.* paras. 6-3.a., 6-8.a.(1).

35. *Id.* para. 6-3.b.(1).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* para. 6-3.b.(2)

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* para. 6-3.b.(3).

46. *Id.* para. 6-3.d.

47. *Id.*

48. *Id.* para. 1-9.f.

49. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 705(c), 100 Stat. 3816, 3904 (1986).

50. AR 600-110, *supra* note 8, para. 6-6.c.(1) (referencing U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations ch. 7-16 (19 Dec. 2016) [hereinafter AR 635-200]).

51. *Id.* para. 6-14.a. (referencing AR 635-200, *supra* note 50, ch. 5-3.c.).

52. *Id.* para. 6-14.a.(1).

53. *Id.* para. 6-14.b. (referencing AR 635-200, *supra* note 50, ch. 5-11).

54. *Id.* para. 6-14.c (referencing AR 635-200, *supra* note 50, ch. 14-12).

55. *Id.* (referencing AR 635-200, *supra* note 50, ch. 5-3.c-d.).

56. *Id.* para. 6-13.a. (referencing U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges ch. 2, 3 (8 Feb. 2020) [hereinafter AR 600-8-24]).

57. *Id.* para. 6-13.a. (referencing AR 600-8-24, *supra* note 56, ch. 3-7).

58. *Id.* para. 6-13.b.

59. *Id.* para. 6-13.d. (referencing AR 600-8-24, *supra* note 56, ch. 4-2.a.(15)).

60. *Id.* para. 6-13.e. (referencing AR 600-8-24, *supra* note 56, ch. 4-2.b.).

61. U.S. Dep't of Def., Instr. 1332.45, Retention Determinations for Non-Deployable Service Members (30 July 2013) [hereinafter DoDI 1332.45]; U.S. Dep't of Army, Dir. 2018-22, Retention for Non-Deployable Soldiers (8 Nov. 2018) [hereinafter Army Dir. 2018-22].

62. DoDI 1332.45, *supra* note 61, para. 1.2.b.(1).

63. Army Dir. 2018-22, *supra* note 61, para. 4.d.

64. DoDI 1332.45, *supra* note 61, para. 3.6.a.(1).

65. AR 600-110, *supra* note 8, para. 4-7.b.

66. *Id.* para. 4-11.d.

67. *Id.* para. 4-9.a.(1)(e).

68. Memorandum from Asst. Sec'y of Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Characterization of Human Immunodeficiency Virus (HIV) Positive Soldier Deployable Status for the Purposes of Calculating Non-Deployable Time (9 Nov. 2018).

69. *Id.* para. 2.

70. *See, e.g.,* Roe v. Dep't of Def., 947 F.3d 207, 221-224 (4th Cir. 2020) (noting Modification Thirteen to USCENTCOM Individual Protection and Individual/Unit Deployment Policy (23 Mar. 2017), providing that personnel who are found to be medically non-deployable, including those with HIV infections, may not enter the CENTCOM area until the non-deployable condition is completely resolved or an approved waiver is obtained, which to date, CENTCOM has never granted and is "extremely unlikely" to ever do so). *See also* Modification Fourteen to USCENTCOM Individual Protection and Individual-Unit Deployment Policy, USCENTCOM (3 Oct. 2019), https://usarcent.army.mil/Portals/1/Directorates/Surgeon/MOD14-Final_combined.pdf?ver=2019-11-26-091007-320 [hereinafter MOD14].

71. MOD14, *supra* note 70 (referencing MOD14-Tab A: Amplification of the Minimal Standards of Fitness for Deployment to the CENTCOM AOR, USCENTCOM To Accompany MOD Fourteen to USCENTCOM Individual Protection and Individual/Unit Deployment Policy (noting that some nations within the CENTCOM AOR have legal prohibitions against entering their country(ies) with a positive HIV diagnosis)).

(Credit: istockphoto.com/Smederevac)

Administrative Actions with a Counterintelligence Twist

By Major Timothy M. McCullough

When there is a military justice action—whether court-martial, Article 15, or reprimand—our Corps is well-versed in the follow-on actions required. From post-trial procedures to administrative separations, judge advocates (JAs) can smoothly guide our commands through the sometimes-intricate processes to maintain good order and discipline.

Despite these well-exercised muscle movements, the process often grinds to a halt when elements of counterintelligence (CI) investigations and non-Army agency equities become intertwined with the well-rehearsed administrative processes. While CI investigations are not as routine as their Criminal Investigation Division (CID) counterparts, JAs should understand how to leverage these robust investigations as well as the multi-agency input supporting them. This article will assist JAs in coordinating within the interagency space to deliver the right evidence to the right actor in a usable format while leveraging the capabilities of other agencies to address the commander's concerns.

Counterintelligence Investigations

Executive Order (EO) 12333 directs the Secretary of Defense to "protect the security of Department of Defense [(DoD)] installations, activities, information, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar associations with the [DoD] as are necessary."[1] This authority is further delegated through Army channels to the Commander of U.S. Army Intelligence and Security Command (INSCOM); it is formalized, in part, in Army Regulation (AR) 381-12, *Threat Awareness and Reporting Program*.[2] In AR 381-12, Tables 3-1 through 3-4 set forth a series of indicators that Soldiers should report to 1-800-CALL-SPY or a number of other resources described.[3]

Through authorities from INSCOM—and as described in AR 381-20, *Army Counterintelligence Program*—CI agents examine these tips and generate CI reports that could serve as the basis for additional investigation.[4] These investigations are designed to: identify activities that may constitute national security crimes; substantiate or refute allegations or indications of spying; protect Army personnel, installations, and property; and acquire evidence to assist in the prosecution by competent authorities.[5]

The collection of information about a subject of an investigation is further limited by the procedures outlined in DoD Manual 5240.01.[6] During a CI investigation, generally, non-public information about a U.S. person[7] can only be intentionally collected without consent when the individual is believed: to be engaged in intelligence activities on behalf of a foreign power or their agent; be engaged in international terrorist activities; or be acting on behalf of an international terrorist.[8] Given the subject matter and predicate for CI investigations, it is common for the investigations to include information, classified at various levels, from a number of other agencies.

Using CI Evidence for Separation

With the robust quality of CI investigations, it is tempting to simply use the CI investigation for a traditional administrative action.[9] While the CI investigation may resemble—or in some cases parallel—a CID investigation, the CI investigation is intelligence driven and governed by intelligence oversight procedures;[10] on the other hand, the CID investigation is for an express law enforcement purpose.[11] This distinction most commonly manifests as a JA's inability to use all the evidence in the CI file for the separation process due to intelligence considerations such as the incidental disclosure of sources and methods.[12]

In originally classifying a piece of information, the agency head—whether DoD, Army, or other agency—is making a determination about the potential harm the release of that information could have on the national security of the United States. These published classification guides[13] extend to the derivative classification of subsequent reports that restate, paraphrase,

or incorporate the protected information.[14] Stated another way, the classification protects the information—including specific words—rather than the form the information takes. Since intelligence from non-Army agencies may carry additional caveats or limitations on its distribution or use, derivative classification can make it difficult to include a summary of classified material in a separation packet.[15]

With the difficulty in sharing intelligence with the target of that intelligence, it is often necessary to find alternate methods for separation. One available option is to use the CI investigation as a starting point for a more traditional CID or administrative investigation.[16] Although the CI investigation provides a highly reliable roadmap to misconduct, when considering this path, the JA should work closely with the CI agent to prevent the inadvertent exposure of a source who contributed to the initial CI investigation.

Alternatively, the command could base the separation on information the subject is legally entitled to. For example, when a subject fills out their Standard Form 86,[17] or conducts an interview with the Office of Personnel Management, those files are accessible by the individual through the Privacy Act.[18] Additionally, if there is inconsistent data between these sources and other available sources, such as Federal Bureau of Investigation or U.S. Customs and Immigration Service (USCIS) interviews, it is possible to justify separation without referencing sensitive materials.[19]

Finally, when a separation authority is reviewing the separation action, consider reading that commander into the CI investigation. In presenting the CI investigation in this manner, the purpose is to give context to assist the command in choosing from the range of options available under the Uniform Code of Military Justice and regulation, not as a reason for separation.

Sharing Evidence for Action by Other Agencies

In addition to screening the evidence from a CI investigation for use in a separation, other government agencies may use the information only as background rather than a basis for action. For example, in separating a non-U.S. citizen with identified CI risks, CI agents and their servicing JAs may need to work with USCIS to fully neutralize the threat through post-separation deportation. As CI investigations derive their authority from a component of the intelligence community, and in addition to the limitations of dissemination above, Procedure 4 limits how U.S. person information may be disseminated.[20]

In some cases, CI agents may uncover evidence of non-national security crimes—like threats against an investigator, theft, or the unauthorized use of a government information system.[21] In these situations, with proper intelligence oversight, CI agents can share this information with the appropriate federal entity—generally CID. Through CID's existing relationships with other law enforcement agencies—both federal and local—CID can share evidence of crimes with other interested agencies. In a hypothetical situation, CI and CID agents can compare interview notes on a subject with interviewers from USCIS so that all federal agencies are operating from a common set of facts during the various interviews of a subject. By including DoD law enforcement in the investigation of CI matters, where appropriate, investigators and their servicing JAs can leverage the law enforcement sharing agreements to address both the unit's discipline issues and larger national security concerns.

Leveraging Outside Capabilities to Address Commander Concerns

In addition to the utility of using CI information in the administrative process and communicating relevant information to other federal authorities, JAs can coordinate with outside agencies to address the commander's concerns. For example, if the subject of a CI investigation makes comments about going absent without leave, this information can be shared with other interested federal agencies. In some circumstances, these agencies have the authority to flag the subject's passport when they attempt to travel with the document. While the majority of these flags will not stop travel, they will trigger a notification to the requiring agency of the travel—hopefully with time to act.

Another concern of commanders separating Soldiers with CI concerns is the ability of the soon-to-be former Soldier returning as a federal employee or contractor. With credible derogatory information that falls within one of the thirteen adjudicative guidelines,[22] the special security officer (SSO) or security manager should report the information through the Joint Personnel Adjudication System to the DoD central adjudication facility.[23] In future national records checks, correct reporting of derogatory information ensures future investigators will have access to the information before government employment.[24]

Conclusion

Separations with a CI twist can be more difficult to move through the process—not for a dearth of evidence, but due to the nature of the evidence. As such, these separations require JAs to work with non-traditional partners both inside and outside the DoD. In working through professional CI agents, the SSO/security manager, CID, and other federal agencies, JAs can support their commands with the maintenance of good order and discipline. These separations also safeguard the national security of the United States by removing people of questionable loyalty from having placement and access to sensitive information—or those with the sensitive information. **TAL**

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A special thank you is owed to the truly professional Counterintelligence Agents of the 500th Military Intelligence Brigade-Theater, specifically the Hawaii Resident Office for talking me through their investigative procedures so that we could find ways for the brigade legal team to assist in their mission to protect national security.

Notes

1. Exec. Order No. 12,333, 3 C.F.R. § 200, *as amended by* Exec. Order No. 13,284, 13,355, and 13,470 ¶ 1.10(h) (July 30, 2008).

2. U.S. Dep't of Army Reg. 381-12, Threat Awareness and Reporting Program (1 June 2016).

3. *Id.* tbl.3-1-3-4, para. 4-2. Although a single spillage event or foreign contact does not mean an individual is a counterintelligence threat, patterns of behavior or the appearance of multiple indicators will often trigger an initial investigation. Indicators include activities as obvious as: "advocating support for international terrorist organizations or objectives"; "sending large

amounts of money to persons or financial institutions in foreign countries"; or "procuring supplies and equipment, purchasing bomb making materials, or obtaining information about the construction and use of explosive devices." *Id.* Indicators also include more mundane or nuanced activities such as: "joking or bragging about working for a foreign intelligence service or associating with international terrorist activities"; "expressing a political, religious, or ideological obligation to engage in unlawful violence directed against U.S. military operations or foreign policy"; or "participation in political demonstrations that promote or threaten the use of unlawful violence directed against the Army, DOD, or the United States based on political, ideological, or religious tenets, principles, or beliefs." *Id.* Indicators also include information technology activities such as: "downloading, attempting to download, or installing non-approved computer applications"; "unauthorized use of universal serial bus, removable media, or other transfer devices"; or "exfiltration of data to unauthorized domains or cross domain violations." *Id.*

4. U.S. Dep't of Army, Reg. 381-20, The Army Counterintelligence Program (U) (25 May 2010). While the paragraphs referenced in this article are unclassified, the overall classification of Army Regulation (AR) 381-20 is SECRET//NOFORN.

5. *Id.* para. 4-2.

6. U.S. Dep't of Def., Manual 5240.01, Procedures Governing the Conduct of DoD Intelligence Activities (8 Aug. 2016) [hereinafter DoDM 5240.01]. Department of Defense Manual 5240.01 applies to all units conducting intelligence activities under DoD's authorities. *Id.* para. 1.1. After approval of the Attorney General and consultation with the Director of National Intelligence, the Department of Defense (DoD) published DoDM 5240.01 as a series of procedures to guide the practice of intelligence. *Id.* para. 1.3. Within these procedures—colloquially known as "Procs"—2 describes when a Defense Intelligence Component (DIC) may intentionally collect U.S. person information (USPI). *Id.* para. 3.2. Provided that the DIC complies with Proc 2, Proc 3 describes the retention of USPI. *Id.* para. 3.3. Proc 4 addresses dissemination of properly collected and retained USPI—in any form—to other government entities within the DoD, the federal government, of other governments. *Id.* para. 3.4.

7. *Id.* Glossary. U.S. person includes:

> A U.S. citizen. An alien known by the Defense Intelligence Component concerned to be a permanent resident alien. An unincorporated association substantially composed of U.S. citizens or permanent resident aliens. A corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments. A corporation or corporate subsidiary incorporated abroad, even if partially or wholly owned by a corporation incorporated in the United States, is not a U.S. person. A person or organization in the United States is presumed to be a U.S. person, unless specific information to the contrary is obtained. Conversely, a person or organization outside the United States, or whose location is not known to be in the United States, is presumed to be a non-U.S. person, unless specific information to the contrary is obtained.

Id.

8. *Id.* para. 3.2.c.(4)(a)-(c).

9. For simplicity, this article refers to separation as encompassing both officers and enlisted. While the regulations differ, there are similar evidentiary notice requirements for both groups. For example, during an enlisted separation, the Soldier has the right "[t]o obtain copies of documents that will be sent to the separation authority supporting the proposed separation." U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations para. 2-2c(3) (19 Dec. 2016). For officers and enlisted Soldiers entitled to a board, the board procedures in Army Regulation (AR) 15-6 state that respondents have the right to "[e]xamine and object to the introduction of real and documentary evidence, including written statements." U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers para. 7-8a(1) (1 Apr. 2016) [hereinafter AR 15-6]. Both AR 635-200 and AR 15-6 have general procedures for addressing classified material.

10. DoDM 5240.01, *supra* note 6, § 3.

11. U.S. Dep't of Army, Reg. 195-2, Criminal Investigation Activities para. 3-1 (9 June 2014) ("The Army has investigative authority whenever an Army interest exists and investigative authority has not been specifically reserved to another agency in accordance with AR 27–10; and the MOU between the DOD and the DOJ relating to the investigation and prosecution of certain crimes (DoDI 5525.07). Generally, an Army interest exists when one or more of the following apply: (1) The crime is committed on a military installation or facility, or in an area under Army control. (2) There is a reasonable basis to believe that a suspect may be subject to the Uniform Code of Military Justice. (3) There is a reasonable basis to believe that a suspect may be a DOD civilian employee or a DOD contractor who has committed an offense in connection with his or her assigned contractual duties which adversely affects the Army. (4) The Army is the victim of the crime… (5) There is a need to protect personnel, property, or activities on Army installations from criminal conduct on, or directed against, military installations that has a direct adverse effect on the Army's ability to accomplish its mission.").

12. Exec. Order No. 13,526, 75 Fed. Reg. 705 § 1.4. (2010). For implementation of these rules for the Army, see U.S. Dep't of Army, Reg. 380-5, Army Information Security Program (22 Oct. 2019) [hereinafter AR 380-5].

13. AR 380-5, *supra* note 12, para. 2-9.

14. *Id.* para. 2-1.

15. *Id.* para. 7-2. *See also* 32 C.F.R. § 2001.24j (2020) ("Dissemination control and handling markings identify the expansion or limitation on the distribution of the information. These markings are in addition to, and separate from, the level of classification.").

16. AR 15-6, *supra* note, 9, paras. 3-16, 7-5 (guidelines on handling classified materials).

17. *See Questionnaire For National Security Positions*, U.S. Off. of Prof. Mgmt. (2016), https://www.opm.gov/forms/pdf_fill/sf86.pdf. The Standard Form 86 is the Office of Personnel Management published Questionnaire for National Security Positions. The form asks about personal, family, and financial history to determine suitability for positions of public trust.

18. The Privacy Act of 1974, 5 U.S.C. § 552a(d) (2019) ("Each agency that maintains a system of records shall—(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence."). *See also* U.S. Dep't of Army, Reg. 25-22, The Army Privacy Program (22 Dec. 2016).

19. In some instances, these investigative interviews—whether as part of an initial entry background check or for a security clearance—can constitute a false official statement under Article 107. Manual for Courts-Martial, United States pt. IV, ¶ 107 (2019) [hereinafter MCM] ("Any person subject to this chapter who, with intent to deceive—(1) signs any false record, return, regulation, order, or other official document, knowing it to be false; or (2) makes any other false official statement knowing it to be false; shall be punished as a court-martial may direct."). For officers, it is possible to obtain separation through a two-step process. First, the derogatory CI information should be sent through Joint Personnel Adjudication System to the DoD central adjudication facility to facilitate the revocation of any clearance. Although this action requires notice to the Soldier facing the loss of their clearance, the notification makes allowance for withholding information for national security. U.S. Dep't of Army, Reg. 380-67, Personnel Security Program para. 8-6 (24 Jan. 2014) [hereinafter AR 380-67] ("The statement shall be as comprehensive and detailed as the protection of sources afforded confidentiality under the provisions of the Privacy Act of 1974 (5 USC 552a) and national security permit."). Second, with the above action complete, the command can begin separation for the loss of the officer's security clearance. U.S. Dep't of Army, Reg. 600-8-24, Officer Transfers and Discharges para. 4-2b(10) (22 Dec. 2016) ("The final denial or revocation of an officer's Secret security clearance by appropriate authorities acting pursuant to DoDD 5200.2-R and AR 380-67.").

20. DoDM 5240.01, *supra* note 6, para. 3.4(c)(5). Dissemination to non-DoD federal government entities is limited to when "the recipient is reasonably believed to have a need to receive such information for the performance of its lawful missions or functions." *Id.*

21. MCM, *supra* note 19, ¶ 123 ("Any person subject to this chapter who—(1) knowingly accesses a Government computer, with an unauthorized purpose, and by doing so obtains classified information, with reason to believe such information could be used to the injury of the United States, or to the advantage of any foreign nation, and intentionally communicates, delivers, transmits, or causes to be communicated, delivered, or transmitted such information to any person not entitled to receive it; (2) intentionally accesses a Government computer, with an unauthorized purpose, and thereby obtains classified or other protected information from any such Government computer; or (3) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization to a Government computer; shall be punished as a court-martial may direct.").

22. AR 380-67, *supra* note 19, app. I.

23. *Id.* paras. 9-1-9-6.

24. *Id.*

U.S. Army paralegal specialists search an apartment complex floor by floor during a hostage rescue training mission on Fort McCoy, Wisconsin, during 2019 Paralegal Warrior Training Course, July 22, 2019. (U.S. Army Reserve photo by SGT James Garvin)

On Becoming a Versatile Paralegal

By Sergeant Major Anthony D. Rausch

13 March 2020 started like any other day. I went on a long run that would energize me. I prepared for my last day of class, where I would re-certify as a military instructor. Everything was falling into place. Soon, I would permanently change stations (PCS) and slowly begin the transition to the next chapter of my career as a fellow at the U.S. Army Sergeants Major Academy. Of course, as the reality of coronavirus disease-2019 (COVID-19) finally made its way to the United States, that all changed. The Army cancelled training, restricted travel, and delayed PCS moves. Everything I came to know and expect, as a Soldier and leader for the last nineteen years, was changing. Nothing could have prepared me or other members of the Judge Advocate General's (JAG) Corps for COVID-19. The sudden changes required us to learn new things while continuously developing expertise in multiple core legal disciplines. This article explores the well-known concepts of expertise and versatility and examines them in light of this new, unknown environment of an ongoing pandemic and its effects. In this article, I offer ideas on how to instill these concepts of expertise and versatility in junior Soldiers to help them now and in their future JAG Corps careers.

Expertise

First, it is essential to note there is no cookie-cutter approach to becoming an expert in a field. Multiple studies have sought to determine how one best develops expertise.[1] Some may have heard of the 10,000-hour rule, which suggests the key to success in any field is the amount of time you practice.[2] Practice makes perfect, they say. Although the 10,000-hour rule may sound intriguing, psychological research shows that people achieve expertise through quality training and focused practice—not the amount of time spent on a particular task.[3] The Army defines expertise as "in-depth knowledge and skill developed from experience, training, and education."[4] That said, leaders own the task of developing expertise in themselves and their Soldiers.[5] Leaders fulfill their responsibility of developing expertise in their Soldiers when they take the time to create quality training that will keep their Soldiers engaged and focused.[6] My first assignment as a paralegal was a great illustration of how a noncommissioned officer (NCO) took charge of my development as a Soldier and steadily advanced me on the path of becoming an expert.

Be a Mentor/Find a Mentor

When I arrived at my first assignment in Hunter Army Airfield, Georgia, I was assigned the responsibility of processing all chapters for the installation. I had received limited instruction in Advanced Individual Training (AIT) on how to draft administrative separations, so I had no idea where to start. Fortunately, my NCO at the time—Master Sergeant (MSG) (Retired) Billie Suttles—pointed me to the regulation and the templates on the shared drive (before Military Justice Online (MJO)[7]) and had me get to work immediately. She made it clear she was not going to hold my hand but was willing to guide me through the process of drafting administrative separations in an effective manner.

For the next twelve months, then-MSG Suttles went through dozens of boxes of red pens as I attempted to master the art of chapter processing. She never allowed me to use the excuse of limited knowledge as a reason to turn in a substandard chapter packet. She regularly referred me to the regulation to find answers on why specific language appeared in the separation packet memoranda. So that I could understand why the templates were formatted the way they were in our shared drive, she sent me to a class on how to draft Army correspondence properly. Learning how to process administrative separations did not come easy for me. Still, through multiple repetitions, quality training, mentoring from my NCO, and patience, I slowly became the

expert that commanders, first sergeants, and attorneys could rely on for guidance on administrative separations.

Challenge Their Development/ Challenge Your Development

As leaders, we cannot allow our Soldiers to become data entry clerks—where their only purpose is to input data into MJO and generate documents—without helping them understand the meaning behind what they are doing. Leaders are responsible for providing as many opportunities as possible for their Soldiers. These opportunities should provide quality training where they are not constantly distracted by a first sergeant who needs "just a quick second of your Soldier's time to talk about an Article 15." My numerous years in a training environment have taught me that our Soldiers are able to get the most out of their training when we keep them engaged through creative, interactive, and relevant training. Using the eight-step training model outlined in Field Manual 7-0 is an excellent framework for designing relevant training that will keep Soldiers engaged.[8] Just as then-MSG Suttles did for me, leaders must challenge their Soldiers to think bigger and dig deeper on the road to becoming an expert in a variety of subjects. Although it took a long time, I became comfortable and confident in my abilities to process administrative separations. It was only a matter of time, however, before I was required to step out of my comfort zone and learn new things.

Versatility[9]

During the initial invasion, my deployment to Iraq with 3d Infantry Division awakened me to the need to be versatile. As the 3d Infantry Division crossed the berm into Iraq, I sat in the driver's seat of the High Mobility Multipurpose Wheeled Vehicle during complete blackout conditions. There, it became clear to me that expertise as a paralegal in any of our core legal disciplines would not be enough to return me to my family. Developing expertise is undoubtedley an important aspect of being successful in the legal profession. Still, we cannot let our focus on becoming an expert hinder our ability to adjust to change or new responsibilities.[10] As paralegal NCOs, we must be versatile and encourage the same behavior in our Soldiers.

Leaders must "embrace a variety of subjects, fields, or skills."[11] Likewise, Soldiers must follow the example of their leaders and also be willing to embrace a variety of skills. Leaders who are capable and ready to step out of their comfort zone inevitably influence and encourage their Soldiers to do the same. Leaders who are not open to learning a variety of skills fail to model being a lifelong learner[12] and, in the end, fail their Soldiers. No amount of experience or expertise in one position could have prepared me for the challenges I faced as a young specialist deploying for the first time. Nor could any amount of experience or expertise have prepared me for the changes that took place as COVID-19 arrived in the United States. If leaders lack versatility and adaptability, discourage their Soldiers from offering new ways to solve problems, or allow themselves and their Soldiers to become complascent, poor performance and mission failure are the likely outcomes. To assist leaders in developing versatility in themselves and their Soldiers, the following are a few recommendations based on my personal experience.

Soldiers are able to get the most out of their training when we keep them engaged through creative, interactive, and relevant training

Volunteer for Opportunities to Work Outside of Your Comfort Zone

I did not have to fight through a long line when Sergeant Major (SGM) (Retired) Mark Cook suggested I take the Observer Controller/Trainer (OC/T) job at Fort Polk. After I took the assignment, people often asked me what I had done to anger Human Resources Command (HRC). The fact is, though, I learned the most about the Army and its capabilities during my time there. It was not enough for me to know the responsibilities of a paralegal, I had to understand how our duties in the JAG Corps tied into other staff sections and the Army as a whole. While I was at the Joint Readiness Training Center, I was appointed as the task force maintenance officer, served as the knowledge management officer, and sat on a committee chaired by a former Sergeant Major of the Army to help identify deficiencies in Army training and assist in developing solutions to the training gaps. My assignment to Fort Polk was, by far, the most instrumental experience in my personal and professional growth. Being assigned to jobs that forced me out of my comfort zone made me a more well-rounded Soldier and enhanced my critical and creative thinking skills.

Be an Agent for Change

There is no doubt that COVID-19 upended the way we normally conduct business throughout the Army. Upon the arrival of COVID-19, a number of our Soldiers and Civilians started teleworking as a result of social distancing guidelines that were put in place by our senior leaders.[13] Since it was no longer business as usual, and there would be no opportunity to see Soldiers on a daily basis, many questions arose about how to conduct accountability and training. Despite all these challenges, senior leaders throughout the JAG Corps immediately took action by creating physical fitness challenges to keep Soldiers engaged and connected,[14] maintained accountability through the use of technology, and developed virtual training plans to ensure Soldiers still received professional development opportunities.[15] Our leaders quickly recognized that conditions were changing, and it could no longer be business as usual; they encouraged leaders at all levels to embrace the change and adapt to new ideas of conducting business by keeping an open mind. This particular type of versatility has more to do with a leader's mindset than

learned skills, but it is definitely a choice for a leader to keep that open mind and react to situations in a versatile manner.

Do Your Best Not to Homestead

When HRC calls and informs you it is time to move, be ready to move. Discuss the move with your family and work together to make it work. This summer, I will have been assigned to Fort Bliss for three years, which is the longest I have been in one location. I typically move every two or three years and have never been to the same duty station twice. The constant moves have exposed me to a number of different organizational cultures and new ideas. Although constant PCS moves have been somewhat difficult on the family, being exposed to new environments has made me more adaptable and capable of meeting new challenges. "Leaders exposed to different types of thinking, different people and cultural norms, everyday changes in execution, and new challenges will learn the value of adaption."[16] Arguably, it may do the same for your Family, in a less tangible way.

Engage in Lifelong Learning[17]

As of this year, I officially became eligible for retirement. Even though I am coming to the end of my career, I am still taking every opportunity to learn new things. I recently became certified as a paralegal and officially earned the civilian title of CORE Registered Paralegal. Although the credential is designed for paralegals relatively new to the profession, I still learned a lot and feel that—even late in my career—pursuing the paralegal credential was worth the effort. Becoming a credentialed paralegal has opened up new opportunities for when I leave the Service, and it has also made me a more competent Army paralegal for the remainder of the time I serve and a better supervisor in that I can share this experience with my Soldiers and encourage them to pursue the same credential.

Change in the Army is inevitable. As leaders, it is our job to develop versatility in ourselves and our Soldiers, while continuously building expertise. By doing so, we gain a competitive edge and improve our credibility with commanders and other clients. These are just a few tips leaders can follow. As TJAG mandates in almost all of his communications, as a Corps, we need to be ready. Pursuing expertise and versatility, and mentoring those we lead, will help us to develop the deep knowledge and skills required to meet TJAG's mandate.[18] As we navigate COVID-19, expert and versatile leadership within the JAG Corps is on full display; luckily, the current generation of leaders has pursued those two ideals throughout our careers. We will pass what we have learned to the next generation of leaders. **TAL**

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Notes

1. Eric Barker, *How to Become an Expert at Anything, According to Experts*, Time (Aug. 23, 2016, 8:00 AM), https://time.com/4461455/how-to-become-expert-at-anything/ (summarizing research and studies on expertise and listing tips).

2. K. Anders Ericcson, *Deliberate Practice and the Acquisition and Maintenace of Expert Performance in Medicine and Related Domains*, 79 Acad. Med. 70 (2004), https://journals.lww.com/academicmedicine/Fulltext/2004/10001/Deliberate_Practice_and_the_Acquisition_and.22.aspx.

3. Kevin Loria, *The '10,000-Hour Rule' About Becoming an Expert Is Wrong—Here's Why*, Business Insider, (Aug. 27, 2017, 11:49 AM), https://www.businessinsider.com/expert-rule-10000-hours-not-true-2017-8. Even the researcher Anders Ericsson, whose 10,000-hour theory was popularized by author Malcolm Gladwell in his 2008 book *Outliers*, has disavowed the idea that just practice makes perfect. Anders Ericsson & Robert Pool, Peak: Secrets from the new Science of Expertise (2016) (extolling the virtues of purposeful/deliberate practice over traditional practice and emphasizing the importance of feedback and the role of an effective teacher in pursuing expertise). *See also, e.g.*, *Becoming an Expert Takes More Than Practice*, Assoc. of Psychol. Sci. (July 2, 2014), https://www.psychologicalscience.org/news/releases/becoming-an-expert-takes-more-than-practice.html.

4. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership para. 4-17 (1 Aug. 2019) (C1, 1 Nov. 2019) [hereinafter ADP 6-22].

5. *Id.* para. 1-113 ("Noncommissioned officers are the backbone of the Army and are responsible for maintaining Army standards and discipline. [Noncommissioned officers] are critical to training, educating, and developing individuals, crews, and small teams.").

6. *Id.* para. 1-113. "Tactical success relates directly to the Soldiers' level of tactical and technical training." *Id.*

7. DJAG Policy Memorandum 18-02, Deputy Judge Advocate Gen., U.S. Army, subject: The Judge Advocate General's Corps Enterprise Applications (19 Dec. 2017) (directing all Judge Advocate General's (JAG) Corps personnel to use the Military Justice Online application to process all military actions).

8. *See generally* U.S. Dep't of Army, Field Manual 7-0, Train to Win in a Complex World para. 1-1 (5 Oct. 2016) [hereinafter FM 7-0].

9. *See* ADP 6-22, *supra* note 4, paras. 8-13–8-14 (defining and discussing versatility, as well as the damaging effects of a leader lacking versatility).

10. William Arruda. *Four Ways To Become More Versatile And More Valuable At Work*, Forbes Mag. (Apr. 5, 2018, 8:11 AM), https://www.forbes.com/sites/williamarruda/2018/04/05/four-ways-to-become-more-versatile-and-more-valuable-at-work/#5d5f8faa3f77.

11. *See Versatile*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/versatile (last visited July 1, 2020). *See also* Robert B. (Bob) Kaiser, *The Best Leaders Are Versatile Ones*, Harv. Bus. Rev. (Mar. 2, 2020), https://hbr.org/2020/03/the-best-leaders-are-versatile-ones.

12. *Lifelong Learning Resources*, The Judge Advocate Gen's Legal Ctr. & Sch., https://tjaglcspublic.army.mil/lifelong-learning (last visited July 1, 2020) (The U.S. Army Judge Advocate General, Lieutenant General Charles N. Pede, and the Regimental Command Sergeant Major (CSM), CSM Osvaldo Martinez, both encourage this mindset of lifelong learning and have gathered materials posted to "Lifelong Learning" of The Judge Advocate General's Legal Center and School public website.). *Id.*

13. *See Coronavirus: DOD Response*, U.S. Dept. of Def., https://www.defense.gov/Explore/Spotlight/Coronavirus/ (last visited July 1, 2020).

14. #JAGRCSMChallenge 3-15 April 2020, *U.S. Army JAG Corps*, Facebook (Apr. 15, 2020), https://www.facebook.com/ArmyJAGCorps/?__tn__=%2Cd%2CP-R&eid=ARB1Q1dGNXQmeb_c7JGMAroMCx4bk1sWG0W4D4DsEt9g5THqzJEBR6H-7DhRqTzf480XnLDZkWsorBcPB (containing Regimental CSM Osvaldo Martinez's COVID-19 Fitness Challenge, #JAGRCMSChallenge).

15. *See, e.g.,* U.S. Army Cadet Command Public Affairs Office, *U.S. Army Cadet Command Makes Changes To Summer Training Programs In Response To COVID-19*, Army.mil (May 12, 2020), https://www.army.mil/article/235542/u_s_army_cadet_command_makes_changes_to_summer_training_programs_in_response_to_covid_19.

16. ADP 6-22, *supra* note 4, para. 8-12.

17. *See* Arruda, *supra* note 10 (explaining four ways to become more versatile, one of which is to "[b]ecome a forever learner").

18. FM 7-0, *supra* note 8, para. 1-3. Training—whether to become expert or versatile in whatever is being trained—"is the cornerstone of readiness." *Id.*

(Credit: istockphoto.com/anyaberkut)

Demystifying the Promotion Review Board

By Major Elizabeth N. Strickland

The Promotion Review Board Mystery

Promotion Review Boards (PRBs) are not widely understood throughout the Army. Unlike other Army actions, for which an officer can reach out to peers and mentors for guidance, most people who have gone through a PRB do not publicize their knowledge of the system. Why? Because it would require them to openly discuss derogatory information in their file. With so few people familiar with the process, officers rely on attorneys to understand the process and develop successful strategies for responding to the board. Legal assistance and Trial Defense Service (TDS) attorneys should ensure they are prepared to answer questions about the process, other effects of the PRB, and how final disposition will impact the officer in the future.

What Is the PRB?

During the officer promotion process, Human Resources Command (HRC) is responsible for conducting post-board screenings for derogatory information.[1] This screening ensures all officers selected for promotion meet the standard of exemplary conduct required of them.[2] Derogatory information in an officer's post-board screening triggers a PRB.[3] The PRB assesses the derogatory information, the officer's complete promotion file, and any rebuttal matters submitted by the officer for consideration.[4] The PRB's role is to determine whether the officer should be retained on the promotion list and attain the rank for which they were selected or be removed from the promotion list.[5] The PRB process is lengthy and complex, but begins with a basic background check of all personnel selected for promotion.

Where Does the Post-Board Screening Find Derogatory Information?

The post-board screening pulls records from Criminal Investigation Command (CID), Military Police, Department of the Army Inspector General, the officer's restricted file, previous court-martial convictions, Army Military Human Resources

Record (AMHRR) documents that entered the file after the board, and misconduct which occurred or was discovered post-board.[6] The post-board screening also pulls records related to special interest situations, like incidents involving media scrutiny.[7] A referred officer evaluation report can also trigger the PRB.[8] While the basic triggers for a PRB remain the same, it is important to note that some of the effect of screenings changed with the Fiscal Year 2020 National Defense Authorization Act (FY20 NDAA).[9]

Effect of the FY20 NDAA on the PRB

Section 502 of the FY20 NDAA directs that all derogatory information be provided directly to the promotion selection board. This is a departure from the previous rule, which permitted inclusion of only permanently-filed, non-restricted documents to selection boards. Once the FY20 NDAA selection board process takes effect, HRC will still be responsible for post-board screenings; however, it will also conduct pre-board screenings to identify and provide all derogatory information to the selection board. The effect of this change in policy is that promotion boards will consider derogatory information in the initial determination of whether selection for promotion is warranted. Because boards will be able to consider this information when making the selections, this same information does not need to be considered post-selection. Thus, the majority of derogatory information that must be considered post-board would be misconduct occurring or discovered after the selection board or derogatory information that becomes available after the board. While this has the effect of reducing the number of officers subject to a PRB, the PRB process will still exist and should be understood by the attorneys who will represent officers undergoing the process.

Promotion Review Board Process

Screening Board

The process for the PRB begins with the office of the Army's Deputy Chief of Staff for Personnel—the Army G-1—requesting a post-board derogatory record screening from CID, the Department of the Army Inspector General, and HRC.[10] If these screening agencies discover derogatory information, HRC flags the officer and initiates the PRB process.[11]

Non-Transferable Flag

The officer will be flagged for "HQDA delay or removal from promotion list."[12] While this is not a flag for adverse action, it does have the similar effect of preventing favorable administrative actions.[13] This flag prevents the officer from receiving awards, being considered by another board if it occurs during the PRB process, attending schools without an exception to policy, and requesting retirement or resignation until the PRB is resolved.[14]

Because the promotion hold is a non-transferrable flag, the officer is also prohibited from making a permanent change of station (PCS) move without an exception to policy. The HRC Commander is the approval authority and will deny the request if the officer has not submitted response matters prior to the expected PCS date.[15]

Notice

Officers typically receive informal notification of the impending PRB through their chain of command. Although this informal communication may be an oral notification stating only that the PRB will occur, without any details about the issue giving rise to the PRB, most officers will know what incident triggered the PRB. Whether or not the officer received an informal notice, a formal notification will arrive. Formal notice includes written notice, a copy of the officer's flag, a copy of the derogatory information generating the PRB, and an election of rights document.[16] Usually the officer has fourteen calendar days to make an election of rights and submit matters, but they may request an extension.[17]

Election of Rights

The officer has three choices: they may avoid the PRB by declining the promotion, submit matters for consideration by the PRB, or request their file be considered by the board without submitting additional matters.[18] If the officer declines promotion, HRC will remove them from the promotion list, and the officer will be categorized as a non-select.[19] Officers unfamiliar with the PRB may find it confusing initially, but the process is relatively direct once they understand the concept and the basic steps from agencies' screening to final action.

The Board

In either case where the officer chooses consideration by the board, the PRB process takes eight to twelve months for final disposition.[20] If officers have later promotion dates, the PRB may be complete prior to their original promotion date; but, for officers earlier on the promotion list, the process will likely continue well after the anticipated promotion date.

Once the officer submits rebuttal matters, they are considered in the next regularly scheduled board that is eligible to promote the officer.[21] This board must have the same composition as the selection board for that rank.[22] The PRB reviews the promotion board file, derogatory information, and all matters submitted by the officer.[23]

Approval Authority and Resolution

Once the PRB is complete, recommendations route through Army G-1 to the Secretary of the Army for final decision and disposition. If the Secretary of the Army finds the officer should be retained on the promotion list, the name is forwarded for Senate approval. If the Secretary of the Army determines the officer should be removed from the promotion list, the officer is treated as a one-time non-select and is eligible to compete for promotion in the next board.[24] Regardless of the decision, the officer will be notified in writing of the outcome. If the officer prevails in the PRB process and is approved for retention on the promotion list by the Secretary of Army, the officer's flag is removed; however, they may not wear rank reflecting the promotion until HRC provides promotion orders.[25] For field grade officers, all promotions require confirmation from the Senate.[26] This may take weeks or even months to occur; but, upon Senate approval, the officer will receive back-pay to their original date of rank and an adjusted date of rank if the PRB surpassed the officer's promotion date.[27]

Practice Notes

While the PRB is a mysterious process, attorneys may find that the same strategies

and techniques used for responding to a memorandum of reprimand, Grade Determination Review Board, or other adverse action closely mirror the approach for responding to the PRB. Being deliberate about compiling a response packet and setting the right tone will improve an officer's chance of success at a PRB.

What Should the Officer Include?

The officer will not be afforded the opportunity to appear at the PRB. Anything they want to convey must be provided in a documentary submission. Officers should include anything that either provides context to the misconduct or shows the officer's overall good conduct. The officer's packet should include a memorandum from the officer requesting to be retained on the promotion list, letters and memoranda from people who can provide support of the officer's good character, and other documents that are relevant to the case. As HRC furnishes the PRB with a complete copy of the adverse information and the full promotion board file, the packet from the officer should not include documents already in the board file.[28]

Response Packet Best Practices

The officer should reach out to those who may be willing to write letters of support as soon as they receive informal notice of the PRB. Giving people as much notice as possible ensures they have time to write and perfect their memorandum or letter. When requesting a letter of support, the officer should be prepared to tell the person writing the letter of support the underlying circumstances leading to the board and what facts or traits they would like the writer to concentrate on. As with other types of responses, officers submitting matters for the PRB should carefully select people to write the letters of support. The letters of support should illustrate the officer's character from different perspectives. Perspectives of peers, immediate supervisors, and more senior leaders demonstrate to the board that the officer is well-rounded and adds value to the organization. Letters of support should be clear, well-written, and express a message that is in keeping with the officer's strategy for responding to the PRB. Human Resources Command will not accept letters of support sent directly to them from the person writing the letter, so the officer will have an opportunity to read the letter before sending it to the PRB.[29]

In most cases, the officer knows they committed the misconduct and acknowledges its wrongfulness. In such cases, rather than quibbling about whether the conduct was really a violation of a rule or regulation, the officer should be ready to submit a packet asking for mercy. The response memorandum should demonstrate the officer taking responsibility, showing humility, and exhibiting self-reflection. In cases where the officer did not commit the misconduct, the officer must provide evidence to that effect. A memorandum simply denying the facts behind the derogatory information may reflect negatively on the officer and will convey a message that the officer refuses to accept responsibility.

Creating the most effective packet possible requires deliberate selection of documents of support, humility in responding to the derogatory information, and an understanding of both the process and the purpose of the PRB.

Conclusion

The PRB is a lengthy and difficult process for officers subject to it. Because of the small population of people directly impacted by the PRB, these officers often only have their attorney to support them through the process. Attorneys in legal assistance and TDS should be aware of the process and tactics for overcoming the PRB so that they are ready to be of service to this population of clients. **TAL**

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Notes

1. U.S. Dep't of Army, Reg. 600-8-29, Officer Promotions para. 2-12 (9 Sept. 2020) [hereinafter AR 600-8-29].

2. Requirement of Exemplary Conduct, 10 U.S.C. § 7233 (2018).

3. Officer Promotions: Frequently Asked Questions for Promotion and Command Review Boards (15 Nov. 2016) (on file with Human Resources Command) [hereinafter Officer Promotions].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. AR 600-8-29, *supra* note 1, para. 7-2. *See also* U.S. Dep't of Army, Reg. 623-3, Evaluation Reporting System para. 3-27 (14 June 2019), explaining that "referred reports" are adverse evaluation reports issued to rated Soldiers under various circumstances including failure to meet Army standards, derogatory information during a rated period, relief for cause, or other negative performance indicators.

9. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1790, 133 Stat. 1198 (2019). *See also* 10 U.S.C. § 615 (2019).

10. Officer Promotions, *supra* note 3, para. 3-19.

11. *Id.*

12. *Id.*

13. U.S. Dep't of Army, Reg. 600-8-2, Suspension of Favorable Actions para. 3-1 (11 May 2016).

14. *Id.* para. 2-8.

15. *Id.*

16. Officer Promotions, *supra* note 3, para. 2-2.

17. *Id.* para. 3-7.

18. *Id.* para. 3-4.

19. *Id.*

20. *Id.* para. 3-12.

21. *Id.* para. 3-18.

22. AR 600-8-29, *supra* note 1, para. 2-4.

23. Officer Promotions, *supra* note 3, para. 3-13.

24. *Id.* para. 3-18.

25. AR 600-8-29, *supra* note 1, para. 3-2.

26. *Id.* para. 2-10.

27. Officer Promotions, *supra* note 3, para. 3-16.

28. *Id.*

29. *Id.* para. 3-9.

(Credit: David F. Morrill, William & Mary)

No. 1

An Officer and a Dean

William & Mary's New Law Dean a JAGC Captain

Interview with Sean Lyons

Last spring, A. Benjamin Spencer, a judge advocate captain in the U.S. Army Reserve and a nationally-renowned civil procedure and federal courts expert, was appointed Dean of the William and Mary Law School, the nation's first—and one of the most prestigious—law schools. Born in Atlanta, Georgia, and raised in Hampton, Virginia, Captain Spencer graduated from Morehouse College, after which he attended the London School of Economics on a Marshall Scholarship, earning a master's degree in criminal justice policy. He completed his juris doctor at Harvard Law School and began his academic career at the University of Richmond School of Law. After a stint at Washington and Lee University, Spencer was named the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia (U.Va.) School of Law. For his excellence in teaching, he was awarded the Virginia Outstanding Faculty Award, the highest honor for faculty working at the commonwealth's colleges and universities.

Spencer is an author of the iconic Wright & Miller Federal Practice and Procedure *treatise, which is devoted to civil procedure. Last year, the treatise published its first volume under the name Wright, Miller & Spencer, in recognition of his contributions. He has authored numerous law review articles, book chapters, and books, including* Acing Civil Procedure *and* Civil Procedure: A Contemporary Approach, *used widely by professors and students throughout the country.*

Spencer recently spoke to The Army Lawyer *about his experiences as an academic, dean, and captain in the Judge Advocate General's (JAG) Corps.*

You joined the JAG Corps in 2015 while a professor at U.Va. School of Law. What spurred that decision?

My dad's and my grandfather's service in the Army was the impetus. My grandfather, Adam Arnold, was in the infantry during World War II. He served in Italy and France. My father was in the JAG Corps full-time and as a reservist for a total of sixteen years. I had never given the JAG Corps much thought; I was focused on my academic career. But when I became a professor at U.Va., I could see the JAG school out my office window. I'd watch the run groups go in and out, and some of the formations out front, so that piqued my interest. I talked to my father about his experiences a little more, and I had a colleague at U.Va., Tom Nachbar, who was in the JAG Corps reserve, and I finally decided to apply. I thought I was too old—I was 41 at the time—but I was able to get an age waiver. And since the school was right there in Charlottesville, and the OBC was held there, I didn't have to leave my family, other than the six weeks at Fort Benning.

Where have you served?

I was first assigned to the 174th Legal Operations Detachment, where I had the opportunity to work at United States Central Command in Tampa. I got to do a lot of administrative and international law work there. It was a fantastic experience; I was lucky to learn a great deal about Army leadership, as well as just learning how the Army worked. During that time, I also edited

material for *The Army Lawyer* and *Military Law Review*. I then transferred to the 80th Training Command in Richmond, Virginia, where I was chief of legal assistance. Then I applied for a competitive position at the government appellate division, which is where I am now. I am one of three reservists attached there who assist with writing briefs on behalf of the Army in appeals of criminal cases. It's a great position and fits with some of my experience, as I've done appellate litigation before.

What has surprised you the most about the JAG Corps?

There are lots of things I could list. Before I joined, when I was talking to the recruiters, I didn't realize lawyers did so much soldiering. I didn't have any appreciation for that. I quickly learned about the physical fitness requirements, too, and I had to lose a ton of weight. I was 237 pounds at the time, and they showed me the height weight chart, and I realized I needed to get to work. So I lost 27 pounds before I joined. I didn't have any appreciation for it before, but I am thrilled it's a part of it. I'm much healthier now.

I'm also surprised how small the organization is, in the sense that almost everyone knows everyone else. There's only about one degree of separation. That means networking and communication are important for how the JAG Corps works. It's not uncommon to run into our generals—I don't think that's common in most parts of the Army—and I have found them to be very accessible. I've also been surprised at how much freedom and flexibility you have, on the reserve side at least, to follow your career path. I've been able to identify jobs that interest me and apply for them.

What about the military justice system versus what you've experienced in the civilian legal world?

From what I've learned, the system is, in many ways, designed to be used as a commander's tool, as part of good order and discipline. That's a foreign concept to civilian courts. In some respects, the military justice system is more stringent than civilian courts, but in some ways there's a broader perspective. The jurors, for instance, are military people. They are not just making a legal judgement. They are making a legal judgement combined with a military judgement. When they are deciding a case, they are looking at what has been the person's contribution to the unit and mission, what would be the impact on good order and discipline—all the while keeping people safe and holding the accused accountable. So you can't come at it as just a lawyer, you have to have experience of being in a formation, being in a barracks, what happens in a room inspection, etcetera. I have had only a limited range of that experience—I have not been deployed, for instance—but I can see how important having even a small piece of that perspective is. There's a unique context and set of values within the system.

In my current role handling appeals, I've been surprised by the number of sexual assault cases. That's probably what I am dealing with most. I think that may speak to the Army not having any tolerance for that, at least from my sliver of experience. Those people are dealt with pretty swiftly. But I acknowledge I only see one piece of what happens, so people who question that certainly could have different perspectives.

What, if anything, has the JAG Corps given or taught you that you can bring to being a dean?

Some people, whether they are civilians or in the military, can make mountains out of molehills—it's human nature. But what the military side has reinforced for me is perspective, that there are often lots of bigger things happening than what you see within your own sphere, and lots of things you can't see from your perspective. There are leaders leading Soldiers downrange where they might not come back. Things of consequence. It helps me realize that not everything is going to be the end of the world. But you have to meet people where they are, and then try to lead them toward seeing the bigger picture. I've also learned from the Army the importance of humility as a leader, and the importance of teamwork. I have tried to incorporate those lessons here at William and Mary, although it's tougher in these days of Zoom. But I've been able to see how some of the best leaders in the Army work and listen, and have tried to emulate that.

What does it feel like to be the first African-American dean at the alma mater of Thomas Jefferson, who, as we know, enslaved people?

From a historical perspective, it is a testament to the progress we've made in this country. We have a ways to go, but I think it's remarkable the first professor here was a slaveholder, and his students, including John Marshall, owned slaves. I'm the descendant of slaves. I know they never could have imagined that a person like me would become the leader of this institution. So that's remarkable. But on an everyday level, I have to be honest, it's not something that really crosses my mind. William and Mary has been fantastic about equity, inclusiveness, belonging—there's no sense I get differential treatment. So while I appreciate the historical nature to it all, I'm just doing the work of a law school dean, and doing it at a wonderful place.

You're not the only member of the family to have been the "first first" African-American within the legal and academic worlds.

That's right. As I mentioned, my father was in the JAG Corps, and he later became the first African-American federal judge in Virginia. My grandfather, the same one who was in World War II, was the first African-American professor at Notre Dame. He was a finance professor there for thirty years.

What's your job? What do you actually do?

There's a lot of meetings (laughs). Especially now that Zoom is the chief way to communicate. You can't just walk into someone's office. I have eight direct reports, whom I meet with one-on-one every week, then we meet as a team once a week. There is a weekly meeting with the president's cabinet, then with the provost, and then another one with the other deans here. There are meetings with alumni, which is chiefly about developing relationships. Then there are meetings with other law school deans, meetings with law firms to develop opportunities for students, and meetings with all

the faculty members to stay connected to what they need and what the school might need from them. Then there are meetings with students and different affinity groups within the law school. My schedule is not my own. But I have no regrets. I love the position, you get to do great stuff for people.

What's one the biggest challenges you face as dean?
Planning around COVID takes up an inordinate amount of time in how the school functions, so there's a lot of work on logistics, planning, and making sure we are meeting our mission, even if we are all apart. From an academic perspective, I don't think there's enough time now for everyone to think, and plan, and write, including myself. I still have publications and have to work on that front, as do the professors.

So between handling the administrative and academic work of a dean, being a reservist, making sure you pass the Army Combat Fitness Test . . .
Yeah, there's not a lot of time. I have to carve out time in my schedule for myself and my family.

Yes, family: Nine kids? Did we read that right in your bio?
Yes (laughs). And the only reason I am able to do all of these things is because of my wife, Marlette. She's the one who takes care of all those nine kids. And nowadays, I know most Americans are working from home and helping their kids with Zooms. I am not. I'm here in my office. She's doing it by herself. Only because she does that am I able to be here. And I have to be here. Not only because I'm the dean, but she's got seven kids on Zoom at home. There's no way I could be home, too. Just think of all the Wi-Fi bandwidth needed in our house.

What has having such a large family taught you about being in the Army or being a dean?
You have to have patience. It's also about recognizing that there are multiple perspectives, and you need to solicit people's views, especially that of your partner's. And you have to try to lead people, not just from the top down. You have to empower them to manage some of the others. The older kids' chores are really about being a supervisor. One daughter is the kitchen supervisor. I go to her if the kitchen is not clean. I hold her accountable. I tell her to gather up her team. We have a laundry supervisor—that's a big operation. Same thing. But that's how we run it.

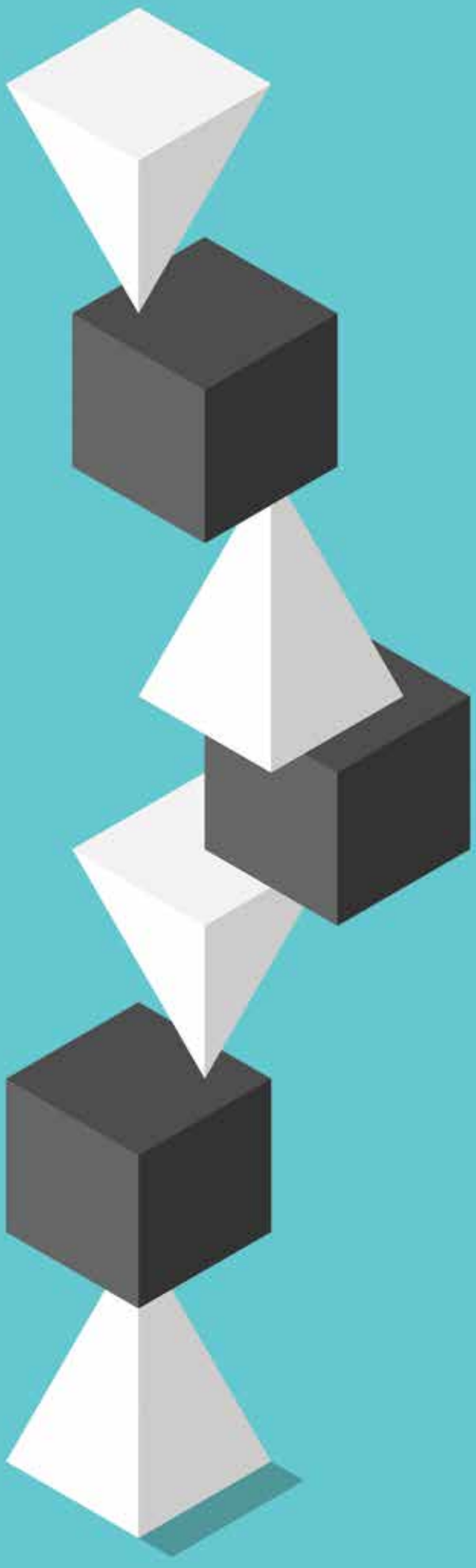
Does William and Mary have a JAG community at all that you've connected with?
Fred Lederer is here, he's sort of a legend in the JAG Corps. He served with my dad, and they know one another. There are some Funded Legal Education Program students here, some prior service students, and we have a veteran's clinic supported by retired vets. But other than that, there's no real culture that maybe under normal circumstances would exist, because everyone is remote. Once everyone is back, I hope we can cultivate that more.

How do you balance being the law dean at William and Mary—the leader of one of the most prestigious law schools in America—but then for one weekend a month and two weeks during the year, being a not-very-high-ranking Army captain?
I started as a mismatch from the outset. As I mentioned, I was forty-one years old when I joined, held a distinguished chair at U.Va., and then I was a first lieutenant in the Army. But the reason why it wasn't awkward is because inside the JAG Corps, none of it mattered. I didn't know about military law. I hadn't been doing anything as a Soldier. I am definitely glad I had that rank, and am glad being a captain now. It's easy to be humble when you see people who are so much more experienced than you. I am just looking to make a contribution. I am grateful for my assignments.

What are your goals as dean at William and Mary?
I want to continue to build on the strengths we have at William and Mary Law School, which means enrolling the very best students who, in turn, will learn from faculty who are at the top of their fields. We are in pursuit of excellence, unparalleled excellence, every day.

Belonging is a core value here, and one of my main priorities as dean is a focus on diversity, equity, and inclusion. We've rolled out a plan called *Why We Can't Wait, An Agenda for Equity and Justice*. In addition, our students have always been good citizens, but I want to foster and develop them to become advocates for justice. Finally, I want to ensure that we are laying the foundation for a legal education that both honors the long-standing traditions of the institution while preparing our students for the future of law.

What do you think are the biggest challenges facing legal education today, and how do you see that applying to the JAG Corps, if at all?
One of the biggest challenges is the influx of partisan and ideological polarization. Personally, I think that lawyers and other interpreters of the law should remain independent thinkers who can give sound legal advice as lawyers and deliver true justice as judges. Another major challenge is reckoning with the impact of technology on the practice of law. Our students, our graduates, and members of the JAG Corps all need to be prepared for an experience that could be entirely different, from the subject matter to how and where we practice law. Both inside and outside the JAG Corps, legal professionals need to be prepared to confront the legal challenges of tomorrow, which might be quite different from those we have grown accustomed to addressing.



(Credit: istockphoto.com/Dmitrii_Guzhanin)

No. 2

Revising the Exclusionary Rule

By Major William "Joey" Mossor

Justice Ginsburg's dissent champions what she describes as "'a more majestic conception' of...the exclusionary rule," which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.[1]

A Mundane Explanation[2]

To stop law enforcement from violating the Constitution during a search, the Supreme Court created the exclusionary rule.[3] This rule denies the admission of incriminating evidence, which may result in the guilty going free because of law enforcement misconduct. Military Rule of Evidence (MRE) 311 implements the exclusionary rule for military courts; recently, Congress added a balancing test that must be met before applying the rule.[4] The new balancing test limits the application of the rule, but it is not an exception.[5] Moreover, MRE 311 does not explain how to apply this balancing test.[6]

The MRE 311 balancing test requires exclusion of unlawfully obtained evidence, but only if the exclusion of the evidence would result in an "appreciable deterrence" of future violations of the Fourth Amendment and the benefits of the deterrence "outweigh the costs to the justice system."[7] Under this test, for deterrence to be appreciable, the actions that violate the Fourth Amendment must be "deliberate enough to yield meaningful deterrence."[8] Additionally, the appreciable deterrence must pay the cost to the justice system of "letting a guilty and possibly dangerous defendant go free."[9] In other words, a negligent violation of the Fourth Amendment is not enough to warrant the harsh results of exclusion.[10]

This article explains why MRE 311 should be revised and recommends modifications to MRE 311 to make it easier for practitioners to understand. First, there is a discussion of the purpose of the exclusionary rule and the origin of the balancing test. Second, an explanation that the new balancing test subsumes both the "good faith" and "reliance" exceptions listed in MRE 311. Last, a proposed modification makes the rule more comprehensible by deleting the unnecessary exceptions, adding a discussion section explaining how to analyze the balancing test, providing guidance of the proper procedure when applying the rule, and including a robust analysis of the rule in the appendix of the *Manual for Courts-Martial* (*MCM*).[11]

Modest Foundation

Understanding the exclusionary rule requires a basic understanding of the constitutional right from which it derives. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[12] The Fourth Amendment, however, does not explain how the right is protected or what remedy there is for violations of that right.[13] The Supreme Court of the United States, therefore, forged the exclusionary rule.

The exclusionary rule prohibits the use of unlawfully obtained evidence in a criminal trial. The Supreme Court acknowledged that the rule is meant as a "'prudential' doctrine" to "compel respect for the constitutional guaranty" of freedom from unlawful searches and seizures.[14] Subjects of Fourth Amendment violations cannot independently seek redress for those violations; but rather, the only remedy is exclusion of the unlawfully obtained evidence. In *Calandra*, the Supreme Court acknowledged that "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through the deterrent effect, rather than a personal constitutional right of the party aggrieved."[15] In other words, the rule cannot restore the privacy rights that were violated; however, they can help prevent such violations in the future. As laid out in Supreme Court cases, "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[16] The Supreme Court created the exclusionary rule; one must understand the purpose of the rule to know when it applies.

In other words, the rule cannot restore the privacy rights that were violated; however, they can help prevent such violations in the future

Purpose of the Exclusionary Rule

Determining when the exclusionary rule applies can be difficult, because even if a Fourth Amendment violation occurs, i.e., an unlawful search or seizure, it "does not necessarily mean that the rule applies" to exclude the evidence obtained.[17] As one scholar amusingly explains, "The term 'exclusionary rule' is a bit like the canned cooked pork Spam—virtually everybody is familiar with it, only a few people are sure about its precise contents, and most people can stomach it only occasionally and in small portions."[18] It may be unpalatable, but understanding the purpose of the exclusionary rule is essential to determine when the rule should or should not apply.[19] Dissenting justices and scholars have advocated different purposes for the exclusionary rule, but this article ignores these majestic concepts and focuses on Supreme Court precedent from which MRE 311(a)(3) derives.[20]

The sole purpose of the exclusionary rule, as repeatedly held by the Supreme Court, "is to deter future Fourth Amendment violations."[21] "The exclusionary rule is not an individual right"[22] attached to the Fourth Amendment, "nor is it designed to 'redress the injury' occasioned by an unconstitutional search," thus it cannot be used to compensate an injured criminal.[23] Instead, excluding unlawfully obtained evidence is only meant to deter Fourth Amendment violations. That being said, applying the rule to exclude evidence is a "'last resort, not [a] first impulse'" and "applies only where it 'results in appreciable deterrence.'"[24] To that end, the Supreme Court developed and Congress adopted a balancing test to determine whether to apply the exclusionary rule.

Origin of the Balancing Test

This balancing test weighs the benefits of deterrence against the social costs to the justice system. The 2016 amendment to MRE 311(a)(3) "incorporates the balancing test...set forth in *Herring v. United States*."[25] In *Herring*, the Supreme Court held that "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[26] The Court explains sufficiently deliberate as "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[27] Additionally, the price paid by the justice system is "something that 'offends basic concepts of the criminal justice system.'"[28]

The cost-benefit analysis of the balancing test requires that police conduct be more than merely negligent, and if police conduct is sufficiently deliberate, then deterring such conduct must outweigh the cost of letting a guilty defendant go free by excluding evidence.[29] The appropriateness of excluding evidence with the exclusionary rule can only "be resolved by weighing the costs and benefits of preventing the use...of...evidence."[30] Put another way, the possible benefit of the deterrent effect by excluding evidence "must be weighed against the 'substantial social costs exacted by the exclusionary rule.'"[31]

The *MCM* credits *Herring* with creating the balancing test amended to MRE 311, but the cost-benefit analysis language of the balancing test has been part of Supreme Court exclusionary rule decisions for decades.[32] The significance of *Herring* is the Court's clarification that "[t]he pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of arresting officers."[33] Echoing the good faith examination language from a 1984 case, the Court in *Herring* held that the objective analysis of an officer's conduct is "'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'"[34] The Supreme Court reaffirmed this objective analysis in *Davis v. United States*, stating, "the harsh sanction of exclusion 'should not be applied to deter objectively reasonable law enforcement activity.'"[35] Therefore, the negligent conduct of an objectively reasonable officer would not merit deterrence, and any marginal deterrence would not outweigh the costs—"[i]n such a case, the criminal should not 'go free because the constable has blundered.'"[36] Separate from this balancing test analysis are exceptions to the exclusionary rule that allow admission of evidence, even if exclusion would be appropriate under the balancing test.

Meager Exceptions and Analysis

Military Rule of Evidence 311(c) lists four exceptions to the exclusionary rule: (1) impeachment, (2) inevitable discovery, (3) good faith execution of a warrant or search authorization, and (4) reliance on

statute or binding precedent.[37] Because law enforcement conduct that meets the latter two exceptions would not trigger the exclusionary rule after a proper analysis of the balancing test, they are now redundant. Knowing the exceptions and understanding how to analyze the exclusionary rule will make clear the reason why the balancing test subsumes these exceptions.

The Objectively Reasonable Good Faith Exception

The "good faith" exception permits evidence from an unlawful search if law enforcement acted in good faith while executing an invalid warrant. Military Rule of Evidence 311(c)(3) states this exception as follows:

> Evidence that was obtained as a result of an unlawful search or seizure may be used if: (A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority; (B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and (C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.[38]

This addition to the rule in 1986 incorporated the Supreme Court's holding in *United States v. Leon.*[39] In *Leon,* the Court stated that "where the officer's conduct is objectively reasonable, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way... unless it is to make [the officer] less willing to do [their] duty."[40] The Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion."[41] A few years later, in 1987, the Supreme Court in *Illinois v. Krull* extended this principle of "objectively reasonable reliance" from invalid warrants to invalid statutes, and this generated the reliance exception.[42]

The Objectively Reasonable Reliance Exception

The "reliance" exception to MRE 311(c)(4) states that "[e]vidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment."[43] This addition to the rule in 2016 adopted the Supreme Court's holding in *Illinois v. Krull.*[44] In *Krull*, the Court held that there is no significant deterrent effect in excluding evidence seized pursuant to a statute reasonably relied upon in good faith, prior to the declaration of its invalidity, and the possible benefit of applying the exclusionary rule is unjustified when weighed against the social cost.[45] The Court's opinion in *Krull* is an expansion of the principles of *Leon* and applies the same approach to the exclusionary rule in evaluating reasonableness.[46]

The Objectively Reasonable Balancing Test

The balancing test of MRE 311(a)(3) states that unlawfully obtained evidence is inadmissible against the accused if "exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system."[47] This balancing test derives from *Herring v. United States.*[48] The "good faith" exception of MRE 311(c)(3) derives from *United States v. Leon.*[49] The "reliance" exception of MRE 311(c)(4) derives from *Illinois v. Krull.*[50] *Herring* is a clarification of the principles laid out in *Leon* and *Krull*, and *Krull* is an extension of *Leon.*[51] Therefore, MRE 311(a)(3)'s balancing test gleans from the same principles as both the "good faith" and "reliance" exceptions.

"The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion 'var[y] with the culpability of the law enforcement conduct' at issue."[52] In *Herring*, the Court explains that "the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance'" and admits, "[w]e (perhaps confusingly) called this objectively reasonable reliance 'good faith.'"[53] Accordingly, "when police act with an objectively 'reasonable good-faith basis belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'"[54] This means objectively reasonable conduct that cannot yield an appreciable deterrence under the balancing test is the same as objectively reasonable conduct that would qualify for either the "good faith" or "reliance" exceptions. Furthermore, the pointlessness of the exceptions is even more obvious when appropriately analyzing the exclusionary rule.

The proper way to analyze an issue under MRE 311 is to follow the sequence of the rule itself

The Objectively Reasonable Analysis of the Rule

The proper way to analyze an issue under MRE 311 is to follow the sequence of the rule itself.[55] Under MRE 311, evidence against an accused is inadmissible if the requirements of the exclusionary rule are satisfied.[56] First, the "[e]vidence [was] obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity."[57] Second, "the accused makes a timely motion to suppress or an objection to the evidence under the rule."[58] Third, the military judge decides that:

> the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or

seizure under the Constitution of the United States as applied to members of the Armed Forces.[59]

Fourth, the military judge determines that "exclusion of the evidence would result in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system."[60] Lastly, the military judge must consider any exception to the rule that may apply to the facts of the case.[61] Simply put, one must first determine that the rule applies before looking for exceptions to the rule.

These modifications will make the rule more user-friendly for practitioners

To illustrate how a proper analysis of the rule nullifies both the "good faith" and "reliance" exceptions, consider the conduct of two officers who obtained evidence from unlawful searches, and assume that the accused made a timely objection.[62] Officer Finkle executed a search pursuant to a warrant that he reasonably and with good faith relied on, but the military judge determined that there was no probable cause to support the warrant.[63] Officer Einhorn executed a search pursuant to a statute that she reasonably relied on, but subsequently the statute is held to be unconstitutional in a different case.[64] In both examples, the military judge concludes that the officers did not intentionally violate the Fourth Amendment and that neither acted in reckless disregard of constitutional requirements. Thus, the conduct of both officers was objectively reasonable under that balancing test, and the evidence would be admissible at trial.[65]

Importantly, the military judge never had to consider the exceptions to the rule, even though Officer Finkle's conduct would have qualified for the "good faith" exception and Officer Einhorn's conduct would have qualified for the "reliance" exception.[66] In other words, the objectively reasonable standard is the same for both the balancing test and the exceptions. Therefore, if the conduct of law enforcement is objectively reasonable, then the rule does not apply, and there is no need to consider the exceptions.

The Supreme Court also follows the procedure of analyzing the balancing test before considering exceptions when discussing the exclusionary rule.[67] In *Davis*, the Supreme Court addressed the question of "whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent," before considering any exceptions.[68] First, the Court analyzed the balancing test and found the evidence "is not subject to the exclusionary rule."[69] Then, the Court acknowledged that even without the balancing test, the inevitable discovery exception would have been applicable and "suppression would thus be inappropriate."[70] This procedure is not readily apparent in MRE 311, and modifications to the rule will make it easier for practitioners to understand.

Minor Modifications

Military Rule of Evidence 311 needs further modifications to help military practitioners better understand the exclusionary rule. "Judge advocates today are comfortable with the [MREs], and also accept that the rules will be modified on a regular basis to conform to changes in both the [Federal Rules of Evidence] and case law from the Supreme Court and Court of Appeals for the Armed Forces."[71] The recommendations for modification from this article will simplify the rule and are in accordance with current case law. These modifications are no more extensive than changes the rule has undergone over the past few years.

MRE 311's Evolution

The title of MRE 311 is "Evidence Obtained From Unlawful Searches or Seizures," and it is comprised of five parts: (a) the general rule, (b) definitions of whose conduct the rule seeks to deter, (c) exceptions to the rule, (d) motions to suppress and objections under the rule, and (e) effects of a guilty plea on the rule.[72] The rule's current form is the result of several modifications over the past few years.

In 2013, the rule underwent its first major changes in decades, trimming down from nine parts to the current five parts.[73] The most significant change in 2013 was that the "definitions" section was moved in front of the "exceptions" section, and it subsumed many of the previous parts.[74] In 2016, besides the balancing test, the other notable addition was the "reliance" exception.[75] The only relevant modifications since 2018 include the language added to the "reliance" exception and the removal of the analysis of the rule from the appendix of the *MCM*.[76]

The current exclusionary rule under MRE 311(a) is:

> Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if: (1) the accused makes a timely motion to suppress or an objection to the evidence under this rule; (2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and (3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.[77]

The lone explanation in MRE 311 for proper analysis of the exclusionary rule is within the definition section, and it describes which government actors can make a search or seizure unlawful.[78] Without providing further discussion on the proper way to analyze the rule or guidance on the procedure for applying it, the exclusionary rule is difficult to digest.

MRE 311's Proposed Modifications

Like Spam, only a few comprehend the contents of MRE 311 and are willing to consume it, but modifications to the rule will make it palatable.[79] Such modifications include deleting the unnecessary exceptions, adding a discussion section explaining how to analyze the balancing test, providing guidance of the proper procedure when applying the rule, and including an analysis of the rule in the appendix of the *MCM*. These modifications will make the rule more user-friendly for practitioners.

Discussing the Balancing Test

Deleting the unnecessary exceptions and adding a discussion section immediately after the general rule will help explain how to analyze the balancing test. As discussed, the balancing test subsumes the "good faith" and "reliance" exceptions, but the principles that created them should be part of the discussion of the balancing test.[80] The *MCM* states that a "[d]iscussion [within a rule] is intended by the drafters to serve as a treatise" in order to make users aware of principles or requirements derived from "Executive Order, judicial decisions, or other sources of binding law."[81] The following discussion section should appear in the rule directly after the general rule subsection, so that practitioners understand how to analyze the balancing test:

> The balancing test of Mil. R. Evid. 311(a)(3) requires an objective analysis of the conduct of government personnel obtaining evidence as a result of an unlawful search or seizure. For deterrence to be appreciable, the conduct must be sufficiently deliberate that exclusion can meaningfully deter it, such as conduct that is deliberate, reckless, grossly negligent, or in some circumstances recurring or systemically negligent. Additionally, the conduct must be sufficiently culpable that such deterrence is worth the price paid by the justice system. The price of exclusion is something that offends the basic concepts of the criminal justice system, for instance letting a guilty defendant go free by excluding evidence. The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of government personnel. The objective analysis is whether a reasonably well trained person acting in a government capacity would have known that the search was illegal in light of all the circumstances.
>
> The harsh sanction of exclusion is not appropriate to deter objectively reasonable conduct. Moreover, negligent conduct that is objectively reasonable would not result in an appreciable deterrence, and any marginal deterrence would not outweigh the cost to the justice system.[82]

This proposed discussion will alert practitioners to the importance of the exclusionary rule's balancing test requirement.[83] Even if practitioners understand how to analyze the balancing test, MRE 311 should also provide the proper procedure for applying the exclusionary rule.

Delineating the Procedure

Providing guidance in the procedure section of the rule will ensure proper use of the rule. The addition of guidance to practitioners on the procedure of applying MRE 311 will parallel other rules of evidence that exclude otherwise relevant evidence.[84] Rules 311, 412, 513, and 514 have similar structure—they all include the general rule, definitions, exceptions, and the procedure for applying the rule.[85] Military Rule of Evidence 311(d), titled "Motions to Suppress and Objections," is the procedure section of the rule; but, it does not explain the procedure the military judge should use when applying the rule.[86] Military Rule of Evidence 311(d)(7) only discusses the timing of the military judge's ruling.[87] The title of subsection (d) of MRE 311 should change to "Procedure to Exclude Evidence from an Unlawful Search and Seizure," and the following additional subsection should directly precede the subsection discussing the timing of the military judge's ruling:

> Guidance on Application. Before excluding evidence under this rule, the military judge must find that the evidence was obtained as a result of an unlawful search or seizure, and that exclusion would result in an appreciable deterrence of future unlawful searches or seizures, and that such deterrence outweighs the costs to the justice system. If the military judge concludes that the facts meet the requirements of the rule, evidence may still be admissible if the military judge determines that an exception under Mil. R. Evid. 311(c) applies.[88]

This new subsection ensures that practitioners know the proper procedure in applying the rule. In addition to understanding the balancing test and the procedure of applying MRE 311, practitioners would also benefit from a detailed analysis of the principles of the exclusionary rule.

Detailing the Analysis

As previous manuals have done, including a detailed analysis of the rule in the appendix of the *MCM* will guide interpretations of the law under the rule.[89] The *MCM* states that an "[a]nalysis sets forth the nonbinding views of the drafters as to the basis for each rule" and that it "is intended to be a guide in interpretation."[90] The 2019 *MCM* does not provide an analysis to MRE 311; it only guides practitioners to the analysis in the appendix of the 2016 *MCM*.[91] The analysis of MRE 311 should be restored to the appendix of the *MCM*, and a corrected version of the analysis is an appendix to this article.[92] Modifying MRE 311 and adding an analysis for the rule will allow practitioners to both understand and properly apply the exclusionary rule.

The harsh sanction of exclusion is not appropriate to deter objectively reasonable conduct

Meaningless Conclusion

The balancing test of MRE 311 is not another exception to the exclusionary rule, nor is it a new concept. The balancing test incorporates principles from a line of cases that have spawned the "good faith" and "reliance" exceptions and thus subsumes these exceptions. The current version of MRE 311 neither explains how to analyze the balancing test nor properly applies the exclusionary rule. The rule modifications to MRE 311 proposed herein explain how to analyze the balancing test, explain the proper procedure for applying the rule, and put an analysis section back in the appendix of the *MCM* so that practitioners can correctly interpret the principles of the exclusionary rule. By incorporating these modifications into MRE 311, the rule will be more in line with Supreme Court case law, and it will be easier for practitioners to understand. **TAL**

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Appendix A. Military Rule of Evidence 311[93]

Rule 311. Evidence obtained from unlawful searches and seizures

(a) *General rule*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule;

(2) the accused had a reasonable expectation of privacy in the person, place, or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the Armed Forces; and

(3) exclusion of the evidence results in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system.

Discussion

The balancing test of Mil. R. Evid. 311(a)(3) requires an objective analysis of the conduct of government personnel obtaining evidence as a result of an unlawful search or seizure. For deterrence to be appreciable, the conduct must be sufficiently deliberate that exclusion can meaningfully deter it, such as conduct that is deliberate, reckless, grossly negligent, or in some circumstances recurring or systemically negligent. Additionally, the conduct must be sufficiently culpable that such deterrence is worth the price paid by the justice system. The price of exclusion is something that offends the basic concepts of the criminal justice system, for instance letting a guilty defendant go free by excluding evidence. The pertinent analysis of deterrence and culpability is objective, not an inquiry into the subjective awareness of government personnel. The objective analysis is whether a reasonably well trained person acting in a government capacity would have known that the search was illegal in light of all the circumstances.

The harsh sanction of exclusion is not appropriate to deter objectively reasonable conduct. Moreover, negligent conduct that is objectively reasonable would not result in an appreciable deterrence, and any marginal deterrence would not outweigh the cost to the justice system.

(b) *Definition.* As used in this rule, a search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) military personnel or their agents and was in violation of the Constitution of the United States as applied to members of the Armed Forces, a federal statute applicable to trials by court-martial that requires exclusion of evidence obtained in violation thereof, or Mil. R. Evid. 312–317;

(2) other officials or agents of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States or any political subdivision of such a State, Commonwealth, or possession, and was in violation of the Constitution of the United States, or is unlawful under the principles of law generally applied in the trial of criminal cases in the United States district courts involving a similar search or seizure; or

(3) officials of a foreign government or their agents, where evidence was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" by a United States military or civilian official merely because that person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because that person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

(c) *Exceptions.*

(1) *Impeachment.* Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

(2) *Inevitable Discovery*. Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made.

~~(3) Good Faith Execution of a Warrant or Search Authorization. Evidence that was obtained as a result of an unlawful search or seizure may be used if:~~

(A) the search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Mil. R. Evid. 315(d) or from a search warrant or arrest warrant issued by competent civilian authority;

(B) the individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

(C) the officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using an objective standard.

(4) Reliance on Statute or Binding Precedent. Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acted in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment.

(d) ~~*Motions to Suppress and Objections.*~~ *Procedure to Exclude Evidence from an Unlawful Search and Seizure.*

(1) *Disclosure.* Prior to arraignment, the prosecution must disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, or evidence derived therefrom, that it intends to offer into evidence against the accused at trial.

(2) *Time Requirements.*

(A) When evidence has been disclosed prior to arraignment under subdivision (d)(1), the defense must make any motion to suppress or objection under this rule prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

(B) If the prosecution intends to offer evidence described in subdivision (d)(1) that was not disclosed prior to arraignment, the prosecution must provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

(3) *Specificity.* The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence described in subdivision (d)(1). If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or a general objection.

(4) *Challenging Probable Cause.*

(A) *Relevant Evidence.* If the defense challenges evidence seized pursuant to a search warrant or search authorization on the ground that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to or otherwise known by the authorizing officer, except as provided in subdivision (d)(4)(B).

(B) *False Statements.* If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, is entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion must be granted unless the search is otherwise lawful under these rules.

(5) *Burden and Standard of Proof.*

(A) *In general.* When the defense makes an appropriate motion or objection under subdivision (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure; that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence; or that the evidence would have been obtained even if the unlawful search or seizure had not been made. ~~that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize, or apprehend or a search warrant or an arrest warrant; that the evidence was obtained by officials in objectively reasonable reliance on a statute or on binding precedent later held violative of the Fourth Amendment; or that the deterrence of future unlawful searches or seizures is not appreciable or such deterrence does not outweigh the costs to the justice system of excluding the evidence.~~[94]

(B) *Statement Following Apprehension.* In addition to subdivision (d)(5)(A), a statement obtained from a person apprehended in a dwelling in violation of R.C.M. 302(d)(2) and (e), is admissible if the prosecution shows by a preponderance of the evidence that the apprehension was based on probable cause, the statement was made at a location outside the dwelling subsequent to the apprehension, and the statement was otherwise in compliance with these rules.

(C) *Specific Grounds of Motion or Objection.* When the military judge has required the defense to make a specific motion or objection under subdivision (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or objected to the evidence.

(6) *Defense Evidence.* The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this rule. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of such testimony by the accused, the defense must inform the military judge that the testimony is offered under subdivision (d). When the accused testifies under subdivision (d), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

(7) *Guidance on Application.* Before excluding evidence under this rule, the military judge must find that the evidence was obtained as a result of an unlawful search or seizure and that exclusion would result in an appreciable deterrence of future unlawful searches or seizures and that such deterrence outweighs the costs to the justice system. If the military judge concludes that the facts meet the requirements of the rule, evidence may still be admissible if the military judge determines that an exception under Mil. R. Evid. 311(c) applies.

(~~7~~8) *Rulings.* The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal

the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.

(8~~9~~) *Informing the Members.* If a defense motion or objection under this rule is sustained in whole or in part, the court-martial members may not be informed of that fact except when the military judge must instruct the members to disregard evidence.
(e) *Effect of Guilty Plea.* Except as otherwise expressly provided in R.C.M. 910(a)(2), a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the Constitution of the United States and Mil. R. Evid. 311–317 with respect to the offense, whether or not raised prior to plea.

Appendix B. Analysis of Military Rule of Evidence 311[95]

Rule 311. Evidence obtained from unlawful searches and seizures

Rules 311–317 express the manner in which the Fourth Amendment to the Constitution of the United States applies to trials by court-martial, *Cf. Parker v. Levy*, 417 U.S. 733 (1974).

(a) *General rule.* Rule 311(a) restates the basic exclusionary rule for evidence obtained from an unlawful search or seizure and is taken generally from Para. 152 of the 1969 Manual although much of the language of para. 152 has been deleted for purposes of both clarity and brevity. The Rule requires suppression of derivative as well as primary evidence and follows the 1969 Manual rule by expressly limiting exclusion of evidence to that resulting from unlawful searches and seizures involving governmental activity. Those persons whose actions may thus give rise to exclusion are listed in Rule 311(b) and are taken generally from Para. 152 with some expansion for purposes of clarity. Rule 311 recognizes that discovery of evidence may be so unrelated to an unlawful search or seizure as to escape exclusion because it was not "obtained as a result" of that search or seizure.

The Rule recognizes that searches and seizures are distinct acts the legality of which must be determined independently. Although a seizure will usually be unlawful if it follows an unlawful search, a seizure may be unlawful even if preceded by a lawful search. Thus, adequate cause to seize may be distinct from legality of the search or observations which preceded it. Note in this respect Rule 316~~(d)(4)(C)~~(c)(5)(C), Plain View.

(1) *Objection.* Rule 311(a)(1) requires that a motion to suppress or, as appropriate, an objection be made before evidence can be suppressed. Absent such motion or objection, the issue is waived. Rule 311~~(i)~~(d)(2)(A). *See United States v. Robinson*, 77 M.J. 303 (C.A.A.F. 2018).

(2) *Adequate interest.* Rule 311(a)(2) represents a complete redrafting of the standing requirements found in para. 152 of the 1969 Manual. The Committee viewed the Supreme Court decision in *Rakas v. Illinois*, 439 U.S. 128 (1978), as substantially modifying the Manual language. Indeed, the very use of the term "standing" was considered obsolete by a majority of the Committee. The Rule distinguishes between searches and seizure. To have sufficient interest to challenge a search, a person must have "a reasonable expectation of privacy in the person, place, or property searched." "Reasonable expectation of privacy" was used in lieu of "legitimate expectation of privacy," often used in *Rakas*, *supra*, as the Committee believed the two expressions to be identical. The Committee also considered that the expression "reasonable expectation" has a more settled meaning. Unlike the case of a search, an individual must have an interest distinct from an expectation of privacy to challenge a seizure. When a seizure is involved rather than a search the only invasion of one's rights is the removal of the property in question. Thus, there must be some recognizable right to the property seized. Consequently, the Rule requires a "legitimate interest in the property or evidence seized." This will normally mean some form of possessory interest. Adequate interest to challenge a seizure does not *per se* give adequate interest to challenge a prior search that may have resulted in the seizure.

The Rule also recognizes an accused's rights to challenge a search or seizure when the right to do so would exist under the Constitution. Among other reasons, this provision was included because of the Supreme Court's decision in *Jones v. United States*, 302 U.S. 257 (1960), which created what has been termed the "automatic standing rule." The viability of Jones after Rakas and other cases is unclear, and the Rule will apply *Jones* only to the extent that Jones is constitutionally mandated.

1986 Amendment: The words "including seizures of the person" were added to expressly apply the exclusionary rule to unlawful apprehensions and arrests, that is, seizures of the person. Procedures governing apprehensions and arrests are contained in R.C.M. 302. *See also* Mil. R. Evid. 316~~(c)~~(b).

2016 Amendment: Rule 311(a)(3) incorporates the balancing test limiting the application of the exclusionary rule set forth in *Herring v. United States*, 555 U.S. 135 (2009), where the Supreme Court held that to trigger the exclusionary rule, "the deterrent effect of suppression must be substantial and outweigh any harm to the justice system." *Id.* at 147; *see also United States v. Wicks*, 73 M.J. 93, 104 (C.A.A.F. 2014) ("The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the benefits of deterrence must outweigh the costs" (internal quotation marks omitted)).

2020 Amendment: A discussion section was added to the rule to explain how to analyze the balancing test and it is based on the principles set forth in *United States v. Leon*, 468 U.S. 897 (1984), expanded by *Illinois v. Krull*, 480 U.S. 340 (1987), and clarified by *Herring v. United States*, 555 U.S. 135 (2009).

(b) *Nature of search or seizure.* Rule 311(~~c~~b) defines "unlawful" searches and seizures and makes it clear that the treatment of a search or seizure varies depending on the status of the individual or group conducting the search or seizure.[96*]

(1) *Military personnel.* Rule 311(~~c~~b)(1) generally restates prior law. A violation of a military regulation alone will not require exclusion of any resulting evidence. However, a violation of such a regulation that gives rise to a reasonable expectation of privacy may require exclusion. *Compare United States v. Dillard*, 8 M.J. 213 (C.M.A. 1980), with *United States v. Caceres*, 440 U.S. 741 (1979).

(2) *Other officials*. Rule 311(cb)(2) requires that the legality of a search or seizure performed by officials of the United States, of the District of Columbia, or of a state, commonwealth, or possession or political subdivision thereof, be determined by the principles of law applied by the United States district courts when resolving the legality of such a search or seizure.

(3) *Officials of a foreign government or their agents.* This provision is taken in part from *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976). After careful analysis, a majority of the Committee concluded that portion of the *Jordan* opinion which purported to require that such foreign searches be shown to have complied with foreign law is dicta and lacks any specific legal authority to support it. Further the Committee noted the fact that most foreign nations lack any law of search and seizure and that in some cases, e.g., Germany, such law as may exist is purely theoretical and not subject to determination. The *Jordan* requirement thus unduly complicates trial without supplying any protection to the accused. Consequently, the Rule omits the requirement in favor of a basic due process test. In determining which version of the various due process phrasings to utilize, a majority of the Committee chose to use the language found in para. 150b of the 1969 Manual rather than the language found in *Jordan* (which requires that the evidence not shock the conscience of the court) believing the Manual language is more appropriate to the circumstances involved.

Rule 311(cb) also indicates that persons who are present at a foreign search or seizure conducted in a foreign nation have "not participated in" that search or seizure due either to their mere presence or because of any actions taken to mitigate possible damage to property or person. The Rule thus clarifies *United States v. Jordan*, 1 M.J. 334 (C.M.A. 1976) which stated that the Fourth Amendment would be applicable to searches and seizures conducted abroad by foreign police when United States personnel participate in them. The Court's intent in *Jordan* was to prevent American authorities from sidestepping Constitutional protections by using foreign personnel to conduct a search or seizure that would have been unlawful if conducted by Americans. This intention is safeguarded by the Rule, which applies the Rules and the Fourth Amendment when military personnel or their agents conduct, instigate, or participate in a search or seizure. The Rule only clarifies the circumstances in which a United States official will be deemed to have participated in a foreign search or seizure. This follows dicta in *United States v. Jones*, 6 M.J. 226, 230 (C.M.A. 1979), which would require an "element of causation," rather than mere presence. It seems apparent that an American service member is far more likely to be well served by United States presence—which might mitigate foreign conduct—than by its absence. Further, international treaties frequently require United States cooperation with foreign law enforcement. Thus, the Rule serves all purposes by prohibiting conduct by United States officials which might improperly support a search or seizure which would be unlawful if conducted in the United States while protecting both the accused and international relations.

The Rule also permits use of United States personnel as interpreters viewing such action as a neutral activity normally of potential advantage to the accused. Similarly the Rule permits personnel to take steps to protect the person or property of the accused because such actions are clearly in the best interests of the accused.

(c) *Exceptions*: Rule 311~~(b)~~(c)(1) ~~states~~ incorporates the impeachment exception from the holding of *Walder v. United State*s, 347 U.S. 62 (1954), and restates with minor change the rule as found in para. 152 of the 1969 Manual.

1986 Amendment: Rule 311(b)(2) was added to incorporate the "inevitable discovery" exception to the exclusionary rule of *Nix v. Williams*, 467 U.S. 431 (1984). There is authority for the proposition that this exception applies to the primary evidence tainted by an illegal search or seizure, as well as to evidence derived secondarily from a prior illegal search or seizure. *United States v. Romero*, 692 F.2d 699 (10th Cir. 1982), cited with approval in *Nix v. Williams, supra*, 467 U.S. 431, n.2. *See also United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982); *United States v. Yandell*, 13 M.J. 616 (A.F.C.M.R. 1982). *Contra, United States v. Ward*, 19 M.J. 505 (A.F.C.M.R. 1984). There is also authority for the proposition that the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the investigative authority and were being actively pursued prior to the occurrence of the illegal conduct which results in discovery of the evidence (*United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984)).

As a logical extension of the holdings in *Nix* and *United States v. Kozak*, *supra*, the leading military case, the inevitable discovery exception should also apply to evidence derived from apprehensions and arrests determined to be illegal under R.C.M. 302 (*State v. Nagel*, 308 N.W.2d 539 (N.D. 1981) (alternative holding)). The prosecution may prove that, notwithstanding the illegality of the apprehension or arrest, evidence derived therefrom is admissible under the inevitable discovery exception.

~~Rule 311(b)(3) was added in 1986 to incorporate the "good faith" exception to the exclusionary rule based on *United States v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The exception applies to search warrants and authorizations to search or seize issued by competent civilian authority, military judges, military magistrates, and commanders. The test for determining whether the applicant acted in good faith is whether a reasonably well-trained law enforcement officer would have known the search or seizure was illegal despite the authorization. In *Leon* and *Sheppard*, the applicant's good faith was enhanced by their prior consultation with attorneys.~~

~~The rationale articulated in *Leon* and *Sheppard* that the deterrence basis of the exclusionary rule does not apply to magistrates extends with equal force to search or seizure authorizations issued by commanders who are neutral and detached, as defined in *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979). The United States Court of Military Appeals demonstrated in *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981), that commanders cannot be equated constitutionally to magistrates. As a result, commanders' authorizations may be closely scrutinized for evidence of neutrality in deciding whether this exception will apply. In a particular case, evidence that the commander received the advice of a judge~~

advocate prior to authorizing the search or seizure may be an important consideration. Other considerations may include those enumerated in *Ezell* and: the level of command of the authorizing commander; whether the commander had training in the rules relating to search and seizure; whether the rule governing the search or seizure being litigated was clear; whether the evidence supporting the authorization was given under oath; whether the authorization was reduced to writing; and whether the defect in the authorization was one of form or substance.

As a logical extension of the holdings in *Leon* and *Sheppard*, the good faith exception also applies to evidence derived from apprehensions and arrests which are effected pursuant to an authorization or warrant, but which are subsequently determined to have been defective under R.C.M. 302 (*United States v. Mahoney*, 712 F.2d 956 (5th Cir. 1983); *United States v. Beck*, 729 F.2d 1329 (11th Cir. 1984)). The authorization or warrant must, however, meet the conditions set forth in Rule 311(b)(3).

It is intended that the good faith exception will apply to both primary and derivative evidence.

2016 Amendment: Rule 311(c)(4) was added. It adopts the expansion of the "good faith" exception to the exclusionary rule set forth in *Illinois v. Krull*, 480 U.S. 340 (1987), where the Supreme Court held that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment.

2020 Amendment: Deleted both the "good faith" and "reliance" exceptions from the rule because they were subsumed by the balancing test of Rule 311(a)(3). The "good faith" exception was based on the holding *United States v. Leon*, 468 U.S. 897 (1984). *See also Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The "reliance" exception was derived from the holding of *Illinois v. Krull*, 480 U.S. 340 (1987). These exceptions relied on an objectively reasonable standard, which is the same standard of the balancing test. Therefore, any objectively reasonable conduct that would have met one of these exceptions would not have resulted in exclusion under the balancing test and been found admissible without considering the exceptions.

(d) *Motion to suppress and objections. Procedure to Exclude Evidence from an Unlawful Search and Seizure*. Rule 311(d) provides for challenging evidence obtained as a result of an allegedly unlawful search or seizure. The procedure, normally that of a motion to suppress, is intended with a small difference in the disclosure requirements to duplicate that required by Rule 304(d) for confessions and admissions, the Analysis of which is equally applicable here.

Rule 311(d)(1) differs from Rule 304(c)(1) in that it is applicable only to evidence that the prosecution intends to offer against the accused. The broader disclosure provision for statements by the accused was considered unnecessary. Like Rule 304(d)(2)(C), Rule 311(d)(2)(C) provides expressly for derivative evidence disclosure of which is not mandatory as it may be unclear to the prosecution exactly what is derivative of a search or seizure. The Rule thus clarifies the situation.

(2) *Time Requirements.* Rule 311(d)(2) "unambiguously establishes that failure to object is waiver, and it is not a rule that uses the term 'waiver' but actually means 'forfeiture.'" *United States v. Robinson*, 77 M.J. 303, 307 (C.A.A.F. 2018).

(g4) *Scope of motions and objections c Challenging Probable Cause*. Rule 311(d)(4)(A) follows the Supreme Court decision in *Franks v. Delaware*, 422 U.S. 928 (1978), *see also United States v. Turck*, 49 C.M.R. 49, 53 (A.F.C.M.R. 1974), with minor modifications made to adopt the decision to military procedures. Although *Franks* involved perjured affidavits by police, Rule 311(a) is made applicable to information given by government agents because of the governmental status of members of the armed services. The Rule is not intended to reach misrepresentations made by informants without any official connection.[97*]

1995 Amendment: Subsection (d)(4)(B) was amended to clarify that in order for the defense to prevail on an objection or motion under this rule, it must establish, inter alia, that the falsity of the evidence was "knowing and intentional" or in reckless disregard for the truth. *Accord Franks v. Delaware*, 438 U.S. 154 (1978).

(e5) *Burden of proof*. Rule 311(e)(d)(5) requires that a preponderance of the evidence standard be used in determining search and seizure questions. *Lego v. Twomey*, 404 U.S. 477 (1972). Where the validity of a consent to search or seize is involved, a higher standard of "clear and convincing," is applied by Rule 314(e). This restates prior law.

February 1986 Amendment: Subparagraphs (e)(1) and (2) (d)(5)(A) was amended to state the burden of proof for the inevitable discovery as prescribed in *Nix v. Williams*, 467 U.S. 431 (1984) and *United States v. Leon*, 468 U.S. 897 (1984).

1993 Amendment: The amendment to Mil. R. Evid. 311(e)(2)(d)(5)(B) was made to conform Rule 311 to the rule of *New York v. Harris*, 495 U.S. 14 (1990). The purpose behind the exclusion of derivative evidence found during the course of an unlawful apprehension in a dwelling is to protect the physical integrity of the dwelling not to protect suspects from subsequent lawful police interrogation. *See id.* A suspect's subsequent statement made at another location that is the product of lawful police interrogation is not the fruit of the unlawful apprehension. The amendment also contains language added to reflect the "good faith" exception to the exclusionary role set forth in *United States v. Leon*, 468 U.S. 897 (1984), and the "inevitable discovery" exception set forth in *Nix v. Williams*, 467 U.S. 431 (1984).

2016 Amendment: Subparagraph (d)(5)(A) was amended adding the balancing test of subparagraph (a)(3) of the rule as prescribed in *Herring v. United States*, 555 U.S. 135 (2009).

2020 Amendment: Subparagraph (d)(5)(A) was rearranged, deleting language from the "good faith" and "reliance" exceptions and placing the burden of the Rule 311(a)(3) balancing test before the burden of the inevitable discovery exception.

(f6) *Defense evidence*. Rule 311(d)(6) restates prior law and makes it clear that although an accused is sheltered from any use at trial of a statement made while challenging a search or seizure, such statement may be used in a subsequent "prosecution for perjury, false swearing or the making of a false official statement."

(7) *Guidance on Application.* Rule 311(d)(7) describes the procedure for military judges to use when applying the exclusionary rule. Simply put, the proper procedure of the rule is the military judge answering the followed five questions. First, was evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity? Second, did the accused makes a timely motion to suppress or an objection to evidence under this rule? Third, did the accused had a reasonable expectation of privacy in the person, place, or property searched? Fourth, would the exclusion of the evidence result in appreciable deterrence of future unlawful searches or seizures and the benefits of such deterrence outweigh the costs to the justice system? Lastly, if exclusion is appropriate under the rule, do any exceptions apply that permits admission of the evidence over the rule? *See Davis v. United States*, 564 U.S. 229 (2011).

2020 Amendment: Subparagraph (d)(7) was amended to the rule in order provide practitioners guidance on the proper procedure when applying the exclusionary rule, that is to analyze whether the requirement of the rule are met before considering exceptions. *See Davis v. United States*, 564 U.S. 229 (2011) (the Court acknowledged that the inevitable discovery would have applied to the case, but the evidence was already admissible under the balancing test).

(~~h~~9) *Objections to evidence seized unlawfully*. Rule 311(~~h~~)(d)(9) is new and is included for reasons of clarity.

(~~i~~e) *Effect of guilty plea.* Rule 311(~~i~~)(e) restates prior law. *See, e.g., United States v. Hamil*, 15 U.S.C.M.A. 110, 35 C.M.R. 82 (1964).

2013 Amendment. The definition of "unlawful" was moved from subsection (c) to subsection (b) and now immediately precedes the subsection in which the term is first used in the rule. Other subsections were moved and now generally follow the order in which the issues described in the subsections arise at trial. The subsections were renumbered and titled; this change makes it easier for the practitioner to find the relevant part of the rule. Former subsection (d)(2)(C), addressing a motion to suppress derivative evidence, was subsumed into subsection (d)(1). This change reflects how a motion to suppress seized evidence must follow the same procedural requirements as a motion to suppress derivative evidence.

This revision is stylistic and addresses admissibility rather than conduct. *See supra*, General Provisions Analysis. The drafters did not intend to change any result in any ruling on evidence admissibility

2020 Amendment. Besides the amendments to the rule discussed *supra*, the amendment rearranged the appendix to correspond with the *2013* rearrangement of the rule and corrected errors left from that amendment, bring the analysis up to date with the current version of the rule.

Notes

1. Herring v. United States, 555 U.S. 135, 141 n.2 (2009) (Chief Justice Roberts delivered the opinion of the Court and in this footnote dismantles Justice Ginsburg's dissenting opinion.).

2. *Id.* The titles of the main headers are a satirical repartée to Justice Ginsburg's grandiose vision of the exclusionary rule, because there is nothing "majestic" about Military Rule of Evidence (MRE) 311. *See id.* at 148 (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (rejecting the Court's conception of the exclusionary rule and arguing for "a more majestic conception" (internal quotation and citation omitted)).

3. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (Miss Dollree Mapp was convicted of possessing obscene literature in violation of state law—i.e., she had pornographic books and pictures, officers seeking to question a man about a recent bombing of Don King's house arrived at Miss Mapp's residence in Cleveland and requesting to enter and search, but she refused to allow them to enter without a warrant. Police then forcibly gained entrance and produced a paper claiming to be a warrant, which Miss Mapp grabbed and placed in her bosom. The Supreme Court found this to be an illegal warrantless search in violation of the Fourth Amendment and excluded the seized evidence from a criminal trial.); Weeks v. United States, 232 U.S. 383 (1914) (Mr. Fremont Weeks was charged with the use of the "mails" to send tickets representing chances at a lottery—i.e., sending junk mail, while he was absent at his "daily vocation," government officials unlawfully and without a warrant searched his home. The Supreme Court reversed the lower court's decision to admit unlawfully seized evidence because the Government had violated the Fourth Amendment.). *See generally* William Yardley, *Dollree Mapp, Who Defied Police Search in Landmark Case, Is Dead*, N.Y. Times (Dec. 9, 2014), https://www.nytimes.com/2014/12/10/us/dollree-mapp-who-defied-police-search-in-landmark-case-is-dead.html (gives Miss Mapp's history and provides context for what lead to the landmark case of *Mapp v. Ohio*).

4. Manual for Courts-Martial, United States, Mil. R. Evid. 311(a)(3) (2016) [hereinafter 2016 MCM] (the *Manual for Courts-Martial* (*MCM*) was updated in 2018, but MRE 311(a)(3) did not change). *See* Exec. Order. No. 13730, 81 Fed. Reg. 33,352 (May 20, 2016) (amending MRE 311).

5. *See* 2016 MCM, *supra* note 4, Mil. R. Evid. 311.

6. *See id.*

7. *Id. See also* Herring v. United States, 555 U.S. 135 (2009).

8. Davis v. United States, 564 U.S. 229, 240 (2011).

9. *Herring*, 555 U.S. at 142. *See* United States v. Leon, 468 U.S. 897, 908 (1984).

10. *See Herring*, 555 U.S. at 148–49 (quoting *Leon*, 468 U.S. at 907-08).

11. *See infra* apps. A & B (proposed modified MRE 311 and the corrected analysis for the appendix of the *MCM* are appendices to this article).

12. U.S. Const. amend. IV (full text states: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

13. *See id. See also* Arizona v. Evans, 514 U.S. 1, 10 (1995) (the Court recognized "that the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands" (citing *Leon*, 468 U.S. at 906)).

14. Davis v. United States, 564 U.S. 229, 236 (2011) (first quoting Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 363 (1998); and then quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). *See also* Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

15. United States v. Calandra, 414 U.S. 338, 348 (1974) (Mr. John Calandra was a mobster in the Cleveland crime family and while he was being investigated for illegal gambling, federal agents searched his place of business pursuant to a warrant for evidence of illegal gambling operations. During the search, an agent that was aware of a separate investigation for illegal loansharking, discovered evidence of loansharking. The Supreme Court held that the evidence could be suppressed at a criminal trial, but that the exclusionary rule did not extend to grand jury proceedings, because such an extension would not result in an incremental deterrent effect to prevent future police misconduct.). *See generally* Edward P. Whelan, *The Life and Hard Times of Cleveland's Mafia: How Danny Greene's Murder Exploded the Godfather Myth*, Cleveland Mag. (Feb. 15, 2011, 12:00 AM), https://clevelandmagazine.com/entertainment/film-tv/articles/the-life-and-hard-times-of-cleveland's-mafia-how-danny-greene's-murder-exploded-the-godfather-myth (exploring the final years of the Cleveland Mob and discusses Mr. John Calandra's role).

16. Herring v. United States, 555 U.S. 135, 144 (2009).

17. *Id.* at 140 (citing Illinois v. Gates, 462 U.S. 213, 223 (1983)).

18. Eugene R. Milhizer, *Debunking Five Great Myths About the Fourth Amendment Exclusionary Rule*, 211 Mil. L. Rev. 211, 214 (2012) (The article is from a speech presented at the 54th Judge's Course at The Judge Advocate General's School on 5 May 2011, and suggests that evidence obtained from an unlawful search and seizure should always be admitted and that the exclusionary rule should be abolished.).

19. *See* Lieutenant Colonel Patrick Walsh and Paul Sullivan, *The Posse Comitatus Act and the Fourth Amendment's Exclusionary Rule*, 8 Am. U. Nat'l Sec. L. Brief 3, 23 (2018) (examining the use of the military

as domestic law enforcement and how the exclusionary rule is misused when courts apply it to deter the military's domestic law enforcement activities that may violate the Posse Comitatus Act).

20. *See* Davis v. United States, 564 U.S. 229, 259 (2011) (Breyer, J., dissenting, joined by Justice Ginsburg) (arguing that the exclusionary rule is being "watered-down," and will only protect ordinary Americans from "searches and seizures that are egregiously unreasonable"); *Herring*, 555 U.S. at 148 (Ginsburg, J., dissenting, joined by Justices Stevens, Souter, and Breyer) (embracing "'a more majestic conception' of the Fourth Amendment and its adjunct, the exclusionary rule" in that exclusion is a remedy for a violation and not a mere deterrent (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting))); *Calandra*, 414 U.S. at 357 (Brennan, J., dissenting) (proposes the rule's purpose is judicial integrity, "enabling the judiciary to avoid the taint of partnership in official lawlessness"). *See also* Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. Crim. L. & Criminology 757 (2009) (discussing that the ruling in *Herring* is a sign of continued assault against the exclusionary rule); Scott E. Sundby & Lucy B. Ricca, *Is the Exclusionary Rule a Good Way of Enforcing Fourth Amendment Values?: The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 Tex. L. Rev. 391 (2010) (championing Justice Ginsburg's majestic dissent in *Herring* as the correct conception of the exclusionary rule); Claire Angelique Nolasco, Rolando V. del Carmen, & Michael S. Vaughn, *What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 Am. J. Crim. L. 221 (2011) (postulating that the ruling in *Herring* has weakened the exclusionary rule by "significantly loosen[ing] the rule and, in effect, makes its boundaries difficult to delineate").

21. *Davis*, 564 U.S. at 236–37 (citing *Herring*, 555 U.S. at 141; United States v. Leon, 468 U.S. 897, 909 (1984); Elkins v. United States, 364 U.S. 206, 217 (1960)). *See* Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights."); *Calandra*, 414 U.S. at 347–55 ("the rule is...designed to safeguard Fourth Amendment rights through its deterrent effect"). *See also* Illinois v. Krull, 480 U.S. 340, 352 (1987) ("the exclusionary rule was historically designed 'to deter police misconduct'" (quoting *Leon*, 468 U.S. at 916)).

22. *Herring*, 555 U.S. at 141.

23. *Davis*, 564 U.S. at 236 (quoting *Stone*, 428 U.S. at 486).

24. *Herring*, 555 U.S. at 140–41 (first quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006); then quoting *Leon*, 468 U.S. at 909 (internal quotation marks and citation omitted)).

25. 2016 MCM, *supra* note 4, app. 22 at 20 (the 2016 *MCM* is cited here, because the analysis of Military Rule of Evidence 311 in the 2019 MCM appendix explicitly incorporates the analysis in the 2016 MCM appendix).

26. *Herring*, 555 U.S. at 144 (Mr. Bennie Dean Herring was searched incident to an arrest pursuant to an outstanding warrant for a failure to appear on felony charges, but after the search was conducted, it was discovered that the warrant database was not up to date and that the warrant had been recalled five months earlier. The Supreme Court held that the evidence was admissible and concluded that the conduct was negligent and exclusion would not result in an appreciable deterrence.).

27. *Id.* at 144.

28. *Id.* at 142 (quoting *Leon*, 468 U.S. at 908).

29. *See id.* at 141–45.

30. *Leon*, 468 U.S. at 907.

31. Illinois v. Krull, 480 U.S. 340, 352-53 (1987) (quoting *Leon*, 468 U.S. at 907).

32. 2016 MCM, *supra* note 4, app. 22 at 20. *See Krull*, 480 U.S. at 352–53 (the possible benefit of applying the exclusionary rule must be weighed against the social costs); *Leon*, 468 U.S. at 907–10 (if the benefit of suppressing evidence is marginal or nonexistent, then deterrence cannot justify the "substantial costs of exclusion"). *See also* United States v. Janis, 428 U.S. 433, 454 (1976) (the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion"); United States v. Calandra, 414 U.S. 338, 354 (1974) (the Court believed that the damage of extending the exclusionary rule to a grand jury process "outweighs the benefit of any possible incremental deterrent effect").

33. *Herring*, 555 U.S. at 145 (internal quotation marks and citation omitted).

34. *Id.* at 145 (quoting *Leon*, 468 U.S. at 922).

35. Davis v. United States, 564 U.S. 229, 241 (2011) (quoting *Leon*, 468 U.S. at 919).

36. *Herring*, 555 U.S. at 147–48 (quoting People v. Defore, 242 N.Y. 13, 21 (1926)).

37. Manual for Courts-Martial, United States, Mil. R. Evid. 311(c) (2019) [hereinafter 2019 MCM].

38. *Id.* Mil. R. Evid. 311(c)(3).

39. 2016 MCM, *supra* note 4, app. 22 at 20. *See Leon*, 468 U.S. 897 (Mr. Alberto Leon was involved in dealing cocaine and Quaaludes in Burbank, CA. Law enforcement searched Mr. Leon and his residence pursuant to a facially valid warrant, but the lower court found that there was not probable cause to support the warrant. The Supreme Court found that the officers objectively reasonably relied on the warrant and that "application of the extreme sanction of exclusion was inappropriate.").

40. *Leon*, 468 U.S. at 919–20.

41. *Id.* at 921–22.

42. *See* Illinois v. Krull, 480 U.S. 340 (1987).

43. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(c)(4).

44. 2016 MCM, *supra* note 4, app. 22 at 21. *See Krull*, 480 U.S. 340 (Mr. Albert Krull operated a wrecking yard that was in the possession of at least three stolen vehicles that were discovered during a search pursuant to a state statute that permitted state officials to inspect records of wrecking yards, but the statute was later found to be unconstitutional. The Supreme Court concluded that the exclusionary rule did not apply because the detective "relied, in objectively good faith, on a statute.").

45. *Krull*, 480 U.S. at 352–60.

46. *Id.* at 349–50.

47. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(a)(3).

48. 2016 MCM, *supra* note 4, app. 22 at 20. *See* Herring v. United States, 555 U.S. 135 (2009).

49. 2016 MCM, *supra* note 4, app. 22 at 20. *See* United States v. Leon, 468 U.S. 897 (1984).

50. 2016 MCM, *supra* note 4, app. 22 at 21. *See Krull*, 480 U.S. 340.

51. *See Herring*, 555 U.S. at 142 (explaining that the principles for the balancing test are consistent with the holding in *Leon* and that *Krull* extends the *Leon* holding).

52. Davis v. United States, 564 U.S. 229, 238 (2011) (quoting *Herring*, 555 U.S. at 143).

53. *Herring*, 555 U.S. at 142 (quoting *Leon*, 468 U.S. at 922).

54. *Davis*, 564 U.S. at 238 (first quoting *Leon*, 468 U.S. at 922; and then quoting *Herring*, 555 U.S. at 143).

55. *See* 2019 MCM, *supra* note 37, Mil. R. Evid. 311. *See also Davis*, 564 U.S. 229; *Herring*, 555 U.S. 135. *Cf.* United States v. Epps, 77 M.J. 339, 347–49 (C.A.A.F. 2018) (The Court first finds that the inevitable discovery exception applies ,and then acknowledges that even if it did not apply that "any marginal deterrent benefit to be gained is far outweighed by the heavy costs of exclusion."); United States v. Wicks, 73 M.J. 93 (C.A.A.F. 2014) (The Court follows the balancing test from *Herring* and determines that the exclusionary rule does not apply, but only after finding that no exceptions apply to the facts.).

56. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(a) (the "General Rule" listing the requirements of the rule).

57. *Id.*

58. *Id.* Mil. R. Evid. 311(a)(1).

59. *Id.* Mil. R. Evid. 311(a)(2).

60. *Id.* Mil. R. Evid. 311(a)(3).

61. *Id.* Mil. R. Evid. 311(c)(1)-(4).

62. *See id.* Mil. R. Evid. 311(a)(1)-(2).

63. *See* United States v. Leon, 468 U.S. 897 (1984); 2019 MCM, *supra* note 37, Mil. R. Evid. 311(c)(3).

64. *See* Illinois v. Krull, 480 U.S. 340, 349-50 (1987); 2019 MCM, *supra* note 37, Mil. R. Evid. 311(c)(4).

65. *See* Herring v. United States, 555 U.S. 135, 142 (2009); 2019 MCM, *supra* note 37, Mil. R. Evid. 311(a)(3).

66. *See* 2019 MCM, *supra* note 37, Mil. R. Evid. 311(c)(3)-(4).

67. *See* Davis v. United States, 564 U.S. 229 (2011) (Mr. Willie Gene Davis was a convicted felon riding in a vehicle that was pulled over, and police arrested him for providing a false name. Additionally, pursuant to appellate precedent that was later overturned, police searched the vehicle and discovered a firearm in Mr. Davis's jacket. The Supreme Court held that since the police in this case were relying on binding appellate precedent, the exclusionary rule did not apply.)

68. *Id.* at 239.

69. *Id.* at 241.

70. *Id.* at 244.

71. Fred L. Borch, *The Military Rules of Evidence: A Short History of Their Origin and Adoption at Courts-Martial*, Army Law., June 2012, at 9, 12 (explaining that while the Military Rules of Evidence are well accepted today, they had a tumultuous origin).

72. 2019 MCM, *supra* note 37, Mil. R. Evid. 311.

73. Manual for Courts-Martial, United States, Mil. R. Evid. 311 (Supp. 2014) [hereinafter Supp. 2014 MCM]. *See* Exec. Order. No. 13,643, 78 Fed. Reg. 29,566 (2013) (amending Military Rule of Evidence 311).

74. Supp. 2014 MCM, *supra* note 73, Mil. R. Evid. 311(b).

75. 2016 MCM, *supra* note 4, Mil. R. Evid. 311(c)(4) ("Reliance on Statute. Evidence that was obtained as a result of an unlawful search or seizure may be used when the official seeking the evidence acts in objectively reasonable reliance on a statute later held violative of the Fourth Amendment."). *See* Exec. Order. No. 13,730, 81 Fed. Reg. 33,352 (2016) (amending Military Rule of Evidence (MRE) 311).

76. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(c)(4) (adding the words "or binding precedent" after the word "statute"); 2019 MCM, *supra* note 37, app. 16 at 2. *See* Exec. Order. No. 13,825, 83 Fed. Reg. 9899 (2018) (amending MRE 311).

77. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(a).

78. *See id.* Mil. R. Evid. 311(b).

79. *See* Milhizer, *supra* note 18, at 214.

80. *See supra* Meager Exceptions and Analysis.

81. 2019 MCM, *supra* note 37, app. 15 at 2.

82. *Infra* app. A. *See* Herring v. United States, 555 U.S. 135 (2009); Illinois v. Krull, 480 U.S. 340 (1987); United States v. Leon, 468 U.S. 897 (1984).

83. *See Herring*, 555 U.S. 135. *See also* 2019 MCM, *supra* note 37, app. 15 at 2.

84. *See* 2019 MCM, *supra* note 37, Mil. R. Evid. 412(c)(2)(3) (directing the military judge that evidence offered to prove a victim engaged in other sexual behavior or the victim's sexual predisposition is inadmissible unless the requirements for one of the enumerated exceptions are met); 2019 MCM, *supra* note 37, Mil. R. Evid. 513(e) (directing the military judge that evidence of confidential communications between the patient and a psychotherapist are inadmissible unless the requirements for one of the enumerated exceptions are met); 2019 MCM, *supra* note 37, Mil. R. Evid. 514(e) (directing the military judge that evidence of confidential communications between the victim and the victim advocate are inadmissible unless the requirements for one of the enumerated exceptions are met).

85. 2019 MCM, *supra* note 37, Mil. R. Evid. 311 (subdivision (a) is the "General Rule," subdivision (b) is the "Definition" of a person acting in a government capacity, subdivision (c) is the "Exceptions," and subdivision (d) is the procedure, but is titled "Motions to Suppress and Objections"); 2019 MCM, *supra* note 37, Mil. R. Evid. 412 (subdivision (a) is the general rule titled "Evidence generally inadmissible," subdivision (b) is the "Exceptions," and subdivision (d) is the procedure titled "Procedure to determine admissibility"); 2019 MCM, *supra* note 37, Mil. R. Evid. 513 (subdivision (a) is the "General Rule," subdivision (b) are the "Definitions," subdivision (d) is the "Exceptions, and subdivision (e) is the procedure titled "Procedure to Determine Admissibility of Patient Records or Communications"); 2019 MCM, *supra* note 37, Mil. R. Evid. 514 (subdivision (a) is the "General Rule," subdivision (b) is the "Definitions," subdivision (d) is the "Exceptions," and subdivision (e) is the procedure titled "Procedure to Determine Admissibility of Victim Records of Communication").

86. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(d) (subdivision (d)(1) explains when evidence should be disclosed, subdivision (d)(2) provides the time requirement for making a motion and objection under the rule, subdivision (d)(3) discusses the requirement for specificity of a motion or objection, subdivision (d)(4) discusses challenging probable cause of a search warrant or authorization, subdivision (d)(5) discusses the burden of proof applied to the parties when arguing a motion or objection, subdivision (d)(6) discusses the evidence that the defense may present in support of a motion or objection, subdivision (d)(7) discusses the timing of the military judge's ruling on a motion or objection, and subdivision (d)(8) discusses how to inform the members when a motion or objection is sustained and evidence is excluded).

87. 2019 MCM, *supra* note 37, Mil. R. Evid. 311(d)(7) ("Rulings. The military judge must rule, prior to plea, upon any motion to suppress or objection to evidence made prior to plea unless, for good cause, the military judge orders that the ruling be deferred for determination at trial or after findings. The military judge may not defer ruling if doing so adversely affects a party's right to appeal the ruling. The military judge must state essential findings of fact on the record when the ruling involves factual issues.").

88. *Infra* app. A. *See* Davis v. United States, 564 U.S. 229 (2011).

89. *See* 2016 MCM, *supra* note 4, app. 22 at 19; Supp. 2014 MCM, *supra* note 73, app 22 at 20.

90. 2019 MCM, *supra* note 37, app. 15 at 2.

91. *See* 2019 MCM, *supra* note 37, app. 16 at 2; 2016 MCM, *supra* note 3, app. 22 at 19.

92. *See infra* app. B.

93. Modifications are underlined and deletions have a strike through them.

94. This section is arranged in line with the correct procedure for applying the rule. This article did not discuss this change, because it is not substantive and the error was likely an administrative oversight of the drafters. The drafters presumably placed the balancing test at the end of this subdivision without consideration of inserting it in the order it should appear.

95. As with the rule modifications in appendix A, *supra*, the modifications are underlined and deletions have a strike through them. The analysis of the definition section is moved before the exceptions section to reflect the rule. The *Challenging Probable Cause* section was moved to correspond with the rule.

(Credit: istockphoto.com/Elen11)

No. 3

Space Law

What It Is and Why It Matters

By Major Joshua J. Wolff

Irresistible to pun lovers and self-styled comedians, the words "space law" can elicit a variety of reactions: curiosity, humor, or even confusion. Upon telling fellow Army professionals of my plans to study space law, I would often hear a version of the following response: "Oh, space law! So you're going to learn how to court-martial Spock?" (or Worf or, occasionally, ALF). As hilarious as the references are contemporary, the good-natured ribbing—from both within and outside the judge advocate legal services community—reflects a general knowledge gap regarding the Department of Defense (DoD) and Army's reliance on space assets and the scope of associated legal issues. But, from the creation of the United States Space Command to the nascent Space Force, the space domain's role in national defense is rapidly expanding. National security professionals who understand the broad principles of space law and related implications on military operations are better-suited to serve Army and DoD clients. This article aims to provide that foundation through a brief discussion of space law's fundamental rules and the related national security law implications.

What Space Law Is—and Is Not

Space law's definition depends upon how broadly one views the field. In the narrowest sense, it is limited to the body of international law that addresses outer space *directly*. This consists of four widely-subscribed treaties from the 1960s and 1970s, colloquially known as the Outer Space Treaty (OST) (1967),[1] the Rescue Agreement (1968),[2] the Liability Convention (1972),[3] and the Registration Convention (1975).[4] These agreements, along with other equities and interests, led states to develop various domestic legal controls. This added regulation gives rise to space law's broader definition: *every* legal regime with a significant impact on at least one type of space activity. The broader definition thus includes *both* international law and domestic statutory and regulatory regimes with topics ranging from telecommunications[5] to export control[6] to space resource mining.[7]

Space law is *not* maritime or air law "higher up." The analogy is tempting: the high seas and air above them are, like space, areas used by states yet the sovereign territory of none. Some legal principles from space law even appear to be the same, with the law of the flag conferring jurisdiction to a state for its vessels on the high seas and Article VIII of the OST accomplishing a corollary function for manmade objects in outer space.[8] These comparisons, however, are misleading for several reasons.

Chief among the distinctions between air and maritime law and space law relates to responsibility. In all regimes, states are obligated to ensure vessels or objects under their registration comply with and conform to international law.[9] Unique to space law, however, is that states bear international responsibility and financial liability for internationally wrongful acts or damage resulting from their national activities in outer space—*including*

those produced by non-governmental entities.[10] In other words, while a state is obligated to ensure those conducting activities under color of its authority are compliant with international law in all domains, it faces significantly greater consequences[11] for its nationals' noncompliance under space law.

Physical differences between the domains can significantly affect these legal issues. If two ships or aircraft were to get too close to each other in a contested situation in their respective domains, the worst-case scenario includes damaged property, environmental damage, and potentially injuries or even limited loss of life. While these consequences are serious, they are largely contained and relatively discrete (both temporally and geographically).[12] If two satellites were to collide—and recent reporting on Russian satellite activities shows this is a distinct possibility[13]—the debris could prove hazardous for years as it continues to orbit the earth. This poses risks to completely unrelated space objects, including some that are not even launched at the time of the incident.[14] Considered in the context of the unique responsibility and liability obligations mentioned above and described in greater detail below, the risks of analogizing law of the air or sea domains directly to space become more apparent. Specifically, a private satellite operator's negligence producing a collision in outer space (or even losing control of the object due to technical failures) could cause financial uncertainty for that state indefinitely as the remnants of that satellite remain in orbit.

Another way space physics affects legal analysis is in the proportionality rule of the law of armed conflict, which prohibits attacks when the expected loss of life, injury to civilians, or damage to civilian property is excessive in relation to the concrete and direct military advantage anticipated.[15] In space, due to long-lasting debris, the expected damage from any kinetic strike is extremely difficult to forecast; this complicates the assessment. Moreover, the potential that long-lasting debris may interfere with future operations is an important practical consideration for commanders.

In sum, space is different and far too much so to extrapolate the law of the sea or air law directly. From the legal perspective, all of its rules developed in a world that is post-United Nations (U.N.) Charter. As a result, there is an amplified role for states in the supervision of activities undertaken there. Physically, space lacks borders and objects behave differently there. Accordingly, many legal principles will yield different results when applied in this domain.

Space Law and National Security

For the national security professional, the narrower definition of space law, discussed above, is most applicable and will thus be the basis of the rest of this article. Most of the principles relevant to military operations and other national security considerations are derived from the OST and elaborated in the other three major space treaties. The OST incorporates international law, including the U.N. Charter, into all activities in the exploration and use of outer space.[16] Space law's rules, then, must be read and understood in the broader context of other national security law—primarily the *jus ad bellum* and *jus in bello*.[17] The following is a brief distillation of space law's general principles with some illustrations of their impact on national security matters.

The Core Principles: Freedom of Use and Prohibition of Appropriation

The first principle of space law, often referred to as "freedom of use," is articulated in Article I of the OST: outer space, including all celestial bodies, is free for exploration and use by all states without discrimination of any kind.[18] Older than any of the space treaties, this principle arose in 1957 when the Soviet Union launched Sputnik in an acquiescent response from the international community.[19] Sputnik's unprotested passage over other states marked a monumental change from the traditional *ad coelum* doctrine, which held that property had an infinite extension overhead.[20] Freedom of use appears straightforward and analogous to the Lotus Principle, which holds that states may conduct any activity not *specifically* prohibited by treaty or custom.[21] The national security significance of free use becomes more apparent when considered in the context of the next principle, the prohibition on national appropriation. This principle holds that no portion of space or any celestial body is subject to national appropriation by claim of sovereignty *or any other means.*[22] These rules produce a natural tension: states are generally free to operate as they see fit in outer space, but are limited in protecting assets because they cannot exclude others from occupying positions deemed threatening (i.e., are unable to claim territorial sovereignty). This creates potential for conflict.

The reported 2018 encounter between Russian and French satellites illustrates both this tension and the primacy of the free use principle. In that instance, French officials alleged that a Russian satellite maneuvered to and operated in close proximity to a French satellite.[23] The French government characterized the actions as espionage. This moniker carries legal significance because espionage is *not* prohibited under international law, even if states regularly condemn it when discovered.[24] The freedom of use and non-appropriation principles left the French government without any *legal* recourse, perhaps leading them to choose public condemnation as a response. In other words, France could characterize the Russian satellite maneuvering as irresponsible, but *not* illegal. Importantly, the United States has articulated favoring freedom of use since the earliest days with President Eisenhower reportedly viewing the Sputnik's successful launch as a partial victory because it confirmed the principle in international law.[25]

The freedom of use rule differs from air law, which is governed by a separate rule structure relying in part on territory. This raises the question: where does territorial air space end and outer space *legally* begin? Two methods to answering this question dominate the discussion: spatialism and functionalism. The spatialist approach proposes a particular altitude (typically 100 kilometers above sea level) as constituting outer space and, therefore, governed by space law. Anything below such a level is subject to air law. Proponents of this approach argue that a clear delineation will make rules easier to follow and enforce. The functional approach argues that the *purpose or use* of the object under analysis—whether to operate in outer space or to be used in the earth's atmosphere—should govern which law applies. Functional

supporters note that some space objects can enter into relatively low orbits and that all space objects begin movement with a negligible altitude, meaning different legal regimes would apply to the same object at different stages of its use (or even different points of an orbit). The overwhelming majority of state practice—including that of the United States—is to follow the functional approach, declaring that any object in orbit is in outer space.[26]

Military-Specific Principles

The next few principles of space law apply directly to military operations. The first principles restrict the use of weapons of mass destruction (WMD). Specifically, stationing WMD in outer space (or installing them upon any celestial body) is prohibited.[27] Such weapons *transiting through* outer space, however, is not prohibited by this rule. Nuclear explosions of any kind in outer space—an event with exceptionally hazardous consequences on the earth's surface[28]—are also prohibited during peacetime.[29]

The next principles relate to the moon and other celestial bodies. The OST states that these may only be used for "peaceful purposes."[30] While the scope of this term is subject to some debate, the majority view (and that held by the United States) is that this term prohibits *aggression*, but not military measures taken for defensive posture.[31] This interpretation is potentially critical for space entrepreneurs' plans to harvest resources from celestial bodies. Recalling the freedom of use and non-appropriation principles above, protecting equipment and facilities of states, or their juridical persons conducting such activities, may well prove to be such a peaceful purpose.[32]

Another rule with potential direct implication on military space operations is the declaration of astronauts as "envoys of mankind."[33] This title confers special quasi-diplomatic status and includes a pledge (at least among parties to the Rescue Agreement) to return the astronauts safely to their state of nationality if found within a member state's territory.[34] Many astronauts are military officers, which raises a number of questions in the event of an armed conflict. The legal answers to these questions will rely upon fairly traditional analysis of protected status (and loss thereof); but, depending on the nature of and parties to the conflict in question, the policy implications are potentially very complex.[35]

Unicorn of International Law: State Responsibility for Private Activities in Space

One of the most unique features of space law is how it addresses state responsibility. Born of Soviet opposition to (and some may say suspicion of) American enthusiasm for private activities in space,[36] the general rule is that states are internationally responsible for "national activities" in outer space, whether conducted by governmental or non-governmental actors.[37] This is a marked departure from the general rule that states are only internationally responsible for the actions of government organs or private actors under the state's "effective control."[38] The scope of the phrase "national activities in outer space" is not defined in any treaty; but, state practice—including that of the United States—is to view this broadly. Thus, all space activities conducted from their territory—and those carried on by their nationals—are regulated.[39]

The unusual responsibility rule in space law raises three critical points for practitioners to understand. First, the term "space activities" includes *all* actions associated with the operation of a space object, regardless of whether they occur on the earth's surface, in the atmosphere, or in outer space. The majority of actions to control and otherwise utilize satellites are conducted by humans from the earth's surface, meaning the term's applicability is broader than it may appear at first blush (i.e., it applies on the earth's surface as well as in outer space). Second, beware conflating international responsibility for wrongful acts with attribution. Doing so implies that, if a space object is used to conduct what would amount to an armed attack, a private actor from State A could initiate an international armed conflict with State B—regardless of whether State A's government exercised any control over the private actor.[40] Such an interpretation is contrary to the U.N. Charter's purpose of maintaining international peace and security.[41] The final takeaway is that states are *obligated* to require authorization and continuing supervision of their national activities in outer space. Thus, as mentioned above, states tend to maximize jurisdiction and control over anything that could be considered their national activities.[42]

As the private commercial participation in space activities increases, these responsibility rules can raise some interesting questions. Some of these questions are straightforward, such as the lawful targeting of privately-owned equipment in the event of an armed conflict. Simply put, in the event of an armed conflict, commercial satellites that provide services to a government entity are lawful "dual use" targets by an enemy—if they provide an effective contribution to military action.[43] Other questions are much more difficult. One of them relates to the law of neutrality, which—in order to retain protection from the conflict's effects—generally obligates neutral states to refrain from participating in hostilities; but, it imposes no such restriction on neutral states' *nationals*.[44] Would neutral state nationals enjoy this greater leeway in providing space-based services to belligerents to an armed conflict—such as earth imaging or satellite communications? Or would space law's unique state responsibility for such activities mean the prohibition on participation applies? This question is currently unsettled in international law but may be of growing importance as governments—including militaries—are increasingly using commercial space services.[45]

A corollary to international responsibility for national activities in outer space is that states also bear *financial* liability for damage caused by space objects.[46] The general rule creates a two track system: launching states are strictly liable for damage to persons or property occurring on the surface of the earth or to an aircraft in flight, while liability for damage or injury in space is fault-based.[47] Straightforward in concept, these rules have remained untested as a matter of international law. In 1978, when a nuclear-powered Russian satellite crashed in Canada, questions arose as to whether environmental harm constitutes "damage" on earth.[48] Determining fault for damage caused in outer space is even murkier. International space traffic management rules do not exist; there is no right of way

in orbit. Moreover, establishing underlying facts of any collision in outer space is fraught with challenges. These rules drive substantial insurance requirements as part of the licensing process.

The authority to uphold these responsibilities are provided by Article VIII of the OST and the Registration Convention, which provides that each space object must be registered to *one* state, which will then maintain jurisdiction and control over the object. The registration principle is one of authority, not transparency. These rules are meant to ensure that no space object can be stateless, providing at least some mechanism to identify a responsible or liable state to enforce those corollary rules. Registration is not, however, a transparency measure. The only information required is identifying; its capabilities need not be described.[49]

Together, these rules are important for national security practitioners to understand. This system—and particularly the ambiguous term "national activities in outer space"—incentivizes states to maximize oversight for space-related activities conducted from their territory or by their nationals. The physical requirements to operate constellations of satellites often requires a series of stations around the globe for control functions.[50] The result is that several states may have international obligations (responsibility or financial liability) at stake for any given satellite constellation. As militaries increasingly use commercially-provided space services, these equities must be carefully considered from acquisition onward. Planners must account for other states' obligations generally, as in the event of a collision, and how these obligations may change in the event of an armed conflict.

Principles of Cooperation

The remaining principles are aimed at a cooperative approach to the use and exploration of outer space. One such principle is the obligation for states to conduct their activities with due regard to the corresponding interests of other states.[51] To facilitate this cooperation, states are obligated to seek consultation with others when they suspect planned activities (by the state or its nationals) may potentially cause harmful interference with the activities of another state.[52] Similarly, states have a right to request consultation if they believe the activities of another state (or that state's nationals) might cause harmful interference to its own activities.[53] This is a relatively narrow principle because it does not provide for a dispute resolution mechanism.

A recent example demonstrates both the purpose and limitations of this rule. In February 2020, U.S. officials disclosed concerns of a Russian satellite maneuvering near one of its satellites.[54] According to reports, the United States sought to address this through diplomatic channels.[55] If the United States perceived the Russian satellite's actions may cause harmful interference (e.g., potential for collision or interrupting the satellite's control), space law would guarantee a right to *request* consultations with the Russian government. Should the Russian government not agree with the assessment that these actions pose the risk of harmful interference, however, space law does not currently provide for any means to resolve the difference. This principle may seem of little utility, but some have recently suggested its use as a basis for establishing some norms in the realm of space traffic management. Specifically, this rule may serve as a basis for states to establish physical zones around space objects (e.g., 15 kilometers), and declare that operation by another space object in such zone (without consultation) as constituting potential harmful interference.[56] Under this approach, the potential harmful interference grants a right to request consultation from the state responsible for the other space object). This may prove to be a solution to the friction described above between the principles of freedom of use and prohibited sovereignty in space.

Three other rules on cooperation round out the principles of space law. First, states are obligated to consider requests to observe the flight of space objects.[57] This rule is generally unused and was meant to facilitate reciprocity in extraterritorial construction of tracking facilities.[58] Next, the OST obligates states to share the "nature, conduct, locations, and results" of scientific studies conducted in space.[59] This rule's weight is significantly limited, however, by the caveat that states must only do this insofar as it is feasible and practicable.[60] Lastly, the OST requires "stations, installations, equipment, and space vehicles on the moon and other celestial bodies" to be open to representatives from other state parties on a basis of reciprocity with reasonable advance notice.[61] This rule may prove of increasing importance as both the United States[62] and China[63] have plans to build research stations on the moon in the next decade.

Conclusion

The rules discussed here are drawn from a body of international law designed to harmonize the use and exploration of outer space and celestial bodies. These constitute an agreement amongst parties (many have argued among *all* states as customary international law)[64] on conduct related to space activities. The above examples provide context for some of the ways these rules may affect matters of national security in peacetime and conflict. Difficult questions exist beyond the scope of this article, and many more will arise as technology and use of space continues to develop. As policies evolve and norms mature to account for these changes, national security professionals will benefit from understanding the bedrock principles described above, particularly those related to freedom of use, appropriation, and responsibility. Interpretations may evolve and change—particularly when considered in the context of an armed conflict—but the rules are likely to remain, constituting the bedrock for international law of the space domain.[65] **TAL**

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Notes

1. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 6, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty]. A fifth treaty, The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, exists, but has only been ratified by five states and is thus generally not considered part of the body of space law.

2. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 673 U.N.T.S. 119 [hereinafter Rescue Agreement].

3. Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187.

4. Convention on Registration of Objects Launched Into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention].

5. International Telecommunications Convention and Optional Protocol, Oct. 25, 1973, 28 U.S.T. 2495, TIAS 8572.

6. Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, Aug. 5 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

7. U.S. Commercial Space Launch Competitiveness Act, Pub. L. No. 114-90, 129 Stat. 704 (2015).

8. Outer Space Treaty, *supra* note 1, art. VIII.

9. *See* Convention on Civil Aviation art. 12, Dec. 7, 1944, 15 U.N.T.S. 295; Convention on the Law of the Sea art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397.

10. Outer Space Treaty, *supra* note 1, arts. VI and VII.

11. I.e., international responsibility and financial liability.

12. The 2001 collision between a U.S. Navy and Chinese naval aircraft is a prime example. While the event was significant for U.S.-Chinese relations, its effects were relatively localized and short-lived. *See* Shirley A. Kan et al., Cong. Rsch. Serv., RL30946, China-U.S. Aircraft Collision Incident of April 2001: Assessments and Policy Implications (2001).

13. *See* Chelsea Gohd, *2 Russian Satellites are Stalking a US Spysat in Orbit. The Space Force is Watching,* Space.com (Feb. 11, 2020), https://www.space.com/russian-spacecraft-stalking-us-spy-satellite-space-force.html (quoting officials describing Russian satellite operations proximate to United States assets as "dangerous"). *See also infra,* note 22 .

14. David Wright et al., The Physics of Space Security: A Reference Manual 22 (2005).

15. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Conventions]. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts (Protocol I) art. 57(2)(a)(iii), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP 1].

16. Outer Space Treaty, *supra* note 1, art. III.

17. The two general categories of the law of war are *jus ad bellum* (the law concerning the use of force) and the *jus in bello* (the law of conduct during a war). *See* U.S. Dep't of Def., DoD Law of War Manual para. 1.11 (May 2016) [hereinafter Law of War Manual].

18. Outer Space Treaty, *supra* note 1, art. I.

19. *See* Memorandum of Conference with the President (Oct. 8, 1957, 8:30 AM), https://www.archives.gov/files/education/lessons/sputnik-memo/ [hereinafter Sputnik Memorandum].

20. Vladen S. Vereshchetin, *Outer Space, in* The Max Planck Encyclopedia of Public International Law (2006).

21. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser A) No. 10 (Sept. 7).

22. Outer Space Treaty, *supra* note 1, art. II.

23. Angelique Chrisafis, *'Act of Espionage': France Accuses Russia of Trying to Spy on Satellite Data*, Guardian (Sept. 7, 2018), https://www.theguardian.com/world/2018/sep/07/france-accuses-russia-spying-satellite-communications-espionage.

24. Christian Schaller, *Spies, in* The Max Planck Encyclopedia of Public International Law (2015).

25. *See* Sputnik Memorandum, *supra* note 19.

26. Law of War Manual, *supra* note 17, para. 14.2.2.

27. Outer Space Treaty, *supra* note 1, art. IV.

28. Gilbert King, *Going Nuclear Over the Pacific,* Smithsonian Mag., (Aug. 15, 2012), https://www.smithsonianmag.com/history/going-nuclear-over-the-pacific-24428997.

29. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty), *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43 (entered into force Oct. 10, 1963).

30. Outer Space Treaty, *supra* note 1, art. IV.

31. Law of War Manual, *supra* note 17, para. 14.10.4.

32. Theresa Hitchens, *WH Woos Potential Allies, Including China, for Space Mining*, Breaking Def. (Apr. 6, 2020), https://breakingdefense.com/2020/04/wh-woos-potential-allies-including-china-for-space-mining.

33. Outer Space Treaty, *supra* note 1, art. V.

34. Rescue Agreement, *supra* note 2, art. 2.

35. Law of War Manual, *supra* note 17, para. 12.5.

36. Paul G. Dembling & Daniel M. Arons, *The Evolution of the Outer Space Treaty*, 33 J. Air L. & Com., 419, 437-38 (1967).

37. Outer Space Treaty, *supra* note 1, art. VI.

38. *Draft Articles on Responsibility for Internationally Wrongful Acts*, U.N. GAOR Supp. No. 10, at 43, U.N. Doc. A/56/10 (Nov. 2001), https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 115 (June 27).

39. Bin Cheng, Studies in International Space Law 658-59 (1997).

40. Generally, states are only internationally responsible for the acts of their organs or those acting pursuant to the state's effective control. *See* sources cited *supra* note 38.

41. U.N. Charter art. I.

42. Cheng, *supra* note 39.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims in International Armed Conflicts art. 52, June 8, 1977, 1125 U.N.T.S. 3. While many states (including the United States) are not parties to this treaty, the provision related to defining a military objective as described above is accepted as customary international law. *See* Law of War Manual, *supra* note 17, paras. 5.6.3, 19.20.1.1.

44. *Compare* Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War art. 6, Oct. 18, 1907, 36 Stat. 2415, T.S. No. 545 [hereinafter Hague XIII] (prohibiting neutral states from directly or indirectly providing war material to belligerents) *with* Hague XIII art. 7 (explicitly exempting states from preventing the export of the same). The only logical conclusion that these articles presents is that a neutral *state* providing such material would violate its duty of non-participation, but that its juridical persons or nationals providing the same material is *not* considered state participation. *See also* Law of War Manual, *supra* note 17, para. 15.3.2.1 (noting that "[c]ommercial transactions between belligerent States and neutral corporations, companies, citizens, or persons resident in a neutral State are not prohibited").

45. *See* Charles Beames, *Why Hybrid Systems Will Enable The United States' Future*, Forbes (Nov. 29, 2019), https://www.forbes.com/sites/charlesbeames/2019/11/29/why-hybrid-systems-will-enable-the-united-states-space-future/ (citing reports that the space economy will be a multi-trillion-dollar industry in the next thirty years).

46. Outer Space Treaty, *supra* note 1, art. VII.

47. *Id.*

48. *The Dangers of Cosmos 954*, N.Y. Times, Jan. 27, 1978, at A24.

49. Registration Convention, *supra* note 4, art. IV.

50. For example, the European Space Agency's position, navigation, and timing satellite constellation, GALILEO, uses six such stations distributed around the globe to ensure coverage. *GALILEO Ground Segment*, European Space Agency, https://gssc.esa.int/navipedia/index.php/Galileo_Architecture#GALILEO_Ground_Segment.

51. Outer Space Treaty, *supra* note 1, art. IX.

52. *Id.*

53. *Id.*

54. Gohd, *supra* note 13.

55. *Id.*

56. Lieutenant Commander Mark T. Rasmussen, National Security Zones in Outer Space (May 6, 2020) (unpublished manuscript) (on file with author). For example, State A could announce that it perceives any space object operating within 15 kilometers of its space objects without coordination as constituting potential harmful interference. Thus, if State A's space domain monitoring indicated that a space object belonging to State B was projected to operating inside that zone, State A has a basis under the OST to request consultation with State B.

57. Outer Space Treaty, *supra* note 1, art. X.

58. Dembling & Arons, *supra* note 36, at 442-44.

59. Outer Space Treaty, *supra* note 1, art. XI.

60. *Id.*

61. *Id.* art. XII.

62. Meghan Bartels, *NASA Unveils Plans for Artemis 'Base Camp' on the Moon Beyond 2024,* Space.com (Apr. 3, 2020), https://www.space.com/nasa-plans-artemis-moon-base-beyond-2024.html.

63. Rafi Letzter, *China Plans to Build a Moon Base,* Wash. Post (Apr. 30, 2019), https://www.washingtonpost.com/national/health-science/china-plans-to-build-a-moon-base/2019/04/26/d22406f2-6768-11e9-a1b6-b29b90efa879_story.html.

64. F.G. von der Dunk, *The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law, in* 6 Studies in Space Law 3 (Frans von der Dunk ed., 2011).

65. *See* Law of War Manual, *supra* note 17, para. 1.3.2 (describing the law of armed conflict's relationship with other bodies of international law).

(Credit: istockphoto.com/enot-poloskun)

No. 4

The Plea of Necessity and Cyber Warfare

By Captain Katharina J. Rienks

A strict observance of the written law is doubtless one of the high duties of a good citizen, but not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[1]

The Ballistic Missile Defense System (BMDS) is one of the most important, yet largely unnoticed, homeland defense mechanisms operated by the United States. The system is a highly sophisticated network featuring an integrated, layered architecture that provides multiple opportunities to detect and destroy incoming missiles and their warheads before they can reach their targets.[2] The BMDS protects both the homeland and our deployed military forces, as well as some of our allies worldwide.[3] The system's architecture includes networked sensors and ground- and sea-based radars for target detection and tracking; ground-and sea-based interceptor missiles for destroying a ballistic missile; and a command, control, battle management, and communications network linking the sensors and interceptor missiles.[4] Interference with the BMDS could have catastrophic effects on the United States' capability to detect and destroy various kinds of missiles.[5]

For the purposes of this article, imagine that—through continuous monitoring—the Command and Control, Battle Management, and Communication (C2BMC) system detects a cyber operation disrupting the various ground- and sea-based radars and surveillance systems that make up the early warning systems. United States Cyber Command (USCYBERCOM) traces the operation back to a government building within North Korea. Intelligence suggests that the intent of the operation was to affect only one of the ground-based radars in an effort to "grandstand" North Korea's cyber capabilities. Unbeknownst to North Korea, the operation is affecting a majority of the early warning systems. The operation has not caused any physical damage to the BMDS, but is severely limiting communication within the system.

Diplomatic relations with North Korea are non-existent. Due to a contentious trade war with China, relations are strained, and China refuses to mediate between the United States and North Korea. Allies of the United States unsuccessfully attempted to engage in diplomacy with China and North Korea. While the futile attempts at diplomacy are ongoing, the cyber operation crippling the BMDS is progressing. At the same time, attempts to reset and repair the early warning systems from within the United States are in progress. However, the only way to neutralize the cyber operation is to take the source of the operation completely offline.

To prevent a complete loss of all BMDS early warning capabilities, the U.S. Strategic Command (USSTRATCOM) Commander is considering a conventional military strike on the power transformer in North Korea that is supplying the

building with electricity. In the alternative, USCYBERCOM recommends a cyber operation to shut down the power grid in North Korea, take the source offline, and end the operation.

In this scenario, there have been no casualties or damages resulting from the cyber operation. In fact, most Americans are going about their days as usual, with no knowledge of the severely degraded BMDS. Intelligence suggests that the intent behind the operation of infecting one of the systems that comprises the BMDS was to show the United States that it is vulnerable. Additionally, there is no evidence that any of the states with Intercontinental Ballistic Missile (ICBM) capabilities are planning an attack on the United States or its allies.

A robust body of advisory, non-binding opinions attempted to examine cyber operations; but, laws and international agreements remain lacking

The first proposed course of action is an air strike on the transformer supplying electricity to the building that controls the cyber operation, carried out by F-16s from the 36th Fighter Squadron, Osan Air Base, Republic of Korea (ROK). This course of action would destroy the transformer and shut down part of the power grid for an extended period of time. The alternate approach of a cyber operation would not cause any territorial intrusion or visible damages. Instead, it would shut down the entire power grid and cause widespread power outages in hospitals, schools, public transportation, and other important infrastructure. Both proposed courses of action require causing at least some temporary power outages.

In the absence of an armed conflict and its associated remedies under the United Nations (U.N.) Charter, this article examines whether the proposed kinetic strike or cyber operation by the United States would be a permissible response under the plea of necessity. This article gives a brief overview of the current state of international law as it applies to cyber operations and introduces the concept of the plea of necessity, also known as the necessity doctrine. Within this basic framework, this article examines the elements of a plea of necessity and whether either of the proposed courses of action would be justified. The analysis shows that the plea of necessity would not justify an action amounting to a use of force in response to a cyber operation that is below the use of force threshold. Alternatively, under the plea of necessity, the proposed cyber operation has the potential to be a viable option—if it remains below the use of force threshold. This article then concludes that the plea of necessity is a limited remedy that may justify an otherwise belligerent act, but only in specific circumstances.

Background

International Law Applicable to Cyber Operations

Despite cyber warfare capabilities developing at a dizzying rate, the *jus ad bellum* and the *jus in bello* of the past century regulate today's cyber warfare, just like they have regulated traditional warfare in the past.[6] While the law of armed conflict (LOAC) and the U.N. Charter are well-established, cyber operations complicate the traditional use of force framework.[7] A robust body of advisory, non-binding opinions attempted to examine cyber operations; but, laws and international agreements remain lacking. This article examines a remedy outside the scope of the traditional laws pertaining to armed conflict, focusing on the plea of necessity. First, however, a brief review of the current legal landscape is helpful in understanding the various categories of cyber operations.

Article 2 of the Geneva Convention of 1949 (GC I) first introduced the term "armed conflict" and the laws pertaining to it.[8] Despite laying out the rules applying to armed conflict, GC I does not actually define what constitutes armed conflict or the use of force. In an attempt to prevent armed conflict, Article 2(4) of the U.N. Charter prohibits both the threat of force, as well as the use of force: "[A]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[9]

To fully understand how a cyber operation might be categorized as a use of force, it is important to understand the jurisprudence that has attempted to define use of force and armed conflict. The International Court of Justice (ICJ) held that armed conflict involves action by armed forces across international borders, as well as such armed actions carried out by "armed bands, groups, irregulars, or mercenaries."[10] Similarly, according to conclusions of the International Law Association's (ILA) Committee, an armed conflict requires an intense exchange of fighting by organized armed groups.[11] Under this traditional framework of armed conflict, it is irrelevant in which domain the conflict takes place, be it on land, at sea, in the air, or in cyberspace.[12] To aid in the analysis, the U.N. Charter lists specific acts that generally do not amount to the use of force. For example, Article 41 of the U.N. Charter lists "complete or partial disruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" as conduct that does not constitute a use of force.[13]

Applying the Traditional Use of Force Framework to Cyber Operations

With categorical exclusions on the one hand, and vaguely-defined concepts on the other, experts and scholars have long struggled to categorize cyber operations.[14] The Tallinn Manual 2.0 on International Law Applicable to Cyber Warfare is a good starting point. While the Tallinn Manual 2.0 is not binding law, it analyzes and clarifies how concepts of traditional warfare may apply to cyber operations.

The Tallinn Manual 2.0 defines armed conflict as a situation involving hostilities, including cyber operations, whether or not they meet resistance.[15] For purposes

of defining "hostilities," a cyber operation arising to a use of force is a "cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects."[16] The Tallinn Manual 2.0 specifically focuses on the use of intentional violence against a target in determining whether a use of force exists.[17]

Furthermore, the International Tribunal for the Former Yugoslavia (ICTY) held in the *Tadić* case that uses of force are not limited to activities that release kinetic force.[18] Thus, cyber operations can amount to a use of force if they are sufficiently violent and cause intended death or destruction.[19] Harold Koh, the then-legal advisor for the Department of State, echoed this sentiment when he stated, "if the physical consequences of a cyber-attack work the kind of physical damage that dropping a bomb or firing a missile would, that cyberattack should equally be considered a use of force."[20] Combining the approaches of both the Tallinn Manual 2.0 and the ICTY, the Department of Defense and international commentators adopt this "consequence centric" approach to defining cyber operations.[21]

Contrary to cyber operations that cause death or destruction, states generally agree that the term "use of force" does not apply to political, psychological, or economic coercion, or to minor cyber operations that threaten information systems, manipulate information, or steal data.[22] Similarly, espionage does not violate public or customary international law.[23] These activities fall below the use of force and would not justify a use of force in response.[24]

If a state faces a cyber operation qualifying as an armed attack, it may exercise its inherent right to self-defense as laid out in Article 51 of the U.N. Charter.[25] For example, a cyber operation that affects the Supervisory Control and Data Acquisition (SCADA) controller of a dam and interferes with its safety mechanisms could be a use of force. This is because it combines the intent to cause grave harm with the effect of a breach, leading to casualties and widespread damage.[26] Under those circumstances, the victim state could legally respond with a use of force under Article 51 of the U.N. Charter.[27]

Now, with this general framework in mind, consider this article's scenario of interference with the BMDS. North Korea's operation caused no casualties or physical damage. Furthermore, there does not seem to be any immediate intent to cause casualties or damages—either by the perpetrator, North Korea, or by countries that could harm the United States—by exploiting the lack of an early warning system against ICBMs.

In fact, it seems that the scope of the interference goes beyond the intent of the operation, and the full effect is unknown to anyone except the United States. Arguably, with the lack of any scale and effect that would satisfy the consequence-centric approach, the cyber operation in our scenario falls just below the threshold for a use of force.[28]

This conclusion eliminates the United States' opportunity to lawfully respond with means authorized as self-defense under Article 51 of the U.N. Charter. It is clear, however, that the ongoing cyber operation causes significant harm to the United States and is more serious than a cyber operation intended to influence public opinion, steal financial information, or hack into the system of a major movie production company.[29] In the already gray zone of cyber operations, an equally obscure concept known as the plea of necessity may offer an alternate way of responding to the ongoing threat.

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The Plea of Necessity and Its Application to Cyber Operations

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles) formulated by the International Law Commission of the United Nations (ILC) are the starting point for any plea of necessity analysis. The Draft Articles have undergone continuous review and modification since 1956, adjusting to the developing field of international law.[30] The latest version of the Draft Articles has been widely applied by the ICJ and, though not converted into a convention, courts largely agree that the Draft Articles form the legal framework for state responsibilities with regards to internationally wrongful acts.[31]

Historically, the central theme of the plea of necessity was that a state had the fundamental right to self-preservation.[32] Most importantly, a threat to this fundamental right justified a state taking steps to preserve its existence, even if those steps would be wrongful if there was no threat.[33] The Draft Articles describe and distinguish the plea of necessity as follows:

> The plea of necessity is exceptional in a number of respects. Unlike consent (art. 20), self-defence (art. 21) or countermeasures (art. 22), it is not dependent on the prior conduct of the injured State. Unlike force majeure (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.[34]

Despite the use of the concept of necessity for almost two hundred years, redress under the plea of necessity is rare and extremely limited.[35] One of the best-known

cases of necessity is the case of the *Caroline*. In 1837, British armed forces entered U.S. territory to attack and destroy the Canadian rebel vessel *Caroline*, which was carrying recruits and military material to Canadian insurgents.[36] While the case of the *Caroline* is often referred to as a case of preemptive self-defense, much of the justification at the time also relied on the concept of necessity; in fact, the two concepts were used interchangeably during diplomatic exchanges at the time.[37] British statesman and treaty negotiator Lord Ashburton justified the use of force in the territory of another state. He said, there must be "a strong overpowering necessity" that could "for the shortest possible period" and "within the narrowest limits" suspend the obligation to respect the independent territory of another state.[38] The strong and overpowering necessity in the case of the *Caroline* was that the British feared another attack from the United States. The argument for the use of force in the case of the *Caroline* was a combination of self-defense and self-preservation, which then evolved into a belief that the use of force was necessary to prevent a potential future attack.[39]

Since 1837, customary international law and the appropriate bases for the use of force have developed; and, today, many commentators consider the *Caroline* an example of preemptive self-defense rather than necessity.[40] However, the ICJ has repeatedly held that the *Caroline* was a case of necessity.[41] With this historical understanding of necessity as a starting point, the necessity doctrine developed over the years to encompass more than just the mere self-preservation of a state.[42] This expansion, discussed below, makes necessity an interesting concept for cyber operations.

To shed light on the more contemporary plea of necessity, the ILC appointed Judge Roberto Ago to conduct a thorough study on the necessity doctrine, published in 1980.[43] While there are certain limitations, many of the basic frameworks introduced by Judge Ago have a timeless application. Considering that states currently apply rules formulated for the warfare of past centuries to cyberspace, a forty-year-old analysis of an almost 200-year-old legal concept does not seem unduly outdated.

After reviewing doctrines and the decisions of international tribunals, Judge Ago approached necessity from a slightly different angle and found that it is not a right emanating from the right of self-preservation, but rather an excuse to breach a state's international obligation when necessary to protect an essential interest.[44] Similarly, the ILC noted, "necessity is used to denote those exceptional cases where the only way a state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency."[45] In exceptional circumstances, necessity could permit a state to escape liability for belligerent acts that would normally constitute a violation of international law.[46] Interestingly, Judge Ago recognized that there does not have to be a link between a state's very existence and recourse under the plea of necessity.[47] As a result, the definition of necessity expanded significantly, to include essential interests which themselves alone are not linked to a state's existence.[48]

The *Torrey Canyon* incident of 1967 best exemplifies the movement toward a more expansive definition of necessity.[49] The *Torrey Canyon*, a Liberian tanker carrying crude oil, ran aground off the coast of Cornwall, England.[50] The oil began to leak into the Atlantic Ocean.[51] As the *Torrey Canyon* continued to leak large amounts of oil, the British government was facing the risk of an environmental disaster.[52] After various attempts at containing the spill, the British government bombed the vessel in order to burn off the remaining oil.[53]

the ILC cautioned against subverting the plea of necessity into a plea of "military necessity"

Despite the *Torrey Canyon* incident clearly posing an environmental threat, it was not a threat even remotely linked to the very existence of Great Britain.[54] However, the ILC found that the British government's actions were justified under a plea of necessity, even if the Liberian government had objected to the bombing of the vessel.[55] In its opinion, the ILC noted the following:

> [W]hatever other possible justifications there may have been for the British Government's action, it seems to the Commission that, even if the ship owner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.[56]

The ILC's commentary demonstrates the development of the plea of necessity being applied beyond mere self-preservation.[57]

With this general framework created by Judge Ago and the ILC, it seems possible to apply this well-established concept of necessity to a cyber operation that threatens an essential interest of the victim state. However, the threshold for an essential interest is high, and the stakes become higher when the proposed response is an act amounting to a use of force.[58] The ILC intentionally drafted the plea of necessity narrowly to prevent abuse by states and to further the balancing of state sovereignties.[59] In fact, while not specifically excluding forcible action, the ILC cautioned against subverting the plea of necessity into a plea of "military necessity."[60] To go even further, Judge Ago clearly excluded the use of force against the territorial integrity of a state as justifiable under the plea of necessity.[61] Many commentators agree and argue that exceptions to the prohibition against the use of force only arise in cases of self-defense under Article 51 of the U.N. Charter, or subject to U.N. Security Council authorization.[62] Notably, while raising the issue of use of force under the plea of necessity, the Tallinn Manual 2.0 leaves the ultimate question unanswered.[63] Clearly, the limitations for the use of the plea of

necessity are significant. It is under those strict limitations that this article analyzes whether the proposed kinetic strike or cyber operation could be justified in the given scenario.

Would the Proposed Responses to the BMDS Scenario Be Justified by the Plea of Necessity?

Scholars and practitioners must analyze and apply the elements of the plea of necessity to answer this overarching question. The Draft Articles articulate the following analytical framework:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.[64]

In the given scenario, the United States did not contribute to (i.e., provoke) the situation of necessity; therefore, we will not discuss the last element. The analysis is fact-specific and may change considerably with even only slight variations, particularly in cyber operations where attribution is difficult.[65] With this in mind, the elements of a plea of necessity may now be applied to the scenario.

Is an Essential Interest of a State at Risk?

The threshold question in this analysis is whether the BMDS constitutes an essential interest of the United States. The Draft Articles do not specifically lay out what constitutes an essential interest of a state. Rather, the Draft Articles caution that whether an interest is essential "depends on the circumstances and cannot be prejudged."[66] As Judge Ago noted, a threat to an essential interest "represents a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, [and] the preservation of the environment of its territory or a part thereof."[67] Curiously, there are a substantial number of cases where the plea of necessity was invoked based on the environmental protection of a specific area or species.[68] This suggests a general broadening of the scope of an essential interest in certain circumstances and forms the starting point for the BMDS analysis.

Is Ballistic Missile Defense an Essential Interest of the United States?

In determining whether a working defense mechanism would constitute an essential interest, it is best to look to other incidents where a state invoked the plea of necessity on a "defense-based" theory. As previously discussed, although concepts of self-defense and necessity were used interchangeably at the time, the *Caroline* case is the most relatable scenario. Nevertheless, in a way, the underlying analysis is similar. How? Because the acts were intended to prevent a potential future attack. In the BMDS scenario, the United States is facing a threat to one of its unproven—yet most important—assets of homeland defense.[69]

Under the umbrella of a North Atlantic Treaty Organization (NATO) ballistic missile defense system, missile defense is an integral part of homeland defense worldwide, not just in the United States.[70] In fact, missile defense is so important to peace worldwide that NATO Secretary General Jens Stoltenberg considers it "an important tool for NATO's core task of collective defense."[71] With the threat that ballistic missiles pose, and the considerable efforts aimed at defending against them, it would seem that under the analysis of Judge Ago—as well as the Draft Articles—the BMDS scenario would be a threat to an essential interest, i.e., the ability to provide homeland defense. Therefore, the threshold element is met. The grave and imminent peril determination is the next consideration.

Is the Essential Interest Threatened by a Grave and Imminent Peril?

To satisfy the conditions for a plea of necessity, the essential interest must be threatened by a grave and imminent peril.[72] Furthermore, the threat cannot merely be a possibility—it must be objectively established by the evidence.[73] This does not mean the threat must occur immediately, as the analysis does not exclude a threat that will occur in the future, as long as such future occurrence is certain.[74]

In the BMDS scenario, the grave and imminent peril has already materialized, as the cyber operation that is degrading communications between the various early warning systems is ongoing. For purposes of the grave and imminent peril analysis, it is important to recall what the threatened essential interest is. As established above, the essential interest is not the very existence of the United States as a nation state, but rather maintaining a functional homeland defense system. This essential interest is in grave and imminent peril because the operation to degrade this function is in progress. Therefore, the grave and imminent peril analysis is relatively straightforward. The peril is grave by virtue of the potential for a complete degradation of the BMDS, leaving the United States and its allies without a functioning BMDS. The peril is also imminent because it is ongoing and continues to affect additional early warning systems. The BMDS scenario therefore meets the requirements for an essential state interest in grave and imminent peril. Consequently, the focus now shifts to the proposed courses of action.

The analysis is fact-specific and may change considerably with even only slight variations

Is the Proposed Action the Only Way to Guard Against the Peril?

How to Determine the "Only Way"

As discussed earlier, the use of force pursuant to the plea of necessity to justify otherwise wrongful conduct is extremely limited. This strict limitation becomes obvious when engaging in the analysis of whether a belligerent act is the only way to guard against the grave and imminent peril. Judge Ago noted that if a state acts in a way that violates another state's rights, it must "truly be the only means available to it for averting the extremely grave and imminent peril which it fears."[75] Judge Ago further elaborated, "[I]t must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations."[76] Acting under a plea of necessity is improper if there are other lawful means available, even if they may be more costly or less convenient.[77] The word "way" does not only mean unilateral action, but may be comprised of cooperative action with other states or international organizations, such as through diplomacy.[78] Lastly, any action under the plea of necessity is also subject to the concept of proportionality.[79]

This part of the analysis is by far the most fact dependent and may change considerably with any variation of the facts. The BMDS scenario simplifies the facts to focus on the analysis of the legality of a belligerent act under the plea of necessity. The facts reveal that diplomacy and state-side attempts at repairing the early warning system have failed. In this scenario, the only way to end the cyber operation is to take the server completely offline. Physical destruction of the transformer or a cyber operation shutting down the power grid are the only ways to achieve the desired result. While it is—admittedly—simplified, the purpose of this article is not to determine whether there are other ways to neutralize the threat, but to analyze whether either of the proposed courses of action would be justified under the plea of necessity. Therefore, this article accepts the proposed courses of actions as viable and exclusive and now moves on to the analysis of the two courses of action.

Military Action Invoked by the Plea of Necessity

With the plea of necessity already being a limited concept, military action is even more restricted when invoked under the plea of necessity. Going back to 1837, the *Caroline* incident may be the only true example of military action invoked by a plea of necessity. States have invoked military action pursuant to necessity in the context of humanitarian intervention, but this justification was met with strong resistance by the U.N. Security Council.[80]

For cyber operations that do not amount to a use of force, there is no precedent for using force in response. Commentators have grappled with the possibility of justifying forcible action in such a scenario.[81] Some commentators are steadfast in their opinion that such uses of force are only legal pursuant to a U.N. Security Council authorization, or in self-defense under Article 51 of the U.N. Charter.[82] Other experts recognize this severely limits states, subjecting them to considerable risk as they must wait until a cyber operation qualifies as a use of force; at which point considerable damage may have already been done.[83]

The plain language of the Draft Articles do not prohibit the use of force pursuant to necessity, but they do impose strict limitations and suggest that other international treaties are better equipped to regulate the use of force.[84] Despite the lack of a clear exclusion of the use of force as a remedy due to necessity, the balancing test discussed as part of the next element likely renders any use of force in the necessity context wrongful.

Does the Conduct in Question Seriously Impair an Essential Interest of the Other State?

This element necessarily requires a balancing test between the intended actions to combat the grave and imminent peril and the rights of the other state.[85] In the end, the protected essential interest must be of "greater importance than the other state's interest that will be temporarily disregarded."[86] The Draft Articles make this balancing requirement even more stringent by introducing a standard of "a reasonable assessment of the competing interests, and not merely the point of view of the acting state."[87] Upon analyzing the limiting factors, it becomes clear that a response to below-use-of-force conduct almost automatically excludes the use of force by virtue of the necessary balancing of obligations.[88]

Nevertheless, some experts have departed from this strict reading of the plea of necessity, especially in cases of humanitarian intervention and counterterrorism.[89] In situations of counterterrorism, some commentators argue that the use of force may be excusable under the plea of necessity, but only if the target is a non-state actor operating out of a state that is unwilling or unable to prevent its territory from being used for the purpose of planning and executing terrorist attacks.[90] The argument put forth is that an "anticipatory strike" against non-state actors in the territory of an "unable" state can be conceptualized much like the *Caroline* case and, therefore, be an excusable use of force pursuant to the plea of necessity.[91] Notably, this use of force only seems to be excusable against non-state actors in the territory of another state, and is clearly distinguishable from the present scenario. Thus, even though the use of force may be excusable in those limited circumstances, it does not change the strict balancing requirement with regard to a nation–state adversary.

One scenario where the use of force has been used against a state actor, despite the lack of justification due to self-defense or a Security Council resolution, is in the context of humanitarian intervention. However, the legality versus morality debate of such forceful interventions have continued to challenge scholars of international law.[92] A thorough discussion of Humanitarian Intervention and the Responsibility to Protect (R2P) is beyond the scope of this article. Suffice it to say that the use of force in cases of humanitarian intervention is often seen as "illegal but legitimate" and, in some way, a necessary choice of the lesser evil.[93] Neither of the circumstances where the use of force pursuant to the plea of necessity has been considered aids the analysis of the North Korea scenario. The adversary is a state actor engaging in a cyber operation, not a humanitarian crime. Therefore, despite the possibility of applying the plea of necessity

in conjunction with the use of force in cases of non-state actor terrorism or humanitarian intervention, the current scenario requires the balancing of state interests as written in the Draft Articles. As a result, resorting to the use of force becomes increasingly untenable.

Does the Proposed Kinetic Strike Seriously Impair an Essential Interest of the Other State?

A balancing test of the BMDS scenario quickly reveals an issue with the first proposed course of action. A kinetic strike within the borders of another sovereign state that will likely cause destruction, a significant power outage, and possibly casualties, clearly amounts to a use of force.[94] Compared to the threat to the United States, the proposed kinetic strike within the territory of another state has a significantly more serious impact.[95]

The kinetic strike course of action would disregard the basic state obligations regarding the use of force.[96] Even after establishing that an essential interest of the United States is in grave and imminent peril, a reasonable assessment of the proposed action would conclude that the use of force against the territorial integrity of North Korea would not pass the balancing test, and is therefore not justified by a plea of necessity.

Does the Cyber Operation Seriously Impair an Essential Interest of the Other State?

The second proposed course of action may offer a viable alternative to a kinetic strike, but balancing test concerns remain. Nevertheless, the scales may be slightly in favor of executing the proposed cyber operation. The North Korean fundamental interest that is affected by the cyber operation is that of having control over its power grid and providing electricity to its citizens. If the majority of the country would be without power, hospitals, and public services, citizens would surely suffer. However, upon balancing North Korea's interest in its power grid against the United States' interest in a functional BMDS, the viability of this option reveals itself. Both interests aim at providing essential services to its citizens—electricity on the one hand and homeland defense on the other. Both operations in isolation are internationally wrongful acts carried out via cyber means. However, neither operation has the intent to cause casualties and destruction. North Korea's intent was to grandstand its cyber capabilities, the United States' intent is to shut down power to the server and end the malicious cyber operation.

Depending on the effects of the shutdown, the U.S. cyber operation may barely remain below the threshold of a use of force under a consequence-centric approach. Remaining below the threshold is an important factor given the severe limitations pertaining to the use of force.[97] If the shutdown is short, and the targeted building has a backup generator, the effects on the civilian population may be limited and proportional.[98]

If the proposed response can limit its effects on the population as much as possible, the cyber operation is now somewhat comparable to Great Britain's response in the *Torrey Canyon* incident. Just as Liberia did not intend an uncontrollable oil spill, North Korea did not intend for the cyber operation to have such a disproportionate impact. However, much akin to Liberia who simply abandoned a tanker gushing oil onto Cornwall's coastline, North Korea is also unwilling to remediate the issue.[99]

The facts now align with Judge Ago's baseline view that the plea of necessity may justify a state violating its obligations in the face of grave and imminent peril. When balanced, the United States' response impedes on the interest of North Korea; but, considering the interests sought to be protected, it does not unduly impede under the circumstances. Therefore, if it is limited and proportional, the cyber operation could be justified under a plea of necessity.[100] The last step is to determine whether either course of action is explicitly or implicitly excluded from relying on the plea of necessity.

Does the Proposed Course of Action Explicitly or Implicitly Exclude Reliance on Necessity?

Even if a case meets all of the above elements, a state may not rely on necessity if such reliance is explicitly or implicitly excluded.[101] The ILC states that reliance on military necessity is excluded in certain humanitarian conventions that govern behavior during armed conflict.[102] This is logical, as necessity should never be relied upon to violate human rights obligations established by the Geneva Conventions, the Hague Convention, and Customary International Law. Furthermore, the Draft Articles make it clear that the plea of necessity is not intended to cover conduct that is regulated by the primary obligations established by the U.N. Charter.[103] However, considering that paragraph 19 of the Draft Articles continues to discuss military necessity and forcible humanitarian intervention, this assertion is somewhat vague.[104]

Nevertheless, the scales may be slightly in favor of executing the proposed cyber operation

State sovereignty and the prohibition of the use of force are cornerstone obligations regulated by treaty provisions and international humanitarian law, but they do not explicitly exclude recourse under a theory of necessity.[105] However, based on the balancing test above, it seems that any use of force in response to a below-the-threshold cyber operation would be implicitly excluded due to tipping the scales in favor of regulation by treaty provisions and international humanitarian law.[106] Thus, application of this last factor once again eliminates the kinetic strike option, but would not eliminate the counter cyber operation if it remains below the use of force threshold.

Conclusion

On the surface, the plea of necessity seems to be an advantageous concept for responding to cyber operations that do not meet the use of force threshold. Upon diving deeper into its elements and limitations, it becomes clear why this seemingly flexible

and malleable framework has seen limited use. It is easy to argue that a state interest is essential and that a peril is imminent and grave. The built-in safeguards of the plea of necessity make it difficult to apply, and rightfully so. With the first two elements being very malleable, the mandatory balancing of state obligations—in addition to explicit and implied exclusions—are necessary safeguards to avoid the abuse of this doctrine. It is in the depths of this balancing test where the kinetic strike option runs aground. The plea of necessity will not justify the use of force in response to a below-the-threshold cyber operation.

However, the proposed cyber operation could be justified by the plea of necessity under the right set of facts. While not a straightforward way out of uncharted waters, the plea of necessity may, after careful analysis and balancing of the available courses of action, offer a limited option when responding to below-the-threshold cyber operations in the future. **TAL**

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Notes

1. Extract of a Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810) *in* 11 The Works of Thomas Jefferson, 3, 146 (Paul Leicester Ford, ed.) (1905).

2. *The Ballistic Missile Defense System (BMDS),* U.S. Dep't of Def. Missile Def. Agency, https://www.mda.mil/system/system.html (last visited July 14, 2020) [hereinafter *BMDS*].

3. Jonathan Masters, *Ballistic Missile Defense,* Council on Foreign Relations (Aug. 15, 2014), https://www.cfr.org/backgrounder/ballistic-missile-defense.

4. *BMDS, supra* note 2.

5. Masters, *supra* note 3.

6. David Wallace et al., *Revisiting Belligerent Reprisals in the Age of Cyber?,* 102 Marq. L. Rev. 81, 82 (2018) (*Jus ad bello* refers to the conditions under which States may resort to war or to the use of armed force in general, *jus in bellum* is the law that governs the way in which warfare is conducted.).

7. Walter G. Sharp, Sr., Cyber Space and the Use of Force 5 (1999).

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

9. U.N. Charter art. 2, ¶ 4.

10. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).

11. What is War? An Investigation in the Wake of 9/11 10 (Mary E. O'Connell ed., 2012).

12. Catherine Lotrionte, *Reconsidering the Consequences for State-Sponsored Hostile Cyber Operations Under International Law,* 3 Cyber Def. Rev. 73, 77 (2018).

13. U.N. Charter art. 41.

14. Lotrionte, *supra* note 12, at 81.

15. Tallinn Manual 2.0 on the International Law Applicable to Cyber operations 415–17 (Michael N. Schmitt ed., 2d ed. 2013) (hereinafter Tallinn Manual 2.0).

16. *Id.*

17. *Id.*

18. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal, ¶ 120, ¶ 124 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (holding that despite the lack of a kinetic effect, chemical weapons are prohibited in armed conflict).

19. *Id.*

20. Harold Hongju Koh, Legal Adviser, Dep't of State, International Law in Cyberspace: Remarks as Prepared for Delivery to the USCYBERCOM Inter-Agency Legal Conference (Sept. 18, 2012), *reprinted in* 54 Harv. Int'l L. J. Online, 1, 4 (2012), https://harvardilj.org/wp-content/uploads/sites/15/2012/12/Koh-Speech-to-Publish1.pdf.

21. Todd C. Huntley, *Controlling the Use of Force in Cyberspace: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 Naval L. Rev. 1, 22 (2010).

22. Sheng Li, *When Does Internet Denial Trigger the Right of Armed Self-Defense?*, 38 Yale J. Int'l L. 179, 184 (2013); *see also* Huntley, *supra* note 21, at 31.

23. Commander Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. Rev. 217, 218 (1999).

24. *See* Huntley, *supra* note 21, at 31.

25. U.N. Charter art. 51 (recognizing the "inherent right of individual or collective self-defense" of United Nations members faced with an armed attack and containing no language that would limit the right to self-defense to armed attacks by States); see *also* Tallinn Manual 2.0, *supra* note 15, at 345 (recognizing that the issue of whether acts of non-State actors can constitute an armed attack absent involvement by a State is a matter of debate among the experts).

26. U.S. Dep't of Def., DoD Law of War Manual para. 16.3.1 (June 2016, updated Dec. 2016) (listing examples of cyber operations that would cross the threshold of a use of force: triggering a nuclear plant meltdown; opening a dam above a populated area and causing destruction; and disabling air traffic control services, resulting in airplane crashes and the crippling of a military's logistics systems).

27. Michael N. Schmitt, *"Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law,* 54 Va. J. Int'l. L. 698, 698 (2014); Tallinn Manual 2.0, *supra* note 15, at 339.

28. Tallinn Manual 2.0, *supra* note 15, at 340–41; Lotrionte, *supra* note 12, at 87. *See also* Koh, *supra*, note 20, at 4; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27) (The term "scale and effects" was introduced by the International Court of Justice in its opinion in the case of *Nicaragua v. United States of America* when the court discussed to what scale an act would have to rise, and what effects it must have to be considered a use of force.).

29. For background information on the aforementioned operations, *see* Daniel J. Weizner, *How Cambridge Analytica, Facebook and Other Privacy Abuses Could Have Been Prevented*, Lawfare (Apr. 4, 2018, 7:00 AM), https://www.lawfareblog.com/how-cambridge-analytica-facebook-and-other-privacy-abuses-could-have-been-prevented; Alyssa Newcomb, *Massive Equifax Data Breach Could Affect Half of the U.S. Population*, NBC News (Sept. 10, 2017, 6:01 PM), https://www.nbcnews.com/tech/security/massive-equifax-data-breach-could-impact-half-u-s-population-n799686; Press Release, U.S. Dep't of Just., North Korean Regime-Backed Programmer Charged With Conspiracy to Conduct Multiple Cyber Attacks and Intrusions (Sept. 6, 2018), https://www.justice.gov/opa/pr/north-korean-regime-backed-programmer-charged-conspiracy-conduct-multiple-cyber-attacks-and.

30. James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Audiovisual Library of Int'l L., 1, 1–2, http://legal.un.org/avl/pdf/ha/rsiwa/rsiwa_e.pdf (last visited July 14, 2020).

31. The Development of International Law by the International Court of Justice 81(Christian Tams & James Sloan eds., 2013).

32. Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct,* 3 Yale Hum. Rts. & Dev. L.J. 1, 4 (2000).

33. *Id.*

34. Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, [2001] 2 Y.B. Int'l Law Comm'n 80, U.N. Doc. A/56/10 [hereinafter Draft Articles].

35. Christian Schaller, *Beyond Self-Defense and Countermeasures: A Critical Assessment of the* Tallinn Manual 2.0's *Conception of Necessity,* 95 Tex. L. Rev. 1619, 1621–22 (2017).

36. Draft Articles, *supra* note 34, at 81 (discussing the facts of the *Caroline* incident).

37. Roberto Ago (Special Rapporteur), *Addendum to the Eighth Report on State Responsibility*, [1980] 2 Y.B. Int'l Law Comm'n 61, 65, U.N. Doc. A/CN.4/318/ADD.5-7; *Correspondence Between Great Britain and the United States, Respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline, April 24, 1841*, 29 British and Foreign State Papers 1133, 1137–38 (1840-1841).

38. *Correspondence Between Great Britain and the United States, Respecting the Destruction of the Steamboat Caroline, July 28, 1842,* 30 British and Foreign State Papers 193, 196 (1841-1842).

39. James Green, *Docking the* Caroline*: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 Cardozo J. Int'l & Compar. L. 429, 438 (2006).

40. *Id.* at 432.

41. Draft Articles, *supra* note 34, at 81. *See also* Ago, *supra* note 37, at 39.

42. Boed, *supra* note 32, at 7.

43. Ago, *supra* note 37 (Despite his analysis appearing to be somewhat dated, this should not discourage a close look at his report and analysis.).

44. *Id.* at 19–20.

45. Draft Articles, *supra* note 34, at 80 (further listing the elements of a plea of necessity).

46. *Id.* at 84 (discussing "military necessity" and the extreme limitations associated with invoking military actions pursuant to a plea of necessity); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 140 (July 9) (In applying the defense of necessity under customary law, the ICJ notes that it only applied in "strictly defined conditions.").

47. Ago, *supra* note 37, at 21.

48. Boed, *supra* note 32, at 10.

49. *Id.*

50. Draft Articles, *supra* note 34, at 82.

51. *Id.*

52. *Id.*

53. *Id.*

54. Boed, *supra* note 32, at 10.

55. Int'l Law Comm'n, Rep. on the Work of Its Thirty-Second Session, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 39, U.N. Doc.A/CN.4/SER.A/1980/Add.1 (Part 2).

56. *Id.*

57. Boed, *supra* note 32, at 10.

58. Michael N. Schmitt, *Peacetime Cyber Responses and Wartime Cyber Operations Under International Law: An Analytical* Vade Mecum, 8 Harv. Nat'l Sec. J. 239, 252 (2017).

59. *Id.*

60. Draft Articles, *supra* note 34, at 84 (discussing the rare incidents where necessity has been invoked to excuse military actions abroad. It should be noted that those incidents of "military necessity" were in a humanitarian intervention context.).

61. Ago, *supra* note 37, at 21 ("Moreover, in view of the compelling reasons which lead to the definitive affirmation of the prohibition of the use of force against the territorial integrity or political independence of any State, it seems to us inconceivable that the legal conviction of States would today accept 'necessity' as justification for a breach of that prohibition and, more generally, for any act covered by the now accepted concept of an 'act of aggression.'").

62. Schaller, *supra* note 35, at 1621–22.

63. Tallinn Manual 2.0, *supra* note 15, at 140.

64. Draft Articles, *supra* note 34, at 80.

65. U.S. Dep't of Def., Department of Defense Cyberspace Policy Report: A Report to Congress Pursuant to the National Defense Authorization Act for Fiscal Year 2011, Section 934, 4 (Nov. 2011), https://apps.dtic.mil/dtic/tr/fulltext/u2/a552759.pdf.

66. *Id.*

67. Ago, *supra* note 37, at 14.

68. Draft Articles, *supra* note 34, at 81–82 (discussing the environmental basis for necessity in the cases of *Russian Fur Seals, Torrey Canyon,* the *Gabčíkovo-Nagymaros Project,* and the *Fisheries Jurisdiction* case).

69. *See FY17 Ballistic Missile Defense Systems*, Off. of U.S. Sec'y of Def.,https://www.dote.osd.mil/Portals/97/pub/reports/FY2017/bmds/2017bmds.pdf?ver=2019-08-19-113818-163 (last visited July 14, 2020).

70. *See* Jens Stoltenberg, Editorial, *Defending our Nations From Ballistic Missile Threats,* NATO (May 12, 2016), https://www.nato.int/cps/en/natohq/opinions_130662.htm?selectedLocale=en.

71. *Id.*

72. Draft Articles, *supra* note 34, at 83.

73. *Id.*

74. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 54 (Sept. 25) (The court held that grave and imminent peril "does not exclude...that a 'peril' appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.").

75. Ago, *supra* note 37, at 20.

76. *Id.*

77. Draft Articles, *supra* note 34, at 83; *see also* Lotrionte, *supra* note 12, at 97.

78. Draft Articles, *supra* note 34, at 83.

79. *Id.*

80. *Id.* at 84; S.C. Res. 143, ¶ 1 (July 14, 1960); *see also* Nicole Hobbs, *The UN and the Congo Crisis of 1960,* Harvey M. Applebaum '59 Award, 19 (2014), http://elischolar.library.yale.edu/applebaum_award/6.

81. Tallinn Manual 2.0, *supra* note 15, at 140.

82. *Id.*

83. *Id.*

84. Draft Articles, *supra* note 34, at 84.

85. Lotrionte, *supra* note 12, at 97.

86. *Id.*

87. Draft Articles, *supra* note 34, at 83.

88. Anders Henriksen, *Lawful State Responses to Low-Level Cyber-Attacks,* 84 Nordic J. Int'l L. 323, 350 (2015).

89. Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force Be Illegal But Justified?, in* Human Rights, Intervention, and the Use of Force (Philip Alston & Euan Macdonald eds., 2008); Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 Colum. J. Transnat'l L. 337 (2004–05).

90. Jure Vidmar, *The Use of Force as a Plea of Necessity,* 111 Am. J. Int'l L. Unbound, 301, 305 (2017).

91. *Id.*

92. *See* Christine Chinkin, *Kosovo: A "Good" or "Bad" War?*, 93 Am. J. Int'l L. 841, 843 (1999) ("How can I, as an advocate of human rights, resist the assertion of a moral imperative on states to intervene in the internal affairs of another state where there is evidence of ethnic cleansing, rape and other forms of systematic and widespread abuse, regardless of what the Charter mandates about the use of force and its allocation of competence?"); Heidrali Teimouri & Surya P. Subedi, *Responsibility to Protect and the International Military Intervention in Libya in International Law: What Went Wrong and What Lessons Could Be Learnt from It?,* 23 J. Conflict & Sec. L. 3 (2018).

93. Vidmar, *supra* note 90, at 306.

94. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27) (The ICJ discusses the use of force under customary international law throughout its opinion.).

95. Ago, *supra* note 37, at 21.

96. U.N. Charter art. 2, ¶ 4.

97. *See* Ago, *supra* note 37, at 19.

98. *See Factsheet on North Korea*, U.S. Energy Info. Admin., https://www.eia.gov/beta/international/analysis.php?iso=PRK (June 2018) (According to the Energy Information Administration, only twenty-seven percent of households in North Korea had access the electricity in 2016).

99. Report of the International Law Commission on the Work of Its Thirty-Second Session, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n 39, U.N. Doc.A/CN.4/SER.A/1980/Add.1 (Part 2).

100. *Id.* at 40.

101. Draft Articles, *supra* note 34, at 84.

102. *Id.*

103. *Id.*

104. *Id.*

105. *See* Ago, *supra* note 37, at 41.

106. *Id.*

(Credit: istockphoto.com/EtiAmmos)

No. 5

Modernizing Through Innovative Acquisition

By Major Clayton J. Cox & Major Annemarie P.E. Vazquez

To succeed in the emerging security environment, our Department and Joint Force will have to out-think, out-maneuver, out-partner, and out-innovate revisionist powers, rogue regimes, terrorists, and other threat actors.[1]

Opening the Tool Box

Drawing a pair of Colt .45 automatic pistols, and accompanied by two submachine-gun-wielding mechanics, Captain (CPT) Paul Irvine "Pappy" Gunn entered a U.S. supply depot in Brisbane, determined to get what he needed for his unit's mission.[2] It was January 1942, and Manila—where his wife and children were still living—had just fallen to the Japanese.[3] His family was in an internment camp. He was stuck in Australia, working to patch together a military force to push the enemy back—or at least stall their advance toward Australia.[4] Desperation set in. Frustrated with the Army Air Force's struggles to keep pace with Japanese warfighters, and understanding the need to modify U.S. equipment and tactics for the fight at hand, he took drastic measures to get what the mission required: he robbed his own quartermaster.[5]

Although most military leaders have never resorted to the drastic measures employed by then-CPT Gunn, many have shared his dissatisfaction with the process of getting what they need quickly and effectively for mission success. Not long after becoming president, Bill Clinton quipped that the federal procurement system "would have broken Einstein's brain" and indicated that the White House was "running on Jimmy Carter's telephone system and Lyndon Johnson's switchboard."[6] More specifically related to the Department of Defense (DoD), in 2017 Senator John McCain—then-Senate Armed Services Committee Chairman—cautioned, "[W]e will not be able to address the threats facing this Nation with the system of organized irresponsibility that the defense acquisition system (DAS) has become."[7] Even the National Defense Strategy (NDS), with which the DoD aligns its acquisition priorities,[8] voices dissatisfaction with the DAS, describing it as "over-optimized for exceptional performance at the expense of providing timely decisions, policies, and capabilities to the warfighter."[9]

So how did we get here and why should military lawyers care? First, the NDS says it is important to improve the acquisition system to better serve warfighter needs. Due to their problem-solving skill sets and ability to navigate legal authorities, lawyers are well positioned to add value to this effort. However, this is true only when they understand the wide range of available authorities, their intended purposes, and the agencies empowered to use them. Second, many of the military's acquisition activities make the news headlines. Having a basic understanding of the topic gives context to DoD's on-going efforts to find solutions to acquisition system

deficiencies.[10] Third, legal teams are more effective when they understand their client's priorities, and modernization—which requires innovative acquisition—is high on the list. In 2014, Chuck Hagel, former Secretary of Defense put it plainly,

> We have always lived in an inherently competitive security environment, and the past decade has proven no different. While we have been engaged in two large land mass wars over the last thirteen years, potential adversaries have been modernizing their militaries, developing and proliferating disruptive capabilities across the spectrum of conflict.…I see no evidence this trend will change.… We must take the initiative to ensure that we do not lose the military-technological superiority that we have long taken for granted.[11]

As our adversaries incorporate and deploy advanced technologies, the United States must be prepared to engage in what Dr. Bruce Jette, the Army's top acquisition executive, calls "a more complicated threat environment."[12] This environment includes new technology, such as drone swarms and unmanned aerial vehicles, that utilize artificial intelligence (AI)-enabled autonomous weapons.[13] Fortunately, unlike CPT Gunn, we do not have to rob the quartermaster to get what we need. Over the years, Congress has modified—and continues to modify—our acquisition system to provide more ways to buy things we need now.

As examples of Congress's efforts, and on top of DoD's existing authorities, the Fiscal Year (FY) 2016 and 2017 National Defense Authorization Acts (NDAAs) expanded and added flexible acquisition authorities.[14] In addition to improving flexibility, Congress designed this legislation to move procurement faster by advancing existing capabilities and acquiring emerging technology.[15] Many of these authorities are specifically intended for research and development projects. All of them achieve speed as a byproduct of being flexible, meaning they eliminate regulatory hurdles, lower approval authorities, and streamline review processes.[16] Congress has also provided the DoD authorities like Small Business Innovation Research (SBIR) contracts, Partnership Intermediary Agreements (PIAs), and Technology Investment Agreements (TIAs) to drive innovation within the commercial sector. Federal assistance instruments like grants and cooperative agreements allow the DoD to pursue projects with a public purpose with state and local governments. With Cooperative Research and Development Agreements (CRADA), the DoD can share its own research labs outside the federal government—including with the private sector and public institutions.

Many of these authorities are new and unfamiliar to attorneys, and they may not know which parts of the acquisition process they were intended to fix. To truly appreciate what fast and flexible means, one must have a reference point. To this end, the section Getting Oriented offers an overview of traditional acquisition options, and the section Rapid Acquisition Authorities offers a glance at ten flexible acquisition authorities. Knowing this information will ready practitioners for opportunities to engage and contribute to the DoD's modernization effort.

Getting Oriented

The DAS is one of three interconnected systems that comprise what are called "Big A" acquisitions, which include the Joint Capabilities Integration and Development System (JCIDS); Planning, Programming, Budgeting, and Execution (PPBE) process; and the DAS.[17] The JCIDS processes govern how the military identifies capability gaps across the force and decide whether they should fill those needs (requirements) with a materiel solution, as in, equipment.[18] The PPBE process manages funding for identified requirements, which is often a multi-year endeavor. Finally, the DAS is the system that actually acquires whatever was approved (validated) in JCIDS and funded by the PPBE process. Planning occurs years in advance across services and, generally, takes about *sixteen–and–a–half years* from stating a requirement to it being operationally capable.[19] This is due, in part, to regulatory processes and milestone reviews associated with programs that will be discussed momentarily.

While "Big A" acquisitions entail the triad of JCIDS, PPBE, and the DAS, "Little a" acquisitions are only done by the DAS, which, for purposes of this discussion, can be further separated into two general categories. The first gives rise to *programs* and are for acquisitions with high price tags that start at $185 million, or $40 million for an automated information system.[20] Programs can be thought of as business strategies for carefully managing the entire lifecycle of the acquisition, setting forth phases, milestone reviews for advancement to the next phase, measures for ensuring performance and longevity, and controlling costs.[21]

Programs follow what was formerly called the "5000-series" of directives and instructions, recently renamed the Adaptive Acquisition Framework (AAF). The AAF starts with Department of Defense Directive (DoDD) 5000.01 and Department of Defense Instruction (DoDI) 5000.02T,[22] which together establish how programs operate. A program is a management tool and not a contractual instrument to buy anything. Programs must work in conjunction with contractual vehicles to acquire the needed goods or services. That is to say, programs must work in conjunction with the second category of the DAS–contracting authorities. Put simply, a program is like a highway: it is unable to deliver goods, but it provides the pathway for trucks that do.

The second category within the DAS is the wide variety of contracts and contract-like instruments.[23] The Federal Acquisition Regulation (FAR) is a body of law found in Title 48 of the Code of Federal Regulations,[24] and it supplies a variety of methods for acquiring goods and services.[25] These contracting methods are used in conjunction with programs as the legal instrument with which goods and services are acquired. They are also used as standalone contracts to fulfill requirements falling below program thresholds. This means that an agency desiring a new projector system can just follow the FAR and buy one—within fiscal constraints—instead of having to worry about DAS milestone review and approval requirements that would apply to a high-cost, risky project of producing the next-generation land combat vehicle. Similarly, an agency seeking a contract to research an unmanned aerial projector

platform upon which they could mount intelligence, surveillance, and reconnaissance (ISR) equipment may pursue it under the FAR. That said, the agency may wish to diverge from the FAR in favor of other methods to avoid the applicability of notice and timing requirements and statutes, like the Competition in Contracting Act, 10 U.S.C. § 2304 or the Contract Disputes Act, 41 U.S.C. §§ 7101-7109, which can slow down or derail projects.[26]

The two categories of the DAS converge to create a system optimized to reduce risk, maximize performance, and control costs; but, if a person could describe the pace of a traditional program acquisition, it would be *glacial*. Given the scope and significance of the DoD's eighty-eight Major Defense Acquisition Programs—each at an estimated cost of $480 million—the process seems almost necessarily slow.[27] *Almost*. If operating in a vacuum, the DoD could take as long as it liked, but two external factors make "traditional" unsuitable for rapidly evolving technology and warfighter needs.

First, the DAS is slow for more than just the DoD. It is prohibitively slow, expensive, and cumbersome for all but the largest defense contractors in the industry.[28] When the DoD was the major driver of research and development (R&D), this burden did not matter because the industry relied on the DoD as the main source of innovation. But the tables have turned, and industry investment in R&D dwarfs that of the DoD and leads the way in many areas of technological innovation—like artificial intelligence, robotics, and space.[29] That means the DoD must adapt its acquisition processes to the private sector.

Second, the DoD and industry must partner together in creative ways to keep pace with evolving technology and, whenever possible, drive the direction of innovation in ways that support DoD's mission to counter advances made by our adversaries.[30] As stated in the NDS, "Today, we are emerging from a period of strategic atrophy, aware that our competitive military edge has been eroding."[31] This means the DoD must have *and use* flexible approaches to attract industry partners and collaborate with them. The remainder of this article introduces readers to alternatives and complements to traditional acquisition options, along with examples of how they are currently being used.

Rapid Acquisition Authorities

Authorities abound for speeding up the advancement and acquisition of technology and enticing non-traditional defense contractors to enter the fray. The following discussion introduces ten of them, some of which have gained significant media attention.[32]

Middle-Tier of Acquisition—Section 804 of FY 2016 NDAA

Middle-Tier of Acquisition (MTA), also referred to as Section 804 authority, is something of a program-*lite*; it is intended for promising technologies and existing prototypes that do not require much additional development.[33] This authority provides "a streamlined and coordinated requirements [JCIDS], budget [PPBE], and acquisition [DAS] process" for rapid prototyping and rapid fielding—and streamlined indeed, because MTA is exempt from JCIDS and the DAS program requirements.[34] The rapid prototyping path moves technologies with a level of maturity to prototyping within five years, meaning the MTA program must demonstrate a prototype in an operational environment within five years. If proven technologies exist, they follow the rapid fielding path and must be fielded within five years.

Efficiencies are achieved by allowing planners to alter JCIDS, PPBE, and DAS processes in ways that can increase speed and flexibility. For example, lowering approval thresholds allows periodic reviews to pass through fewer layers of approval authorities before moving to the next milestone (a time-intensive process). Similarly, decision authorities are empowered to eliminate unnecessary documentation or approval processes that add little to no value to the program (there are a surprising number of them).[35] Regardless of cost threshold, this authority can be used for everything from developing new systems to finding innovative ways to maintain old ones.[36] However, per DoD guidance, the Under Secretary of Defense for Acquisition and Sustainment may determine that a program is not fit for the MTA pathway. The major capability acquisition pathway falls under DoDD 5000.02T. From there, they may direct the program to follow a more time-intensive major capability acquisition pathway, which falls under DoDD 5000.02T.[37]

An example of this option in action is the B-52 Commercial Engine Replacement Program (CERP), one of the first Air Force programs to use the MTA pathway.[38] Needing to update the B-52's engine, the Air Force decided buying commercially available engines and modifying them would best satisfy their need.[39] The agency leveraged the MTA rapid prototyping authority to shorten the CERP's timeline and reduce the required documentation by sixty percent of what would have been required under a traditional program.[40] The Air Force acquisitions team set aside the traditional 5000-series schedule and created its own, which reduced costs related to time and unnecessary documentation, led to early virtual prototypes, and enabled the release requests for proposals from industry sooner.[41] The agency estimates that the schedule consolidation enabled by the MTA pathway saved about $500 million.[42] Furthermore, the Air Force elected to consolidate prototype testing requirements that would have traditionally been required.[43] Due to the successful implementation of the MTA pathway, the Air Force anticipates awarding a CERP contract for these new engines by July 2021, a huge step towards its stated goal of keeping the B-52 in service until at least 2050.[44] The agency estimates that using MTA instead of following traditional requirements will shave

if a person could describe the pace of a traditional program acquisition, it would be *glacial*

three–and–a–half years off the acquisition timeline.[45]

Section 806 FY 2017 NDAA Prototyping Projects

Similar to MTA authority, Section 806 of the FY 2017 NDAA provides authority to pursue rapid prototyping by adapting major capability acquisition program requirements, but it is specifically intended for major weapon systems.[46] Through that authority, prototypes are selected "through a merit-based selection process that identifies the most promising, innovative, and cost-effective prototypes."[47] Prototypes must be complete within two years, and the project cost must fall below $50 million.[48] Projects must address "high priority warfighter needs; capability gaps or readiness issues with major weapon systems; opportunities to incrementally integrate new components into major weapon systems based on commercial technology, [...] and opportunities to reduce operation and support costs of major weapon systems."[49]

One major benefit of using this authority is the ability to select a project for a follow-on FAR-based contract, or other transaction (OT), for production without competition.[50] The promise of a follow-on contract or OT provides strong incentives for commercial entities to meet the required need, and no competition can make production happen sooner.

Urgent Capability Acquisitions

"An 80% solution in seven to eight weeks is better than a 95% solution in two years."[51] This is the mantra that drives the DoD's unrelenting pace for Urgent Capability Acquisitions (UCAs), which is a specific program authority found within the 5000-series.[52] Urgent capability acquisition requirements originate with Combatant Commanders, and are those urgent operational needs (UONs) that, if unfulfilled, "result in capability gaps potentially resulting in loss of life or critical mission failure," and may be joint in nature (JUONs), or concern joint emergent operational needs (JEON).[53] Solutions are fielded in two years or less by exempting UONs from PPBE, many program requirements, and many of the JCIDS requirements. Like MTA or major capability acquisition ("traditional") programs, UONs may be fulfilled using a combination of FAR- and non-FAR-based contractual instruments.[54]

One example of the process comes out of Army units in Iraq that needed a solution for defeating enemy use of small, unmanned aerial systems (sUAS), which the enemy used to surveil and attack Iraqi forces.[55] The drones operated so low that the unit's only defense was small arms fire. A hand-picked team of subject-matter experts used existing contracts together with letter contracts (also called undefinitized contract actions, or UCAs),[56] interagency acquisition authorities and Military Interdepartmental Purchase Requests (MIPRs),[57] and research labs across the DoD.[58] An iterative feedback loop with warfighters helped shape the final product: a counter-sUAS (C-sUAS) modified from commercial off-the-shelf (COTS) drones that the forward units received in *months*, not years. Though urgent capability acquisitions may seem like a multipurpose authority, it is only intended for readily adaptable or mature technology to fulfill the most urgent needs arising from operational necessity. If successful, the technology generated from UCAs could transition to an MTA program or a major capability acquisition program for full-scale production.

Other Transaction Authority

One available option for rapid acquisitions gets a fair amount of contemporary press: Other Transaction Authority (OTA). Although it has recently become a buzzword, the authority has been around for decades, originating during the Space Race of the 1950s and 1960s.[59] Other Transaction Authority is a flexible option for research and developing prototypes, especially when existing technology capable of meeting a need is non-existent or underdeveloped. Like the MTA pathway, OTA can provide shortcuts to the traditional major capability acquisition pathway in DoDI 5000.02T, and it can also provide alternatives to FAR-based contracting vehicles.

Other Transaction Authority—Research

The DoD's OTA authority empowers it in two ways: conducting research and developing prototypes. First, under its authority derived from 10 U.S.C. § 2371, the DoD can "enter into transactions (other than contracts, cooperative agreements, and grants)…in carrying out basic, applied and advanced research projects."[60] Projects under § 2371 are exempt from the processes of DoDI 5000.02T and JCIDS.[61] Transactions under this authority are exempt from most provisions of the FAR, including most of its statutory requirements.[62] However, one of the key benefits is that these agreements are highly tailorable and may be used in conjunction with the FAR and other authorities.[63] When used for research, these transactions are generally called Technology Investment Agreements (TIAs), discussed further below.[64]

Other Transaction Authority—Prototyping

Second, under the authority granted by 10 U.S.C. § 2371b, the DoD may conduct prototype projects aimed at improving mission effectiveness, whether that be for personnel, "supporting platforms, systems, components, or materials" or improvements of any of these used by the armed forces.[65] Agreements under this authority are commonly referred to as other transactions (OTs) and may be used on their own or in conjunction with other acquisitions authorities, such as Middle-Tier of Acquisition authority or prize authorities.[66] For example, a prize competition could be structured so that the winning solutions to a pre-defined problem set (e.g., the best machine learning algorithm for predicting post-traumatic stress diagnosis) are eligible for a prototype OT. Proven techniques could transition seamlessly from competition to prototyping.[67] Additionally, under § 2371b, the DoD may also award a follow-on production contract for a developed prototype without competing the award; but, this only occurs if certain requirements are met.[68] Offering the possibility of a follow-on production contract without competition is a powerful financial incentive for potential contractors to compete for the initial OT. More initial participation means more creative solutions for the DoD to choose from and competitive pricing.

Though speed is often a benefit of using OTA,[69] its primary purpose is to create a flexible way for the private sector and the U.S. Government (USG) to do business.[70] Certain sectors of industry avoid the bureaucratic slog of traditional government

contracting, and OTA is meant to fix that by simplifying and streamlining various acquisition processes and incentivizing participation.[71]

In light of OTA's primary purpose, those using OTA prototyping authority should keep in mind that its use comes with restrictions. The DoD may only use OTA if one of four conditions have been met:

1. at least one nontraditional defense contractor or nonprofit research institution participates to a significant extent;
2. all significant participants other than the Federal Government are small businesses or nontraditional defense contractors;
3. at least one third of the prototype project's cost will be paid for by someone other than the Federal Government; or
4. exceptional circumstances justify use of OTA, as determined by the senior procurement executive for the agency.[72]

An example of this option in action is the National Security Space Launch (NSSL) program, which has been "charged with procuring launch services to meet the government's national security space launch needs."[73] To accomplish this goal, the NSSL has developed a multi-phase strategy being implemented from fiscal year (FY) 2013 to FY 2027.[74] The overall program is complex and uses a variety of acquisition tools,[75] including use of OTA to help expand an underdeveloped space launch system industrial base.[76] Through OTs, the Air Force has awarded investment funding for developing launch vehicle prototypes to United Launch Alliance (ULA), Blue Origin, and Orbital Science Corporation.[77] This OT funding has enabled more competition when soliciting for space launch services.[78]

Small Business Innovation Research (SBIR) Program

Another acquisition tool popular in the R&D community is the SBIR program. Its mission includes stimulating innovation, meeting research and development needs, and fostering socioeconomic development.[79] In carrying out this mission, it encourages small businesses to participate in federal research and development efforts.[80]

The SBIR program has three phases, each with its own aims. The first thins the overall number of submissions, awarding up to $150,000 to cover six months' of costs for businesses whose ideas have technical merit, feasibility, and commercial potential.[81] The second phase focuses on the scientific and technical merit, awarding up to $1 million to cover up to two years' of costs for those advancing from the first to second phase.[82] The final phase is unfunded, but advancing businesses benefit through assistance received in commercializing their work, and may include follow-on R&D contracts with the USG.[83] The government benefits by having developed new technology and a new business partner.

One of many SBIR success stories involves the Navy's use of the program to develop Automated Test and ReTest (ATRT), created by Innovative Defense Technologies.[84] This suite of technologies started as a Navy SBIR contract nested within a larger Navy initiative to get "software-driven capabilities to the warfighter as quickly as possible."[85] Launching surface-to-surface missiles from a Navy littoral combat ship is a complex task involving tremendous technical configurations and interfacing. This capability is enabled by ATRT.[86] Furthermore, ATRT provides an eighty-five percent savings in time and manpower, increased system quality, and reduced costs.[87] These are promising results from a non-traditional partner.

Federal Assistance Instruments

Since the Revolutionary War, the USG has used federal assistance instruments to offer aid in various forms to states, local governments, and even individuals.[88] Federal assistance instruments may be used as contractual vehicles as part of an established program or as stand-alone agreements. Though varied in form and substance, a common thread binds federal assistance instruments—furtherance of a public purpose.[89]

Grants and Cooperative Agreements

Two of the most well-known federal assistance instruments are grants under 31 U.S.C. § 6304[90] and cooperative agreements under 31 U.S.C. § 6305.[91] Though they are considered contracts, they are not *procurement* contracts.[92] That means they are regulated by the DoD Grant and Agreement Regulations (DoDGARs) and not bound by the FAR.[93] The Federal Grant and Cooperative Agreement Act of 1977 clarifies when a procurement contract, grant, or cooperative agreement should be used.[94] Contracts are the appropriate instrument when the USG seeks to acquire property or services for its own direct benefit or use.[95] However, if the primary purpose is "to carry out a public purpose of support or stimulation authorized by law" then the proper instrument is a grant or cooperative agreement.[96] Grants and cooperative agreements enable an agency to develop relationships with companies for minimal investment and, depending on the level of USG involvement in the contemplated activity, either a grant (no substantial involvement) or cooperative agreement (substantial involvement) is appropriate.[97]

Grants are used for a multitude of reasons, but most frequently for R&D with the DoD. A small FY 2020 grant with the University of Maryland examines the safety and reliability of artificial intelligence agents used within Cyber-Physical Systems domains, like self-driving cars.[98] The grant funded a two-day workshop with subject matter experts whose task was to produce a report outlining promising areas of study for increasing safety, reliability, and resiliency of AI-enabled technologies. Subsequent spin-offs could pursue the workshop's leads with yet another grant or other agreement.

Technology Investment Agreements (TIAs)

Another type of assistance instrument is the TIA. The TIA is specifically designed to increase collaboration and investment by the private sector in defense research programs with a view toward innovations that support future defense needs.[99] Curiously, the TIA may use authority under 10 U.S.C. § 2358 and take the form of a cooperative agreement; or, with proper justification, it may use authority under 10 U.S.C. § 2371 and be fashioned as an "assistance transaction other than a grant or cooperative agreement."[100] The distinction lies in the extent to which the USG needs to negotiate intellectual property and data rights,

with § 2371 having the most flexibility for negotiation.

The benefit of a TIA is not the payment of money—cost-sharing to the maximum extent practicable is required; rather, it is the self-interested potential for profit on the private sector side and increased civil-military integration on the government side.[101] Indeed, recipients must include a for-profit partner. Profit-driven involvement equates to a strong incentive to invest in order to ensure, for example, the successful incorporation of the technology into the marketplace.[102] For the DoD, this incorporation increases competition, which then drives down acquisition costs.[103]

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Partnership Intermediary Agreements (PIAs)

Partnership Intermediary Agreements (PIAs) are often lumped together with TIAs, but they serve different functions. Authority for PIAs flows from a different source, 15 U.S.C. § 3715, and the overarching purpose is different, too; PIAs are not vehicles for research projects.[104] Rather, their purpose is to facilitate technology transfer from DoD labs to the private sector and accelerate licensing.[105] Additionally, while TIAs may be fashioned as cooperative agreements or "assistance transactions other than a grant or cooperative agreement," a PIA may take shape as a contract, agreement, or memorandum of understanding between the federal government and a state or local government.[106] This authority is available to federal laboratories and federally funded research and development centers.[107]

Consider Montana State University's TechLink, a service that helps "innovation-minded businesses and entrepreneurs identify, evaluate, and license technology developed within DoD and [Veterans Affairs] labs nationwide."[108] Its website lists over 7,000 technologies available for licensing and offers free consultation with licensing professionals to navigate the application process. Through TechLink's service, a United Kingdom-based company, Equivital, Inc., licensed an Army patent for an algorithm that it used to create wearable monitoring technology.[109] The technology has expanded worldwide across sectors and is used in U.S. military hazardous materials protective clothing to monitor, predict, and prevent heat-related casualties.

Though not always intended for speed, federal assistance instruments are flexible, industry-oriented tools for facilitating research and development, or speeding up technology transfer.[110] This makes them attractive options when the DoD wishes to leverage the private sector's capacity for speeding technological advancement and mass-producing or scaling dual-use technologies.

Cooperative Research and Development Agreements (CRADAs)

Another federal assistance instrument available is a Cooperative Research and Development Agreement (CRADA), which is highly tailorable and allows the Federal Government to collaborate with universities, the private sector, and state and local government.[111] Often the level of collaboration is extensive, with the USG and non-USG researchers working side by side in the same lab. As part of a CRADA, federal laboratories and these non-federal partners provide personnel, services, facilities, equipment, intellectual property, or other resources to conduct specific research and development efforts.[112] The authorizing statute provides broad authority, limited primarily by the mission of the agency's laboratory.[113] Also, as the FAR does not govern CRADAs, these agreements can be tailored easily, adapting them to the needs of the agency and non-federal partner, and executed quickly so work can get underway.[114]

Laboratories across the DoD regularly use CRADAs. One example of this is the Navy's Naval Surface Warfare Center, Panama City Division (NSWCPCD) and its partnership with a multi-national company.[115] As part of a CRADA, these two organizations developed technology for military divers to better navigate under dangerous conditions.[116]

Federal assistance instruments are flexible, industry-oriented tools for facilitating research and development, and increasing technology transfer.[117] This makes them attractive options for leveraging the private sector's capacity for speeding technological advancement and mass-producing or scaling dual-use technologies.

Incentive Prizes and Challenge Competitions

A relatively recent option for acquisitions is the use of challenges and prizes to promote innovation and build bridges with non-traditional private sector partners.[118] There are various authorities that allow certain agencies to conduct prize contests, including the DoD.[119] Government-initiated challenge competitions tend to be modeled after commercial competitions and pitch sessions.[120] They often have phases, wherein competitors submit white papers describing their idea. Those submissions are narrowed, and the remaining competitors pitch their innovations in more detail or demonstrate a proof of concept, which can include simulated events and attacks, contests, races, or closed course demonstrations. Selected entrants may receive seed or prize money to continue their work, cover costs, and help further develop the technology. In some cases, successful competitors will be offered contracts or other government agreements to develop and scale the technology. Not all agencies have authority to sponsor challenge competitions, but those that do are increasingly putting them to use.[121] Agencies across the federal government list current challenges for the public at challenge.gov, and they range from redesigning a government website to searching for synthetic biology solutions.[122]

In 2015, the Air Force Research Laboratory (AFRL) offered a $2 million prize "to spur innovation in mid-sized turbine engine technologies."[123] The Air Force took lessons learned from that project to enhance its prizes and challenges in the future.[124] Tech hubs across the DoD use SBIR

contracts together with these authorities to spark interest in private sector-defense collaboration, spur innovation, and support small business forays into dual-use technologies.[125]

Another example comes from the Army Rapid Capabilities Office (RCO), which hosted the Army Signal Classification Challenge in 2018. Over 150 teams from universities, laboratories, industry, and government competed for a first place prize of $100,000 to show "they had the best artificial intelligence [AI] and machine learning [ML] algorithms for performing 'blind' signal classification quickly and accurately."[126] The goal was to find AI and ML solutions to reduce the cognitive burden on Soldiers engaged in electronic warfare (EW) and improve the speed and accuracy of EW operations. The RCO's first foray into competitive challenges was a success: Rob Monto, Emerging Technologies Director, said, "[I]n a matter of less than four months…we have a very accurate, very rapid algorithm for a specific problem set.…[W]e can move forward with trying to build and integrate it into a real solution for the Army."[127]

Competitions serve many ends: they stimulate leap-ahead technologies pulled from the far reaches of people's garages, university laboratories, and private sector tech firms. They pool resources, ideas, and talent, they encourage usable, transferrable solutions for immediate implementation, and they draw attention to problems the DoD faces in ways no request for proposals ever could.[128]

Conclusion

A wide range of options are available for quickening the pace of acquisition, reducing barriers to private sector engagement, developing and fielding small-scale solutions, and driving innovation. Although frustration with acquiring the technology, equipment, and services needed for warfighting is not new—it has most certainly been around as long as war itself. That frustration need not endure. Yet, the global race toward advancement of technology further complicates domestic efforts to keep the upper hand and compels us all to find, or better yet, create, opportunities for modernization and integration of future technologies into the force. Using fast and flexible authorities to overcome that demanding challenge requires leaders who can identify those opportunities, assemble the right team, and navigate regulatory hurdles.

Considering the mandate of the NDS, the nature of today's geo-political climate, and U.S. adversaries' pursuit of disruptive technology, legal practitioners should be familiar with the reasons for the DoD's concerted drive to develop and integrate technology-enabled capabilities into the force. Understanding the basics of how the DoD cultivates, obtains, and shares innovative ideas, systems, and approaches using flexible acquisition authorities prepares practitioners for future opportunities to engage and contribute as the DoD modernizes "a Joint Force fit for our time"—no Colt .45s required.[129] **TAL**

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Notes

1. Summary of the 2018 National Defense Strategy of the United States of America: Sharpening the American Military's Competitive Edge 5 (2018) [hereinafter Nat'l Def. Strategy].

2. John R. Bruning, Indestructible 179-80 (2016).

3. *Id.* at 164-71.

4. *Id.* at 182.

5. *Id.* at 179-80, 325-26.

6. National Archives and Records Administration, 1 Public Papers of the Presidents of the United States: William J. Clinton, January 20 to July 31, 1993, at 141 (1994).

7. Department of Defense Acquisition Reform Efforts: Hearing Before the S. Armed Servs. Comm. (SASC), 115th Cong. 2 (2017) (statement of Sen. John McCain, Chairman, SASC) [hereinafter DoD Reform Efforts].

8. Nat'l Def. Strategy, *supra* note 1. The National Defense Strategy is nested with the National Security Strategy. *See* National Security Strategy of the United States of America 29 (2017) [hereinafter Nat'l Sec. Strategy].

9. Nat'l Def. Strategy, *supra* note 1, at 10.

10. Nat'l Sec. Strategy, *supra* note 8, at 27.

11. Memorandum from Sec'y of Def. to Secretaries of the Military Dep'ts, subject: The Defense Innovation Initiative (Nov. 15, 2014).

12. Todd South, *Here's How the Army Acquisition Chief Plans to Equip Soldiers for the Next War*, Army Times (Jan. 10, 2019), https://www.armytimes.com/news/your-army/2019/01/10/heres-how-the-army-acquisition-chief-plans-to-equip-soldiers-for-the-next-war/.

13. *Id. See also* Ryan Pickrell, *The U.S. Air Force Wants to Put an AI Drone up Against a Fighter Pilot in a Dogfight That Could Change Aerial Combat*, Bus. Insider (Jun. 5, 2020), https://www.businessinsider.com/us-air-force-to-have-drone-dogfight-a-fighter-jet-2020-6.

14. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, §§ 804, 806, 129 Stat. 726, 882 (2015) [hereinafter FY16 NDAA]; National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 2447d, 130 Stat. 2259 (2016) (10 U.S.C. § 2447d) [hereinafter FY17 NDAA]. Some existing authorities are discussed in the section Rapid Acquisition Authorities.

15. DoD Reform Efforts, *supra* note 7, at 4. "Emerging technology" has no government-wide definition. *See, e.g.*, Nat'l Def. Strategy, *supra* note 1, at 3; Kelly M. Sayler, Cong. Rsch. Serv., IF11105, Defense Primer: Emerging Technologies (2019).

16. See discussion in the section Rapid Acquisition Authorities.

17. Chairman, Joint Chiefs of Staff, Instr. 5123.01H, Charter of the Joint Requirements Oversight Council (JROC) and Implementation of the Joint Capabilities Integration and Development System (JCIDS) (31 Aug. 2018) [hereinafter CJCSI 5123.01H]; U.S. Dep't of Def., Dir. 7045.14, The Planning, Programming, Budgeting, and Execution (PPBE) Process (25 Jan. 2013) (C1, 29 Aug. 2017). *See* U.S. Dep't of Def., Dir. 5000.01, The Defense Acquisition System para. 4.1 (12 May 2003) (C2, 31 Aug. 2018) [hereinafter DoDD 5000.01]; U.S. Dep't of Def., Instr. 5000.02T, Operation of the Defense Acquisition System 15 (7 Jan. 2015) (C5, 21 Oct. 2019) [hereinafter DoDI 5000.02T]. Effective 23 January 2020, the 2015 version of DoDI 5000.02 was renumbered to DoDI 5000.02T (transition), and remains in effect until content is removed, cancelled, or transitioned to a new issuance and the new DoDI 5000.02 cancels it. *See* U.S. Dep't of Defense, Instr. 5000.02, Operation of the Adaptive Acquisition Framework (23 Jan. 2020).

18. As opposed to non-materiel solutions: Doctrine, Organization, Training, (materiel), Leadership and Education, Personnel, Facilities, or Policy, known as "DOTmLPF-P." *See* Chairman, Joint Chiefs of Staff, Instr. 3170.01H, Manual for the Operation of the Joint Capabilities Integration and Development System B-G-F-1 (31 Aug. 2018).

19. Jon Harper, *New Undersecretary Vows to Shake up Pentagon's Acquisition System,* Nat'l Def. (Mar. 6, 2018), https://www.nationaldefensemagazine.org/articles/2018/3/6/new-undersecretary-vows-to-shake-up-pentagons-acquisition-system.

20. DoDI 5000.02T, *supra* note 17, encl. 1, Table 1. Other factors may result in designation as an Acquisition Category (ACAT) program, like technological complexity, congressional interest, or a large commitment of resources. *See also* Major Defense Acquisition Programs, 10 U.S.C. § 2430; Major Systems, 10 U.S.C. § 2302d.

21. DoDD 5000.01, *supra* note 17.

22. DoDI 5000.02T, *supra* note 17.

23. Not all contractual instruments are "contracts." Some are called grants, cooperative agreements, or "other transactions." Each is discussed in the section Rapid Acquisition Authorities.

24. FAR, https://www.acquisition.gov/browse/index/far (last visited Sept. 29, 2020).

25. *See, e.g.*, *id.* pts. 13, 15, 34, 35. There are other non-FAR-based methods, some of which are discussed in the section Rapid Acquisition Authorities.

26. These projects include: the Competition in Contracting Act, 10 U.S.C. § 2304; the Contract Disputes Act, 41 U.S.C. §§ 7101-7109; and other FAR notice and timing requirements. *See, e.g.,* Availability of Solicitations, FAR 5.102; Preaward, Award, and Postaward Notifications, Protests, and Mistakes, FAR 15.5.

27. That figure does not include lower-dollar threshold programs. Off. Undersec. Def. & Chief Financial Off., Program Acquisition Costs by Weapons System 5 (Feb. 1, 2020) (This document is the DoD's Budget Request for Fiscal Year 2021). The trade-off for a slower pace is minimization of risk and maximization of performance over the long haul. The B-52's seven years of development compared to ninety-nine years of service is a great example. *See* Walter J. Boyne, *The Best Bargain in Military History*, Air Force Mag. (Nov. 27, 2018), https://www.airforcemag.com/article/the-best-bargain-in-military-history/.

28. *See* Bill Greenwalt, *Build Fast, Effective Acquisition: Avoid the System We've Got*, Breaking Def. (Apr. 25, 2014, 4:30 AM), https://breakingdefense.com/2014/04/build-fast-effective-acquisition-avoid-the-system-weve-got/ ("These new restrictions and regulations have incentivized many emerging commercial companies to stay out of DoD contracting. And those commercial companies that currently sell to the military are now faced with the choice of opting out of the government marketplace or radically changing their structure to conform to these requirements.").

29. *See* Nat'l Def. Strategy, *supra* note 1, at 1; *Annual Report 2017*, Def. Innovation Unit 2 (2017), https://www.diu.mil/about.

30. *See also America's Eroding Technological Advantage: NDS RDT&E Priorities in an Era of Great Power Competition with China*, Govini (2020), https://www.govini.com/americas-eroding-technological-advantage-nds-rdte-priorities-in-an-era-of-great-power-competition-with-china/.

31. Nat'l Def. Strategy, *supra* note 1, at 1.

32. *See, e.g.*, Courtney Albon, *SpaceX Refutes Air Force's Jurisdictional Claims in Launch Services Lawsuit*, Inside Def. (July 12, 2019), https://insidedefense.com/share/204216; Jackie Wattles, *Elon Musk Speaks at Air Force 'Pitch Day' as Military Seeks to Deepen Ties to Commercial Space*, CNN (Nov. 5, 2019, 8:30 PM), https://www.cnn.com/2019/11/05/tech/elon-musk-air-force-pitch-day-spacex/index.html. Other authorities not discussed include Mechanisms to Speed Deployment of Successful Weapon System Component or Technology Prototypes, 10 U.S.C. § 2447d; FY17 NDAA, *supra* note 14, § 879 (Defense Commercial Solutions Opening Pilot Program, 10 U.S.C. § 2302 note); and Independent Research and Development Costs, 10 U.S.C. § 2372.

33. U.S. Dep't of Def., Instr. 5000.80, Operation of the Middle Tier of Acquisition (MTA), paras. 1.2.b, 3.1.a, 3.2.a (30 Dec. 2019) [hereinafter DoDI 5000.80].

34. FY16 NDAA, *supra* note 14, § 804; DoDI 5000.80, *supra* note 33, § 1.2f. This is not to say the program proceeds without management; quite the opposite. Program executive offices carefully tailor the program to fit the needs of the acquisition.

35. DoDI 5000.80, *supra* note 33. *See* 3 Section 809 Panel, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations, Rec. 75 (2019) ("Revise regulations, instructions, or directives to eliminate non-value-added documentation or approvals.").

36. Interview by Ben Fitzgerald with Dr. Will Roper, Assistant Secretary of the Air Force for Acquisition, Technology & Logistics and Dr. Bruce Jette, Assistant Secretary of the Army, for Acquisition, Logistics & Technology (June 2018), https://aaf.dau.edu/aaf/mta/highlights/.

37. DoDI 5000.80, *supra* note 33, § 2.1.

38. Abbigail Pogorzelski, Manager, Commercial Engine Replacement Program, Presentation on DAU Section 804 Middle Tier Acquisition Discussion: B-52 Commercial Engine Replacement Program (Apr. 3, 2019), https://www.dau.edu/News/Powerful-Example—B-52-Commercial-Engine-Replacement-Program.

39. *Id.*

40. *Powerful Example: B-52 Engine Replacement Program*, Defense Acquisition University (last visited Sept. 29, 2020), http://cdnapisec.kaltura.com/index.php/extwidget/preview/partner_id/2203981/uiconf_id/39997971/entry_id/1_hri8fhuh/embed/dynamic/ [hereinafter DAU Podcast].

41. Pogorzelski, *supra* note 38; *see also* DAU Podcast, *supra* note 40.

42. DAU Podcast, *supra* note 40.

43. *Id.*

44. John A. Tirpak, *USAF Releases B-52 Engine Replacement RFP, Award Expected July 2021*, Air Force Mag. (May 20, 2020), https://www.airforcemag.com/usaf-releases-b-52-engine-replacement-rfp-award-expected-july-2021/.

45. Pogorzelski, *supra* note 38.

46. 10 U.S.C. § 2447b(c)(1). Major weapon systems are defined in 10 U.S.C. § 2430.

47. 10 U.S.C. § 2447c(b).

48. 10 U.S.C. § 2447c.

49. 10 U.S.C. § 2447c(b); 10 U.S.C. § 2447b(c).

50. 10 U.S.C. § 2447d.

51. Defense Acquisition University (DAU) Powerful Examples Team, *JRAC Helps Warfighters Overcome Urgent Threat from Enemy Drones*, DAU (Aug. 6, 2019), https://www.dau.edu/powerful-examples/Blog/Powerful-Example—JRAC-helps-Warfighters-overcome-urgent-threat-from-enemy-drones [hereinafter DAU Team].

52. The solutions must fall below certain programs thresholds. *See* U.S. Dep't of Def., Dir. 5000.71, Rapid Fulfillment of Combatant Commander Urgent Operational Needs (24 Aug. 2012) (C1, 31 Aug. 2018) [hereinafter DoDD 5000.71]; *see also* U.S. Dep't of Def., Instr. 5000.81, Urgent Capability Acquisition (31 Dec. 2019) [hereinafter DoDI 5000.81].

53. CJCSI 5123.01H, *supra* note 17, Glossary.

54. DoDD 5000.71, *supra* note 52; DoDI 5000.81, *supra* note 52.

55. DAU Team, *supra* note 51.

56. *See* FAR 16.603 regarding undefinitized contract actions, called "letter contracts" (a "written preliminary contractual instrument" that is used when a definitive contract cannot be completed in time). Prior to starting any project (and obligating funds), the requirement must be *validated*, or approved, by the appropriate authority.

57. A Military Interdepartmental Purchase Request is how military organizations transfer money in exchange for services, supplies or equipment. *See* U.S. Dep't of Def., Def. Contract Mgmt. Agency, Instr. 704, Military Interdepartmental Purchase Request (MIPR) ¶ 1.2.1 (June 26, 2013). *See also* FAR 17.5.

58. This being a joint urgent operational need, other services were also facing a similar capability gap. You can explore DoD's research labs online. *See Department of Defense Laboratories*, Def. Innovation Marketplace, https://defenseinnovationmarketplace.dtic.mil/business-opportunities/laboratories/ (last visited May 27, 2020).

59. Heidi M. Peters, Cong. Rsch. Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress 1 (2019). Other Transaction Authority includes 10 U.S.C. § 2371 (for research), 10 U.S.C. § 2371b (for prototyping), and 10 U.S.C. § 2373 (for experimentation). Section 2373 is not discussed, but generally allows the DoD to "buy…telecommunications supplies, including parts and accessories, and designs thereof" that are necessary for experimental or test purposes in furtherance of national of national defense. *Id.*

60. 10 U.S.C. § 2371(a).

61. Though, they could be designated as programs due to technological complexity, congressional interest, or a large commitment of resources. *See* DoDI 5000.02T, *supra* note 17, encl. 1, tbl 1.

62. Peters, *supra* note 59, at 1.

63. 10 U.S.C. § 2374(d)-(e). *See* Richard Dunn, *Prize Authority – From Prize to What?*, Strategic Inst. (June 19, 2019), https://www.strategicinstitute.org/other-transactions/prize-authority/.

64. Diane Sidebottom, Presentation to the Advanced Acquisitions 2 Class at The Judge Advocate General's Legal Center and School (Apr. 17, 2020). *But see* Richard L. Dunn, *10 U.S.C. 2371 "Other Transactions": Beyond TIA's*, Strategic Inst. (July 31, 2017), https://www.strategicinstitute.org/tag/richard-l-dunn/ (Agreements under 10 U.S.C. § 2371 need not always be TIAs. And, TIAs need not always be "other transactions" under 10 U.S.C. § 2371; they may use 10 U.S.C. § 2358 as cooperative agreements.). See the discussion in the section Rapid Acquisition Authorities.

65. 10 U.S.C. § 2371b(a)(1).

66. Sidebottom, *supra* note 64. In this article, OTA will be used for Other Transaction Authority, not Other Transaction Agreements, which are also commonly abbreviated at OTAs. Other transactions and the agreements memorializing them will be referred to as OTs.

67. 10 U.S.C. § 2374(d)-(e); *see also* Dunn, *supra* note 64.

68. 10 U.S.C. § 2371b(f).

69. Speed is not always a benefit of using OTA, especially the first times an agency uses it. *See* Sidebottom, *supra* note 63.

70. *Id.*

71. *Id.*

72. 10 U.S.C. § 2371b(d)(1).

73. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433, 436 (2019).

74. *Id.* at 443.

75. *See id.*

76. *Id.* at 437. *See also National Security Space Launch*, Air Force Space Command (Nov. 6, 2012), https://www.afspc.af.mil/About-Us/Fact-Sheets/Display/Article/1803281/national-security-space-launch/.

77. *Space Expl. Techs. Corp.*, 144 Fed Cl. at 438.

78. Thomas Burghardt, *Tory Bruno Outlines ULA Transition to Vulcan and National Security Launches*, NASASpaceFlight (Mar. 12, 2020), https://nasaspaceflight.com/2020/03/tory-bruno-ula-transition-vulcan-nssl-launches.

79. *The SBIR and STTR Programs*, SBA, https://www.sbir.gov/about (last visited Aug. 26, 2020). For examples of SBIR success stories, *see Company Stories*, SBA, https://www.sbir.gov/news/success-stories (last visited Aug. 26, 2020).

80. *Id.*

81. *Id.*

82. *Id.*

83. 15 U.S.C. § 638(i)(2)(C).

84. *SBIR-STTR-Success: Innovative Defense Technologies*, SBA (Feb. 24, 2020), https://www.sbir.gov/node/1665115.

85. *Id.*

86. *Id.*

87. *Id.*

88. 32 C.F.R. § 21.420 (2020); *see, e.g.*, Land-Grant Act of 1862 (Morrill Act), 7 U.S.C. §§ 301-305, 308, Pub. L. 37–130 (1862) (granted land to universities to establish agricultural and engineering programs); Homestead Act of 1862, 12 Stat. 392 (granted 160 acres of public land to settlers agreeing to maintain them for five years).

89. 31 U.S.C. §§ 6304-6305.

90. By dollar amount, grants dwarf federal dollars spent on other assistance agreements. *See FY Spending By Object Class*, USASpending, https://www.usaspending.gov/#/explorer/object_class (last visited Aug. 26, 2020). As of 31 March 2020 the federal government obligated seventy percent of its $3.4 trillion budget on grants and fixed charges. Of that only $467 million came from DoD's dedicated research, development, test, and evaluation funds. *Id.*

91. 31 U.S.C. §§ 6304–6305.

92. As defined in FAR 2.101, 15; *see also* 32 C.F.R. § 21.670 (2020).

93. 32 C.F.R. § 21.325 (2020) (FAR and its supplements apply only if DoD Grant and Agreement Regulations specify they do); Trauma Serv. Grp., Ltd. v. United States, 33 Fed. Cl. 426 (1995).

94. 31 U.S.C. §§ 6303-6305.

95. 31 U.S.C. § 6303. *See also* 32 C.F.R. § 22.205(a) (2020).

96. 31 U.S.C. § 6304. *See also* 31 U.S.C. §§ 6303, 6305. Cooperative agreements are not the same as cooperative research and development agreements under 15 U.S.C. § 3710a. *See also* the discussion in the section Rapid Acquisition Authorities. "Substantial involvement" is not defined, *but see* Off. of Mgmt. & Budget, Implementation of Federal Grant and Cooperative Agreement Act of 1977, 43 F.R. 36,860, 63 (Aug. 18, 1978).

97. *See* discussion *supra* note 96.

98. *See Workshop on Assured Autonomy*, *Award number W911NF2010020*, Dep't of Def. Grant Awards (Jan. 1, 2020), https://dodgrantawards.dtic.mil/grants/#/simpleSearch (type W911NF2010020 into the Simple Search box and click on *Workshop on Assured Autonomy*).

99. 32 C.F.R. § 37.115 (2020). *See generally*, 32 C.F.R. § 21.680 (2020). *See also* discussion, *supra* note 62 (Agencies with a delegation of authority under 10 U.S.C. § 2371 or 10 U.S.C. § 2358 may use a TIA). 32 C.F.R. § 37.120 (2020).

100. The distinction lies in the patent rights provisions. *See* 32 C.F.R. § 37.120 (2020), Appx. B; *see also* discussion, *supra* note 64 (Agencies with a delegation of authority under 10 U.S.C. § 2371 or 10 U.S.C. § 2358 may use a TIA).

101. 32 C.F.R. § 37.215 (2020); *see* 10 U.S.C. § 2501(b).

102. 32 C.F.R. § 37.115 (2020).

103. 32 C.F.R. §§ 37.210, 37.215 (2020).

104. 15 U.S.C. § 3715.

105. *Id.*

106. Including: state and local agencies *and* state or local government-funded, chartered, or operated nonprofits that assist, counsel, advise, evaluate, or cooperate with small business firms or institutions of higher education. *See* 15 U.S.C. § 3715(c).

107. 15 U.S.C. § 3715(a); *see also* 15 U.S.C. § 3710a(d)(2) (definition of federally funded research and development center).

108. *See Your Pipeline to Innovative Products and Services*, TechLink Center, https://techlinkcenter.org (last visited Aug. 27, 2020).

109. *Beating the Heat: Company Leverages Army Patent to Commercialize Wearable Monitor Systems*, TechLink Center, https://techlinkcenter-assets.s3-us-west-2.amazonaws.com/success-stories/Equivital.pdf (last visited Aug. 27, 2020).

110. Federal agencies must have statutory authority to use assistance instruments. 32 C.F.R. § 21.410 (2020); *see also* 32.C.F.R. § 21.420 (2020) (list of statutory authorities).

111. 15 U.S.C. § 3710a.

112. Gregg Sharp, Presentation on Grants and Cooperative Agreements at The Judge Advocate General's Legal Center and School to the Advanced Contract Attorneys Course (Mar. 18, 2004) (on file with authors).

113. Landon Wedermyer, The Cooperative Research and Development Agreement: A Force Multiplier for Cyber Acquisition 16 (Dec. 17, 2019) (on file with authors). *See also* 15 U.S.C. § 3710a(d)(1).

114. 15 U.S.C. § 3710a.

115. U.S. Dep't of Navy, Tech. Transfer Program Off., Cooperative Research and Development Agreements Annual Report Fiscal Year 2018, at 5 (2018).

116. *Id.*

117. *See supra* note 109.

118. Memorandum from Jeffrey D. Zienks, Dep. Dir. For Mgmt. on Guidance on the Use of Challenges and Prizes to Promote Open Government to the Heads of Exec. Dept. and Agencies (Mar. 8, 2010), whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2010/m10-11.pdf.

119. *See* 10 U.S.C. § 2374a; Crowdsourcing & Citizen Science, 15 U.S.C. § 3724; 15 U.S.C. § 3719.

120. The term "competitions" is used in the generic sense.

121. *See, e.g.*, prize and competition authorities discussed in the Conclusion. Increased use of DoD's flexible acquisition authorities is due in part to an expansion of authorities. *See, e.g.,* FY16 NDAA, *supra* note 14; FY17 NDAA, *supra* note 14. This increase is also partly attributable to acknowledgment that the DoD needs to speed up innovation, and Congressional encouragement to do it faster. *See Department of Defense Acquisition Reform Efforts: Hearing Before the S. Armed Servs. Comm. (SASC)*, 115th Cong. 4 (2017) (statement of Sen. John McCain, Chairman, SASC); 1-3 Section 809 Panel, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (2019). *See generally* Nat'l Sec. Strategy, *supra* note 8, at 29; Nat'l Def. Strategy, *supra* note 1.

122. *About Challenge.gov*, U.S. Gen. Serv. Admin., https://www.challenge.gov/about/ (last visited May 27, 2020).

123. *Transformational Innovation*, U.S. Air Force https://www.transform.af.mil/Projects/Air-Force-Tech-Challenge/ (last visited Aug. 27, 2020).

124. *Id.*

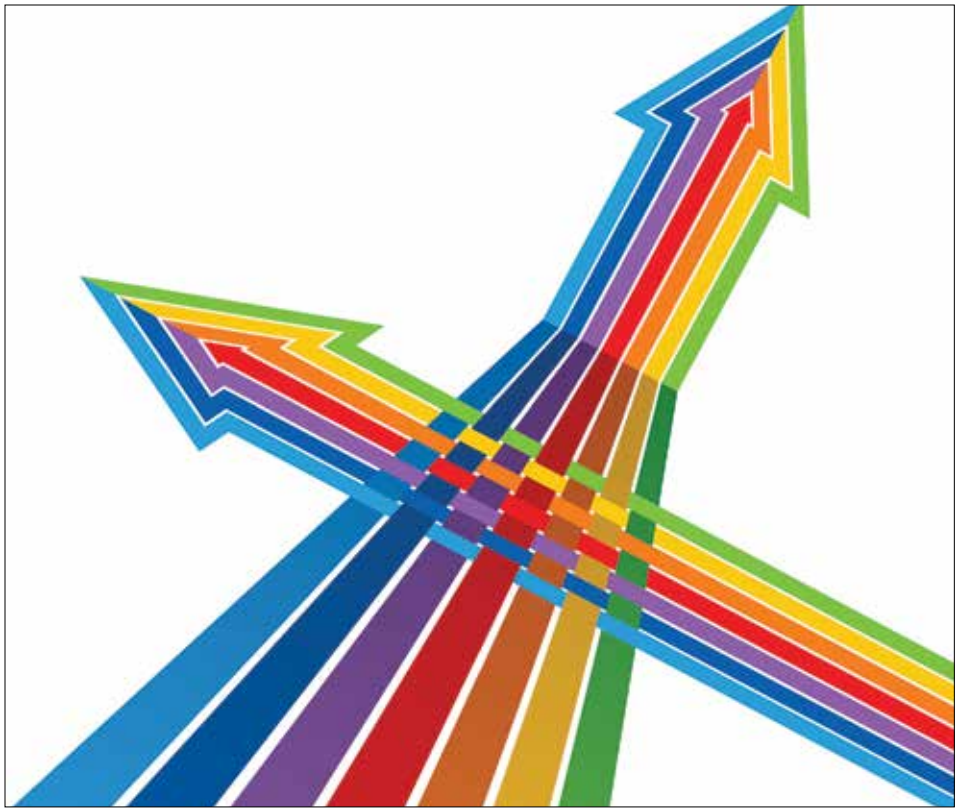
125. *See Army Futures Command*, U.S. Army, https://www.army.mil/futures (last visited Aug. 27, 2020); *Army Applications Lab*, U.S. Army, https://aal.army/ (last visited Aug. 27, 2020) (Please note that this website only works on non-government, or civilian, computers); *AFWERX*, U.S. Air Force https://www.afwerx.af.mil/faq.html (last visited Aug. 27, 2020); *NAVALX*, U.S. Navy, https://www.secnav.navy.mil/agility/Pages/events.aspx (last visited Aug. 27, 2020); *About SOFWERX*, SOFWERX, https://www.sofwerx.org/about (last visited June 11, 2020).

126. Nancy Jones-Bonbrest, *Army Contest Invites Winning Innovators to Bring AI Capabilities to Soldiers*, U.S. Army Rapid Capabilities & Critical Tech. Off. (Aug. 27, 2018), https://rapidcapabilities office.army.mil/news/Army-rapid-capabilities-office-announces-winners-of-artificial-intelligence-challenge/.

127. *Id.*

128. *See, e.g.*, Alex Davies, *Inside the Races that Jump-Started the Self-Driving Car*, Wired (Nov. 10, 2017, 7:00 AM), https://www.wired.com/story/darpa-grand-urban-challenge-self-driving-car/; Alex Davies, *An Oral History of the DARPA Grand Challenge, The Grueling Robot Race that Launched the Self-Driving Car*, Wired (Aug. 3, 2017, 9:00 AM), https://www.wired.com/story/darpa-grand-challenge-2004-oral-history/ (The participants of DARPA's Grand Challenges formed a community of visionaries who, ten years later, are the leaders of the industry that has integrated self-driving cars into cities worldwide.).

129. *See* Nat'l Def. Strategy, *supra* note 1, at 11.



(Credit: istockphoto.com/lvcandy)

Closing Argument

Cross-Functional Teams for the Future

By Major Douglas A. Reisinger

The Army is on the precipice of a fundamental shift. Modernization will displace readiness as the Army's top priority in 2022.[1] To be clear, readiness will remain an important line of effort beyond 2022—much like how the renewed emphasis on readiness several years ago did not eliminate the Army's focus on stability operations. Nonetheless, this scheduled reprioritization will be significant. Force modernization operates "at the intersection of technology and concepts."[2] What this means is that pivoting to modernization involves more than merely developing and procuring technologically mature systems. This effort will incorporate new operational concepts—such as multi-domain operations—and their associated changes to doctrine and organizational structures. It will combine these considerations with upgraded and/or new equipment and capabilities.[3] Although the Army stood up Army Futures Command (AFC) in 2018 to spearhead the Army Modernization Strategy, the entire force will see and feel the changes to equipment and doctrine over the next decade. With such an all-encompassing push to modernize how the Army fights, is structured, and leverages emerging technology, judge advocates advising the modernization mission often find themselves at the intersection of several legal disciplines.

Not unlike the Judge Advocate General's Corps's emphasis on versatility, AFC has sought to obtain innovative solutions to Army requirements through multi-disciplinary approaches. The engine of AFC's modernization efforts is the Cross-Functional Team (CFT), which is a case study in multi-disciplinary versatility. In 2017, the Army launched a pilot program of eight CFTs tasked with identifying, prioritizing, and developing capabilities the Army requires to achieve overmatch against its adversaries in the future fight.[4] In order of priority, these eight CFTs are: (1) Long Range Precision Fires; (2) Next Generation Combat Vehicle; (3) Future Vertical Lift; (4) Assured Positioning, Navigation, and Timing; (5) Air and Missile Defense; (6) Network; (7) Soldier Lethality; and (8) Synthetic Training Environment. Once the CFTs develop requirements for the future fight (through experimentation and technical demonstrations where necessary), they are charged with rapidly transitioning each capability to the Army Acquisition System for materiel development, testing, and fielding to the force.[5] The CFT pilot program was made permanent with the establishment of AFC in 2018.[6]

The enshrining of the CFTs within AFC, a new four-star Army Command, was revolutionary for two main reasons: (1) it broke down partitioned, stove-piped requirements development by bringing all key stakeholders together; and (2) it provided requirements developers with a multi-disciplinary team, led by a general officer or senior executive service civilian, dedicated to specific modernization efforts. Moreover, the establishment of AFC brought operational concept development (formerly a Training and Doctrine Command responsibility), capability development (formerly an Army Materiel Command responsibility), and overall modernization strategy under one command.

The CFT, by contrast, is a microcosm of the consolidated AFC structure due to its targeting a particular portfolio of

modernization efforts at this intersection of technology and concepts. For example, the Next Generation Combat Vehicle CFT has a portfolio that includes such modernization efforts as the optionally-manned fighting vehicle, robotic combat vehicles, the armored multi-purpose vehicle, and mobile protected firepower (a light tank). To bring all subject matter experts together, the CFTs are manned with personnel from the Requirements, Acquisition, Science and Technology, Test and Evaluation, Resourcing, Contracting, Costing, and Logistician communities. In addition, the CFT includes representatives of the end user—senior noncommissioned officers who are technical experts in their respective fields (e.g., infantrymen, armor crewmen, and air and missile defense crewmembers). This conglomeration, charged with leveraging industry and academia in informing its modernization objectives, is not the capability developer of yesteryear.

With all of its various subject matter experts under one roof, the CFT requires innovative legal support. One CFT visit with a defense contractor could raise a myriad of issues. For instance, observing a demonstration of a prototype that uses machine learning in its targeting algorithm may give rise to no less than seven independent legal issues across the spectrum of legal practice, including:

- Ethical considerations of engaging with one defense contractor for a demonstration;
- Contract law implications such engagement may have on any pending or planned procurement;
- Law of Armed Conflict considerations in the technology's use of artificial intelligence and machine learning to inform a commander's application of lethal force;
- Acquisition considerations, such as whether the maturity of the technology is sufficient to warrant use of Middle Tier Acquisition Authority or otherwise enter the Major Capability Acquisition pathway at a particular milestone;[7]
- Fiscal considerations, such as which budget activity of Research, Development, Test & Evaluation funds may be necessary to further develop or integrate the technology;
- The status of the intellectual property applicable to the prototype and the ensuing potential for "vendor lock;" and
- Review of the inevitable gift that Army leaders will receive for attending the demonstration.

These routine legal problem sets vary in complexity; but, the multi-disciplinary nature of modernization legal advice is ever-present.

How the CFTs connect with industry and academia is also unconventional. The CFTs develop emerging requirements through both traditional and non-traditional processes. These approaches include engagements and demonstrations from both large and small businesses, partnerships with academia—such as the Artificial Intelligence Task Force's arrangement with Carnegie Mellon University, and through non-traditional startup technology companies seeking seed capital through Army Applications Lab.

Much like the Army's recent collaboration with Microsoft to develop the new Integrated Visual Augmentation System, force modernization in the high tech era looks different than it did in prior decades. This is due, at least in part, to the universal applicability of emerging technologies. For instance, if the Army is looking to create an unmanned ground combat vehicle, it may make sense to leverage traditional defense contractors for improved armor and munitions. But perhaps the autonomous navigation, or "self-driving," component may be better fulfilled with modified software from a commercial company that has already invested significant time and research into the technology—such as Tesla, Apple, Google, or Uber. It is for this reason that the CFTs (and AFC more generally) must engage with industry, academia, and startups, all while pursuing unconventional ways of conducting market research and experimentation. Yet throughout these unconventional touchpoints, AFC and the CFTs ensure regular Soldier inputs to development, modeling, and simulation by partnering with Army Forces Command and its various subordinate brigade combat teams.

This innovative approach to research and development raises novel legal issues, which are further compounded with various arms control treaties and regulations if any such technology originates from outside the United States. Despite these complexities, Army modernization efforts possess sufficient flexibility within existing laws and regulations to succeed, whether procuring and developing technology domestically or from foreign sources. Army Futures Command's fresh approach and its challenging of conventional methods, however, will inherently raise unique issues that require adaptable legal advisors. Whether advising Army modernization efforts directly as a legal advisor for AFC, or indirectly as a judge advocate at a brigade or division fielding invitations from industry to provide a technology demonstration, the pivot to modernization will impact the entire Army. What force modernization requires of its legal support over the next decade, therefore, is wide-ranging advice that rethinks how we approach traditional problem sets. The future depends on it. **TAL**

MAJ Reisinger is an acquisition and military law attorney at Army Futures Command in Austin, Texas.

Notes

1. U.S. Dep't of Army, Strat., The Army Strategy 4 (25 Oct. 2018), https://www.army.mil/e2/downloads/rv7/the_army_strategy_2018.pdf.

2. Email from Commanding General, Army Futures Command, to All Army Futures Command Message, subject: Three Things (22 June 2020) (on file with author).

3. *Id.*

4. U.S. Dep't of Army, Dir. 2017–24, Cross-Functional Team Pilot In Support of Materiel Development 1 (6 Oct. 2017).

5. *Id.*

6. Headquarters, U.S. Dep't of Army, Gen. Order No. 2018–10 (4 June 2018).

7. U.S. Dep't of Def., Instr. 5000.02, Operation of the Adaptive Acquisition Framework fig. 1 (23 Jan. 2020).

AROUND THE CORPS

SSG Bambi Parks, South Carolina National Guard, was the honor graduate from September's court reporter course at TJAGLCS in Charlottesville, VA. The attending court reporters donned their masks for the socially-distanced graduation ceremony. (Credit: Jason Wilkerson/TJAGLCS)

AROUND THE CORPS

In November, TJAGLCS had the honor of hosting Department of Defense General Counsel, the Honorable Paul C. Ney, as he and The Judge Advocate General, LTG Charles N. Pede, addressed the 212th JAOBC and 69th Graduate Course. (Credit: Jason Wilkerson/TJAGLCS)

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